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

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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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Business at OECD (BIAC) appreciates the opportunity to submit these comments to the OECD Competition Committee for its session on the implications of e-commerce for competition policy.

1. Introduction

1. While there is no established definition of e-commerce, it is broadly understood to mean the sale of goods and services online.

2. The e-commerce sector has contributed significantly to economies globally, and more so in those countries with consumer driven economies, with strong internet infrastructure, and where barriers to setting up new businesses and creating innovative business models are low.

3. In its e-commerce sector inquiry report, the European Commission (EC) noted that "The percentage of people aged between 16 and 74 that have ordered goods or services over the internet has grown year-on-year from 30 % in 2007 to 55 % in 2016."[1] That report also noted that online sales have grown exponentially in the EU since 2000 with an annual average growth rate of approximately 22%, and that the rapid development of e-commerce affects both business and consumers.[2]

4. According to eMarketer, in 2017, retail e-commerce sales worldwide reached $2.304 trillion, a 24.8% increase over the previous year.[3] That report found that e-commerce made up 10.2% of total retail sales worldwide in 2017, up from 8.6% a year prior. This growth in share was largely influenced by Asia-Pacific, where 14.6% of overall retail spend went toward e-commerce. However, the importance of e-commerce to the economies examined varied. In the digitally maturing markets of Central and Eastern Europe, as well as parts of Southeast Asia, e-commerce accounted for less than 5% of retail sales. The same was true for regions where economic factors have slowed e-commerce sales growth, such as Latin America and the Middle East and Africa.[4]

5. E-commerce can bring significant benefits for consumers all over the world. It can overcome geographical limitations faced by "brick and mortar" stores. It allows businesses to gain new customers with efficient and targeted advertising. It reduces costs for businesses and lowers prices for consumers. It helps consumers find the products they

[1] Eur. Comm'n, DG Competition, Report from the Commission to the Council and European Parliament—Final Report on the E-commerce Sector Inquiry ¶ 3 (May 10, 2017), available at http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

[2] Id.

[3] Worldwide Retail and Ecommerce Sales: eMarketer's Updated Forecast and New Mcommerce Estimates for 2016—2021, eMarketer (Jan. 29, 2018), available at www.emarketer.com/Report/Worldwide-Retail-Ecommerce-Sales-eMarketers-Updated-Forecast-New-Mcommerce-Estimates-20162021/2002182.

[4] Id.

want more easily. It is always open, and it can eliminate consumers' travel times and cost, thereby enhancing efficiency. As the OECD Secretariat Paper notes "[t]he growth of e-commerce has the potential to increase competition within retail markets, to greatly enhance consumer choice, and to prompt and facilitate innovation in product distribution."[5]

6. Some of the features of this sector—the types of goods and services sold, how companies price and sell, and the range of commercial practices and relationships—seem entirely new and others, while familiar, appear to arise in new contexts. The growth in the e-commerce sector has also, to varying degrees, been accompanied by changes in the relative bargaining strength of market operators, with new business models and new entrants often having a disruptive effect on traditional businesses.

7. It is therefore understandable that competition agencies have increasingly focused on this sector and that developments in e-commerce have prompted calls, in certain quarters, for increased regulatory action. There has also been a continual effort on the part of agencies to learn about this new sector and its seemingly unfamiliar business practices, in particular through the use of sector studies. As the OECD Secretariat Paper observes "[c]ompetition agencies across the OECD are increasingly involved in both enforcement and advocacy efforts relating to e-commerce markets."[6]

8. BIAC notes that for the ecommerce sector to continue to grow and deliver the consumer benefits we have seen over the last few years, it is important that competition authorities provide clear and consistent guidance on the application of competition law to new practices; take enforcement action only when needed and that is evidence-based, consistent, and follows sound economic principles and established theories of harm; and always act in the interest of the consumer, rather than to protect established competitors. Competition authorities also have a valuable role to play in educating businesses and consumers and by eliminating unjustified public restrictions of competition to ensure that markets deliver value to consumers.

2. Features of the E-Commerce Sector

9. Features of the e-commerce sector, which are relevant to any assessment of the competitive dynamics within it, include the following:

10. **The wide availability of information and knowledgeable consumers**: The proliferation of options in the e-commerce sector—both in the types of good and services available and in the methods of selling—has significantly increased choice for consumers. It has also led to the growth of a diverse range of information sources and search functions, and a fluid line between online and offline retail.[7]

[5] OECD, Implications of E-Commerce for Competition Policy—Background Note ¶ 1 (May 4, 2018), available at DAF/COMP(2018)3 [hereinafter OECD Secretariat Paper].

[6] Id. ¶ 3.

[7] As the recent Salesforce Connected Shoppers Report found "Armed with smartphones in their pockets and purses, most shoppers are doing their homework and researching merchandise before they reach the point of purchase in-store (79%) and online (85%)" Salesforce, Connected Shoppers Report (2017), available at www.salesforce.com/form/industries/connected-shopper-report-2017.jsp.

11. **Innovation and efficiency**: The e-commerce sector has prompted significant efficiencies and innovation in retail sale and distribution. Digital goods and services are increasingly easy to purchase and consume, with much of e-commerce now taking place on the phone. eMarketer found that mobile commerce (m-Commerce) accounted for 58.9% of digital sales in 2017.[8] The sector has also driven other innovations such as e-payments, one-day delivery, personalization, and interactive content. The pace of change has been significant, with some sectors, such as music distribution, experiencing a succession of displacing technologies and new methods of consumption, over a relatively short space of time. We have also seen the growth in marketplaces and online e-commerce platforms, connecting buyers and sellers even more easily. And further technological and commercial changes are expected in the sector.[9]

12. **Low barriers to entry and expansion**: The wide choice and innovation seen in the e-commerce sector has been fueled largely by the low barriers to entry. The cost to set up and maintain an online presence is low, as compared with physical stores. Efficiencies in supply chains and lowering delivery costs have improved the ease and speed of fulfilment and improved the reputation and popularity of e-commerce.

13. **Diversity and disruption**: The sector is also characterized by a diverse range of providers, with many manufacturers operating directly as retailers with online stores, traditional retailers having a strong online presence, and "new entrant" marketplaces and retailers. The growing importance of e-commerce to the overall retail economy has led to some disruption with many "bricks and mortar" retailers seeing consumer spend switching to online sales. While this can lead to increased consumer welfare, it can have a social impact on areas that depend on the presence of physical stores. The sector has also seen the growing importance of global e-commerce companies with strong brands and operations across borders, and consequently changes in relative bargaining strength across traditional distribution chains.

14. All these developments should be positive and welfare enhancing, and there is little doubt that the growth in e-commerce has led to significant consumer benefits. However, as with any new type of business, especially one that can disrupt established operators, there can be risks and challenges in the application of competition law and policy to the sector.

15. We summarize some of the challenges below and, as with the OECD Secretariat Paper, we focus on "e-commerce retail value chains, which result, ultimately, in the sale of products for the consumption by final consumers."[10]

16. As a preliminary point, we also note that the sector has given rise to a number of non-competition issues, such as the social impact of the shift from "bricks and mortar" to online sales. BIAC notes that it is important for competition authorities to focus on

[8] eMarketer, supra note 3.

[9] See, e.g., John Hall, 7 E-Commerce Trends To Pay Attention To In 2018, Forbes, (Nov. 19, 2017) available at www.forbes.com/sites/johnhall/2017/11/19/7-e-commerce-trends-to-pay-attention-to-in-2018/#362647646e5e.

[10] OECD Secretariat Paper, supra note 5, ¶ 8. His paper does not discuss mergers in the e-commerce sector.

antitrust enforcement.[11] An expansion of the competition regime to encompass non-competition goals risks reducing legal certainty, limiting consumer welfare, and deviating from established standards of evidence-based decision-making.[12] And in those instances where competition agencies have parallel consumer protection powers, certain concerns may be better addressed by those powers.

3. Collusion

17. The fight against cartels, whether online or not, is, and remains, one of the key priorities for competition authorities; cartels are one of the most harmful conducts for competition and consumers. The e-commerce sector, as any other, is not immune to the risks of collusion. What may be different is how any collusion manifests.

18. One area that has received substantial attention recently is the increased use of pricing algorithms and the interplay between such algorithms. Some have argued that the use of such algorithms, and, in particular, the way these allow competitors to collect and observe in real time rivals' actions and consumer choices, may in some situations increase transparency, making the marketplace more prone to collusion. While it is important for competition authorities to be vigilant for market conditions that make collusion more likely, the use of pricing algorithms does not inherently make any market more prone to collusion. In fact, algorithmic pricing can increase price competition, including by "facilitating rapid competitive response"[13] and increasing market transparency may reduce the likelihood of collusion.

19. More generally, it is also important to distinguish between three distinct scenarios, which are often conflated in discussions of this issue.

20. Firstly, instances where algorithms are part of the infrastructure deployed to implement a cartel—that is, humans agree to collude and use computers to create, monitor, and/or police the cartel. The recent U.S. and UK investigation into an alleged price fixing cartel involving the sale of posters on Amazon Marketplace falls within this category.[14] This category of conduct may also include "hub and spoke" collusion. In general terms, such conduct need not be treated any differently to collusion arising in offline markets. While the collusive mechanisms may be different in the e-commerce sector, the degree of factual and legal analyses required to identify an infringement would be the same as with any cartel conduct.

[11] See, e.g., Public Interest Considerations in Merger Control, OECD, available at www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm.

[12] See, Carl Shapiro, Antitrust in a Time of Populism, (Oct. 24, 2017), available at https://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf.

[13] OECD, Algorithms and Collusion—Note by the United States ¶ 4 (May 26, 2017), available at DAF/COMP/WD(2017)41 [hereinafter U.S. Algorithms Note].

[14] CMA Case 50223—Online Sales of Posters and Frames (Aug. 12, 2016), available at https://assets.publishing.service.gov.uk/media/57ee7c2740f0b606dc000018/case-50223-final-non-confidential-infringement-decision.pdf (as well as imposing a fine, the CMA secured the disqualification of the managing director from acting as a company director for five years).

21. Secondly, instances of non-coordinated pricing parallelism or tacit collusion. While the theory of harm here is well understood—that rivals independently determine their own prices, but in a way that limits price competition—the potential concern is that such conduct is more likely to arise with the use of pricing algorithms. The risk is that each firm, using its own pricing algorithms to set its prices, also monitors and adjusts, in real-time, its prices in response to the pricing of rivals. There is some debate as to whether such conduct is considered collusive at all.[15]

22. Thirdly, there may be instances where computers autonomously collude without human intervention.[16] There is, as yet, little evidence that such "autonomous" computer-determined collusion is a possibility and theories are largely speculative. Also, truly autonomous pricing algorithms ought also to have the same incentive to "cheat" on the collusion, as any human cartelist would.

23. Competition agencies should always be vigilant for anti-competitive collusion in markets for the sale of goods or services, whether offline or online. This is where agency enforcement can deliver the greatest value to consumers and law-abiding businesses, and it is conduct that warrants the most stringent enforcement of competition law.

24. However, BIAC notes that, while antitrust enforcement in the e-commerce sector requires a good understanding of the way in which firms price and compete in the industry and may involve the use of sector-specific "screens," the risk of collusive activity is not inherently higher in the e-commerce sector. Further, absent a sound evidence base, agencies should treat with circumspection theoretical claims of autonomously-colluding pricing algorithms and, more generally, should not ignore the efficiencies and consumers benefits that arise from the use of pricing algorithms.

4. Vertical Restraints

25. In vertical agreements (that is, agreements between firms at different levels of the production and distribution chain), it is quite common to include vertical restraints (restrictions on competitive behavior of one of the parties). It is generally accepted that vertical restraints are less harmful to competition than horizontal restraints and may provide substantial scope for efficiencies.[17]

[15] With respect to the EU, see discussion in Faull & Nikpay, The EU Law of Competition, Third Edition, 8.52-8.55, referring to the Suiker Unie and Wood Pulp II judgments; Case C-40/73, Coöoperatieve vereniging 'Suiker Unie' UA v Commission, EU:C:1975:174: "Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors". With respect to the U.S., see U.S. Algorithms Note, supra note 13, ¶ 18. OECD, Algorithms and Collusion - Note by the United States (26 May 2017) (DAF/COMP/WD(2017)41 and www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/algorithms.pdf), which noted that "[a]bsent concerted action, independent adoption of the same or similar pricing algorithms is unlikely to lead to antitrust liability even if it makes interdependent pricing more likely."

[16] Ariel Ezrachi & Maurice Stucke, Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy (Harvard Univ. Press, 2016).

[17] Guidelines on Vertical Restraints, 2010 O.J. (C 130) 1, ¶6.

26. The online world has seen the increased introduction of various traditional vertical restraints as well as other restraints apparently only applicable to the online world. Examples of restraints seen online are so-called "most favored nation" provisions (MFNs), resale price maintenance (RPM) "marketplace bans", online sales restrictions, geo-blocking and restrictions on advertising online.

27. A common use of vertical restraints in the online context has been to protect the image and goodwill of the supplier's brand and to prevent free-riding (i.e., the potential for consumers to acquire information or test the product in a "brick-and-mortar" shop and then purchase it online, usually at a lower price, although, as the OECD Secretariat Paper notes, such free riding may also operate in the opposite direction, with consumers using online services to research products only to then purchase in-store).[18]

28. The EU and the U.S. have traditionally treated vertical restraints in quite different ways. The EU has very detailed rules on the treatment of vertical restraints (including online restraints) in its 2010 VBER and Guidelines on Vertical Restraints which includes safe harbors but also blacklisted restrictions that are deemed infringements "by object," such as RPM. In the U.S., on the other hand, following the Supreme Court's 2007 decision in *Leegin*, virtually all vertical restraints are evaluated under a rule of reason approach.[19] Similarly, while there has not been much activity by the U.S. in this area, many European competition authorities have carried out investigations on vertical restraints in the online world, especially Germany and France.[20]

29. Some of these cases have raised complex issues (such as the extent to which MFNs in the context of online platforms may give rise to potential competition concerns) that have also led to diverging outcomes and decisions by the national competition authorities. The difficulties have caused some commentators to advocate adapting competition rules or introducing regulation. In BIAC's view, three points bear mention:

30. Firstly, the problems encountered in applying competition law in online markets do not warrant the adoption of novel legal approaches or specific rules. Competition law has always been flexible enough to adapt to changes in the economic environment and market practices.[21]

31. In a global market (and in a market with no or little borders such as online), it is important for business that rules are consistent and applied in a consistent matter.

32. Secondly, in BIAC's view, the rule of reason approach applied under US law is one that can adapt itself to a variety of circumstances, including the novel aspects of online markets. Each vertical restraint should be considered on its own merits and in its economic context, on the basis of sound evidence, taking into account any resulting

[18] OECD Secretariat Paper, supra note 5, ¶ 65.

[19] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[20] In Germany, see e.g. decision of the Berlin appeals court in Berlin Appellate Court, An authorised dealer v. Alfred Sternjakob GmbH & Co. KG, 2 U (Kart) 8/09, 19 September 2013. In France, Décision n° 12-D-23 du 12 décembre 2012relative à des pratiques mises en œuvre par la société Bang & Olufsen dans le secteur de la distribution sélective de matériels hi-fi et home cinema

[21] See, e.g., recent comments by Eleanor Fox, Goldman Sachs, Global Macro Research, Regulating Big Tech, April 26, 2018.

efficiency gains and anti-competitive effect. There should be very limited need or scope for "per se/by object" prohibitions. Further, to reduce business uncertainty, clear safe harbors (such as those in the EC VBER) [22] should be applied by enforcers on a consistent basis across jurisdictions.

33. Thirdly, only if a vertical restraint falls outside one the safe harbors, should enforcers conduct a case-by-case analysis of the restraint. Also, that analysis should start—rather than end—by considering the business rationale and reason for the restraint at issue.

34. Some of the most common vertical restraints in the online world that have received considerable attention are MFNs, RPM, marketplace bans, and BIAC would like to make a couple of comments on these.

35. MFNs (especially in the context of platforms—such as hotel booking platforms) offer an example of the most significant divergences in enforcement by national competition authorities in Europe. Economic literature highlights the potential pro and anti-competitive effects of MFNs. BIAC considers that it is important for competition authorities to take enforcement action only where there are clear and proven risks of anticompetitive effects, having fully analyzed the claimed efficiency of the restraint. As mentioned above, in a global online marketplace it is important to avoid divergent approaches which create legal uncertainty and increase costs for businesses.

36. There have been several cases dealing with RPM in the e-commerce sector. While it is not clear whether features of the e-commerce sector increase the likelihood of RPM, recent agency activity has shown that, in those jurisdictions where RPM is considered a "hard core" infringement, enforcement is no less vigorous in the online than in the offline world. Although many jurisdictions do consider RPM to be "hard core" or "per se" illegal, there may be substantial efficiencies that should be fully taken into account.

37. To protect their brand image or to have better control of their distribution channels, manufacturers have used different types of vertical restraints, from a complete online sales ban to restrictions on the use of certain distribution methods, such as online marketplaces, or even the use of price comparison tools. The question of how such restrictions should be approached under competition law is still much debated and varies by jurisdiction. For example, in the EU, with its drive for single market integration, an outright ban on online sales is an "object infringement."[23] In relation to online marketplace bans, recent cases in Europe are starting to bring some clarity on the issue. The *Coty* case, in particular, recognized that selective distribution systems can include marketplace bans[24], which contrasts with previous cases by the Bundeskartellamt and regional courts.[25]

[22] Commission Regulation No 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices, 2010 O.J. (L 102) 1, art. 2.

[23] Case C-439/09, Pierre Fabre, EU:C:2011:649, para. 47.

[24] Case C-230/16, Coty Germany GmbH v Parfümerie Akzente, GmbH, EU:C:2017:941, para. 58.

[25] Bundeskartellamt, Case B3-137/12 Adidas, 27 August 2014.

5. Unilateral Conduct

38. The test for dominance is whether a company can behave independently of its customers, competitors, and consumers. That framework should be no different for the e-commerce sphere.

39. The sector may, however, involve analytical challenges. For example, in defining markets for platforms, which are common in the e-commerce sector, there may be different views on whether distinct markets should be defined for each side of the platform and on whether there should there be a single market that takes into account interdependencies across the platform.[26] Further, given the range of new and diverse business models, it can be tempting to define markets on the basis of single business models, and to do so statically, not taking into account emerging competitive threats and expected changes in consumer behavior.

40. BIAC also notes that any market power analysis must be evidence based, and not formalistic. In general, digital markets are highly dynamic, and competition may not be "like for like," with current and future competitive threats originating from providers with seemingly dissimilar offerings.[27] As the OECD Secretariat Paper notes, many online businesses may be partly or wholly funded by advertising. It is important therefore not to discount the constraints on each side of the business model and what may appear to be market power on one-side may be constrained by the other.[28]

41. Further, the touchstone for market power is whether a company can raise price above the competitive level; market power should not be equated with bargaining strength. Bargaining strength is typically beneficial (countervailing) or neutral (transfer of rents). While it may be tempting to view this as evidence of market power, sometimes dramatic shifts in relative bargaining strength may arise inevitably from procompetitive disruption.

42. Beyond establishing market power, unilateral conduct theories of harm should still follow established frameworks—identifying a departure from competition on the merits based on clear and compelling evidence and setting out evidence of harm to competition (particularly if conduct has been ongoing for a long period of time). Speculative theories of harm are just as out of place in the e-commerce sphere as in traditional sectors.

43. BIAC suggests below five principles to help guide assessments of unilateral conduct in the e-commerce sector. In BIAC's view, these can assist in balancing the need for robust enforcement, while allowing benign and procompetitive practices to flourish.

[26] See OECD Secretariat Paper, supra note 5, ¶¶ 1.3, 3.1.

[27] See, e.g., Dolmans, R. Zimbron, J. Turner, Pandora's box of online ills: technology solutions, regulation, or competition law?, Concurrences No. 3-2017 (colloquium Pembroke College, Oxford, 22 May 2017), available at www.rpieurope.org/Events2017/Dolmans2.pdf ("Platforms offering differentiated services (e.g., Facebook, Amazon, Twitter) vie with each other for the same users' eyeballs by providing free new products on one side of the platform ('attention rivalry'), to draw and charge advertisers and suppliers to the other side. They also compete in a race to develop new technology such as artificial intelligence").

[28] See OECD Secretariat Paper, supra note 5, ¶¶ 1.3.

44. Firstly, antitrust enforcement—even against new types of conduct such as that seen in the e-commerce sector—should be based on sound economic principles and follow, wherever possible, existing case law. Consider the theories of harm discussed in the OECD Secretariat Paper—predatory pricing, tying and bundling, margin squeeze, and refusal to supply. These abuses come with legal conditions that should be satisfied before the conduct can be deemed abusive. These conditions act as successive filters that help to delineate abusive behavior from competition on the merits, and they provide legal certainty for companies when deciding to embark on a particular course of conduct.

45. Even (or, perhaps, in particular) in new and dynamic sectors such as e-commerce, BIAC considers that it is important that theories of harm follow these established frameworks. Business models may not be well understood. Technologies may be new. And competition may be based on quality and innovation, rather than price. If a type of conduct falls within an established abuse category, however, the legal conditions for that abuse ought to be satisfied before the conduct can be found the infringe competition law. Adherence to established rules helps companies know how to modulate their behavior, and it helps authorities by leading to more robust decision-making.

46. Refusal to supply is a good example. In *Oscar Bronner*, the European Court of Justice struck a balance between the defendant's "freedom to arrange their own affairs," with the exceptional circumstances under which a duty to supply can be imposed—namely that the input is indispensable and, absent access to the input, competition would be eliminated.[29] The formulation of that legal test represents a considered balance struck by the Courts, that has developed through a long line of cases over the last thirty years. In BIAC's view, a company should only be held to have committed an abusive refusal to supply if those conditions are satisfied.

47. Secondly, it is important to take an evidence-based approach to enforcement by considering actual market developments over the period since the allegedly abusive conduct began. In many countries, the test for whether conduct restricts competition is a prospective one—is the conduct likely to cause anticompetitive effects? This is necessary because a requirement that authorities could only intervene once concrete effects have manifested would denude competition law of its protective purpose.

48. However, in many cases, the experience of the years since the abuse started provides a real-life test as to whether the conduct is actually likely to foreclosure competition. Accordingly, actual market developments form part of the relevant circumstances and evidence that authorities can—and should—consider in their competitive analysis. For example, if an authority predicts that a particular form of conduct may lead to higher prices or less innovation, it can test that prediction against the observed facts in the market since the abuse started. This would help to improve decision-making by ensuring that theories of harm are grounded in factual developments. BIAC is not advocating that the legal test should be changed from "likely" effects, but actual market developments provide compelling evidence that should be used to establish whether an anticompetitive effect is likely in the first place.

49. Thirdly, in dynamic innovative sectors, a consideration of a well-defined and realistic counterfactual can help improve decision making. As the European

[29] Case C-7/97, Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, ¶ 41.

Commission's Article 102 Guidance Paper notes, if competition in the counterfactual would not have been stronger than competition in the real world, the conduct cannot have restricted competition. The counterfactual is therefore not just an evidential tool—it is integral to the assessment of a party's conduct.[30]

50. Accordingly, identifying a proper counterfactual helps to establish a causal link between the alleged abuse and the observed harm. The counterfactual helps authorities distinguish between competitive harm caused by the alleged abusive conduct from the marginalization of inefficient rivals that is the natural consequence of competition on the merits.

51. Fourthly, enforcement should take place by reference to equally efficient competitors. As the European Court of Justice found in *Post Danmark I* and recently affirmed in *Intel*: "Competition on the merits may by definition, lead to the departure from the market or the marginalisation of competitions that are less efficient and so less attractive to consumers from the point of view, among other things, price, choice, quality or innovation."[31] BIAC considers that this offers an appropriate enforcement benchmark.

52. Finally, it is useful to seek to understand the business justification for a given form of conduct at an early stage of their investigation. This can be particularly valuable in the digital sector where products and business models are often new and innovative. By considering efficiencies and business rationale at the outset we can often better understand and analyze the new and dynamic forms of conduct that we see in the e-commerce sector today.

6. Conclusion

53. The e-commerce sector is becoming an increasingly important part of the economy of many countries and the growth in e-commerce has, to varying degrees, been accompanied by the disruption of existing distribution chains.

54. It is natural therefore that the sector has been, and continues to be, a focus for many competition authorities. We have seen antitrust enforcement activity covering collusive behavior, vertical restraints and unilateral conduct, as well as a number of market studies and advocacy activity.

55. This activity has shown that the current antitrust enforcement tools are sufficient for the e-commerce sector. It has also demonstrated that while the operators, business models, and market dynamics seen in the sector may differ from traditional commerce, what can be considered anticompetitive conduct, leading to consumer harm, is generally not new.

56. Agency activity to-date has also shown is that an understanding of business rationale for different types of conduct is important, as is the value of considering efficiencies and consumer benefits. Even more so because the e-commerce sector may

[30] European Comm'n, DG Competition, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 O.J. (C 45) 7 (Dec. 3, 2008).

[31] C-413/14 P, Intel Corporation Inc. v Commission, EU:C:2017:632, para. 134; Case C‑209/10, Post Danmark A/S v Konkurrencerådet, EU:C:2012:172 para. 22.

involve novel business models, authorities must ensure that any antitrust enforcement is taken on a sound evidence base and not be influenced by the effects of disruption or by shifts in relative bargaining strength often characterizing the sector.

57. Equally important is a consistency of approach and legal certainty. Divergent approaches by authorities force companies to follow the most restrictive approach across the board, denying consumers the benefits of benign and procompetitive initiatives.

58. Further, allowing non-competition goals to guide antitrust enforcement can contribute to legal uncertainty and reduce incentives to innovate. Such goals (including data privacy and consumer protection) are more appropriately and effectively pursued by the established legal framework created for that purpose. In fact, rather than themselves enforcing such non-economic goals, competition authorities have an active role to play in advocating for the elimination of unjustified restrictions to competition, to enable the e-commerce sector to continue to flourish and deliver value to consumers.

59. Finally, given the newness of many practices in the e-commerce sector, competition authorities may find it useful to consider alternatives to enforcement—for example, open letters informing businesses of the rules (as the UK Competition and Markets Authority (CMA) has done, for example, in informing estate agents they should not boycott new platforms)[32]—and to invest in appropriate agency staffing and training to build internal knowledge of and capability around the sector.

[32] See CMA, Open letter to estate agents on choosing online property portals, (Apr. 21, 2016), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/517834/Open_letter_to_estate_agents.pdf.