

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Implications of E-commerce for Competition Policy - Note by Australia

6 June 2018

This document reproduces a written contribution from Australia submitted for Item 5 of the 129th OECD Competition committee meeting on 6-8 June 2018.

More documents related to this discussion can be found at www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm

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1. Introduction

1. Like many competition agencies, Australia's agency the ACCC, has considerable experience in dealing with competition issues that arise in the context of electronic commerce. To give some examples,

- The ACCC is engaged in a substantial market study that is examining the role of digital platforms in the Australia;¹
- It has examined vertical restraints in an online context in an ICN special project; and
- It has taken enforcement action against e-commerce businesses based outside Australia which have confirmed the ACCC's jurisdiction when those businesses are 'engaging in business in Australia' or 'otherwise have a connection to the jurisdiction'.²

2. The purpose of this submission is to provide an update on some work being co-lead by the ACCC in the International Competition Network. It is the Vertical Restraints project of the Unilateral Conduct Working Group (UCWG) of the International Competition Network (ICN). This work is relevant to the Roundtable on E-Commerce and Competition as it involves the analysis of hypothetical scenarios in an online setting, exploring competition concerns in e-commerce.

2. Background

3. The Unilateral Conduct Working Group (UCWG) is a working group of the International Competition Network (ICN). It was established in 2006 with the objective of: examining the challenges involved in analysing the anti-competitive, unilateral conduct of dominant firms and firms with substantial market power; facilitating greater understanding of the issues involved in analysing unilateral conduct; and to promote greater convergence and sound enforcement of laws governing unilateral conduct.

4. The current co-chairs of the working group are the Italian Competition Authority (the *Autorità Garante della Concorrenza e del Mercato* (AGCM)), the Australian Competition and Consumer Commission (ACCC), and the Competition Commission of South Africa (CCSA). Prior to the CCSA joining as co-chair in April 2018, the US Department of Justice was a co-chair of the working group.

¹ ACCC, *Digital platforms inquiry*: <https://www.accc.gov.au/about-us/inquiries/digital-platforms-inquiry>

² See for example: ACCC, 'High Court dismisses Valve's special leave to appeal application' < <https://www.accc.gov.au/media-release/high-court-dismisses-valve%E2%80%99s-special-leave-to-appeal-application> > and ACCC, 'Visa ordered to pay \$18 million penalty for anti-competitive conduct following ACCC action' < <https://www.accc.gov.au/media-release/high-court-dismisses-valve%E2%80%99s-special-leave-to-appeal-application> >.

3. Vertical Restraints Project

5. In 2013 the ICN made a decision to focus a project on the internet economy and practical issues regarding the application and interpretation of competition laws to e-commerce. Further to this decision, in 2016 the UCWG established a project examining the effect of vertical restraints on competition (the Vertical Restraints Project).

6. The Vertical Restraints Project involves the development of a series of papers exploring hypothetical vertical restraint scenarios such as the across platform online parity clauses, to examine the effect on competition and potential resulting efficiencies.

7. A project group of ICN members³ and non-government advisors (NGAs)⁴ is providing jurisdictional/individual responses for each of the hypothetical scenarios (the Project Group). The responses provided by the Project Group will assist in highlighting commonalities and divergent factors in the assessment of the vertical restraints scenarios which will be incorporated into a finalised ICN work product at the conclusion of the project.

8. The ACCC has taken responsibility for leading the development and analysis of the first hypothetical which considers the possible effect of certain parity requirements included in contractual arrangements between fictional Online Travel Agents (OTAs) and accommodation providers. A limited fact scenario was provided the Project Group, who were invited to consider:

- Possible case theories
- Arguments about pro-competitive effects that may be presented and factors relevant to these arguments, and
- Areas of further inquiry by investigators.

9. The Project Group considered the hypothetical scenario in the framework of a rule of reason/competition test. Based upon the limited facts presented it was considered that the scenario was unlikely to give rise to potential *per se*/by object contravention. The first hypothetical has returned constructive responses which indicate there are likely to be similarities and divergences in the approaches of the various jurisdictions.

10. The UCWG plans to update the ICN Steering Group as to progress of the project in June 2018. Once all hypotheticals have been circulated and the Project Group's responses have been received, a final analysis paper will be prepared in the final quarter of 2018, which can then be utilised as a learning resource for the ICN membership.

³ The participating members are: Brazil, France, Netherlands, Germany, United Kingdom, Canada, Hong Kong, European Commission, Federal Trade Commission United States, New Zealand and Sweden.

⁴ The participating NGAs are: Carolyn Oddie (Australia), Daniel Andreoli (Brazil), Martim Della Valle (Brazil), Silvia Fagá (Brazil), Bernardo Macedo (Brazil), Joyce Midori Honda (Brazil), Antonio Di Domenico (Canada), Rachel Brandenburger (European Commission), Rafael Allendesalzar (Spain), Grant Murray (United Kingdom), Daniel Sokol (United States of America), Robert Friedman (United States of America), Kitri Gupta (United States of America), Elisa Kearney (United States of America).