出國報告(出國類別：其他公務有關活動)

出席 2016 年 11 月經濟合作發展組織(OECD)競爭委員會相關會議、第 15 屆全球競爭論壇(GFC)及國際競爭網絡(ICN)結合圓桌會議報告

服務機關：公平交易委員會

姓名職稱：張宏浩　委員

杜幸峰　視察

陳淑芳　專員

簡佳盈　專員

蔡聰勇　專員

赴派國家：法國巴黎

出國期間：105 年 11 月 26 日至 12 月 5 日

報告日期：106 年 2 月 8 日

目　錄

附錄：

壹、參與各項會議之緣起、目的及各會議與會人員

一、OECD「競爭委員會」及相關工作小組

(一) 經濟合作發展組織(OECD)於1961年9月成立，其成立宗旨在支持個別會員國之經濟體獲致最大可能之永續經濟成長、就業、提升生活水準、維護金融穩定、協助其他國家經濟發展、促進全球經濟發展。OECD目前共有35個會員國，包括澳大利亞、奧地利、比利時、加拿大、捷克共和國、丹麥、芬蘭、法國、德國、希臘、匈牙利、冰島、愛爾蘭、義大利、日本、韓國、立陶宛、盧森堡、墨西哥、荷蘭、紐西蘭、挪威、波蘭、葡萄牙、斯洛伐克共和國、西班牙、瑞典、瑞士、土耳其、英國、美國、智利、斯洛維尼亞、以色列及愛沙尼亞。

(二) OECD除總理事會及秘書處外，下設有各專業委員會(Committee)。「競爭委員會」(Competition Committee, CC)係源於1961年成立之「限制性商業行為專家委員會」，1991年更名為「競爭法暨政策委員會」(Competition Law and Policy Committee)，2001年再更名為「競爭委員會」，其下轄有2個工作小組「競爭與管制第二工作小組」(Working Party No. 2 on Competition and Regulation, WP2)及「合作與執法第三工作小組」(Working Party No. 3 on Co-operation and Enforcement, WP3)。競爭委員會與WP2、WP3每年定期於法國巴黎OECD總部召開2次會議，主要討論競爭政策及競爭法之制定及執法方向與技巧，以促進執法活動之國際化及促進各國各項政策及法規之透明化，並制定競爭法執行之最佳實務，促進各國之執法合作並對開發中國家進行能力建置。競爭委員會今年例會分別於6月及11月舉行，本次11月會議於11月28日至11月30日間召開。

(三) 我國於2002年1月1日正式成為OECD競爭委員會一般觀察員(regular observer，自2013年5月起改稱為「參與者」participants)後，即固定派員出席該委員會會議。本會參與競爭委員會相關會議活動，除可與歐美國家直接進行密切互動、交換意見，強化彼此間交流合作外，亦有助於各國對我國競爭政策/競爭法執行成效的了解以及對我國執法面向的建議，且在競爭政策議題上，參與相關會議得使我國從遊戲規則的追隨者成為遊戲規則的制定者，此對提升我國國際地位助益頗鉅。

(四) 本次出席會議人員有35個OECD會員國及歐盟競爭法主管機關官員代表、工商諮詢委員會(BIAC)，及競爭委員會參與者，包括我國、巴西、保加利亞、埃及、俄羅斯、南非、印尼、羅馬尼亞、哥倫比亞、馬爾他、秘魯、烏克蘭及哈薩

克等國競爭法主管機關代表。另新加坡、菲律賓及中國大陸以專案邀請會員(ad-hoc member)身分與會。

二、全球競爭論壇(Global From on Competition, GFC)

(一) OECD為推動國際競爭政策發展，並增進會員國與非會員國間對話，消弭彼此間之爭議，自2002年起，每年均會在競爭委員會例會中，選擇1次接續舉辦「全球競爭論壇」(Global Forum on Competition)，除會員國及參與者外，並邀請非會員國家競爭法主管機關及國際組織派員與會，尋求各國及國際組織間對競爭法執法的相互瞭解，並促進各國自願性採認最佳典範(best practices)、建立各國競爭法主管機關間的合作管道、強化跨國結合案及國際卡特爾案件的調查合作。

(二) 本年度全球競爭論壇為第15屆會議，係安排於本次競爭委員會例會後12月1至2日接續召開。本次出席全球競爭論壇國家計有來自會員國、參與者及61個非會員國家與8個國際組織共416位代表與會。

(三) 我國由本會張宏浩委員率綜合規劃處杜幸峰視察、陳淑芳專員及服務業競爭處簡佳盈專員、製造業競爭處蔡聰勇專員出席上開2項會議。

三、國際競爭網絡(ICN)結合圓桌會議：

(一) 國際競爭網絡(International Competition Network, ICN)係2001年10月由美國與歐盟等14國競爭法主管機關共同發起成立之競爭社群，其目的在提供競爭法主管機關執法經驗交流平台，透過各工作小組匯聚彼此對話逐步建立共識，以調和國際競爭政策歧異。迄今ICN會員涵蓋115個國家或多邊組織，共計逾130個機關會員，另外，與競爭法相關之非政府單位，如律師、學術界人士加入為「非政府顧問」(Non-Government Advisors, NGAs)。ICN組織架構除設有執委會決議各項組織工作運作外，並設有卡特爾、結合、單方行為、倡議及機關工作成效等5大小組，分別討論競爭法之各項議題發展及執法方向。本會係於2002年正式加入成為該組織會員，目前以卡特爾、結合、倡議等競爭法核心議題作為重要參與範疇。

(二) 本次會議由結合工作小組規劃，法國競爭委員會主辦，利用本次OECD全球競爭論壇舉辦之機會，邀請會員參加本次圓桌會議，討論結合執法中結合申報門檻相關問題，計有30多國競爭法主管機關，80餘位代表(包括官員及NGA)報名參加，我國由張委員宏浩率杜幸峰視察及陳淑芳專員出席。

貳、OECD 各工作小組及競爭委員會會議重點

一、「競爭與管制第二工作小組」(WP2)會議

11月28日上午舉行「競爭與管制第二工作小組」(Working Party No. 2 on Competition and Regulation, WP2)會議，由WP2主席Alberto Heimler先生(義大利競爭委員會研究與組織關係處前任處長)主持，討論議題包括：

(一)「陸路交通運輸之創新與競爭」圓桌會議(Roundtable Discussion on Innovations and Competition in Land Transport)：

1、本議題主要在討論競爭法主管機關在處理陸路交通創新發展變化時所面對之反托拉斯議題。主席首先說明，目前各國高速鐵路十分普遍，高速鐵路的發展提供了軌道運輸的強力競爭；而在高速公路運輸上，巴士的解除管制也讓客運服務業提供更廉價的服務，成為私人車輛的替代品。

2、自動售票系統、電動車輛、無人駕駛車輛的研發，以及丹麥、新加坡對計程車的管制革新，都是最近一連串提升陸路運輸競爭的創新案例一部分。秘書處除提供背景文件報告外，並邀請6位專家於會議中分享創新對交通影響經驗。

3、義大利米蘭理工大學經濟學教授Marc Ponti報告「陸路交通之管制與創新」，討論有關營運與科技創新對管制之影響，略以：

(1) 競爭可刺激創新，創新又可分為2大部分：營運創新及科技創新，而創新也可能是因為軍事需求而帶動之結果(如卡車、噴射機或智慧型運輸系統)。自然獨占性質之陸路運輸基礎建設如果不是無償性質，政府應有完整管制措施。

(2) 各國對於陸路交通大都以國營或管制為主而未見明顯之創新。上世紀末，歐洲各國嚐試要對鐵路及區域公共運輸系統引進競爭機制，但僅有英國鐵路自由化成功，惟仍未及於屬自然獨占的鐵路基礎建設部分。法國高速鐵路(HST)的建設營運也僅止於南北向。

(3) 本世紀陸路運輸創新主要在公路部分，以減少廢氣排放與減少意外發生的機率。在歐洲，公路長途運輸的解除管制及以網路為主的計程車與共乘方式的共享服務也是主要創新。對於汽車與卡車，因為排放課稅、低污染車輛與無人自動駕駛車輛的結合意味著社會與私人成本銳減，政府服務的角色也會跟著降低。未來的問題將會是如何規劃「智慧公路」(Intelligent roads)及新的能源供給標準與網絡。

(4) 在鐵路方面並未有太多的創新，惟在世界各地高速鐵路的興起擴建可視為一成功之模式，但因為其造價太高，不見得可適合所有的國家，且有人認為高鐵是對低收入者課稅來補貼高收入者的交通工具。另外，高鐵的基礎建設與服務也難以隔離，無法建立更多之競爭。

(5) 可能之建議：

i) 政府不應再給予補貼或授予獨占地位，污染者自行付費的概念必須實現，只有低收入者及公共運輸可以接受補貼。

ii) 對於鐵路運輸，因為現有廠商佔有優勢，政府應採取「不對稱管制」以保護新進廠商。

iii) 對於有利於市場競爭之創新，政府需要特別管制以加速競爭。

4、芬蘭交通部官員Susanna Metsälami女士報告芬蘭在數位化及創新思維下所提出之新「交通法案」(Transport Code)，以改進市場管制，提升消費者福利，略以：

(1) 數位化經濟是推動新法規的最主要因素。政府將所有交通法規整合成單一法規，利用運輸市場資料的數位化、公開化及可相互運作性，提出更新的服務客戶思想，節省社會、顧客及公司之成本，並使管制更有效率，強化競爭，創造更多工作且可達成環保及廢氣排放管制目標。

(2) 交通法案將所有的交通工具視為單一系統服務，利用MaaS(mobility as a Service)雲端運算，藉手機APPs、各種平台提供較佳之服務，並利用所蒐集到之資料立刻提供數位服務與規範，解除對各種交通工具之管制及方便市場進入。

(3) 交通法案可協助滿足使用者下列需求：結合各種不同交通模式及其發展成為安全、低廉及方便使用之系統，並使新的創新交通服務可以平順的進入市場。

(4) 交通運輸數位化有賴各種服務提供公開之必要資訊，包括路線、時刻表、停靠站、價格及所有可取得之資訊，而售票及支付系統介面也須開放給第3方服務提供者。乘客必須可以購買單一多模式轉乘旅程票卡，而公共採購也必須確保售票及支付可以相容運作。此一模式可能引發之商機有價格比較、結合各種轉乘服務、提供從出門到抵達一線到底服務等，並可創造出各種不同之套裝組合服務。

(5) 公共客運運輸系統必須先取得巴士運輸執照，但不須另外取得額外之路線許可營運執照，以加強各路線間之競爭，營運者也可機動擴展其服務。但地方政府可在必要服務品質考量下，依照歐盟公共服務契約規範，授予獨家營運之權利及簽署服務契約。對於貨運方面，營運者必須先取得商業貨運運輸許可，並有3.5噸以上之貨運車輛。2噸以上之廂型貨運車輛須先向芬蘭交通安全局註冊。

(6) 計程車事業在芬蘭為一高度管制行業，管制項目包括數量、營運範圍及最高

價格，目前僅有1種營運模式，而且高度限制市場進入。新的交通法規則准許發照給任何符合門檻之申請者，且已擁有客運或貨運執照者亦可經營計程車服務，惟計程車司機須取得計程車駕照，而車資最高價格則由主管機關綜合各項指數設定規範。

(7) 透過此一模式可強化各運輸模式間之競爭：對於必要服務資訊開放給各營運者，可透過比較而結合各項服務進行競爭，服務的提供也可依照各種不同需求發展，科技僅扮演中立角色，不妨礙自動化及創新之發展。

(8) 交通法案第二階段將繼續蒐集所有公路、鐵路海運及航空市場及服務之條款，使所有交通運輸成為單一體系，成為單一法律規範。預計2017年2月可以完成草擬條文並公開接受評論，5月向國會提出草案。

5、法國代表就法國陸路交通發展及變革提出報告，略以：

(1) 法國為因應市場發展，採取了一系列由法國競爭委員會(Autorité de la Concurrence，ADC)所建議之管制創新。對於公共汽車，ADC建議開放公共汽車運輸市場，除了解除進入障礙外，並提出數項開放市場建議，包括城市間公共汽車交通自由化、建立城市間之共同監管、及轉運樞紐站之時間分配等，這些建議已造成法國公共汽車運輸管制的重大變化，在乘客人數、服務路線及就業人數等數據上都有顯著增加。

(2) ADC關注的第二個產業是受到破壞性創新影響的高度管制運輸服務產業，如計程車及私人轎車服務。ADC建議所有涉及個人客運服務之運輸皆需受相同規範之約束，並提出數項著眼於開放此一產業競爭之建議。ADC同時建議，政府必須蒐集資料，以確保此一產業之管制能與時俱進。此外，ADC亦對此一產業服務提供者之資格立法建議提出評論。

(3) ADC的第三項建議為對鐵路產業開放競爭。ADC已提出數項建議，主要著眼於確保鐵路產業部門結構之效率，允許對必要開發和維護鐵路服務所需的投資及消費者利益最大化。這些建議大都聚焦於：(1)確保負責管理鐵路網絡和基礎設施事業的自主性，(2)建立關於鐵路事業集團控股公司中立性的保障措施，及(3)強化產業管制機構。

(4) ADC同時也致力於對鐵路非實體基礎設施的執法活動策略，例如預訂和購票所需的資訊科技系統。ADC認定鐵路票務系統為關鍵設施，系統廠商對進入其票務預售系統者給予差別待遇者構成濫用支配地位而處以罰鍰，並獲得其改正之承諾，以確保第三方進入此一必要基礎設施沒有差別待遇。

6、西班牙報告國內陸路交通變革，略以：

(1) 西班牙最近的陸路交通技術變革和IT技術有關。所謂共享經濟的出現，主要是在公路客運部門。這些創新增加了市場競爭程度，消費者的選擇，價格壓力的水平，以及客運交通市場的整體效率。

(2) 鐵路也受益於創新，新技術使得鐵路公司能夠更好地管理交通控制，提高準時性，安全性及其整體管理和服務。儘管如此，西班牙鐵路客運的主要創新是高速和長途服務的發展，西班牙鐵路客運市場幾乎完全封閉競爭。

(3) 政府行政部門有責任允許創新並提高競爭程度。重要的是促進新競爭對手的進入，消除任何可能有的特權，並建構平等的競爭環境。為此，競爭法主管機關可能對尚未實行自由化進程的市場先進行自由化，以及取消，限制或修改限制創新和競爭並構成進入市場的不合理障礙的過時規章。

7、國際交通論壇 (International Transport Forum)研究及政策分析組組長Stephen Perkins先生報告「交通產業之進入障礙及創新」:

(1) 競爭政策主要目的在於防止不必要的市場進入障礙,如果完全競爭無法實現，政府即應採取管制，使市場出現與完全競爭相同之結果；而可用之方法應先以結構面矯正而非行為面之矯正，並防止市場力之濫用。

(2) 鐵路產業傳統上有自然獨占之特性，政府可在最大可能接受範圍內，在鐵路市場中去除進入障礙引入競爭，以維繫現有廠商投資之誘因。如墨西哥鐵路單位即以直接或平行競爭，取得共同管理權及路權來改善鐵路之服務品質。英國鐵路以加盟方式,經營者可向鐵路公司承租取得營運權,經營客運業務，透過競爭提升服務品質。

(3) 對於可能產生完全競爭的市場如果設立市場進入障礙，即等於政府替業者創造經濟租而不利於消費者。對計程車之管制一般理由為：較安全、服務品質或「專業知能」及提供公眾服務，如可裝載輪椅等。但如考量創新及通訊，上開條件中，安全條件可以擴展至車輛可追蹤、駕駛者之身份可辨識，品質或專業知能條件則可用品牌商譽及GPS導航替代，一般性服務則以競爭來強化，如此則可減少管制措施。

(4) 政府應運用大數據對特定問題做「事後管制」或決策之參考，也要能在這急速跨行業創新的時代靈活應變。

8、歐洲鐵路與基礎設施公司聯合會(Community of European Railway and Infrastructure Companies，CER)執行長Libor Lochman報告歐洲鐵道之創新對鐵路內部競爭及外部競爭之發展及影響，略以：

(1) CER成立於1988年，現有超過70位會員及合夥人，其代表73%歐洲鐵路網絡總

長度，80%歐洲鐵路貨運事業及96%歐洲鐵路客運經營者。

(2) 歐盟鐵路自由化自1991年起歷經3次鐵路包裹(package)立法，開放國際貨運及客運市場，並確立乘客權益及駕駛司機之資格等。鐵路客、貨運自2002年至2012年即穩定成長。

(3) 與航空業相比較，鐵路須付出較大之成本，如國際航空燃油可免除價值附加稅(VAT)，但鐵路用油則需負擔高額VAT，且航空可有不可抗拒條款但鐵路沒有。

(4) 2014年所提出之第4次包裹立法草案所追求的是更高度的競爭，更多跨境法律確定性、更好的民間投資環境及更多可達成的標準。對於21世紀歐洲鐵路的優先目標應該是：施行第4次包裹立法之技術柱石、營運數位化、發展泛歐鐵路核心走廊並定義歐盟對車輛採購之功能規格。

9、歐洲Flixbus公司創辦人André Schwämmlein報告歐洲長途巴士解除管制後，對長途巴士市場之影響及與鐵路及汽車之競爭，略以：

(1) Flixbus公司4年前創立於德國慕尼黑，係因應歐洲2013年鐵路獨占時代結束，長途公路客運解除管制後設立，結合科技及電子商務平台，著眼於歐洲城市間之客運公司。目前有超過1000輛巴士及5000位駕駛，並結合250個巴士夥伴，已服務超過3500萬以上之乘客。

(2) Flixbus主要競爭對象為自用車及鐵路，提供方便、現代化及低價之旅行，而巴士本身創新，如車上提供wi-fi、提供食物販售、路線的擴展及運用手機App訂票等，也吸引想搭乘公共運輸工具之乘客。另外還有各國在公路運輸解除管制(德國、瑞士)及一些主要城市運用解除管制振興經濟等因素。

(3) 雖然歐洲在公路運輸上已有解除管制，但仍有許多管制挑戰，如城市基礎設施不足、各國對鐵路之補助、申請公路營運程序複雜冗長及大量的文件與跨境管制措施等。

(4) 創新與解除管制對搭乘長途巴士旅行產生了極大的正面效應，如環保、就業、稅收及文化交流等，政府也不需付出任何成本，應值得推廣鼓勵。

10、歐洲卡車群(European Truck Platooning)交通創新中心主任Dirk-Jan de Bruijn先生報告歐洲貨運卡車群組(platooning)及自動化駕駛之發展，略以：

(1) 卡車群組須運用最先進的科技及駕駛系統，一輛接一輛緊跟在後，並以通信維持聯繫，讓卡車駕駛以固定速度靠近行駛，減少燃料消耗及二氧化碳排放，節約運輸成本及提高交通流量，同時車輛在道路佔用的空間也會變小。

(2) 卡車組隊的影響遠遠超出了運輸部門所能想像。 自動駕駛和智慧移動還提供

了更多的就業，物流和生產機會。

11、主席結論表示，科技的演進對於陸路運輸之創新有著非常重要的影響，各國經驗也提供競爭法主管機關在執法時之參考。

(二)未來討論題目：WP2將考慮於下次會議中討論「電業之破壞性創新」及繼續本次會議未能討論之公共工程採購報告。

二、「合作與執法第三工作小組」(WP3)會議

11月28日下午至11月29日上午舉行「合作與執法第三工作小組」(WP3)會議，由WP3主席美國司法部反托拉斯署代理署長Renata Hesse女士主持，議題包括：

(一) 11月28日下午「地理市場定義」圓桌會議(Roundtable on geographic market definition)：

1、本議題包括我國在內共20個國家及工商諮詢委員會(BIAC)提出書面報告，主要討論跨國或更廣範圍的地理市場界定，特別在全球化、貿易自由化及數位化之長期發展趨勢下，國際運輸及門到門(door-to-door)運送網絡的演進提升了批發及零售階段供應者的可及性，此將增加地理市場界定的複雜度。秘書處亦邀請英國東英吉利大學(University of East Anglia)經濟學教授Bruce Lyons及Compass Lexecon Europe顧問公司Jorge Padilla從學術研究及實務提出看法。

2、OECD 秘書處官員 James Mancini 首先報告秘書處背景文件「跨越國界之地理市場界定」，略以：

(1) 依據歐盟執委會「關於相關市場界定通告」，相關地理市場為各相關事業在某一區域參與產品或服務之供給與需求活動，並可認定其競爭條件具有相當的同質性。美國「水平結合處理原則」(Horizontal Merger Guidelines)明定，如果地理區域限制了消費者替換某些產品的意願或能力，或者限制了某些供給者服務某些消費者的意願或能力，則受結合行為影響的競爭場域即可能有特定的地理界線，又供應商與消費者所在的地理區域都可能產生此影響。對於多數競爭法主管機關，其於審查競爭法案件時進行地理市場界定之考量因素，常與進行競爭評估範圍之考量因素有所重疊。

(2) 界定地理市場時所需衡量因素眾多，除訂價以及運輸成本外，通常尚須考慮產品特性、市場動態、消費者特性、產品管制、貿易障礙及進口等因素。由於全球化市場進而衍生諸如線上銷售、創新進程、語言及文化障礙等議題，以及資訊分享與資料使用等，都將可能成為未來的挑戰。

3、歐盟官員 João Azevedo 介紹「歐盟結合管制之地理市場界定」，該界定內容係參考東英吉利大學教授 Bruce Lyons 報告其與 Amelia Fletcher 合寫之「歐盟結

合管制之地理市場界定：如何完成及如何改進」：

(1) 由於全球化及單一市場深化與時俱進，許多企業在全球規模的基礎上經營並面臨世界各地廠商競爭。利害關係人曾就歐盟在結合案件之地理市場界定是否範圍過於狹隘提出若干質疑，例如歐盟執委會是否已充分考慮全球競爭議題；歐盟執委會於競爭法案件定義相關市場時，是否應多考量供給面之因素；為能在反托拉斯及結合案件上有效掌握全球市場動態，考量進口在市場界定階段扮演之角色，是否應將地理市場界定更為擴大。

(2) 歐盟委託 Fletcher 及 Lyons 二位學者進行研究，其審視近期 10 件以地理市場界定為關鍵議題之結合案件後提出報告，結論認為：(1)歐盟執委會就地理市場界定部分，已提供充分事證，且符合其所訂定之市場界定通告。(2)歐盟應進一步說明地理市場界定僅為結合之過程，競爭效果分析更具重要性。(3)建議倘歐盟主要係以需求替代界定市場，則可將市場外超額產能(swing capacity)及快速進入市場者(rapid entrant)之產能份額(capacity shares)納入考量。(4)另當資料允許時，建議歐盟多運用等時線(isochrones)而非政治疆界界定地理市場。

(3) 歐盟執委會執法在面對現今全球化浪潮下，公布了「相關市場界定通告」，就事業結合及競爭法案件界定相關地理市場，提供充分的彈性。依據過去案例分析，歐盟市場界定仍在持續發展中，而在市場條件改變下，歐盟亦會適時予以調整。此類彈性調整亦包含近期地理市場界定方法之運用，當案件評估、調查性質及資訊蒐集等條件許可，歐盟執委會的市場分析可依賴銷售/服務地區(catchment area)及等時線(isochrones)等方式，進行跨境市場評估。

4、Compass Lexecon Europe 顧問公司資深管理主任 Jorge Padilla 就「地理市場界定之供給面替代－經濟觀點」提出報告：

(1) 市場進入評估應以事業角度進行，評估結論可能改變既定相關產品市場的市場結構；供給面替代評估則是發生於市場面，牽涉市場上所有廠商，而這類評估可能使相關產品市場範圍發生改變。

(2) P 氏設計不同情境案例，輔以圖示說明並提出可能的作法。例如，絕大多數廠商提供服務給位於歐盟地理中心位置之消費者，另有 2 家廠商同時服務位於歐盟內之消費者及位於歐盟地區外之消費者，並對二者採取差別訂價。在該情境假設下，整個歐盟地區即列為相關地理市場，計算市場占有率時，應同時納入所有廠商產能。

(3) 另考慮供給面替代的情境，前例中再增加 2 家廠商僅服務歐盟境外消費者。

如為審查結合案而評估競爭意涵(competitive implication)時，在考慮是否將歐盟境外市場併入歐盟市場中，此時共有 3 項要件應予考量：(1)適時且免成本進入市場；(2)近乎普遍替代性；(3)對稱性：所有歐盟境內廠商亦得快速轉換以爭取歐盟境消費者。前揭狀況(2)及(3)會使供給面替代評估結果與需求面評估產生歧異。

5、美國：

(1) 經檢視過去將地理市場定義為美國國內的相關個案，歸納後發現當相關市場之供給者位於美國境內，或涉案之產品或服務的消費者位於國內，則市場界定為美國境內。首先關注為產品價格，當一家公司就同一產品可對不同區域的消費者進行差別訂價，可視為不同產品且不具替代性，此時視消費者所在區域劃定市場。當不存在差別定價時，則以特定產品的供應者所在地界定地理市場。其次，在界定地理市場時，尚須考量單一廠商在特定區域內提高價格的能力、競爭程度、運輸成本、賣方力量、銷售能力等。

(2) 另美國代表提出跨國市場(如跨國連鎖餐廳)或國際市場究是否可直接與全球市場劃上等號等議題。

6、澳洲：

(1) 考量進口競爭下，澳洲競爭及消費者委員會(ACCC)於多數案例中將相關地理市場定義為澳洲或部分澳洲地區。另於個案中，併同考量位於澳洲境外而將產品輸入澳洲之供應者實際上或潛在所致生之競爭限制。

(2) 儘管超國家市場力量通常會對澳洲境內結合事業的行為產生影響，但在界定地理市場範圍時，地理市場劃定未必與結合對競爭的影響為全球或超國家之評估有關。

(3) 另澳洲與其他國家並無土地疆界連接，故在結合評估及跨國或國際市場相關議題之地理市場界定部分，與歐盟、美國有所差異。相較於土地疆界連結的國家，澳洲地理上獨立代表許多產品及服務之跨境運送成本通常較高。

7、韓國：

(1) 韓國公平交易委員會(KFTC)係考量當一產品價格在特定區域存在明顯、非短暫的上升，其餘區域之產品價格並無變化，而主要消費者可轉換至其他產品，來界定地理市場。地理市場為假定的獨占者在相當期間內，可顯著且小幅提高價格，並從中獲利的最小區域。

(2) 在 2003 年 Muhak Co.,Ltd 及 Daesun Distilling Co.燒酒生產與銷售之結合案審查中，地理市場界定為主要爭點。在結合事業於各自主要市場之市占率均超

過 80%前提下，依據 SSNIP 分析特定區域消費者會否轉換至另一品牌燒酒，認定結合事業是否處於同一地理市場，進而決定地理市場範圍。本案主要爭議包含 SSNIP 分析法所使用的價格上升(根據消費者忠誠度設定為 10%至 30%)及變動成本考量。韓國公平交易委員會分析後發現，兩區域組成一單獨的地理市場，且結合後將產生嚴重的限制競爭問題。

8、BIAC：

(1) 在數位市場部分，廠商及主管機關面臨的新挑戰包含數位經濟交易型態致使市場定義可能產生轉變、如何定義地理市場、如何劃定平台間結合之市場範圍等。

(2) BIAC 分享自不同平台彙整數據之方式，曾解決部分案例於地理市場界定有困難之經驗。

9、日本：在線上旅遊產業部分，其屬雙邊市場(two-sided market)，而提供相關服務之業者所面對為使用者。縱使部分提供服務之業者位於日本境外，但考量多數使用者仍居住在日本，又線上旅遊預訂服務使用之語言為日文，日本公正取引委員會仍將相關地理市場界定為日本境內而非全球。

10、OECD 對我國所提交書面報告提出問題，說明我國於網路廣告案例中將相關地理市場界定為國內之主要因素為何。本會代表報告略以：

(1) 依據公平會對於相關市場界定之處理原則，就案關商品或服務之需求替代、供給替代進行界定地理市場時，考量因素如下：(a)不同區域間產品價格變化及運輸成本大小。(b)產品特性及其用途。(c)交易相對人在不同區域購買產品之交易成本大小。(d)交易相對人對產品獲取之便利性。(e)交易相對人在產品價格調整時，選擇至不同區域購買之情況。(f)交易相對人及競爭事業對於產品區域間替代關係之看法。(g)相關法規或行政規則之規定。(h)其他與地理市場界定相關之事證。

(2) 在網路廣告案例中，雖然網際網路具有跨越國境之特色，但廣告主係藉由網路廣告平台將要傳達的訊息提供給目標觀眾，故在界定地理市場時，仍須考量目標觀眾的分布、習慣、文化背景及語言等因素。公平會目前就所調查之網路廣告相關案件(即網路廣告業者有無不當限制交易相對人事業活動)，該等廣告使用語言為繁體中文。因國人仍習慣瀏覽繁體中文網站，而我國與其他區域的華人在文化上仍有顯著差異(如網路用語代稱某種情境)，對國內的廣告主來說，其他境外的關鍵字廣告平台尚無法提供合理的替代選項，故將前述案件之地理市場界定為我國境內。

(二) 11月29日上午舉行「競爭法主管機關對結合案件之決議：禁止結合與有條件准予結合間之取捨」圓桌會議(Roundtable on agency decision-making in merger cases: from a prohibition decision to a conditional clearance)：

1、本議題包括我國在內共有24個國家及BIAC提出書面報告，並邀請Cleary Gottlieb Steen & Hamilton律師事務所Nicholas Levy先生及Kirkland & Ellis國際律師事務所Paula Riedel女士參與討論，主要討論議題為主管機關如何決定禁止結合、設計矯正措施(remedy)及評價事業提出之矯正措施尚不足以消弭競爭損害或非屬有效。

2、歐盟競爭總署(DG Competition)官員 Simon VANDE WALLE 報告「歐盟結合管制之禁止與矯正措施：

(1) 目前歐盟結合管制係審查結合案件的反競爭效果是否大於經濟效率。在矯正措施部分，第一審查階段須明確且完全消弭嚴重疑慮(serious doubts)，第二審查階段則須通過顯著妨礙有效競爭測試(SIEC)。

(2) 近年來歐盟之結合申報件數、附加矯正措施案件、禁止結合案件及第二審查階段撤回申報情形，自 2012 年至 2016 年 10 月底，每年約有 280 件至 360 件之結合申報案；每年約有 1 至 2 件禁止結合或未能通過第二審查階段 SIEC 測試，附加矯正措施之結合案約 13 件至 20 件。整體而言，禁止結合或於第二階段撤銷申報之結合案約占全年受理結合申請案件的 2%以下，第一階段及第二階段施以矯正措施則占歐盟全年結合案之 2%至 12%。

(3) 至於矯正措施之成效，歐盟執委會 2005 年 10 月曾進行結合矯正措施之研究，2015 年 7 月及 11 月亦分別針對結合決定以及兩大行動通訊業者結合案進行事後評估(ex-post evaluations)。另歐盟目前審查中之結合案，如行動通訊(Hutchison/Telefonica UK、Hutchison 3G Italy/Wind/JV)、石油產業(Halliburton/Baker Hughes)、建築材料(Holcim/Lafarge)及啤酒廠(AB InBev/SAB Miller)等，將參考前揭事後評估結論，希冀作出最有利市場競爭之審查與決定。

3、Kirkland & Ellis 國際律師事務所 Paula Riedel 律師以「競爭法主管機關就結合案件之決定：禁止與有條件准許－執業律師之觀點」提出報告，略以：

(1) 禁止結合之態樣眾多，可概分為：(1)第二審查階段結束之禁止，如：Hutchison/O2 UK案、ICE/Trayport案；(2)可預見禁止結果或商業上無法達成要求的矯正措施而於第二階段調查之撤回，如：Telenor/Telia Sonera案、Baker Hughes/Halliburton案；(3)在第二審查階段時取消併購或破局者；(4)未能及時

實現交易的有條件准予結合，如Britvic/AG Barr案；(5)矯正措施實質執行效果為準禁止(quasi-prohibition)，如：Ball/Rexam案、AB Inbev/SABMiller案(大規模區域矯正措施)等。

(2) 當競爭法主管機關就介入結合案之風險進行評估時，分析面向為：(1)提供完整的競爭分析框架，包含最小合理市場(narrowest plausible market)、競爭密切性(closeness of competition)外、市場集中度、進入障礙、買方力量、效率等因素；(2)執行變數部分，除運用經濟分析(如：向上定價壓力(UPP))外，尚須考慮市場測試是否有效操作、歷史及交易相關資料之相關性，買方力量較強的市場中買方照看自身的能力，及分析方式是否足以對應市場結構的轉變；(3)考量公共利益。

(3) 有關設計矯正措施之思考：(1)減價銷售會否提高投機買家出現的風險？應在維持企業營運及允許於一定時間尋找對維持企業競爭力有興趣、合適的併購者間達成平衡；(2)複雜的併購交易實為常見，矯正措施設計的複雜度不應成為障礙，且競爭法主管機關內應設置矯正措施之專責單位；(3)除了符合比例性外，是否須提高執行成本之權重等。

4、Cleary Gottlieb Steen & Hamilton 律師事務所 Nicholas Levy 律師以相同題目提出其看法，略以：

(1) 訴訟舉證準則的機率衡量(balance of probabilities)標準應適用於決定禁止結合或有條件准予結合。

(2) 第一審查階段(Phase I)矯正措施的標準更易於達成，主管機關應謹慎避免濫用或逾越裁量權限。

(3) 在評估競爭損害及矯正措施之適當性、比例性上，應將結合相關效率納入考量。儘管競爭法主管機關對第三方是否自個案審查結果獲有利益或為矯正措施之受益者持保留態度，第三方意見仍應予考量。

(4) 競爭法主管機關應公開、直接並適時說明個案矯正措施之必要性及範圍，且審查過程中應盡量避免變更標準。另當矯正措施無法消除競爭疑慮或須施以廣泛的矯正措施才得處理時，競爭法主管機關應予告知。

(5) 矯正措施的擬訂已逐步並持續形成，而競爭法主管機關提供管制原則及客觀審視過去矯正措施的有效性將有助於其成形。各國競爭法主管機關間的合作與協調，可確保矯正措施具一致性，避免不必要的重複及延長程序。

5、加拿大：

(1) 加拿大競爭法之規範框架為衡量結合可提升之效率及結合可能帶來的反競爭

效果，由於加國在競爭效果與結合矯正措施效率分析有所不同，效率未必須消除結合可能帶來的反競爭效果；結合相關分析方法(包含效率)細部事項訂於結合處理原則(Merger Enforcement Guidelines)。

(2) 加拿大競爭局通常以可實行、有效之結構性矯正措施為糾正措施，但倘合宜矯正措施之制訂並無可能性，故仍有採取解散或禁止之必要。就矯正措施是否可被接受之評估而言，競爭局必須說明該措施足以將競爭程度重置至不低於結合前之水準。另競爭局近來將結合矯正措施公布於加拿大結合矯正措施訊息公報(Information Bulletin on Merger Remedies in Canada)。

6、OECD 對我國所提交書面報告提出問題：「報告中述及為徵詢結合案對外意見會邀集管制機關、同業公會、專家學者及競爭同業等舉辦座談會，補充說明其運作方式，以及是否為有效率蒐集結合審查所需資訊之方法」。本會代表報告略以：

(1) 公平會在審查結合案件時，會在網站上對外公開徵詢意見，並視個案需求，透過發函、舉辦座談會等方式蒐集結合案對產業及市場競爭影響之產、官、學界相關意見，作為結合決定或擬訂附負擔許可中負擔內容之參考。在舉辦座談會部分，本會邀集公平法及研究領域為相關產業專法的學者、相關主管機關、個案涉及之專業或產業研究機構、公協會、相關業者及參與結合事業等共同參與。

(2) 辦理座談會之主要功能有三：(a)可聽取競爭同業意見並驗證申報人所提出結合申報資料之正確性；(b)瞭解相關上下游業者對該結合案關切面向及意見；(c)獲取相關部會(如投資審查機關及產業主管機關)之專業意見及產業衝擊因應等，可供結合案准駁及附加負擔內容擬訂之參考，故公平會認為仍屬取得結合審查所需資料有效途徑之一。

7、澳洲：在 Sea Swift’s 收購 Toll Marine Logistics 之結合案中，參與結合事業提出之行為面措施係承諾至少提供特定數量且不超過特定價格之遠程船舶服務、不執行獨家交易契約及開放重要基礎設施等。惟澳洲競爭及消費者委員會(ACCC)認為，參與結合事業提出之矯正措施仍未消除潛在競爭者進入市場之關鍵障礙，實施最少數量服務與價格上限措施之結果將劣於競爭市場，又矯正措施並無獨立的審核機制，整體而言，仍不足以消除此收購交易所生之競爭損害，故於 2015 年 7 月決定禁止該交易。

8、美國：

(1) 在 Sysco 與 U.S. Foods 結合案中，二事業為美國食品服務配銷業的兩大龍頭，

透過個別配銷網絡服務大型連鎖飯店、餐廳及食品服務管理公司等，而該結合象徵前兩大全國消費者(即旅館業)食品配銷供應商合併。美國聯邦交易委員會指出，該結合將不法減損特定區域市場之競爭。參與結合事業提出將 11 家配銷中心轉賣予區域性經銷商龍頭 PFG 作為矯正措施，並主張買方未來可穩定成長且具競爭力，但遭聯邦交易委員會拒絕。法院經審理及舉辦公聽會，認為該矯正措施無法使結合後競爭程度回復至結合前，仍維持聯邦交易委員會見解，並令相關事業須俟該委員會行政審查決定後，始得進行結合，最終參與結合事業放棄此交易。

(2) 在 Halliburton 與 Baker Hughes 結合案，二事業規模分別為全球第二及第三大油田服務供應商。因本案終止合併，Halliburton 須支付 Baker Hughes 35 億美元。該案歷經之程序與前揭案件類似，而美國聯邦交易委員會在該案中面臨的挑戰除結合本身外，尚有結合所生反競爭效果、矯正措施設計、與法院間協調合作等更為複雜的問題。

9、韓國：

(1) 韓國公平交易委員會於 2013 年接獲 Essilor Amera Investment PTE.LTD 擬收購 Daemyung Optical Co.之結合申請案，參與結合事業分別為全球與韓國國內第一大視力矯正鏡片製造商、韓國國內第二大矯正鏡片製造商。經市場調查發現，參與結合事業於結合後在單一鏡片市場之市占率達 66.3%，新式變焦鏡片市場之市占率為 46.2%，並成為所有相關市場之第一大製造者。韓國公平交易委員會考量參與結合事業可藉由推出新產品等方式，逸脫價格上限等行為面矯正措施的監督；附加行為面措施通常有期間限制，此將致使矯正措施之有效性受到質疑；即便參與結合事業維持獨立營運，仍無法透過降價以外的方式將競爭程度回復至結合前水準，故決定凍結該結合協議。

(2) 韓國公平交易委員會於 2012 年接獲 ASML US Inc.擬收購 Cymer Inc.之結合申請案，參與結合事業分別為微影技術(lithography)系統及光源相關市場第一大供應商。經衡量本結合可能產生結合事業宣稱的效率，以及禁止或附加結構性措施可消彌的競爭疑慮後，該會決定附加行為面矯正措施。

(三) 1998年惡質卡特爾建議書之執行：本議題主要討論1998年總理事會對惡質卡特爾之建議書(1998 Hard Core Cartel Recommendation)公布後，會員對於執行此一建議書之經驗及修正建議，俾於彙整後提報總理事會。各國大致同意對1998年建議書進行修正討論。

(四) 未來討論題目：下次WP3會議將於2017年6月19日舉行，可能討論題目仍將以

結合為主，主席請秘書處參考ICN目前討論議題，以信函與會員國溝通後決定，以避免與ICN之討論重複。

三、「競爭委員會」(CC)會議

11月29日下午至11月30下午起舉行「競爭委員會」(CC)會議，會議由CC主席Frédéric Jenny先生主持，討論議題如下：

(一) 大數據公聽會：本議題主要討論競爭法是否為適當工具來處理因蒐集或使用大數據而引發之問題，如市場定義、衡量市場力、非價格層面之競爭考量(如隱私權之保護)問題等。

1、秘書處邀請英國薩里大學(University of Surrey)數位經濟教授 Annabel Gawer 女士、美國法律與經濟學國際中心(International Center for Law and Economics)創辦人兼執行長 Geoffrey Manne 先生、美國田納西大學(University of Tennessee)法律系教授 Maurice Stucke 先生、Google 首席經濟學者，美國加州大學柏克來分校資訊學院(UC Berkeley School of Information)經濟學教授 Hal Varian 先生及比利時 Cadealader, Wickersham & Taft 法律事務所 Alec Burnside 律師等專家就本議題從學術及實務觀點提出報告。

2、英國薩里大學數位經濟教授 Annabelle Gawer 女士以「在數位時代引進競爭政策」提出報告：

(1) 目前常見之數據平臺，包括 Facebook、Google、Twitter 等，與傳統產業輸送帶或工作平臺相較，在數據傳輸過程或工作流程上保有相當彈性，是為兩者主要之共通點。現今社會不論從企業內部平臺到產業內供應鍊平臺，乃至整個產業平臺等，利於提升工作效率之各類平臺已儼然成形。

(2) 創新平臺往往具有相當專門技術，得以在創新生態系統(innovation ecosystems)中，促進互補性創新(complementary innovation)之發展，並可善用平臺商業模式，透過電腦作為媒介進行各項交易。經由妥善規劃平臺，可有效促進交易及創新活動，進而創造價值；惟網路效應、市場力量及進入障礙等，則可能成為伴隨而來的新興議題。

(3) 消費者在使用平臺的過程中已不單純僅為消費者，同時也為該平臺提供資料；而平臺本身則得利於使用消費者所提供的數據，更進一步改善其相關產品或服務。亦即，在平臺的使用過程中，消費者與平臺間藉由提供並妥善運用數據，而進行創新研發活動，而使消費者與平臺共同成為創新者。

(4) 為因應大數據時代，應於全球性的架構下妥善減少市場扭曲問題，並基於競爭法作為數據交換整合鏈中聯絡其他資料保護機構之穀倉(silo)，競爭法主管

機關應與數據管制機關進行密切合作。

3、Google 公司首席經濟學者，美國加州大學柏克來分校資訊學院經濟學教授 Hal Varian 先生以「大數據、個人化及競爭」提出報告：

(1) 企業利用銷售點登錄、網路日誌等管道，似無須投入太多資源即可自動蒐集大量資料，但資料本身是毫無使用價值的，除非資料能轉化為資訊、知識及行動等；而進行資料分析時則須投入相關輔助設備，如硬體、軟體、專業知識等。例如可藉由 Kaggle 這類的數據建模和數據分析競賽平臺，來運用數據進行預測分析。

(2) 在運用大數據時，可從需求面與供給面的規模經濟、邊做邊學(如學習曲線)等面向獲得正面回饋；至於資料網路效應(data network effects)，則係由使用者進行搜尋、點擊後，再由搜尋引擎經由搜尋得來的資料中學習，進一步提供更佳之搜尋結果等一連串的動作產生，此即為人所知的邊做邊學，同時也是各產業實際面臨的情況。但學習如規模收益一樣並非免費，除進行大量的投資與承諾外，仍需投入數據、硬體、軟體、工具、專門技術等，並須於生產過程中不斷學習。

(3) 如欲考量進入者的競爭情形時，由於現有廠商擁有勞工、資本、專業知識、數據等，而新進入者大多只具有專業知識，所以當技術創新改變傳統智慧時，全新的契機就會應運而生。例如：Uber 推行與陌生人共乘、iPhone 提供沒有鍵盤的通訊設備、Google 進行的文字廣告(text ads)、Amazon 提供線上銷售書籍、Microsoft 不搭配硬體銷售作業系統等。

4、美國田納西大學(University of Tennessee)法律系教授 Maurice Stucke 先生探討「大數據與競爭政策」：

(1) 為瞭解當前競爭執法工作是否足以因應大數據相關議題，以及是否應期望隱私問題利用隱私權相關法律或市場系統的單一功能來解決等面向，首先應先瞭解何謂大數據，及大數據的 4 個 V，亦即 Volume(容量)、Velocity(速度)、Variety(多樣性)及 Value of personal data(個人資料的價值)。再者，我們需要進一步瞭解大數據的競爭重要性，並檢驗市場力量是否可提供消費者保護其隱私利益的機制。此外，亦須瞭解歐盟及美國如何審查數據導向(data-driven)之結合案件，並確認當競爭法主管機關忽略大數據時可能導致的風險。

(2) S 氏認為藉由大數據而揭露當前反托拉斯架構幾項缺點，主要如競爭法於定義過窄的市場中衡量結合案件之短期價格影響，可能發生忽略或邊緣化部分競爭參數難以量化(如當產品免費時的品質)之情形。此外，數據導向結合案將挑戰傳統的競爭法案件類型，這是由於競爭法著眼於替代性，但數據導向結

合案可能受各種不同資料影響所致。

(3) S 氏建議競爭法主管機關除須掌握隱私權與競爭政策相同點，並處理具市場優勢地位廠商濫用數據導向行為外，亦應拋棄目前以價格中心的反托拉斯分析架構，進一步確認並善用工具評估數據導向的效率，並建議競爭法、隱私權與消費者保護之機關間應進行更密切的合作。

5、美國法律與經濟學國際中心(International Center for Law and Economics)創辦人兼執行長 Geoffrey Manne 先生報告略以：

(1) 為瞭解在競爭法分析中加入隱私疑慮的風險為何，以及企業可在何種範圍內壟斷數據並藉此排除對手等問題，首先須釐清隱私保護與競爭法間之差異。隱私問題基本上屬於消費者保護或侵權行為議題，而競爭法在理論上可用非價格因素處理隱私問題，但當合併其他效果進行評估時仍有困難。隱私問題如與競爭法有關，則涉嫌壟斷事業為獲取超額競爭報酬，必須有降低隱私保護之誘因；惟德國聯邦卡特爾署則認為，由於具市場優勢地位事業受限於特殊義務，競爭法主管機關亦須就消費者是否獲得充分告知資料蒐集的形式及範圍等，檢視該廠商是否濫用市場力量。

(2) M 氏認為近期有關數位平臺競爭分析之核心錯誤，主要是數據壟斷或「大即是壞」之爭論。如有競爭法疑慮時，須證明相關資訊具有敵對性且不可或缺，並於達到一定規模時可能遭到濫用。由於消費者可提供數據給不同線上服務業者及新進的競爭者，所以數據並不常當作為封鎖來源；而且即使在同一個市場內，也會有多種提供給特定數據集的資料來源。另一個核心錯誤是假設「只有相同數據集才能進行替代」。事實上，並沒有一個特定平臺資料市場，而且特定的數據集不必然產生替代方案，用來運作平臺的數據可廣泛地從多方來源獲取，數據其實是種假象。

(3) 在缺乏運用能力時，大部分數據本身缺乏使用價值。如欲從數據擷取價值必須配有許多輔助工具，例如優化演算法(proprietary algorithms)可讓數據成為便於企業使用的工具；但需注意的是，即使有優良的演算法，也有可能宣告失敗，如 Google 對消費者已經購買的商品，還不停地進行廣告。

(4) 競爭法中有關「資料損害」(data harms)可能的矯正措施尚未發展成熟，如欲進行監管，除持續不斷進行外，尚須藉助高度技術以瞭解相關軟體系統。此外，由於產品和服務動態發展，以及要求具有市場優勢地位廠商與對手分享敏感資料，將高度介入企業運作並可能扼殺創新。事實上，由於資訊是絕大多數產品及服務創新的核心，大數據可促進競爭利益，而平臺/網路廠商並無特殊性，所有產業廠商長期以來藉由提升數據的相關性(the relevance of data)

進行決策，並提供消費者更好的服務。

(5) 至於有關消費者保護議題方面，消費者資料保護是否能藉由提升消費者所有權及控制個人資料(如資料可攜權、隱私標準等)等方式更妥適處理，市場競爭法規之意義為何等，皆亦為關心的重點。除倚賴相關法令規範外，亦可藉由市場的互利交易(mutually beneficial trade)機制予以管制。互利交易為第一個管制形式(在許多個案中仍為最佳形式)管理市場參與者的交易行為，在平臺經濟的高度動態本質下，此種管制形式相當具有效率。

(6) 強制的「資料可攜權」(data portability)非屬市場管制，而是一種從上到下的國家干預，藉由針對市場加諸特殊規定，將執法功能從國家本身移轉至擁有隱私的個人身上，同時，亦可能對企業進一步要求隱私標準。此外，由於幾乎無法管理成千上萬個蒐集及處理數據的應用程式、網址、服務、設備等，簡易的標準或技術便成為高度複雜的工程問題。

(7) 至於管理法規部分，消費者保護機關(如美國 FTC)則是以個案方式處理創新及消費者利益保護問題，避免對商業需求作過度及預先規範。再者，當損害類別可快速確認時，即可適用一定的法制規範，如就業歧視等；其他涉及之法律問題，則包括廣泛的隱私保護、修改管制機關法規、修改民事訴訟法規等。此外，亦可以法院作為管制機關，法院及商業法規可為違法行為提供法律資源，相關法律條款則包括資料及隱私規定等；此外，在普通法國家，侵權行為相關法規則是用來處理侵犯隱私問題。資料/隱私並不適合視為傳統財產權，這是由於關係人與提供者互動而產生資料，並非單純的電腦加工品(standalone artifact)。

6、比利時 Cadealader, Wickersham & Taft 法律事務所 Alec Burnside 律師探討「反托拉斯與隱私權間有何關聯性？」，略以：

(1) 歐盟目前尚未形成明確的判例法，僅有一個簡單的歐盟法院判決(Asnef-Equifax 案)，供作簡單的處理原則。由於個人資料(個人的信貸價值)包含在資訊交換中，歐盟法院認為，任何與個人資料敏感度有關的可能議題「就其真正意義而言」(as such)並不屬於競爭法領域，而可利用管控資料保護的相關法規來處理，惟此項論點尚未有進一步討論。

(2) 但這並不表示隱私問題與反托拉斯法無關，亦不意謂著競爭法無法處理與隱私法令相關的議題。至於 Asnef 案，歐盟法院將競爭法同時適用於隱私權之案件中，歐盟法院事實上為歐盟執委會就端詳大數據及隱私議題開啟一道大門，反托拉斯疑慮或許存在。

(3) 歐盟資料保護監督局(European Data Protection Supervisor, EDPS)認為，強大的

組織或能削減隱私品質以及數位服務消費者所享有的自由。對線上服務而言，隱私權是為一項品質指標，須重視的是，當過多資料被存取時，事業是否有濫用市場優勢地位情形，例如不為提高品質或降低成本等。無須積極爭取消費者的優勢地位廠商可能缺乏提供具有高度隱私品質服務的誘因，進而可能忽略服務品質，例如降低隱私保護程度等。

(4) 德國聯邦卡特爾署於 2016 年 3 月針對臉書(Facebook)展開調查，以瞭解可能違反資料保護法之行為是否也可能構成競爭法所稱之濫用市場優勢地位。Facebook 在線上廣告或社群網站有關數據使用的特別服務條款是否可能達成濫用市場優勢地位條件？市場如何界定？對於 Facebook 數據使用的相關條款是否構成濫用市場優勢地位乙事，依德國聯邦最高法院於 2013 年 VBL-Gegenwert 案判決指出，市場優勢地位廠商使用違法的一般交易條件(General Terms and Conditions)，依據德國競爭法，將可構成濫用市場優勢地位行為，惟 Facebook 案目前尚未有初步結論。

(5) 為追求消費者福利與公平之前題下，事業蒐集並處理數據之原則應如何納入歐盟競爭分析？由於芝加哥學派自由放任(laissez-faire)主義之思想家視價格為競爭法核心，同時歐盟競爭法的目標是在包含歐盟社會價值觀與目標之里斯本條約(Lisbon Treaty)中加入法律秩序；所以藉由觀察事業於隱私權及資料保護的作為，或可推論歐盟競爭法於該領域之相關政策。

7、歐盟官員 Cyril Ritter 先生報告「歐盟競爭法、個人資料與大數據」：

(1) 部分利害關係人認為，一些大型線上服務提供者未依照人們所希望的程度保護個人資料或隱私，並藉由累積大數據獲取無法超越的優勢。倘若這些主張為真，歐盟是否能夠並且應該以競爭法來進行相關處置？而其他諸如駭客入侵等受到關切的議題，已透過其他政策而非競爭法處理。

(2) 近年來歐盟執委會處理與大數據有關的案件，包括 2006 年 Asnef 判決、2008 年 Google 與 Doubleclick 結合決定、2014 年 Facebook 與 WhatsApp 結合決定，2016 年歐盟執委會競爭事務委員 Vestager 並針對大數據發表公開談話，歐盟並開始提供相關結合案諮詢等。

(3) 「零價格市場」(Zero Price Market)已納入歐盟資料保護法及消費者保護法規範中，更重要的是，亦受歐盟競爭法規範。依歐盟 1991 年 Hofner 案判決，已肯認競爭法與價格、品質、產出、選擇及創新等因素劃上等號，且歐盟執委會已針對零價格市場之競爭法案件作出決定，而市場界定在實務上一般而言尚未產生相關問題。

(4) 歐盟認為或可將數據視為通貨，並針對卡特爾、剝削性濫用市場優勢地位、

結合等案件進行調查時，須注意對資料保護達到一定水準；此外，由於數據為一項投入或資產，有關濫用市場優勢地位或結合案件亦應妥適處理數據優勢(data advantage)，另應將數據視為產出等。至於何時能掌握數據優勢，則須視數據是否為產品成功之關鍵因素、事業分析數據的能力、數據可否重置或從其他資源取得等因素進行考量。

8、OECD 秘書處就背景文件提出報告，略以：

(1) 依據 De Mauro *et al* 於 2016 年的定義，大數據是一項資訊資產(information asset)，具有大容量、快速、多樣性，並能在特定技術及分析方法下轉換為價值的特色；同時，大數據包含 2 項基本特質，即大範圍的數據集(datasets)，以及使用大規模的計算能力(large scale computing power)及非標準軟體(non-standard software)於合理時間內從數據中擷取價值等。

(2) 從消費者獲得之大數據可顯著提高生產力，進而讓數據驅動創新(data-driven innovation)的使用者可從提高 5%至 10%的生產力成長中獲利，同時根據 Buchholts et al 於 2014 年的主張，由於大數據的使用，歐盟將可於 2020 年前獲得 1.9%額外的經濟成長。此外，藉由妥善運用大數據，預計於 2020 年將可因減少交通阻塞，而節省時間及燃料成本高達 5,000 億美元；透過智能電網應用(smart grid applications)控制家用電器，減少二氧化碳排放約為 790 億歐元；透過提供電子健康紀錄(health electronic records)，進而節省美國健保支出 3,000 億美元等多重社會效益(multiple social benefits)。

(3) 但於使用大數據之過程中，亦須注意避免對消費者產生相關損害。除了私人資料及廣告等直接成本外，由於事業擴增市場力量，對消費者而言，亦可能導致高價格、低品質、低產出及缺乏創新等損害結果。

(4) 善於利用大數據之事業，可從網路效應(network effects)、規模經濟及範疇經濟中獲取市場力量，爰競爭法主管機關進行結合案件審查時，應著重資訊蒐集數量及消費者隱私等結合影響評估。如有消費者對資料保護存有高度偏好，而其他則著重個人化內容(personalized content)時，隱私政策將成為水平差異(horizontal differentiation)來源，例如 Google/DoubleClick 結合案、Microsoft/Yahoo 合資等案例。然而，亦有部分執業律師認為，競爭政策唯一目的係促進資源的有效配置，且透過競爭政策處理隱私議題可能會導致競爭法執法過程主觀判斷的不恰當情形，以及與言論自由基本權力的衝突等。

(5) 另當競爭法主管機關調查濫用市場優勢地位案件時，當行為人具有市場優勢地位時，其違反資料保護的行為是否也同時違反競爭法，此亦有爭議，如德

國聯邦卡特爾署對 Facebook 案的調查。

(6) 此外，進行聯合行為案件調查時，由於數位市場允許新型態的價格固定及其他雙邊協議，但基於不明確的勾結行為並不構成違法，且將違法事由歸因於人工智慧程式設計師(artificial intelligence programmers)存有相當困難，故目前競爭法執法工具可能尚不足以有效打擊數位卡特爾行為。現階段仍就降低價格透明度、對價格變動施以時間差(time-lag)、利用秘密折扣系統等可能解決方案進行討論。

(7) 至於消費者保護議題部分，由於使用者與線上服務提供者間之資訊不對稱問題造成市場失敗，同時因事業經常不當使用「免費」字樣，但零價格(zero-price)的線上服務通常含有其他形式之非貨幣(non-pecuniary)成本，而使「免費」淪為不實，此或將影響消費者理性的決策過程及其法律權利。以 Facebook 隱私權訴訟為例，Facebook 在未獲同意下將個人資料洩露給第三方廣告商，已涉嫌違反電子通訊隱私法(Electronic Communications Privacy Act)及美國加州不公平競爭法。

(8) 復為因應數位化時代，歐盟執委會已就一般資料保護法規進行相關修正，針對資料可攜權明定相關規範，此將有效提升使用者掌控個人資料的權利，並減少轉換成本及封鎖效果，促進潛在競爭利益；但亦可能對小型新設企業造成進入障礙，並損害創新的誘因，而造成可能的反競爭影響。

9、BIAC 由微軟公司律師代表提出報告，建議各國競爭法主管機關在處理大數據案件時，應以合理原則為基礎。

10、法國、德國、英國及美國 FTC 代表也在會中就競爭法、個人資料保護及大數據觀點提出其看法。各國對於資料之蒐集及運用是否可能損及消費者及改變消費者習性、2 家資料蒐集公司如進行結合，是否可能改變市場力及改變資料之價格等看法不一，但就單純消費者隱私保護一事皆傾向並非競爭法應涉入之問題，宜由資料保護或個人隱私保護法規解決。德國另表示，依德國及法國兩國競爭法主管機關共同研究顯示，資料具有市場力，而聯邦卡特爾署已對臉書(Facebook)就其利用所蒐集用戶資料是否涉及阻礙競爭一事進行調查。

(二) CC 邀請前各國參與競爭委員會之會員代表，包括德國前副署長，曾任 CC 主席之 Kurt Stockman 先生、美國司法部反托拉斯署前署長，曾任美國聯邦法官之 Douglas Ginsburg 先生、澳洲競爭及消費者委員會(ACCC)前主任委員 Allan Fels 先生及瑞典競爭局前國際組組長 Monica Widegren 女士共同討論近 20 年來競爭委員會所討論之競爭議題及內容之差異及同儕檢視之發展。

(三)「價格歧視」圓桌會議(Roundtable on price discrimination)：本議題主要討論價格歧視在可能剝削、獨家交易或扭曲交易等違反競爭法行為，及其矯正措施與在數位化時代之執法考量。本議題計有包括我國在內之 13 個國家及 BIAC 提出書面報告，會中並邀請荷蘭蒂爾堡大學(Tilburg University)法律與經濟學教授 Damien Geradin 先生及美國芝加哥大學(University of Chicago)商學院經濟學教授 Dennis Carlton 先生參與討論。

1、秘書處先就背景文件提出報告，略以：

(1) 此次圓桌議題為 OECD 首次就排他性價格歧視以外的問題進行討論。大數據分析使廠商得以進行個人化幾近於完全差別訂價，這引起了一些國家對此問題之政策討論。

(2) 對於消費者而言，完全差別訂價可促進生產，亦即消費者可購買更多之產品，且通常可促進競爭，也可有效抵消固定成本之投資。但消費者也可從此一歧視行為學習及反擊。

(3) 從法律定義上來看價格歧視，大略可分為 3 種不同層次，對於這三種層次的價格歧視所關切的議題為：

i) 第一層次為「第一級傷害」(primary-line injury)，廠商可以排除對手競爭或減少其有效競爭之能力，如掠奪性封鎖(predatory foreclosure)、提高對手之成本或對手價格之稅賦。

ii) 第二層次為「第二級傷害」(Secondary-line injury)，為上游廠商之價格歧視可能扭曲下游競爭，其原因可能因為上游廠商利潤極大化所致，或因為上游商特別偏好某一下游廠商。

iii) 第三層次為對於公平性或對其他政策目標，如保護中小企業或基於對單一市場之必要性等加以關切，而非對廠商濫用市場力之關切。此一層次主要考量全體消費者福祉，可能與競爭政策所關切之問題有所衝突。

(4) 對於差別訂價之基本假設應該是有益於消費者，但如果為完全差別訂價，對消費者有可能造成損害，而引起競爭法主管機關對廠商進行濫用市場力進行調查。競爭法主管機關對於矯正措施應偏向問題(濫用市場力)的起源，而非僅切除其症狀(簡單的禁止其行為)。

2、荷蘭蒂爾堡大學(Tilburg University)法律與經濟學教授 Damien Geradin 先生報告「從法律觀點看價格歧視」，略以：

(1) 價格歧視可分為剝削性價格歧視或扭曲性價格歧視。

(2) 剝削性價格歧視，如透過地理上及個人化價格歧視，為具有支配性地位事業

之超額定價，例如對於不同區域經銷商訂定不同價格，或是針對高收入消費者收取較高費用，低收入消費者收取較低費用。

(3) 扭曲性價格歧視，如基於國籍等進行價格歧視。扭曲性價格歧視主要出現第二層次價格歧視，直接對下游事業產生傷害，

(4) 價格歧視是競爭法最複雜的領域之一。競爭法主管機關須確定問題是否為是一種剝削，扭曲或排斥性價格的情況，且需以經濟原則為基礎來處理此類問題。

3、美國芝加哥大學(University of Chicago)商學院經濟學教授 Dennis Carlton 先生報告略以：

(1) 競爭 3 原則：(1)市場競爭通常是一般民眾樂見之結果，但記得沒有完全競爭這件事；消費者要避免「競爭等於極樂世界」之謬誤想法，而管制者、法院及經濟學者並非無所不知的全能者。(2)單純獨占並不會對競爭產生傷害而違反競爭法；(3)無效率是一種創造利潤的誘因，市場機制會自我修正來降低無效率之缺失。

(2) 價格歧視在不同產品下，定義會顯得模糊不清。在市場上常看到之價格變動、利用折價券宣傳廣告、產品設計不同及自我定位不同等因素，都會造成價格歧視。

(3) 非排他性價格歧視較難以衡量整體福利效果，因為有許多不同細微之差別，且競爭法主管機關也難以偵測。扭曲性價格歧視則會影響上下游並引發市場無效率，許多無效率存在於垂直協定中，但市場會創造誘因來解決這個問題。

(4) 個人化量身定製的價格歧視最大問題是隱私權，這更須要其他法律規範，問題在於：誰可以擁有個人的購買紀錄?

(5) 排他性價格歧視主要的競爭政策問題在於：此一行為是否損害對手的競爭?這是一個非常棘手的問題，因為一般難以分辨對競爭者之傷害及對經濟效率之傷害。競爭法主管機關也難以分辨是否為排他性定價，而其要點在於經濟規模(economies of scale)。具市場力廠商沒有正當理由運用其市場支配力排除其他競爭者取得配銷通路或設施，使其他競爭者無法達到有效率之生產規模，即有可能損及競爭。

(6) OECD 的背景文件包含充分文獻檢視，但未論及處理價格歧視之政策。利用競爭政策來處理排他性價格歧視，在某些情形下是可以的，用以處理非排他性價格歧視可能是個錯誤。

4、 我國對本議題所提之報告分享之案例為臺中港務公司建物租金差別待遇案，主

席對我國所提報告之提問為：請以「第二類型扭曲行為」(secondary-line distortionary practice)說明報告中有關該案例。本會代表說明：

(1) 臺中港務公司無正當理由於出租倉棧收取建物租金對下游貨物裝卸承攬業者必要性關鍵設施給予差別待遇，該行為對於臺中港務公司下游客戶造成損害，是為第二類型扭曲效果。

(2) 公平會考量臺中港務公司為獨占事業，其所為差別待遇已構成獨占事業其他濫用市場地位之行為，然究其原因有其開放下游業者經營時間不同，導致所適用之相關法令及作業程序之時空背景發展因素有所不同所致，復衡酌臺中港務公司之違法行為之動機及目的並非出於不正競爭之意圖，且已研議修正租金基準公式，顯有改正之意，爰未處以罰鍰。

(四) 2015 年競爭政策年度報告(Annual Reports on Competition Policy)：本次會議有包括我國在內的 28 個國家提交 2015 年競爭政策年報，其中德國、義大利、挪威、日本、哥斯大黎加、拉脫維亞、克羅埃西亞、秘魯及南非等國家代表於會中提出口頭報告。另主席亦邀請阿根廷及智利代表將於會中提出有關最近強化法制改革報告。

(五) 競爭法執法中選擇法制標準與經濟學之角色(Choosing Legal Standard and the Role of Economics in Competition Law Enforcement)：由希臘雅典經濟學與商業大學教授 Yannis S. Katsoulacos 報告其研究成果。Katsoulacosino 教授主要探討競爭主管機關在對不同法制標準(當然違法或合理原則)之選擇，進而可能影響經濟分析及證據在競爭法執法中之角色。

(六) 對烏克蘭之同儕檢視：由美國喬治華盛頓大學法律系教授 William Kovacic 先生先報告對烏克蘭競爭法主管機關烏克蘭反壟斷委員會訪談之結果，再由美國聯邦交易委員會、以色列及克羅埃西亞等國代表擔任提問人，由烏克蘭反壟斷委員會主席 Yurily Terentiev 先生主答。

(七) 未來討論題目：會員國同意未來可能討論題目包括：售後市場(aftermarket)競爭議題、金融產業之透明化及合作議題、信號傳遞(signaling)、運算法則及勾結及人力資源相關之競爭法執法：不得挖角(no poach)與薪資固定協議。

參、第 15 屆「全球競爭論壇」

一、開幕典禮及專題演講：由CC主席Frédéric Jenny主持，邀請OECD幕僚長Gabriela Ramos女士致詞及歐盟執委會競爭委員Margrethe Vestager女士做專題演講，略以：

(一) 首先點出社會分配不均，自由貿易加上開放市場雖使得每個人平均福利提升，但不見得每個人都能感受到。這些問題需要每個人共同面對，而競爭政策是其中重要一環。

(二) 競爭法的執法者要的是市場開放與提升競爭，而除了競爭法執法外，更重要的是管制的設計與執行。其說明歐盟能源政策以單一市場做基礎的原因－一個國家的綠電可讓其他國家消費者同時受益，同時為歐盟國家共同支持及規範，這就是競爭所能帶來的好處－鼓勵投資，增加生產，降低價格。

(三) 最末強調競爭法執法可協助達成政策目標－降低產品價格，達成更強、更公平、更綠化的經濟。最重要的是，執法工作必須在清楚的法律架構下，堅持其所定位之角色。獨立的競爭法執法者才能確定其執法有效性。

二、第1場會議主題為「促進競爭，保護人權」，OECD邀請競爭法及人權政策專家座談，以瞭解彼此之觀點，並探討任何可能衝突及最佳解決之道。與談人包括：世界銀行經濟學者Jean-Pierre Chauffour先生、土耳其人權律師Gonenc Gurkaynak先生、OECD勞工工會諮詢委員會秘書長John Evans先生、OECD負責任商業行為工作小組主席Roel Nieuwenkamp先生、新加坡競爭委員會執行長Toh Han Li先生及香港競爭委員會主任委員Anna Wu Hung-Yuk女士等。

(一) 世界銀行經濟學者Jean-Pierre Chauffour以「提倡競爭—保護人權：問題概觀」探討基本人權與競爭問題，略以：

1、一國之國內競爭主要在於檢視國內廠商對市場支配力及反壟斷政策之有效性、專門職業服務之競爭及公共服務競爭、創業成本及時程、破產程序之成本及解散架構之強度、總稅賦比率與稅賦及補助之扭曲結果，而國外競爭則須檢視通關障礙程度(進口禁令、限額等)、關稅、關稅減讓表之複雜程度、通關負擔及相關程序。

2、依照第三代人權概念：自由(Liberté)、平等(Egalité)、博愛(Fraternité)三項基本人權中，自由是消極權利(negative rights)，平等是積極權利(positive rights)，博愛則是共同權利(collective rights)。但消極權利仍可能有積極之責任，消極權利的本質是：沒有應該主張或應得的權利，如免於飢餓之自由，消極的發展權利是不在不正當國際經濟情勢下合作發展。

3、我們需要探討的是民權及政治權利與競爭的關係、個人自由與競爭之關係、個人所得與競爭之關係、人權發展與競爭之關係、性別平等與競爭之關係、童工與競爭之關係、工人保護與競爭之關係、最低工資與競爭之關係、國家不平等與競爭之關係。

(二) 香港競爭委員會(HKCC)主任委員Anna Wu Hung-Yuk女士探討競爭與貪腐，並以香港電信業發展說明人權與競爭之關係，略以：

1、競爭與人權間之聯結串連了消費者權益及貪腐的問題。業者無正當理由的成本增加可被視為將其損失共同施加於個人消費者及社會，而沒有競爭的社會將缺乏創新及整體發展。

2、公平的進入市場機會可平衡對整體資源的使用而達到較大的效率，競爭法所創造出可執法的權利及補救措施基本上本身就是一種人權的表現；因為競爭可使人們取得醫藥、食物及工作等必需品。

3、香港在1990年代開始進行解除管制；2003年1月固網全面自由化，人們可以自由選擇電信公司，電話價格下降，投資增加，新科技也不斷加入。1996年至2002年，在行動電話業務上估計節省了消費者港幣700.2億元(約90億美元)，1991年至2001年在國際電話業務上累計節省了消費者313億元(約40億美元)，同時間在電信業投資增加了約12億美元。

4、2016年5月HKCC公布對香港建物翻新及維護市場圍標案之結果，主要的圍標及貪腐來自金錢及涉及之標案規模、建物不當維護及建物主缺乏專業知識。以翠湖花園(Garden Vista)圍標貪腐案為例，該案賄賂金額高達港幣4500萬元(或美金560萬元)，而翻修工程得標價為港幣2億6200萬元。

5、貪腐影響了公共醫療品質、建物安全標準、公共衛生及安全相關執照之發放、警消服務訓練之品質。HKCC已與廉政公署、警察及證期會等相關單位共同合作打擊貪腐。

(三) 土耳其人權律師Gonenc Gurkaynak先生以「人權、競爭及貪腐」提出報告，略以：

1、自由表達是所有權利的基礎，而言論自由是創新的驅動力。創新注入競爭會促使因為競爭而產生更多創新之循環，創新更幫助推動經濟成長，並解決社會經濟挑戰，如貧窮及健康等問題。

2、依據OECD2014年資料，超過5%的全球GDP是被用來做為賄賂之用，這尤其在一些不穩定政權、有歷史衝突、低所得國家或低人權發展國家尤其明顯。榨取性體制(extractive institutions，即政治灌力、經濟機會與利益皆由少數菁英份子把持)更加深了貪腐的形成，加深貧窮及所得不均，扭曲了市場競爭機制而使產業投資者退卻。

3、貪腐有利於各種關係的串連而對自由市場產生不利的結果，言論自由可透過提升透明度打擊貪腐，或直接透過程序公平提升創新精神。

4、中產階級所得陷阱(Middle income trap)是生產力差距的一個現象，因為科技及潛在架構改變而產生。創新可透過生產力及生產效率刺激經濟成長而解決此一問題。OECD在2012年即建議，各國可透過轉型產品多元化及生產高附加價值來避免此一問題，而榨取性體制則可能無法避免中產階級所得陷阱的發生。從統計數字即可看出：越能創新的國家，貪腐程度越低，越可能避免中產階級所得陷阱。

(四) OECD負責任商業行為工作小組主席Roel Nieuwenkamp先生從聯合國指導原則及OECD對負責任企業指導原則角度看競爭與人權問題，略以：

1、OECD跨國企業指導原則含括企業該盡之企業責任，如資訊揭露、人權、勞動與企業關係、環保、賄賂與勒索、消費者利益、科學與科技、競爭及稅賦等，其中2011年到2015年有約一半的案件是與人權有關。而其影響如：終結供應鍊中的童工問題、改進供應鍊中的衛生及安全問題、世界遺產位置不再進行石油探勘、改進與工會之對話、在供應鍊中有較佳的人權風險評估等。

2、對於競爭與人權合作，主要在於競爭環境是否完備，企業可以先尋求競爭法主管機關的意見，認清法規，完備其遵法計畫，這可幫助企業解決許多問題。另外，公正的工廠評估機構、認證機構(如Bonsucro、公平服裝基金會)、永續經營計畫等。對於競爭，企業注意競爭法之規範，實行遵法計畫，不得與競爭對手討論價格、折扣、成本等資訊，地理市場或產品市場分配，杯葛或排擠，圍標，顧客或供給者之商業資料，競爭資料及對消費者價格之影響等。

(五) 新加坡競爭委員會(CCS)執行長杜漢立(Mr. Toh Han Li)以「競爭法、不平等與勞動市場問題」，探討競爭法執法中之正當程序及勞動市場問題，尤其是在工會在爭取薪資自由方面，略以：

1、單一公司受僱勞工組成工會，其為爭取薪資而所為之聯合行為一向為競爭法執法所豁免，因為工會並非競爭法中所規範之「事業」。但自我僱用者如因提供勞務而聯合向交易者爭取訂定契約價格(交易價格或薪資)，則可能落入競爭法所規範之聯合行為或卡特爾範圍，因為這些自我僱用者為競爭法中所規範之「事業」。此因勞工結盟自由在勞動(就業)法中因勞工保護政策而受到保障，排除對卡特爾規範之適用；但自我僱用者之結盟自由則因競爭法中事業定義而無法與勞工享同等待遇。

2、由此可見，競爭法之執法必須確保與其他政策不發生衝突。熊彼得的「破壞」是競爭過程的主要特徵，但破壞所帶來的工作流失需要政策的介入，如就業媒合、再訓練及勞工技術再造。

3、價格低廉的產品及服務是重要的，但好的工作及強而有力的購買力也是強化社會福利重要的一環，法律體制允許政府政策及經濟效果可豁免於競爭法之執法。

4、杜氏以新加坡模特兒經紀公司共同提高模特兒服務價格案、新加坡醫師協會提高醫師診療費案就業仲介機構提高家事服務薪資案等3案例說明有關勞動就業相關聯合行為之執法。

三、市場研究作為促進競爭有效工具角色(The Role of Market Studies as a Tool to Promote Competition)：本節會議由印度競委爭員會(CCI)主任委員 Devender Kumar Sikri 主持，秘書處報告本年度所進行有關會員對市場調查問卷結果，並由加拿大競爭局報告該局由市場調查所得之經驗。

(一) OECD 競爭組 Lynn Robertson 報告市場研究之意義與目的、實行市場研究的法律權力、蒐集權力與資訊應用、制度框架與市場研究選擇的獨立程度、成功與挑戰。經調查各國實施市場研究情形，獲得 62 個國家的競爭主管機關回覆，其中有 2 國缺乏實行的權力，其餘 60 個國家則為進行中，調查結果及建議摘錄如下：

1、據調查，競爭法主管機關認為進行市場研究的動機主要為倡議、執法先行(pre-enforcement)程序、蒐集資訊及事後評估等，並可能產生競爭法介入、消費者保護機關採取行動、事業自我管制、政府改變法律或公共政策、政府改變市場結構(如私有化)、產業主管機關對市場採取作為等潛在效果。

2、在實行市場研究之權力部分，有 68%受調查者表示在特定目的內享有法定實施市場研究的權力，3%受調查者表示無權力實施市場研究。多數的機密資訊受到保護；63%受調查者表示可向政府機關及個別事業要求提供資訊，20%受調查者僅能夠過一般資訊蒐集權力要求提供資訊，另有 10%受調查者具有要求事業提供資訊之權力。至於處分權力方面，63%受調查者可直接處分，17%受調查者須透過法院進行。

3、市場研究能否成功繫於目的及目標設定是否妥適、利害關係人之積極合作等，而所面臨之挑戰則有人力與財務資源、資料蒐集及利害關係人缺乏合作等。

4、至於對未來市場研究工作 OECD 的建議為：

(1)依據不同的目的將市場研究類型化；

(2)測試在不同法律框架下，市場研究之執行情形，包含蒐集及應用資訊之權力等；

(3)分析作為利害關係人利益維護之程序保障；

(4)綜觀各種可能的制度設計。

(二) 加拿大競爭局報告「市場研究作為促進競爭之工具」:

1、加拿大競爭法中尚未將市場研究及為其蒐集資訊之權力予以明文化,2008 年競爭政策審查小組(competition policy review panel)亦指出此落差。加拿大競爭局在一般競爭推動機構下進行市場研究,並仰賴自願性的資訊提供、公共資訊及交易資訊。

2、加拿大競爭局將倡議重新列為重點工作,首先增加倡議業務,如:介入管制、競爭倡議、健康照護之廣告限制報告等;其次為計畫實施更多市場研究、倡議功能評估等。而該局於推動市場研究工作過程中,汲取標準選擇、內部確認與平衡、透明度、利害關係人的參與等經驗。

四、競爭法主管機關的獨立性－從設計到實務(Independence of Competition Authorities - from Designs to Practices):

(一) 本議題主要討論5大主題:競爭法主管機關與其所屬部級機關之關係、委員會成員之任命、機關財務獨立性及預算來源、未來改革方向及法制與實質獨立之要件;共計有包括我國在內的37個國家或組織提交報告,秘書處並邀請ACCC前主任委員Allen Fels先生及以色列海法大學(Haifa University)法律學教授Michal S. Gal女士參與討論。

(二) 秘書處首先進行背景文件報告,略以:

1、競爭法主管機關獨立重要性在於競爭法主管機關可依法律及經濟證據做成決定,而非政治考量。獨立性的設計並無一套可放諸四海皆準用之原則,完全依各國國情而定,惟可分法律獨立及實質獨立。

2、法律獨立可有幾個主要特點:機關之法律位階、成員之任期固定(較選舉週期長且不得連任),其主要之目標在於成員任免程序透明化,財務及人事資源穩定,但政府可透過控制預算間接控制競爭法主管機關。

3、實質獨立對競爭法主管機關才是真正重要所在,且可真正有效執行競爭法。

(三) 以色列海法大學(Haifa University)法律學教授Michal S. Gal女士就機關獨立性提出報告,略以:

1、競爭法主管機關必須有獨立性的理由有很多,包括:強化其職掌、政令的可靠性、執法一致性及可預測性、降低政治之干預、機關之執法成果為民心所欲及提升執法效率等。

2、競爭法主管機關是否可能會太過獨立?答案是不可能。競爭法主管機關是不可能完全獨立的,因為它還在政府體制之內,沒有獨立於政府體制之外,且必須

與管制機關分享資訊與專業，且其成效必須由其他政府單位，如民意或立法機關進行檢視。

3、競爭法主管機關可透過下列工具減輕反對其獨立性之壓力：透明化、倡議、對不當干預之處分、運用民意支持競爭之輿論壓力、國際同儕之執法成效等。面對不當之案件干預壓力，競爭法主管機關亦可運用廣泛之支持，強調執法長期效果，並有效運用調查工具達到有效處分或矯正結果。

(四) ACCC前主任委員Allen Fels先生報告其與Hilary Jennings女士合著之文章「競爭法主管機關：如果他們不是獨立的會如何？獨立有何不利之處？」，略以：

1、並非所有競爭法主管機關都具有獨立性或其獨立性都相同。在有些國家機關獨立性是完全不能接受，有些國家則僅是象徵性意義，而在某些國家雖被認是高度獨立，但僅合乎某些要件。

2、如果競爭法主管機關不獨立，其本質上是政府的一個部門，政治干預就可能發生，適用「一般」官僚程序，在做決定前會先「諮詢」其他政府機關，其他政策可能影響結果，而在政府中最「霸氣」的單位可能會得勝，結果在法院審理時，競爭法主管機關可能無言以對。競爭法主管機關解決此一問題的方法，可以透過強化正當程序及決策透明度，以強化實質獨立之功能。

3、但是競爭法主管機關具獨立性又會有那些後果？可能與政府產生距離，倡議不太有效果，其他政府在考量限制競爭法案時無從得知，且無法適時表達意見。某些競爭法主管機關被賦予適度的獨立性，但又可參與其他政策之討論制定。

4、競爭政策最大的失敗來自於政府自己所施加的限制競爭，競爭法主管機關對於政府其他機關的倡議是非常重要的。

(五) 本議題因討論時間有限，主席僅邀請少數國家提出經驗分享，並未對本會及其他國家報告提問。

五、12月2日進行「反托拉斯案件中之處分」圓桌會議(Roundtable on Sanctions in Antitrust Cases)：本議題由巴西經濟防衛行政委員會(CADE)代理主任委員Marcio de Oliveira Júnior主持，主要討論各國對反托拉斯罰鍰及其他處分之差異。會議上午進行專家座談，下午則進行分組討論。

(一) 本議題共有包括我國在內的28個國家29個機關及BIAC提出報告，秘書處並請美國普渡大學(Purdue University)教授John M. Connor先生、韓國大學(Korea University)法律學院教授Hwang Lee、澳洲墨爾本大學(University of Melbourne)法律系教授Caron Beaton-Wells女士及南非Baker & McKenzie法律事務所律師Vani Chetty參與專家座談。

(二) OECD秘書處先就背景文件提出報告，略以：

1、罰鍰政策的主要目的在於嚇阻、處分限制競爭行為(卡特爾或濫用市場地位)，或補償因限制競爭受害之被害人。罰鍰處分之一般步驟是：首先決定基本額度，考量限制競爭行為之嚴重性及其持續時程及相關營業額或整體營業額，再參酌其他加重處或減輕因素，並考量相關寬恕政策之減免額。

2、在決定處分額度時可能有某些挑戰因素：母公司是否應負相關責任及其可能影響罰鍰額度、如何決定「同一行為再犯」之定義、關於垂直相關事業或國外銷售額是否應納入罰鍰額度計算、案件中止調查或司法調查是否應繼續處以罰鍰、罰鍰之收取及強制執行、對同業公會罰鍰之考量等。

3、除了罰鍰，競爭法主管機關亦可考量下列替代方法：刑事制裁、撤銷董監事資格、公布其對經濟之損害及處分、禁止參與招標案等。

(三) 韓國大學法學院教授Hwang Lee報告「全球化時代之反托拉斯罰鍰」，略以：

1、全球化問題引發了全球對反托拉斯罰鍰協調合作的問題，因為國際處分通常會有溢出到邊界以外的效果。

2、反壟斷罰鍰需要持續性之理由來保護其處分免受挑戰。雖然反壟斷罰鍰被廣泛用於卡特爾行為，但罰鍰形式之細節是多樣的。例如，違反罰款可能包括濫用獨占力和/或不公平之交易，以及每個卡特爾行為。全球罰鍰之幅度和評估方法並不相同。任何缺失都可能阻礙競爭法主管機關間之嚇阻和有效合作，為了實現最佳嚇阻方式，需要競爭法主管當局間合作。

3、詳細之罰鍰準則並不一定是有利於嚇阻反壟斷。經濟理論為評估適當的罰鍰準則提供1個良好框架,但並不強制競爭法主管機關一定要應遵循這些具體因素。法律授予競爭法主管機關一定程度之裁量權是必要的。而對全球競爭法主管機關所設計之共同框架，應側重於在考慮競爭法主管機關面臨之不同制度，並須兼顧各方面之裁處權與特殊性。

4、競爭法主管機關之裁量權，透過司法審查可以確定反壟斷罰鍰之合法性，以確保競爭法主管機關在法律界限內實行罰鍰。競爭法主管機關應當對違法者之作為進行各種類型之整體處分(包括罰鍰)做出評估。全面性之處分方法不僅對司法審查之目的有意義，而且對最佳處分是有意義的，因為未達到最佳水平之處分將是無效的。

5、為了保持反壟斷罰款之完整性，僅將反壟斷罰鍰分配到政府預算是不夠的。政府應將罰鍰轉移或用於與受害者有關團體。例如可能包括在韓國討論之消費者保護基金或在美國看到之「犯罪受害者基金」。另外，反壟斷罰鍰不應損及具

有重要嚇阻效果之私人損害回復。

6、在設計有效反壟斷罰鍰之框架時，重要的是解決反壟斷處分之稅收抵扣，以及外國競爭法主管機關之嚇阻效應。雖然這些要素以前被認為是本國競爭法執法中之外部因素，但現在應在全球化之背景下認真考慮。

7、競爭法主管機關間之國際協調不僅對解決國際卡特爾行為之漏洞，而且對處理重複執法至關重要。競爭法主管當局間之協調反壟斷罰鍰問題，必須考慮在正向基礎上積極合作。

8、鑑於增強市場功能是刺激效率、創新和發展經濟之核心要素，通過適當之罰鍰制度以保證最佳嚇阻作用應被優先考慮，且隨著全球越來越多國家積極地執行競爭法作為發展經濟之戰略，成功之執法很大程度上取決於嚇阻作用。由於易於執行和具有強大嚇阻作用，罰鍰制度是最突出之制裁工具。

9、目前罰鍰準則設計採用合理性假設，但這種方法在現實中不能良好施行。一些專家認為，更高之罰款可能無法有效地阻止反壟斷違法行為。競爭法主管機關如能考量制訂可以有效執行之罰鍰制度，並配合有效司法審查，則可強化嚇阻作用。從根本上說，最理想之解決辦法是提高競爭法主管機關之執法能力，同時全球所有競爭法主管機關實行最佳處分。

10、除了難以評估適當之罰鍰水平之外，全球化也造成了新的和複雜之各國協調問題。儘管防止重複處分是必要的，但解決間接交易或全球營業額方面的類似問題也很重要。以前這些因素，在執行競爭法中被認為是外部因素，但最近變得很相關。在全球化時代，任何競爭法主管機關都不能獨立運作。應積極促進在實質性措施方面之積極合作，因為不僅有益於全球，而且有利於個別競爭法主管機關。

(四) 美國普渡大學榮譽教授John M. Connor報告題目為「瞄準國際卡特爾的全球執法：簡介與結論」，略以：

1、全球競爭法主管機關之處分在過去25年在規模、類型和地理分佈上增加迅速。然而，每年發現之卡特爾數量增長速度比處分之案件增加更快，表示競爭法主管機關之處分不足以阻止卡特爾形成，罰鍰太低無法阻止聯合定價行為。

2、提高卡特爾罰鍰之趨勢：20 世紀 90 年代初，在對聯合定價事業罰鍰，平均每年不到 1 億美元，按照目前標準微不足道。惟在過去 5 年中，此一數據提高至每年平均 120 億美元。到 2015 年，競爭法主管機關罰鍰至少累計達到 1,070 億美元。如果此一趨勢持續下去，到 2022 年將卡特爾罰鍰累計將攀升至 2,800 億美元。

3、主導罰鍰之競爭法主管機關一直在變化。在 20 世紀 90 年代，美國與歐盟競爭法主管機關主導懲罰卡特爾行為，前揭機關每隔幾年就宣布卡特爾行為之罰鍰。2005 年起，實施卡特爾罰鍰行動在全球其他地區飛快進行，韓國，南非和巴西競爭法主管機關成為主導角色，預計這樣趨勢將會繼續，不僅每年處分案件數量增加，而且每項處分之罰鍰金額也在繼續上升。

4、全球現已有超過 140 個國家實施競爭法，但是每個國家之法律不同，且其所採取捍衛其經濟中的競爭亦有不同措施。起訴國際卡特爾是 1 個巨大的挑戰，因為被告大都是跨國公司，證據和證人往往位於司法管轄區之外，卡特爾之複雜度需要國際競爭法主管機關之合作。

5、1990 年，世界上只有 3 個競爭法主管機關處分國際卡特爾。現在競爭法主管機關是 90 年代之 25 倍。雖然競爭法主管機關在地域上越來越多樣化，但這些卡特爾罰鍰由最終母公司支付，這些母公司有將近一半設在西歐;三分之一是在北美。

6、個人之卡特爾處分主要採取適當罰鍰與和刑事監禁形式，在過去 10 年中，這種處分越來越普遍。截至 2016 年 7 月，大約 1,269 名高階主管被全球 38 個國家逮捕，起訴或控告違反競爭法之行為。約 18%被處以罰鍰;約 26%被監禁；約 6%的卡特爾嫌疑犯被判無罪釋放。事業公司與個人處分之間的最佳平衡是嚇阻效果困難問題之一。除了少數例外，事業罰鍰或個人之財富相比，個人罰鍰往往微不足道。卡特爾因之需要更高之個人罰鍰處分。

7、私人賠償訴訟：在過去 10 年，許多國家之私人賠償訴訟變得更加頻繁，但只有在美國，他們對國際卡特爾嚇阻有重大影響。1990 年至 2016 年 7 月，對卡特爾之個人處分達 593 億美元，其中 89%為美國法院判決，占全球罰鍰之 54%，美國聯邦政府在同一時期對國際卡特爾之罰鍰為 205%。

8、卡特爾罰鍰之總結：

(1) 新興之競爭法主管機關，如巴西、南非、韓國等，雖以較寬鬆標準執法，但其增加罰鍰之速度，高於美國司法部和歐盟，預計 2015 年罰鍰金額將至少達到 1,200 億美元，但實際收到之罰鍰金額將遠低於處分之罰鍰金額。

(2) 美國司法部在 1990 年至 2015 年處分 1,281 名商業人士，2000 年至 2015 年之監禁刑期為 1990 年之 2.5 倍。預估 2018 至 2021 年對個人之處分罰金每年平均可能達到 160 億美元。

(3) 在許多國家，每隔幾年就宣布創紀錄之卡特爾罰鍰。而代表事業之律師，他們援引可在美國理論上實施最高刑罰，可以達到卡特爾行為者超額收費之 8

倍。

(4) 有許多現實因素顯示卡特爾之低度嚇阻是常態。首先，我們知道某些事業具有高度勾結。第二，受到影響之事業，檢察官通常低估其數字。第三，卡特爾事業通常會拖延競爭法主管機關和法院之決定。第四，從來沒有任何賠償造成市場機制之損失。第五，從事後角度來看，沒有過度嚇阻。

(五) 澳大利亞墨爾本大學教授Caron BEATON-WELLS報告「卡特爾行為之刑事處分：寬恕政策之難題」，略以：

1、雖然許多執行競爭法國家對卡特爾行為之個人實施刑事處分，不過仍存在許多爭論，特別是對個人監禁是否為合法且有效之打擊卡特爾作法。而多面向之辯論，部分反映現實。其中 1 個要素是寬恕政策，寬恕政策通常被視為競爭法主管機關在偵查、調查、起訴和最終阻止惡質卡特爾行為方面可用之最有價值工具。

2、在過去 10 年至 15 年間，刑事制度及寬恕政策兩者之間關係仍需充分理解。一種觀點認為，卡特爾刑事處分與卡特爾寬恕政策可能被認為是相輔相成。實行刑事處分被視為提高寬恕政策之有效性，反過來，有效寬恕政策可被視為符合將重大罪犯繩之以法之利益。另一種觀點則認為，卡特爾刑事處分與卡特爾寬恕政策可能被視為彼此緊張，甚至可能相互破壞關係。事實上，寬恕政策可能受到刑事處分之威脅，以及損害刑事處分之完整性和有效性。

3、此一複雜問題涉及從工具性和規範性角度來審視。在任何依賴寬恕政策並決定是否實施刑事處分之國家內，都應考慮到刑事制度政策和未來性。

4、關鍵問題是刑事處分是否加強或削弱寬恕政策之有效性。在處理這個問題時，可考慮以下因素：

(1) 在卡特爾檢測方面：(1)有些實證證明，刑事處分的之可用性、實質性可增加在寬恕政策下收到申請案件之數量或質量；(2)有些經驗證據證明，在某些情況下，刑事處分之可用性可能減少在寬恕政策收到申請案件之數量。

(2) 在卡特爾調查和起訴方面：(1)在犯罪情況下，由於面臨起訴之個人不願意與寬恕政策調查合作，證據可能較少；(2)對寬恕政策之證人依賴可能對陪審團之審判結果有危害。

(3) 在卡特爾嚇阻方面，將刑事處分與寬恕政策結合起來而增加嚇阻之預測是有問題的，因為業界沒有意識到寬恕政策在適用之法律處分扮演之角色。

(4) 總體而言，任何對寬恕政策利益之評估，必須考慮到顯著高於刑事制度之成本，特別在業者沒有提出訴訟時。

5、從規範角度來看，關鍵問題為寬恕政策是否會增強或損害刑事制度有效性，即寬恕政策是否削弱刑法之適當懲罰。在處理這個問題時，可考慮以下因素：

(1) 寬恕政策中涉及之妥協，可能損害公眾對法律制度及其管理之信心，或支持，這可能反過來破壞競爭法主管機關之合法性。

(2) 寬恕政策可能限制商業部門基於規範而遵守卡特爾法律之意願。

(3) 寬恕政策和刑事制度之結合導致政策和實踐不一致，可能損害刑法在教育商業人士和公眾中如何將卡特爾行為視為犯罪之作用。

6、一般而言，寬恕政策及卡特爾刑事處分之組合其利益是有問題的，而且這種組合可能會產生規範成本。

(六) 南非Baker & McKenzie律師事務所律師Vani CHETTY從南非執法觀點討論反托拉斯之處分，略以：

1、在南非競爭法歷史中，最重大之行政處分為南非競爭委員會對 ArcelorMittal South African Limited (ArcelorMittal Case)公司所處之罰鍰。此案顯示南非競爭委員會越來越強硬的執法立場，以懲罰性的處分及煩重之矯正措施來嚇阻轄區內事業違反競爭法行為。

2、雖然懲罰和矯正措施是實現競爭法主管機關執行目標的手段，惟應在確定所實施補救辦法之適當性發揮重要作用，確保所實施的矯正措施本身不會破壞法律尋求實現之目的，即強而有力之經濟活動和健康之競爭。

3、在南非，雖然反托拉斯案件調查所造成之民事賠償損害案件數量開始減少，但這類案件最近增加得很快，而受反托拉斯案件調查之事業受到超出預期之罰鍰處分。

4、南非反托拉斯法最近引入卡特爾行為之個人刑責。公司經理人如已知情而順從公司參與卡特爾行為，將被處以罰鍰或處 10 年以下有期徒刑或兩者。此一條文可能會影響事業申請寬恕政策與競爭法主管機關合作，因為經理人可能擔心在公司申請寬恕政策後自己會受到刑事處分而降低事業申請寬恕政策之意願。如果競爭法主管機關能夠根據刑法規定，在起訴卡特爾侵權訴訟期間提供個人豁免，應可減輕這種情況。然而，在個人無法豁免情形下，事業申請寬恕政策之功效會顯著受到影響。

5、如果罰鍰不成比例地高，並最終使有關事業陷入癱瘓，那麼繁瑣之行政處分就可能過度嚇阻。競爭法主管機關應全面性看待行政處分、民事索賠、刑事處分以及與政府相關協議，將不可避免地妨礙促進競爭的結果和其他公共利益因素，例如：面臨過度懲罰性處分之事業。反托拉斯處分之比例性和合理性應從競爭

法調查後果中加以考慮。

6、總而言之，過分強調執行之方法可能最終破壞法律尋求實現的目的，因此需要平衡，以確保嚇阻並保持健康之競爭及經濟活動，這兩者最終符合公眾利益。

(七) 主席對我國就此一議題所提報告之提問為：請說明本會對9家民營發電廠(IPPs)之罰鍰如何設定?此一罰鍰數額是否為最適罰鍰？如果是，如何得出此一結論？本會代表答以：

1、本案係依公平會所公布之「違反公平交易法第九條及第十五條情節重大案件之裁處罰鍰計算辦法」，以違法行為期間內所獲商品或服務銷售金額之30%作為可處罰鍰之「基本數額」，再考量得加重(例如：主導者)或減輕(例如：坦承並配合調查、提出補救措施)因素，並衡量違法事業之經濟實力及承受罰鍰之能力，以違法事業上一會計年度銷售金額1/10為限，予以論處。

2、公平會裁處罰鍰時，考量過低之罰鍰，對於營業額高之參與者而言，嚇阻效果乃有不足，反有成為鼓勵大企業從事聯合行為之誘因之虞；反之，過高之罰鍰，則使營業額較低之參與者無法負擔，削弱其爾後之經營能力。本案經考量違法期間長、電力市場結構特殊、電力攸關民生、IPPs未再聯合拒絕與台電公司協商、其中4家IPP配合提供關鍵資料而得酌減罰鍰等因素，處9家民營發電廠總計逾60億元罰鍰，當為適宜。

六、下午進行之分組討論共分3組，各分組主持人及討論題目如下：

(一) 第 1 組由葡萄牙競爭局委員 Maria João Melícias 女士主持，討論主題為「各國罰鍰設定程序之步驟」(The steps of the fines setting process across jurisdictions)。我國代表由張宏浩委員率杜幸峰視察及蔡聰勇專員參加，並於會中報告公平會對罰鍰設定之考量因素，略以：

1、公平交易法規範限制競爭行為包括獨占事業濫用市場地位行為、聯合行為、維持轉售價格行為，以及事業杯葛、搭售等其他非價格垂直限制競爭行為，事業若違反前開規定,公平會除可以課處新臺幣 10 萬元以上 5,000 萬元以下罰鍰，還可命其停止、改正行為或採取必要更正措施。

2、對於事業違反濫用獨占力及聯合行為等規定重大違法行為，經主管機關認定有情節重大者，得處該事業上一會計年度銷售金額 10%以下罰鍰。

3、理論上，公平會所處之行政罰款金額是根據事業非法行為之危害程度而決定。依據公平交易法施行細則第 36 條規範之考量因素有：(1)違法行為之動機、目的及預期之不當利益。(2)違法行為對交易秩序之危害程度。(3)違法行為危害交易秩序之持續期間。(4)因違法行為所得利益。(5)事業之規模、經營狀況及

其市場地位。(6)以往違法類型、次數、間隔時間及所受處罰。(7)違法後悛悔實據及配合調查等態度。

4、公平會對於界定重大違法案件的因素有：(1)受影響的市場競爭範圍和程度。(2)市場競爭之損害持續期間。(3)違法事業市場狀況和市場結構。(4)從非法行為獲得之總銷售額和利潤。(5)聯合行為之類型。而對於如何確定重大違法案件之罰鍰則分兩階段過程：(1)確立基本金額：違約期間產品或服務總銷售額之 30%。(2)調整因素：增加或減少罰款之原因。

5、增加罰鍰之因素：非法行為之領導者或組織者。如果事業對卡特爾行為實施監督制度。在過去 5 年內同樣非法行為之屢犯者。減少罰鍰之因素：(1)寬恕政策申請(最多 5 名申請人)。(2)在公平會開始調查時，立即停止非法行為。(3)與公平會合作調查。(4)與受害人訂立賠償協議。(5)被強迫參與聯合行為。

6、公平會未來將瞭解罰鍰考慮的因素如何與確定之罰鍰金額關聯，並應用計量經濟迴歸模型進行定量分析，以為可能之罰鍰範圍(實際關注)提供參考觀點。

(二) 第 2 組由秘魯國家自由競爭防衛及智慧財產保護機構(INDECOPI)主席 Ivo Gagliuffi 先生主持，討論題目為「處以罰鍰之實際問題」，主要討論內容：

1、部分國家競爭法案件於法院完成初步審查(initial review)時，違法之事業即須繳納罰款，惟亦有國家俟法院作出最終判決(final review)後，違法事業才須繳納罰鍰。以巴西為例，當巴西法院就競爭法違法案件完成初步審查時，涉嫌違法之事業僅須提出罰款之銀行保付證明，尚無須實際支付，待法院作出最終判決後，違法事業才須正式繳納罰款。

2、對部分競爭法主管機關而言，向違法事業收取處分之罰款為其執法程序之一環，但亦有收取罰款之權責不屬競爭法主管機關者。依權責須向違法事業收取違法之競爭法主管機關，常於收取罰款時遭遇困難，例如罰款逾期未繳納時，由於金額通常不低，競爭法主管機關須花費相當資源進行強制執行程序。另為使寬恕政策能發揮最大功效，減免罰鍰的額度亦是競爭法主管機關裁量重點。

(三) 第3組由印尼商業競爭監督委員會(KPPU)委員 Munrokhim Misanam 先生主持，討論題目為「罰鍰之替代方法」(Alternatives to fines)，主要討論刑事及民事訴訟對於反托拉斯行為之嚇阻效果。

肆、12 月 3 日 ICN 結合圓桌會議

一、本會議由 ICN 結合工作小組策劃，法國競爭委員會主辦，法國競爭委員會新任主任委員 Isabelle de Silva 女士致開幕詞，並邀請 OECD 秘書處競爭組組長 Antonio

Gomes 先生致閉幕詞，各國代表及 NGA 共 77 人參加。

二、會議主要討論議題為：

(一) 結合門檻之設計(Designing merger thresholds)：本節主要討論 ICN「結合申報及審議程序建議措施」有關結合申報門檻及管轄關聯議題，特別針對各國是否已改以營業額為門檻或仍以市場占有率為門檻及未採用營業額門檻原因進行討論。

1、會議由美國聯邦交易委員會國際反托拉斯顧問 Maria Coppola 女士主持座談，邀請英國國王學院教授 Renato Nazzini 先生、加拿大競爭局資深副局長 Jeanne Pratt 女士、南非競爭委員會副委員 Hardin Ratshisusu 先生與談，主要討論 ICN「結合申報及審查程序建議措施」有關結合申報門檻及管轄關聯議題，特別針對各國是否已改以營業額為門檻或仍以市場占有率為門檻及未採用營業額門檻原因進行討論。座談後再進行分組討論。

2、分組討論主要結論摘要如下：各國競爭法制雖有不同，但主要國家結合審查制度大多已依 ICN「結合申報及審查程序建議措施」設計，以相對較為客觀且易於計算之銷售金額作為其結合審查申報門檻，惟亦有部分國家或因實務限制仍以市場占有率，或如我國採行營業額及市場占有率雙門檻等標準，尚未完全符合該等建議措施；惟是否仍有其他適合作為結合申報門檻之客觀衡量標準，仍待未來進一步討論。會中並提及，新興競爭法主管機關或因其法制架構或競爭文化未臻成熟，除須藉由各國分享經驗以提升其結合審查效率外，或有必要考慮另為該等新興競爭法國家提出較為適合實務現況之結合審查門檻。

(二) 數位經濟與低營業額交易之挑戰(Challenges of the digital economy and low turnover transactions)：

1、本節主要針對結合申報以營業額為門檻之申報制度可能在某些產業中產生問題，如數位服務及藥品產業，結合雙方或一方因營業額未達申報門檻而無須申報，但競爭法主管機關認為有競爭疑慮而須予以審核。本節即在探討面臨此一挑戰之解決方法及各國在使用「殘餘管轄權」(residual jurisdiction)之經驗。

2、專家座談由法國競爭委員會結合審查組組長 Simon Genevaz 先生主持，邀請 Berwin Leigton Paisner 律師事務所合夥人 Dave Anderson 律師、德國聯邦卡特爾署結合審查組組長 Fabian Pape 先生及新加坡競爭委員會執行長 Toh Han Li 與談，並進行分組討論。

3、分組討論主要結論摘要如下：各分組討論過程中，對於結合案其中一方或因於某競爭法主管機關管轄權內之營業額未達申報門檻無須申報，惟仍具有競爭疑

慮之結合案件，是否採行「殘餘管轄權」制度，除美國可依休曼法得以實施外，各國因法制架構不同而尚未有具體共識。惟有關結合案一方或因營業額未達申報門檻而無須申報，如仍具競爭疑慮時，競爭法主管機關是否須採用其他結合申報客觀標準，在考量執法之確定性下，該標準應如何設計，尚待進一步討論。

伍、心得與建議

一、OECD 會議自 2014 年開始改為 1 年 2 次會議後，每次會期皆維持 5 天，其討論議題既多且又非常深入，代表團須在每日會議完後再由團長召開會議，討論隔日會議議題之準備及對 OECD 提問之擬答內容。參加會議同仁雖然可吸收相當豐富知識及經驗，但相對體力及專注力之負荷亦為一大考驗。本次 OECD 會議我國共計提交 6 篇報告，且又另外參加 ICN 結合圓桌會議，代表團在團長帶領下，通力合作圓滿達成任務。由於 OECD 競爭委員會相關會議議題涉及不同處(室)業務，建議各處在指派參加同仁時，仍請考量同仁之參與意願及與會能力。又為妥為準備提交 OECD 之書面報告，建議撰擬報告單位參採 OECD 議題題綱，蒐集相關政策、法規及個案資料，並於報告撰擬過程中適時與團長討論。

二、本次 WP2 會議所討論之「陸路交通運輸之創新與競爭」就陸路交通運輸之競爭主管機關與管制機關對於破壞性創新之因應頗值本會及交通管理單位參考，本議題將於 OECD 公布完整會議紀錄後函送交通部參考。

三、WP3 會議及 ICN 結合圓桌會議所討論與結合有關之議題與本會未來對結合執法及修法有關，且 CC 所討論之「價格歧視」為目前數位經濟下，網路行銷可能造成之競爭法執法問題，GFC 所討論之「反托拉斯案件中之處分」等議題皆與本會執法息息相關，討論內容可做為本會執法參考。為利同仁瞭解，會議相關文獻將建置於本會 BBS 網站供同仁參閱。

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

10 November 2016
English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP2/A(2016)2/REV2
For Official Use

Working Party No. 2 on Competition and Regulation

Draft Agenda: 62nd Meeting of Working Party No. 2

28 November 2016
Paris, France

To be held on the morning of 28 November 2016 (09:30-13:15) in Room CC1 of the Conference Centre, 2 rue André Pascal, 75116 Paris, France.

Contact(s):
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JT03405191

English - Or. English

Draft Agenda: 62nd Meeting of Working Party No. 2

28 November 2016

Paris, France

The 62nd Meeting of Working Party No. 2 will be held on the morning of 28 November 2016 in Room 1 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris, France (from 09.30 am to 13.15pm)

Monday 28 November 2016	
09:30-09:35	**1. Adoption of the draft agenda** DAF/COMP/WP2/A(2016)2/REV2
09:35-09:40	**2. Approval of the Draft Summary Record of the last meeting (13 June 2016)** **For approval:** • Draft summary record of the meeting of June 2016 (61st meeting) DAF/COMP/WP2/M(2016)1 • Draft Summary of Discussion of the RT on Disruptive innovations in legal services (June 2016) DAF/COMP/WP2/M(2016)1/ANN2 **For information:** • Draft Executive Summary of the RT on Disruptive innovations in legal services - (June 2016) DAF/COMP/WP2/M(2016)1/ANN3 • List of Participants (June 2016) DAF/COMP/WP2/M(2016)1/ANN1
09:40-12:20	**3. Roundtable discussion on Innovations and Competition in Land Transport** **For discussion:** • Background paper prepared by the Secretariat DAF/COMP/WP2(2016)6 **Notes by Delegations:** • Denmark - DAF/COMP/WP2/WD(2016)9 • Finland - DAF/COMP/WP2/WD(2016)10 • Italy - DAF/COMP/WP2/WD(2016)11 • Spain - DAF/COMP/WP2/WD(2016)12 • Sweden - DAF/COMP/WP2/WD(2016)13 • United States - DAF/COMP/WP2/WD(2016)14 And:

- Brazil - DAF/COMP/WP2/WD(2016)15
- Russian Federation - DAF/COMP/WP2/WD(2016)16
- Singapore - DAF/COMP/WP2/WD(2016)17

Also available www.oecd.org/daf/competition/competition-and-innovation-in-land-transport.htm

12:20-12:50	**4. Competition advocacy on regulatory restrictions: using empirical evidence Presentation by the Canadian Delegation**
12:50-13:15	**5. Future topics and other business**

Annex 1: Annotations

Item 3.

The dynamics of competition in land transport are about to undergo significant changes. 'Intelligent Transport Systems' are being developed using information and communication technologies to profoundly modify the way that we use transports. The changes involve vehicles, traffic management, and interfaces between road and other modes of transport. In road transport, these developments will lead to increasing automation, vehicle-sharing, and electrification. In rail, the adoption of digital technologies, particularly when coupled with location data, will yield a much more efficient use of railways and significantly reduce costs.

Competition agencies will face a number of challenges brought about by these developments in both passenger and freight markets. While the developments provide an opportunity for competition agencies to intervene through their enforcement and advocacy powers in order to promote greater competition and maximise consumer welfare, they will also need to ensure that data-driven entrants that achieve critical mass do not become dominant through the control of data. This Roundtable discussion will provide an overview of recent developments; of the ways in which regulatory frameworks will have to adapt; and of the antitrust issues that competition authorities are likely to have to deal with in this environment.

The discussion will focus especially on the following subjects:

- Recent developments and innovations in land transport;
- Market developments that can be expected to be brought about by these developments;
- Regulatory obstacles and implications for competition enforcement and advocacy.

The discussion will benefit from the participation of outside experts and selected delegations. The experts will include:

- Libor Lochman (Executive Director, Community of European Railway and Infrastructure Companies), who will explain the impact that recent developments have had on intra- and inter-modal competition in rail;

- Dirk-Jan de Bruijn (Director, Traffic Innovation Centre), who will talk on developments related to freight platooning and automated driving;

- André Schwämmlein (Founder and global MD, Flixbus), who will present on recent developments in coach and bus markets, and the regulatory challenges market entrants face;

- Prof. Marco Ponti, who will provide his views on how innovation is affecting the transport markets and their regulatory framework;

- Susanna Metsälampi from Finland's Ministry of Transport and Communications, who will describe how Finland is working to adapt its regulatory framework to promote and embrace innovations in transport;
- Steve Perkins from the International Transport Forum, a sister organisation to the OECD, who will provide an overview of the various developments affecting land transport and how they will affect transport markets and regulations.

The discussion will benefit from a Background Paper by the Secretariat and country submissions.

Item 4.

Governments and decision makers should consider the effects that regulations have on competition. From the point of view of effective competition policy, regulation should be used sparsely, and only where market forces will not achieve policy objectives. How is this translated into practical advice for regulators who want their regulations to be as effective as possible? In all sectors of the economy, regulation should only be put in place when there is good evidence to show that, without regulation, policy objectives will not be met. Empirical evidence that demonstrates how the benefits of regulation will outweigh the cost to consumers is the best evidence in most cases.

This session will discuss two examples of such guidance recently provided by the Canadian Competition Bureau to regulators to ensure that legitimate policy objectives are met, while at the same time providing maximum scope for market forces to allow the benefits of competition to be achieved. Delegates will also hear two short presentations on OECD-led Competition Assessment Projects in Mexico and Portugal.

Item 5.

Delegates are invited to propose and discuss future topics for the June and November 2017 meetings.

In June 2016 delegates agreed that one topic would focus on electricity generation: "Disruptive technologies and electricity grids – the role of regulation and competition law". The adoption of distributed generation (solar, wind) and storage (batteries) and the use of smart grids has the potential to undermine the natural monopoly characteristics of electricity grids. Others are concerned about regulated monopolies engaging in "unfair competition" in new unregulated markets associated with new technologies.

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

22 November 2016
English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 16 November 2016

DAF/COMP/WP3/A(2016)2/REV3
For Official Use

Working Party No. 3 on Co-operation and Enforcement

Draft Agenda: 124th meeting of the Working Party No. 3

28-29 November 2016
Paris, France

To be held on 28-29 November 2016 in Room CC1 of the Conference Centre, 2 rue André Pascal, 75116 Paris, France (Starting at 14:30 on 28 November and finishing at 13:00 on 29 November).

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JT03405865

Complete document available on OLIS in its original format.

English - Or. English

Draft Agenda: 124th meeting of the Working Party No. 3

28-29 November 2016

Paris, France

The 124th Meeting of Working Party No. 3 will be held on 28-29 November 2016 in Room 1 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris, France (Starting at 14:30 on 28 Nov and finishing at 13:00 on 29 November).

	Monday 28 November
14:30-14:35	**1. Adoption of the Draft Agenda** **For approval:** • Draft Agenda for the 124th meeting DAF/COMP/WP3/A(2016)2/REV3
14:30-14:35	**2. Adoption of the summary record of the last meeting** **For approval:** • Summary record of the last meeting (14-15 June 2016) DAF/COMP/WP3/M(2016)1 **For information:** • List of participants at the meeting of 27 October 2015 DAF/COMP/WP3/M(2016)1/ANN1 • Summary of Discussion of the Roundtable on Jurisdictional Nexus in Merger Control Regimes (15 June 2016) [DAF/COMP/WP3/M(2016)1/ANN2/FINAL] • Executive Summary of the Roundtable on Jurisdictional Nexus in Merger Control Regimes (15 June 2016) [DAF/COMP/WP3/M(2016)1/ANN3/FINAL]
14:35 – 16:00	**3. Roundtable on Geographic market definition** **For discussion:** • Background paper by the Secretariat DAF/COMP/WP3(2016)5 • Summary of Contributions - DAF/COMP/WP3/WD(2016)82 **Submissions by delegations:** • Australia - DAF/COMP/WP3/WD(2016)38 • Belgium - DAF/COMP/WP3/WD(2016)37 • Hungary - DAF/COMP/WP3/WD(2016)39 • Israel - DAF/COMP/WP3/WD(2016)40 • Japan - DAF/COMP/WP3/WD(2016)41 • Korea - DAF/COMP/WP3/WD(2016)42 • Mexico - DAF/COMP/WP3/WD(2016)43 • New Zealand - DAF/COMP/WP3/WD(2016)44

- Portugal - DAF/COMP/WP3/WD(2016)45
- Romania - DAF/COMP/WP3/WD(2016)46
- Spain - DAF/COMP/WP3/WD(2016)47
- Sweden - DAF/COMP/WP3/WD(2016)48
- United States - DAF/COMP/WP3/WD(2016)49
- European Union - DAF/COMP/WP3/WD(2016)50

And:

- Argentina - DAF/COMP/WP3/WD(2016)51
- Indonesia - DAF/COMP/WP3/WD(2016)52
- Lithuania - DAF/COMP/WP3/WD(2016)53
- Russian Federation - DAF/COMP/WP3/WD(2016)54
- Chinese Taipei - DAF/COMP/WP3/WD(2016)55
- Ukraine - DAF/COMP/WP3/WD(2016)81)
- BIAC - DAF/COMP/WP3/WD(2016)56

Also available at www.oecd.org/daf/competition/geographic-market-definition.htm

16:00-16:20	**Coffee break**
16:20-17:50	**3. Roundtable on Geographic market definition (Con't)**

Tuesday 29 November 2016

09:30-11:40 **4. Roundtable on agency decision-making in merger cases: from a prohibition decision to a conditional clearance.**

For discussion:

- Background paper by the Secretariat DAF/COMP/WP3(2016)6
- Summary of Contributions - DAF/COMP/WP3/WD(2016)83

Submissions by delegations:

- Australia - DAF/COMP/WP3/WD(2016)57
- Belgium - DAF/COMP/WP3/WD(2016)58
- Canada - DAF/COMP/WP3/WD(2016)59
- Estonia - DAF/COMP/WP3/WD(2016)60
- Germany - DAF/COMP/WP3/WD(2016)61
- Italy - DAF/COMP/WP3/WD(2016)62
- Japan - DAF/COMP/WP3/WD(2016)63
- Korea - DAF/COMP/WP3/WD(2016)64
- Latvia - DAF/COMP/WP3/WD(2016)65
- Mexico - DAF/COMP/WP3/WD(2016)66
- Netherlands - DAF/COMP/WP3/WD(2016)67
- Norway - DAF/COMP/WP3/WD(2016)68

- Slovenia - DAF/COMP/WP3/WD(2016)80
- Spain - DAF/COMP/WP3/WD(2016)69
- Sweden - DAF/COMP/WP3/WD(2016)70
- United Kingdom - DAF/COMP/WP3/WD(2016)71
- United States - DAF/COMP/WP3/WD(2016)72

And:

- Colombia - DAF/COMP/WP3/WD(2016)74
- Costa Rica - DAF/COMP/WP3/WD(2016)75
- Lithuania - DAF/COMP/WP3/WD(2016)76
- Russian Federation - DAF/COMP/WP3/WD(2016)77
- Chinese Taipei - DAF/COMP/WP3/WD(2016)78
- BIAC - DAF/COMP/WP3/WD(2016)79

Also available at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

11:40-12:00	**Coffee break**
12:00-12:45	**5. Monitoring the Implementation of the 1998 Hard Core Cartel Recommendation** • Scoping note by the Secretariat [DAF/COMP/WP3(2016)7]
12:45-13:00	**6. Other business and future topics** • Scoping note by the Secretariat on further work on jurisdictional nexus in merger control [DAF/COMP/WP3(2016)8]

Annex: Annotations

Item 3

WP3 will hold a **Roundtable on Geographic Market Definition**. This discussion will focus on the definition of geographic markets that are national, or broader, in scope. The topic of national and broader geographic markets is relevant in light of several long-term market trends, including globalisation, trade liberalisation and digitalisation. Improvements in international shipping and door-to-door delivery networks for consumers are also increasing the reach of suppliers at the retail and wholesale levels. These trends can be expected to increase the complexity of geographic market definition. The aim of the roundtable is to identify challenges faced by agencies with respect to delineating markets that may have national or broader borders, and discuss how those challenges are being overcome.

The discussion will draw on a Background Paper by the Secretariat and country submissions as well as the participation of Bruce Lyons (Professor of Economics and Deputy Director of the ESRC Centre for Competition Policy, University of East Anglia) and Jorge Padilla (Senior Managing Director and Head of Compass Lexecon Europe). The delegates will discuss their national experiences based on the call for contributions sent by the Chair.

There will be a 20-minute coffee break from 16:00 to 16:20.

Item 4

WP3 will hold a **Roundtable on Agency decision-making in merger cases: trade-offs between prohibition decisions and conditional clearances.** The discussion will explore issues that arise when agencies are deciding whether to prohibit a merger. While it is clear that an agency should establish that a transaction generates anti-competitive effects to prohibit it, questions remain on the magnitude of these effects and the relationship between them and the pro-competitive effects that mergers can generate. The discussion will also look at remedy design and how an agency decides that a proposed remedy is unable to cure the competition harm, or unlikely to be effective.

The discussion will benefit from a Background Paper by the Secretariat and country submissions as well as the participation of Nicholas Levy, (partner, Cleary Gottlieb Steen & Hamilton LLP) and Paula Riedel (partner, Kirkland & Ellis International LLP). The delegates will discuss their national experiences based on the call for contributions sent by the Chair.

There will be a 20-minute coffee break from 11:40 to 12:00.

Item 5

WP3 will start discussing the implementation of the 1998 Hard Core Cartel Recommendation, on the basis of a scoping note by the Secretariat on trends in cartel enforcement to be circulated before the November 2016 WP3 meeting. Work on the Hard Core Cartel Recommendation will continue in 2017 and likely include a report to the Council on developments since 2005.

Item 6

WP3 will discuss possible future work on jurisdictional nexus in merger control on the basis of a scoping note by the Secretariat, which will build on the conclusions of the relevant roundtable held by WP3 in June 2016 (www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm). Future work will include a stocktaking of powers available to competition authorities to provide investigative assistance when requested.

Delegations are welcome to send to the Secretariat suggestions for additional topics to be discussed in 2017 and 2018.

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

18 November 2016
English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 17 November 2016

Draft Agenda: 126th meeting of the Competition Committee

29-30 November 2016
Paris, France

The 126th Meeting of the Competition Committee will be held on 29-30 November 2016 in Room 1 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris (starting on 29 November at 2.30 pm)

Contact(s):
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JT03405629

Complete document available on OLIS in its original format.

DAF/COMP/A(2016)2/REV2
For Official Use
English - Or. English

Draft Agenda: 126th meeting of the Competition Committee

29-30 November 2016

Paris, France

Tuesday 29 November (2:30 pm – 6:00 pm)	
14:30- 14:35	**1. Adoption of the Draft Agenda** DAF/COMP/A(2016)2/REV2
14:35 - 14:40	**2. Approval of the Draft Summary Record of the last meeting** For approval: • Summary Record of 125th Competition Committee meeting – DAF/COMP/M(2016)1 • Summary Record of the Accession Review of Costa Rica (CONFIDENTIAL) - DAF/COMP/ACS/M(2016)5 For information: • List of Participants – DAF/COMP/M(2016)1/ANN1 • Summary of Discussion of the Roundtable on Fidelity Rebates – DAF/COMP/M(2016)1/ANN2/FINAL • Summary of Discussion of the Roundtable on Commitment Decisions in Antitrust Cases – DAF/COMP/M(2016)1/ANN3/FINAL • Executive Summary of the Discussion of the Roundtable on Fidelity Rebates – DAF/COMP/M(2016)1/ANN4/FINAL • Executive Summary of the Discussion of the Roundtable on Commitment Decisions in Antitrust Cases – DAF/COMP/M(2016)1/ANN5/FINAL
14:40 - 17:00	**3. Hearing on Big Data** For discussion: • Background note by the Secretariat on Big Data - DAF/COMP(2016)14 For information: • BIAC - DAF/COMP/WD(2016)77 Also available at www.oecd.org/daf/competition/big-data-bringing-competition-policy-to-the-digital-era.htm
17:00 - 18:00	**4. Discussion on Competition Law Developments over the last 20 Years with Former Competition Committee Delegates**
Wednesday 30 November 2016 (09:30 am – 6:00 pm)	
9:30-9:35	**5. Election of Chairman and Vice Chairmen for 2017**

9:35 - 9:45	**6.**	**Reports by Working Party Chairmen and by Co-ordinators**
9:45 - 13:00	**7.**	**Roundtable on Price Discrimination**

For discussion:

- Background note by the Secretariat – DAF/COMP(2016)15

Note by delegations:

- Summary of contributions - DAF/COMP/WD(2016)63

Country Contributions:

- Belgium - DAF/COMP/WD(2016)64
- Israel - DAF/COMP/WD(2016)65
- Japan - DAF/COMP/WD(2016)66
- Romania - DAF/COMP/WD(2016)78
- Sweden - DAF/COMP/WD(2016)67
- UK - DAF/COMP/WD(2016)68
- USA - DAF/COMP/WD(2016)69
- Argentina - DAF/COMP/WD(2016)73
- Costa Rica - DAF/COMP/WD(2016)80
- Indonesia - DAF/COMP/WD(2016)70
- Lithuania - DAF/COMP/WD(2016)79
- Russian Federation - DAF/COMP/WD(2016)71
- Chinese Taipei - DAF/COMP/WD(2016)72
- BIAC - DAF/COMP/WD(2016)75

Also available at www.oecd.org/daf/competition/price-discrimination.htm

13:00 - 14:30	**Lunch**	
14:30-14:45	**8.**	**Competition Assessment Project in Greece**

Presentation by Mr Dimitri Loukas (Vice President, Hellenic Competition Commission)

14:45- 15:45	**9.**	**Annual Reports on Competition Policy**
	9.a.	**Presentation of Annual Reports by Delegates**
	9.b.	**Special Country Presentations**

- Argentina: Presentation on recent reforms of the competition law by Mr Greco (Chairman of CNDC)
- Chile: Presentation on recent reforms of the competition law by Mr Irarrazabal (Chairman of FNE)

15:45-16:30	**10.**	**The Role of Economic Analysis in Competition Law Enforcement**

Presentation by Professor Katsoulacos

16.30 – 17.45	**11. Review of Policy Recommendations to Ukraine by OECD and other International Organisations** • Note by the Secretariat DAF/COMP(2016)16
17.45 - 18.00	**12. Other Business and Future Work** • Presentation by the OECD Legal Department of the Secretary-General Project "Consolidating the OECD as a Global Standard Setter" • Note by the Secretariat on Future Topics - DAF/COMP/WD(2016)1/REV2

Annex: Annotations

Item 3

The exponential growth of the digital economy has enabled the rise of business models based on the collection and processing of "Big Data". The use of big data by firms for the development of products, processes and forms of organisation has the potential to generate substantial efficiency and productivity gains, for instance by improving decision-making, forecasting and allowing for better consumer segmentation and targeting. However, acquiring the necessary size to benefit from economies of scale and scope and network effects related to Big Data may potentially lead to monopoly positions, further enhanced through mergers of smaller, new providers of services that do not at first glance appear to be in the same market. The Hearing will discuss whether these are matters for competition authorities to looking into; and whether competition law is the appropriate tool for dealing with issues arising from the use Big Data. In particular, it will explore issues related to measuring market power; considerations of non-price dimensions of competition (such as privacy protection); and the use of artificial intelligence by companies to facilitate collusion, among other topics. The Hearing will also address regulatory issues, such as the existing rules on data transaction and portability; and government access to Big Data to promote public goals. The discussion will benefit from the views of expert speakers (Annabel Gawer, Professor of Digital Economy at the University of Surrey; Geoffrey Manne, Co-founder and Executive Director of the International Centre for Law and Economics; member of the FCC's Consumer Advisory Committee; Maurice Stucke, Professor of Law, University of Tennessee, (US); and Hal Varian, Chief Economist at Google; Professor at Berkeley School of Information) as well as of selected delegations, who will bring a multifaceted perspective on the questions raised by Big Data for competition policy and for competition enforcement. The Hearing will also benefit from a presentation by the Secretariat (Directorate for Science, Technology and Innovation) on the on-going work on "Digitalisation of the Economy and Society", and from a Secretariat paper.

Item 4

A selected group of former delegates to the Competition Committee will discuss in a panel format the main developments in competition law enforcement that have occurred in the last 20 years. When the panellists attended the OECD, competition law enforcement was principally a national exercise. There were no significant numbers of multijurisdictional merger filings; there were few transnational cartel investigations. The competition world has changed dramatically. The panel will be moderated by Kurt Stockman (formerly Chair of the OECD Competition Committee and Vice President of the Bundeskartellamt), and will include Allan Fels (former Chair of the ACCC), Douglas H. Ginsburg (former Assistant Attorney General for Antitrust, U.S. Dept. of Justice), and Monica Widegren (former Director & Head of International Affairs, Swedish Competition Authority).

Item 6

The Chairmen of Working Party No. 2 and of Working Party No. 3 will report on the meetings of the Working Parties held on 28 November (WP2) and 29 November (WP3). The UNCTAD co-ordinator may report on UNCTAD related developments. The ICN co-ordinator will report on recent work and projects by the ICN.

Item 7

Price discrimination is common in many markets, even among firms with no market power; it usually reflects the competitive behaviour that competition policy seeks to promote and hence has no anti-competitive purpose or effect. However, in certain circumstances, price discrimination can be a concern for competition agencies and this is reflected in the wording of many competition laws which identify price discrimination as an anti-competitive conduct if put in place by a dominant firm. The discussion will benefit from the views of expert speakers Prof. Damien Geradin, Professor of Competition Law & Economics at Tilburg University (the Netherlands) and at George Mason University School of Law (Washington, DC) and founding partner at Edge Legal Thinking; and Prof. Dennis Carlton, Professor of Economics, University of Chicago Booth School of Business and from a Secretariat Background paper.

Item 8

The Greek delegation represented by Mr Dimitri Loukas (HCC) will make a presentation on the main findings from the OECD competition assessment project of five sectors in Greece: (1) wholesale trade, (2) construction, (3) e-commerce, (4) media and (5) the rest of manufacturing.

Item 9.a

Competition Delegates are invited to submit their country report as usual while taking note that only some of them will be presented at the November 2016 Competition Committee meeting. Countries listed in the Agenda are welcome to make an oral presentation at this session of they wish to do so. Oral introductory remarks are not obligatory but if such remarks are made, they should be brief (no more than five minutes) with presenters focusing on one or two important points only. The Secretariat will contact delegations to ensure a consistent approach to such presentations.

Reports to be presented by the Delegates at this meeting:

- Germany– DAF/COMP/AR(2016)28
- Italy – DAF/COMP/AR(2016)31
- Latvia– DAF/COMP/AR(2016)46
- Norway – DAF/COMP/AR(2016)36
- Bulgaria– DAF/COMP/AR(2016)41
- Costa Rica– DAF/COMP/AR(2016)42
- Peru– DAF/COMP/AR(2016)48
- South Africa – DAF/COMP/AR(2016)49

Additional Reports for information:

- Australia– DAF/COMP/AR(2016)23
- Canada– DAF/COMP/AR(2016)25
- Chile – DAF/COMP/AR(2016)26
- France – DAF/COMP/AR(2016)27
- Hungary – DAF/COMP/AR(2016)29
- Iceland – DAF/COMP/AR(2016)30
- Japan - DAF/COMP/AR(2016)32
- Korea- DAF/COMP/AR(2016)33
- Netherlands- DAF/COMP/AR(2016)34
- New Zealand- DAF/COMP/AR(2016)35
- Slovenia- DAF/COMP/AR(2016)37
- Switzerland- DAF/COMP/AR(2016)38
- United Kingdom- DAF/COMP/AR(2016)39
- EU- DAF/COMP/AR(2016)40
- Egypt- DAF/COMP/AR(2016)43
- India- DAF/COMP/AR(2016)44
- Indonesia- DAF/COMP/AR(2016)45
- Malta- DAF/COMP/AR(2016)47
- Chinese Taipei- DAF/COMP/AR(2016)50
- Ukraine- DAF/COMP/AR(2016)51

Also available at: www.oecd.org/daf/competition/annualreportsbycompetitionagencies.htm

Item 9.b

The Committee will hear country presentations on recent legal reforms which have taken place in Argentina and in Chile. The presentations will be delivered respectively by Mr Greco (Chairman, CNDC) and by Mr Irarrazabal (Chairman, FNE).

Item 10

Prof Katsoulacos (Department of Economics, Athens University of Economics and Business) will present his recent research of the factors that affect the choice of legal standards and, hence, affect the role of economic analysis and evidence in competition law enforcement.

Item 11

Delegates will discuss the status of implementation of previous OECD, UNCTAD and EC recommendations on competition law and policy in Ukraine. Peer reviewers will debate the progress in the implementation of such recommendations and the remaining open issues as well as discuss further implementation strategies and reform priorities with representatives of the Anti-Monopoly Committee of Ukraine.

Item 12

The Legal Department of the OECD will present the project "Consolidating the OECD as a Global Standard Setter". The purpose of this initiative by Secretary-General is to conduct an OECD-wide effort to review, discuss, and as necessary update the Organisation's legal instruments, and to develop new ones in those areas which have the most impact and relevance for Members and non-Members.

Competition delegates are called to decide on future topics for substantive discussions to be held in June and November 2017. Delegates should feel free to send to the Secretariat as soon as possible any suggestion for the Committee's consideration.

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

19 September 2016
English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF/A(2016)1
For Official Use

Global Forum on Competition

Draft Agenda: Global Forum on Competition

1-2 December 2016
Paris, France

The 15th meeting of the Global Forum on Competition will be held on 1-2 December 2016 in Room 1 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris.

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JT03400825

Complete document available on OLIS in its original format.

English - Or. English

Draft Agenda: Global Forum on Competition

1-2 December 2016

Paris, France

Chair: Frédéric Jenny, Chairman, OECD Competition Committee (France)

	Thursday 1 December
09.00 am–10.30 am	**1. Opening Remarks** *High Level Representative of the OECD* **Keynote Speakers** *Mo Ibrahim*, Founder and Chair, Mo Ibrahim Foundation *Mary Robinson*, Former Head of State of Ireland and former United Nations Commissioner for Human Rights, President Mary Robinson Foundation – Climate Justice *Margrethe Vestager*, European Commissioner for Competition **Introductory Comments** *Frédéric Jenny*, Chair, OECD Competition Committee
10:30 am – 11:30 am	**2. Session I – Promoting competition; Protecting human rights** **Chair:** *Frédéric Jenny*, Chair, OECD Competition Committee Competition law enforcement depends on an effective system of human rights, most obviously the right to property, the right to contract and rights to due legal process. Policies promoting competition between providers can also be effective in supporting human rights more broadly, for example through providing checks on the power of corporations, as well through helping fight corruption in government. However, economic competition itself is occasionally portrayed as harming human rights along with social values, for example through "social dumping, or environmental damage. Furthermore, some policies intended to safeguard human rights depend on agreements between suppliers - agreements that might be in conflict with competition law (or which might at the least raise the risk or suspicion of being in such conflict). The GFC will therefore try to bring experts from the competition and human rights policy communities into dialogue, to understand better each other's one another's perspectives and to explore the ways in which any apparent conflicts between their objectives can be resolved. **Panellists:** • *Jean-Pierre Chauffour*, Lead Economist for the Maghreb countries, World Bank Group • *John Evans*, General Secretary, TUAC • *Gönenç Gürkaynak,* Managing Partner, ELIG, Attorneys-at-Law, Turkey • *Han Li Toh*, Chief Executive, Competition Commission, Singapore • *Roel Nieuwenkamp*, Chair of the OECD Working Party on Responsible Business Conduct

Documentation:

Documentation is also available at : http://www.oecd.org/competition/globalforum/promoting-competition-protecting-human-rights.htm

11.30 am - 1.30 pm	**3.**	**Session II: The role of market studies as a tool to promote competition**

Market studies provide competition authorities with an in-depth understanding of how sectors or markets work, and are usually conducted whenever there are concerns about the functioning of markets. This tool is often used to identify problematic markets and to recommend areas of improvement. The use of market studies various widely across jurisdictions and is characterised by significant conceptual and procedural differences.

This session will discuss the results of a recent survey by the OECD on market studies, summarising similarities across jurisdictions, significant differences as well as their pros and cons. It will aim to identify practices that competition authorities can consider for use in future market studies.

Documentation:

Chair: *to be confirmed*

Background note by the Secretariat DAF/COMP/GF(2016)4

Call for contributions English | French

Documentation is also available at : http://www.oecd.org/competition/globalforum/the-role-of-market-studies-as-a-tool-to-promote-competition.htm

1:30 pm – 1:35 pm	**4.**	**GFC official photo for all participants**
1:35 pm – 3:00 pm	**Buffet lunch, Expresso Café, OECD Conference Centre.**	
3.00 pm – 6.00 pm	**5.**	**Session III – Independence of competition authorities - From designs to practices**

Agency independence is often taken to be a key element of effective enforcement of competition rules. However, given that national competition agencies (NCAs) face different sets of political, legal, administrative, economic and cultural conditions, it is not possible to define any one fit-for-all model that can guarantee formal or informal independence and insulate all NCAs against political pressures. Nevertheless, it is widely recognised that there exist some general principles that could provide NCAs with a certain level of protection and freedom of manoeuvre. The session aims to outline these general principles which are mainly related to the legal framework under which an agency is set up. In addition to legal and structural safeguards, the session also intends to highlight the importance of effective enforcement and advocacy efforts that an NCA can undertake as a tool for enhancing independence, and to discuss the initiatives that can be taken by the agencies regardless of their formal structures.

Chair: *Frédéric Jenny*, Chair, OECD Competition Committee

Panellists:

Allan Fels AO, former Chair of the Australian Competition and Consumer Commission; and Professor, University of Melbourne, Monash & Oxford

Michal S. Gal, Professor and Director of the Forum on Law and Markets at the Faculty of Law, Haifa University, Israel

Written contributions:

- Argentina DAF/COMP/GF/WD(2016)1
- Brazil DAF/COMP/GF/WD(2016)4
- Bulgaria DAF/COMP/GF/WD(2016)6
- Canada DAF/COMP/GF/WD(2016)8
- Czech Republic DAF/COMP/GF/WD(2016)13
- El Salvador DAF/COMP/GF/WD(2016)15
- Estonia DAF/COMP/GF/WD(2016)16
- Indonesia DAF/COMP/GF/WD(2016)19
- Ireland DAF/COMP/GF/WD(2016)21
- Japan DAF/COMP/GF/WD(2016)23
- Kazakhstan DAF/COMP/GF/WD(2016)25
- Latvia DAF/COMP/GF/WD(2016)26
- Lithuania DAF/COMP/GF/WD(2016)27
- Mexico (COFECE) DAF/COMP/GF/WD(2016)29
- Mexico (IFT) DAF/COMP/GF/WD(2016)31
- Portugal DAF/COMP/GF/WD(2016)35
- Russian Federation DAF/COMP/GF/WD(2016)37
- Serbia DAF/COMP/GF/WD(2016)39
- Slovak Republic DAF/COMP/GF/WD(2016)41
- South Africa DAF/COMP/GF/WD(2016)43
- Spain DAF/COMP/GF/WD(2016)45
- Sweden DAF/COMP/GF/WD(2016)47
- Chinese Taipei DAF/COMP/GF/WD(2016)51
- Ukraine DAF/COMP/GF/WD(2016)49

Documentation:

Background note by the Secretariat DAF/COMP/GF(2016)5

Call for contribution English | French

Documentation is also available at: http://www.oecd.org/competition/globalforum/independence-of-competition-authorities.htm

6.00 pm - 8.00 pm	**Cocktail** Ockrent and Marshall Rooms, Château de la Muette, OECD

Friday 2 December

9.30 am - 12.30 pm

6. Session IV: Sanctions in antitrust cases

This session will look at antitrust fines and other sanctions imposed in different jurisdictions. Antitrust fines play a role in deterrence by making anticompetitive conduct less profitable. The amount of fines has dramatically increased in recent years while competition authorities have adopted or revised their legislation or guidelines on fines. However, competition authorities often

face several problems such as collecting fines and inability to pay when imposing them. In order to increase deterrence, some argue that higher fines are necessary while others maintain that there is a need to impose other forms of sanctions. This session will provide an overview of how competition authorities impose antitrust fines and alternatives in order to achieve deterrence, punishment, compensation and other objectives, addressing the problems that can arise at different stage of imposing antitrust fines. Participants will be encouraged to discuss relevant cases from their own jurisdictions.

Chair: *to be confirmed*

Panellists:

Caron Beaton-Wells, Professor, University of Melbourne, Australia

John M. Connor, Professor Emeritus, Purdue University – West Lafayette

Hwang Lee, Professor, Korea University School of Law

Written contributions:

- Argentina DAF/COMP/GF/WD(2016)2
- Australia DAF/COMP/GF/WD(2016)3
- Brazil DAF/COMP/GF/WD(2016)5
- Bulgaria DAF/COMP/GF/WD(2016)7
- Canada DAF/COMP/GF/WD(2016)9
- Chile DAF/COMP/GF/WD(2016)10
- Costa Rica (SUTEL) DAF/COMP/GF/WD(2016)12
- Czech Republic DAF/COMP/GF/WD(2016)13
- European Union DAF/COMP/GF/WD(2016)17
- India DAF/COMP/GF/WD(2016)18
- Indonesia DAF/COMP/GF/WD(2016)20
- Ireland DAF/COMP/GF/WD(2016)22
- Japan DAF/COMP/GF/WD(2016)23
- Lithuania DAF/COMP/GF/WD(2016)28
- Mexico (COFECE) DAF/COMP/GF/WD(2016)30
- Mexico (IFT) DAF/COMP/GF/WD(2016)32
- Netherlands DAF/COMP/GF/WD(2016)33
- Pakistan DAF/COMP/GF/WD(2016)34
- Portugal DAF/COMP/GF/WD(2016)36
- Russian Federation DAF/COMP/GF/WD(2016)37
- Serbia DAF/COMP/GF/WD(2016)40
- Slovak Republic DAF/COMP/GF/WD(2016)42
- South Africa DAF/COMP/GF/WD(2016)44
- Sweden DAF/COMP/GF/WD(2016)46
- Switzerland DAF/COMP/GF/WD(2016)48
- Chinese Taipei DAF/COMP/GF/WD(2016)52
- Ukraine DAF/COMP/GF/WD(2016)50

Documentation:

Background note by the Secretariat DAF/COMP/GF(2016)6

Call for contributions English | French

Documentation is also available at: http://www.oecd.org/competition/globalforum/competition-and-sanctions-in-antitrust-cases.htm

12:30 pm -2:00 pm	**Break**
2:00 pm - 3:30 pm	**5. Session IV (continued) – Breakout Sessions: Sanctions in antitrust cases** [Participants will be allocated in breakout rooms for this session by the Secretariat] 1. Breakout Session 1 – **The steps of the fines setting process across jurisdictions** - Room CC6 This session will examine how jurisdictions go through several steps to determine antitrust fines. This discussion will consider how to set the basic fines and adjust them based on aggravating and mitigating factors. 2. Breakout Session 2 – **Practical issues in imposing fines** - Room CC13 Participants will discuss practical issues such as inability to pay, judicial scrutiny and collecting fines, which are often faced by competition authorities when imposing antitrust fines. 3. Breakout Session 3 – **Alternatives to fines** - Room CC20 Session 3 will look at alternatives to fines. Participants will examine the pros and cons of other forms of sanctions, which include criminal sanctions, disqualification, private damages and debarment. Also, they will discuss the interactions of antitrust fines and other forms of sanctions.
3:30 pm - 5:00 pm	**6. Session IV (continued) – Sanctions in antitrust cases – wrap up plenary session** Chair: *to be confirmed* 1. Report by Moderators 2. General Discussion 3. Summary and final remarks by session chair
5:00 pm – 6:00 pm	**7. Session V – Other Business and Proposals for Future Work** **Chair:** *Frédéric Jenny*

Annex 1: Practical Information

1. **Registration**
   Forum participation is **by invitation only**. It is restricted to government representatives, intergovernmental/ international organisations and regional banks as well as selected invitees. No financial support is available for participants' travel to and stay in Paris. Registration is mandatory. For OECD non-members, registration should be done as soon as possible. Members should register as usual through their Permanent Delegations in Paris.
   When you arrive at the OECD Centre in Paris, you will need to present an identity card or passport to obtain your Forum badge. In addition, please bring a copy of your registration or the Forum agenda to pass the security. Badges will be delivered at the Welcome Desk upon arrival. **The desk will open at 8.00 am on Thursday 1 December 2016. Given the high number of participants, you should allow a minimum of 30-45 minutes for registration**. The GFC will start at 9 am sharp and you should plan to be seated in the room behind your plate at least 5 minutes before the start.

2. **Documentation**
   The Global Forum on Competition website (http://www.oecd.org/competition/globalforum) is our vehicle for conveying general information and documentation. Unless explicitly requested not to do so, we will reproduce written contributions on the site. GFC participants will find the background documentation and the agenda on their table upon their arrival in Room 1 where the Forum will take place. **In a bid to be environmentally friendly, we will not circulate paper copies of the numerous country contributions. Please bring your own copies with you**. Participants will also be able to access Forum documentation on their personal computers through the OECD's free WiFi access in the room. For participants who wish to tweet during our events, please use the twitter hashtag: #OECDcomp and the twitter handle: OECD BusinessFinance @OECD_BizFin.

3. **Seating arrangements**
   Participants will be seated behind their country/economy plate in French alphabetical order, followed by international organisations and selected invitees from business and civil society. Given the large number of delegations represented at the Forum, access to seats equipped with a microphone is limited. In principle, each delegation will have a minimum of one seat with a microphone. For countries with large delegations, the allocation of more seats equipped with a microphone will be considered. Such allocation will be made according to registrations on a first come, first served basis. A number of seats without a microphone will also be available in the rear of the room.

4. **Breakout Sessions**
   For the discussion on "Sanctions in antitrust cases" on Friday 2 December, three breakout sessions are organised in addition to the plenary session to allow a more informal and lively dialogue among fewer participants. Participants will be allocated to the three sessions by the Secretariat. Information on allocation to the three sessions will be provided during the plenary session prior to the breakout sessions. Participants are kindly invited to attend the session they have been allocated to, and to observe the timing and to return to the plenary session immediately after. During the final plenary session they will hear reports from the breakout session moderators and from the experts. A number of participants will be called to describe in four minutes experiences of particular interest to all participants.

5. **Working Methods**
   Discussions will be held in the two OECD official languages (English and French), with simultaneous interpretation. The Chairman (and Session Chairs where relevant) will use traffic lights to regulate the timing of interventions. The high number of participants means that participants will need to be disciplined in their interventions in order to allow as many delegates as possible to have the opportunity to speak. Interventions should be as concise as possible, and each intervention will be limited to a maximum of three minutes. Time constraints may not permit the presentation of the numerous written contributions. Countries who have contributed in writing (in response to the two calls prepared by the OECD Secretariat) will be notified in advance if the session's Chair intends to call upon them to make brief comments on specific points from their written contributions. We will do our best to warn those concerned as soon as feasible, but the late receipt of some country contributions often delays this process. Consequently, countries may not be notified until a few

days before, or even on the eve or on the first day of the Forum. Please carefully check your emails on those days since this will be the only way to communicate efficiently with you. The Secretariat will inform the speakers scheduled on the agenda of the time allocated to them. They are kindly invited to keep their presentations strictly within the indicated limits. This should allow for periods of general discussion long enough to encourage lively exchanges among participants.

6. **Accommodation, Visas, About the Conference Centre**

A list of hotels is provided on the OECD website and bookings may also be made through our booking website. Hotel information and booking facilities are provided for convenience only and do not constitute an endorsement or recommendation by the OECD of the services of a particular hotel, nor a guarantee of quality. We suggest that you verify the nature of the services, the applicable rates and any other relevant information directly with the hotel.

European Union citizens do not require a visa for entry into France. For others, depending on your nationality, the length and purpose of your stay in France, a visa may be required before departure. For further information, please consult the French Ministry of Foreign Affairs website.

Please note that the **OECD cannot organise a visa on your behalf** and that there are long deadlines to get visas in some countries. A personalised invitation letter can be provided by the OECD for the purpose of getting a visa if necessary.

The OECD Conference Centre provides all necessary facilities including phone booths, free WiFi access, computers with free Internet access, a bookshop, coffee and snack bars, and a restaurant. Please consult the Conference Centre website for more information.

7. **General information**

Currency: Euro (EUR, EUR)
Electricity: 220 V, 50 Hz
Time Zone: GMT/UTC + 1 (Central European Time)
Telephone Area Code: The international code to call France is "+ 33". When calling from abroad, the number should be dialled without the first "0".

ICN Merger Working Group
Roundtable Discussion on Nexus and Thresholds
Saturday, December 3, 2016
Paris

Agency heads and senior officials are invited to join other ICN members on the margins of the OECD Global Forum to share perspectives on a critical element of effective merger control: notification rules. The discussions will use the ICN's Recommended Practices for Merger Notification and Review Procedures to address traditional merger threshold issues as well as emerging issues with respect to the review of certain low turnover transactions.

9:00-9:15 Registration and coffee

9:15-9:30 Opening Remarks

Isabelle de Silva, President, Autorité de la concurrence

9:30-10:50 Session I: Designing Merger Thresholds

This session will address implementation of ICN Recommended Practices for Merger Notification and Review Procedures, focusing on nexus to the jurisdiction and notification thresholds.

9:30-10:10 Panel Discussion

The panel will open with a brief overview of the results of the 2016 self-assessment of ICN member conformity with the Recommended Practices. Participants then will discuss areas under consideration for revision to the Recommended Practices on nexus and thresholds, including clarification of materiality, definition of parties and scope of application, jurisdiction to review transactions that do not trigger a notification obligation, and an exception in the current set to review local dominant firm activity. **[Panelists TBD]**

10:10-10:40 Table Talk

Small group discussion led by table moderators and based on a set of discussion questions. A room facilitator will reserve a few minutes to solicit top takeaways from each table.

Discussion Questions:

- Views on ICN's existing Recommended Practices on nexus to the jurisdiction and notification thresholds: Does your jurisdiction conform? If not, why not? Would the proposed changes encourage greater conformity in your jurisdiction (or others)? Are there areas that need additional detail? What might be improved?

- The Recommended Practices contain a limited exception from the two party or target test providing for the use of notification thresholds based solely on the acquiring firm's local activities for cases in which a local, dominant firm acquires a significant foreign potential competitor lacking significant sales in the jurisdiction, and the agency is otherwise deprived of jurisdiction over the matter. Almost fifteen years later, experience suggests the need for this limited exception has not materialized, and that the exception should be closed. What is your view?

- How should we define a "party" in calculating the threshold? Should one of the two parties in a two party threshold test be the "target" or, in the case of a joint venture, the proposed joint venture?

- Are there additional related topics the ICN or OECD should address? For example, we have received suggestions for accompanying illustrative language. Should other complementary work product be developed?

- How can the ICN support its members in implementing the Practices?

10:40-10:50 Session I Wrap Up

10:50-11:10 Coffee break

11:10-12:30 Session II: Challenges of the digital economy and low turnover transactions

The effectiveness of purely turnover-based notification thresholds recently has been called into question with regard to certain sectors, e.g., digital services and pharmaceuticals, for failing to capture certain transactions involving targets with limited actual turnover that may raise competition concerns. This concern arises primarily when an agency's authority to review and challenge proposed transactions is limited to those transactions subject to mandatory notification requirements, i.e., the agency is deprived of jurisdiction for transactions that do not meet the jurisdiction's notification requirements. This session will explore different ways of addressing these challenges, including appropriate alternative criteria for notification and residual jurisdiction.

11:10-11:45 Panel Discussion

Some transactions fall below turnover-based thresholds because the target's products are offered for free, or have yet to come to market, and generate little turnover (one example is Facebook/WhatsApp in 2014 in the digital sector). In such instances, the target's value may not best be correlated to its sales and the value of the target's sales may be a poor indicator of the merger's significance for competition. Thus, in certain instances, turnover-based notification thresholds may have a 'blind spot' if relied on to assert jurisdiction. Panelists will examine the pros and cons of alternative criteria that may be considered to capture those transactions. **[Panelists TBD]**

11:45-12:15 Table Talk

Small group discussion led by table moderators and based on a set of discussion questions. A room facilitator will reserve a few minutes to solicit top takeaways from each table.

- Should reporting requirements be lowered or adapted to capture these transactions? What specific turnover or alternative criteria could be used to capture these transactions? Is the underlying information or data required to check whether these criteria are met readily available to companies active in the sectors concerned? Can past experience in jurisdictions using non-turnover-based thresholds help guide future reform in other jurisdictions? Can alternatives meet the need to provide objective factors for notification? Should sector-specific notification requirements be considered?

- What are the costs – to agencies and parties – of additional filings? Agencies may be concerned that the takeover of innovative firms by well-established tech or pharma companies may preempt potential competition. Does the prospect of these future anticompetitive effects outweigh the added administrative costs for merger control? What are the consequences in terms of the number of filings and their nexus to the jurisdiction and any potential harm if requirements are lowered or adapted?

- Are there any administrable limitations that could be placed on a threshold based on a one party or value of transaction turnover threshold? (e.g., different length or depth of an initial review, or providing for voluntary notifications for certain types of transactions?)

- Can the ability to review mergers below notification thresholds – residual jurisdiction – provide needed flexibility? Can it be limited by elements such as timetable for review or sectors to minimize concerns about legal certainty?

12:20-12:30 Session II Wrap Up

12:30-12:45 Closing Remarks

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

07-Nov-2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3/WD(2016)55
Unclassified

Working Party No. 3 on Co-operation and Enforcement

GEOGRAPHIC MARKET DEFINITION

-- Note by Chinese Taipei --

28-29 November 2016

This document reproduces a written contribution from Chinese Taipei submitted for Item 3 of the 124th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016.

More documents related to this discussion can be found at ww.oecd.org/daf/competition/geographic-market-definition.htm

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org].

JT03404707

Complete document available on OLIS in its original format

English - Or. English

-- CHINESE TAIPEI --

1. This report will introduce regulations on geographic markets set forth in the Fair Trade Act of Chinese Taipei, and illustrate the definition of geographic market used in specific industries.

1. Definition of geographic market and analytical methods

2. According to Article 5 of the Fair Trade Act (hereinafter referred to as the "FTA"): "The term 'relevant market' as used in this Act means a geographic area or a coverage wherein enterprises compete in respect of particular goods or services." In general, product markets, geographic markets, and time horizon should be considered when defining relevant markets. The Fair Trade Commission (hereinafter referred to as the "FTC") shall assess an enterprise's market power and whether its conduct may result in anticompetitive effects when conducting investigations. Hence, the definition of relevant market is critical to the FTC's decision in merger and antitrust cases.

3. For enhancing transparency, the FTC has formulated the "Principles of the Fair Trade Commission Regarding the Definition of Relevant Markets" (hereinafter referred to as the "Principles") specifically to make explicit the definition of relevant markets. The Principles set forth basic principles in defining relevant markets and factors to be considered in defining a product market and a geographic market. The Principles also provide three examples to illustrate analytical methods used in defining markets, and further clarify items that must be taken into consideration when using specific method. Point 2 of the Principles defines a "Geographic Market" as referring to "region where trading counterparts of certain goods or services provided by an enterprise can easily choose or switch to other trading partners."

4. The FTC regards demand substitution as the primary review item in defining relevant markets, and depending on the features of such goods or services, the FTC may also consider supply substitution. The FTC will consider the following factors when defining a geographic market based on the demand and supply substitution of goods and services in question:

- price variations between different regions and shipping costs
- features and uses of the products
- the trading costs to trading counterparts when making product purchases from different regions
- the convenience to trading counterparts in obtaining the products
- the status when trading counterparts choose to make purchases in different regions when an adjustment is made to product prices
- the viewpoints of the trading counterparts and business competitors regarding the substitution between product regions
- the provisions of relevant laws or administrative regulations
- other evidences relating to the definition of a geographic market.

5. Furthermore, when defining relevant markets, the FTC reviews reasonable substitutability between the goods or services in question and their geographic regions and other goods or services and their geographic regions. In addition, the FTC also applies the cross-elasticity test and the hypothetical monopoly test to define relevant markets. Due to the large number of analytical methods for defining markets, the FTC will consider the facts of the case, the features of the goods or services in question, evidence and data, in order to choose an appropriate analytical method for handling a case. However, the above-mentioned analytical methods are not exhaustive, and the FTC doesn't set prioritization to the use of any of the analytical methods. The FTC once chose the LIFO and LOFI of the Elzinga-Hogarty method to define a geographic market.

6. In delineating the market of a specific industry, the FTC may refer to the opinion of the competent authority in charge of the specific industry. The FTC has also established corresponding administrative rules for special industries, such as cable TV, telecommunications and digital convergence. Therefore, the FTC complies with such principles or regulations for defining relevant markets in specific industries.

2. Defining the geographic market in specific industries

2.1 Pulp and cultural paper Industry

7. In most merger cases the FTC has reviewed in recent years, the geographic scope of the relevant product market was Chinese Taipei. However, the FTC in some merger cases defined a geographic market as a specific area within Chinese Taipei, a specific region beyond Chinese Taipei, or even the global market after taking industry characteristics and trading conditions into consideration. When the geographic market is defined as a region or global market, the FTC would also consider the impact on the domestic market when assessing the effect on market competition.

8. The Company A, the biggest firm in the market of paper manufactured for cultural purpose, proposed in 2012 an acquisition of 55% shares issued by the Company B that had significant market shares in the pulp market and in the market of paper manufactured for cultural purposes. In its merger notification, the acquiring firm alleged that the geographic markets should be defined as regional markets by using LIFO and LOFI- for example, the pulp market comprised Chile, Canada, Brazil, U.S.A. and Chinese Taipei, and the market of cultural paper comprised Korea, China, Japan, Indonesia and Chinese Taipei. The alleged geographic markets were challenged by the FTC due to lack of sufficient data such as import and export for defining the relevant markets in the acquiring firm's submission. The FTC found that in comparison with foreign rivals, the domestic firms benefited from the lower transportation and transaction costs; a certain amount of pulp and cultural paper were imported though. Considering the market shares of merging enterprises, domestic cost advantages as well as the impact on the domestic downstream firms, the FTC was of the view that the geographic markets would be confined to domestic markets; otherwise, it may not be able to reflect the market power of the merging enterprises.

2.2 Online game industry, online advertising industry, and online shop platform industry

9. According to the "Regulations on Cross-ownership in Digital Convergence-Related Industries", digital convergence-related industries refer to telecommunications, radio and television, internet, and e-commerce industries, including electronic telecommunication networks established by multiple devices, such as telecommunications, radio, and information and communication networks, as well as business activities provided through telecommunications, radio and television, electronic transactions, online games, and other digital content and application services using the above-mentioned electronic telecommunications network. The hierarchical structure of "infrastructure devices – transport platform services – content and application services" should be regarded as the primary review item for defining the relevant market under the trend of digital convergence. Because the Internet is borderless, digital

convergence-related services are often provided across borders, especially in content and application services. Digital content and application services are not confined by geographic region, and can be provided to any location with internet access. Hence, the FTC has not ruled out expanding the geographic market beyond borders. As for infrastructure devices and transport platform services, the physical network for signal transmission is mainly within Chinese Taipei; platform service providers mostly require permission to operate under sector-specific regulations, and their area of operation is also confined to Chinese Taipei. Therefore, the geographic market of the two sectors is Chinese Taipei. In the following cases, we will illustrate how the FTC defines a geographic market in the online game industry, online advertising industry, and online shop platform industry.

10. Online game industry: foreign Company A and domestic online game Company B violated the FTA by not filing a merger notification with the FTC in advance. The FTC referred to the opinions of the Industrial Development Bureau (the competent authority of the online game industry), the complainant, the two enterprises involved, and the game industry promotion association, and finally defined the product market as the online game market. In considering language (the traditional Chinese version is used in Chinese Taipei), local culture, social networks (domestic players prefer to interact with other domestic players), connection bandwidth (which affects gaming and service quality), and after-sales service, etc., game enterprises have to provide localized services to meet the market's demand, i.e., the geographic market is highly localized. Finally, the FTC has defined the geographic market as the domestic market.

11. Online advertising industry: Online advertising refers to the use of multimedia technology (text, images, animations, audio, or video) by advertisers to promote their goods or services on the Internet, and is characterized by the application of multimedia and frequent user interaction. Online advertisements can be roughly divided into display ads, search ads, and social/buzz marketing.

12. Even though the Internet is borderless, online advertising platforms are typical two-sided markets, in which advertisers send a message to the target audience through the online advertising platform. Hence, the distribution, habits, and cultural background of the target audience must be taken into consideration when defining the geographic market. Considering that citizens are still accustomed to browsing traditional Chinese websites and there is still a significant difference in culture between Chinese Taipei and other Chinese-speaking regions, foreign search ad platforms cannot provide reasonable substitutability to domestic advertisers. Therefore, when investigating related cases as to whether online advertising enterprises have restricted the business activities of their trading counterparts, the FTC has defined the geographic market as the domestic market.

13. Online shop platform industry: Online shopping platforms make transactions through the Internet, and appear to be borderless. Although virtual products can be delivered through the Internet, most physical products still need to be delivered to the buyer by traditional logistics channels and shipping costs need to be considered. Moreover, enterprises prefer to open online shops on domestic online shopping platforms due to language and cultural differences between countries. Even if foreign online shopping platforms charge the same or a lower fee than domestic platforms, they do not provide reasonable substitutability as they cannot provide a similar channel for serving customers. Therefore, when investigating cases as to whether online shopping platform enterprises have restricted the business activities of their trading counterparts, the FTC has defined the geographic market as the domestic market.

2.3 Capacitor industry

14. The FTC previously imposed penalties on capacitor enterprises for exchanging sensitive information, such as that related to price, quantity, production capacity, and dealings with counterparts, through meetings or bilateral contacts, where agreement to restrict competition was reached. The enterprises' conduct resulted in an impact on the function of the capacitor market, and the FTC therefore determined that it constituted a concerted action and imposed an administrative penalty of TWN 5 796 600 000 (Taiwanese new dollars). In this case, there were only a few domestic manufacturers of capacitors, and their output value and production were far lower than those of foreign manufacturers. Most aluminum capacitors were imported in Chinese Taipei, and there were no domestic manufacturers of tantalum capacitors. Downstream enterprises could choose suppliers freely, and there were no laws or administrative rules that restricted the importation of such products. The geographic market should be defined as the global market. However, in considering the jurisdiction of competition law, the FTC should assess the impact of the enterprises' conduct on domestic competition and trading order. When gathering evidence and collecting data for this case, the FTC collaborated and coordinated its investigation with the competent authority for competition law in many countries. Besides scheduling investigations of the enterprises on the same date, the FTC convened numerous telephone conferences between competent authorities or contacted the competent authorities via e-mail during the investigation. The FTC's long-term efforts in international cooperation were apparent in terms of gathering evidence and exchanging experiences in this case.

3. Conclusion

15. The FTA defines a "relevant market" as a geographic area or coverage wherein enterprises compete in respect of particular goods or services. The Principles set forth basic principles of the FTC in defining relevant markets, as well as factors that must be taken into consideration in defining a product market and a geographic market.

16. When defining a geographic market, the FTC will consider price variations between different regions and shipping costs, features and uses of the products, the trading costs to trading counterparts when making product purchases from different regions, the convenience to trading counterparts in obtaining the products, the status when trading counterparts choose to make purchases in different regions when an adjustment is made to product prices, the viewpoints of the trading counterparts and business competitors regarding the substitution between product regions, the provisions of relevant laws or administrative regulations, and other evidences related to the definition of a geographic market. In other words, the FTC will consider industry characteristics, the trading situation, foreign trade, language, culture, and the provisions of relevant laws or administrative regulations when delineating a geographic market, in order to assess an enterprise's market power and the impact of its conduct on market competition.

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AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by Chinese Taipei --

28-29 November 2016

This document reproduces a written contribution from Chinese Taipei submitted for Item 4 of the 124th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

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English - Or. English

-- CHINESE TAIPEI --

1. This report will illustrate the merger control regime under the Fair Trade Act and share the Fair Trade Commission's experiences in reviewing mergers in Chinese Taipei.

1. The merger control regime under the Fair Trade Act

1.1 Definition of merger and notification thresholds

2. A pre-merger notification regime has been established since 2002 amendments to the Fair Trade Act (hereinafter referred to as the "FTA"). The purpose of pre-notification is to prevent those mergers that may result in anti-competitive effect by means of ex-ante regulation of market structure. As defined in Paragraph 1 of Article 10 of the FTA, "merger" refers to one of the following conditions: (i) where an enterprise and another enterprise are merged into one; (ii) where an enterprise holds or acquires the shares or capital contributions of another enterprise to an extent of more than one third of the total number of voting shares or total capital of such other enterprise; (iii) where an enterprise is assigned by or leases from another enterprise the whole or the major part of the business or assets of such other enterprise; (iv) where an enterprise operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter's business; or (v) where an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise.

3. Chinese Taipei's notification system is mandatory. Paragraph 1 of Article 11 of the FTA provides that any merger involving any of the following circumstances shall be filed with the Fair Trade Commission (hereinafter referred to as the "FTC") in advance: (i) as a result of the merger the enterprise(s) will have one third of the market share; (ii) one of the enterprises in the merger has one fourth of the market share; or (iii) sales for the preceding fiscal year of one of the enterprises in the merger exceed the threshold amount publicly announced by the FTC.

4. The 2015 amendments to the FTA brought two major changes to the merger control regime. Firstly, in a merger case, any natural person who has controlling interest of an enterprise is deemed as an enterprise[1]that is subject to the FTA. Moreover, the aggregated turnover of affiliated enterprises shall be considered when the FTC determines whether a merger meets the turnover threshold or not.

1.2 The substantive merger review standard

5. According to Article 13 of the FTA, the FTC may not prohibit any of the mergers filed if the overall economic benefit of the merger outweighs the disadvantages resulting from competition restraint. The FTC may also impose conditions or undertakings in any of the decisions in order to ensure that the overall economic benefit of the merger outweighs the disadvantages resulting from competition restraint. Thus, the net effect between the economic benefit and the disadvantages in terms of the competition restraint resulting from the merger is the basis of the substantive test.

[1] Article 2 of the FTA provides that an enterprise refers to a company, partnership, sole proprietor and any other person or organization engaging in transactions through provision of goods or services.

6. The FTC has established the "Fair Trade Commission Disposal Directions on Handling Merger Filings" (hereinafter referred to as "Merger Directions") to set standards of reviewing mergers for improving transparency. In practice, when reviewing different types of mergers, the FTC considers different factors in weighting the disadvantages resulted from competition restraint.

1.2.1 Consideration of Anti-competitive Effect

7. When assessing the effects of the likely competition restrictions thereof incurred in horizontal mergers, the FTC considers unilateral effects, coordinated effects, market entry, countervailing power and other factors that have influence on competition. If a horizontal merger meet any of the following circumstances, it may be presumed to raise significant competition concerns: (i) the aggregate market share of the merging enterprises reaches half of the total market; (ii) the top two competitors in the relevant market account for two thirds of the total market share, and the aggregate market share of the merging enterprises amounts to twenty percent or more of the total market; (iii) the top three competitors in the relevant market account for three quarters of the total market share, and the aggregate market share of the merging enterprises accounts for twenty percent of the total market.

8. With regard to vertical mergers, the FTC considers the following factors to determine the likely effects on competition restriction: (i) the possibility for other competitors to choose trading counterparts after the merger; (ii) the level of difficulty to enter the relevant market for businesses not participating in the merger; (iii) the possibility for the merging parties to abuse their market power in the relevant market; (iv) the possibility of raising rivals' costs; (v) the possibility of concerted actions occurring as a result of the merger; (vi) other factors likely to lead to market foreclosure.

9. In a conglomerate merger, the FTC considers the following factors to determine whether potential competition exists between the merging enterprises: (i) the possibility of a change in regulations and its impact on the cross-industry operations of the merging enterprises; (ii) the possibility of technological improvement enabling the merging enterprises to engage in cross-industry operations; (iii) whether any of the merging enterprises originally had the intention to develop cross-industry operations; and (iv) other factors likely to affect market competition.

1.2.2 Consideration of Overall Economic Benefits

10. According to the Merger Directions, if a merger is considered likely to entail competition restrictions, the applicant(s) may submit proof of the following factors of the overall economic benefits to be assessed by the FTC: (i) economic efficiency; (ii) consumers' interests; (iii) one of the merging enterprises is originally a weaker competitor; (iv) one of the merging enterprises is a failing firm; (v) other concrete evidence of overall economic benefits to be expected. The aforementioned "economic efficiency" shall meet the following requirements: (i) it can be brought to realization within a short time; (ii) it cannot be achieved other than through the merger; (iii) it can reflect consumers' interests.

11. When reviewing merger cases, the FTC may consider the opinions of the competent authority of the industry of concern to assess the overall economic benefits and disadvantages from the competition restrictions thereof incurred. In addition, for mergers in special industries, such as finance, air transportation, cable TV, telecommunications and digital convergence, the FTC has also established corresponding administrative rules for such enterprises to follow as well as to serve as reference when the FTC reviews related cases.

2. Case study: conditional clearance and prohibition decision

12. As specified in the FTA, when the overall economic benefit of a merger outweighs likely disadvantages from the competition restraint thereof incurred, the FTC does not prohibit the merger but it may approve it with conditions or undertakings attached. Otherwise, the FTC may prohibit the merger.

13. The types of conditions or undertakings (merger remedies) can be roughly divided into structural measures[2] and behavioral measures[3]. Depending on the specific case, the FTC may determine to attach conditions or undertakings that it sees fit. It may also make inquiries into the opinions of the merging enterprises regarding the conditions or undertakings to be attached before concluding a decision on a merger filing. The FTC has not established disposal directions on the contents of conditions or undertakings to be attached, but they have to comply with the principle of proportionality, the principle of prohibiting improper connection and other general principles of law.

14. Between Jan. 2011 and Sep. 2016, the FTC did not prohibit any merger but attached conditions or undertakings in 13 merger filings it reviewed. The undertakings attached were mostly behavioral measures; only a few of them were structural. Before making the decision, depending on the specific case, the FTC would solicit the opinions of related competent authorities, specialists and scholars, specialized research institutions, related businesses, merging enterprises and the public by sending them written requests or holding seminars.

15. According to Paragraph 1 of Article 39 of the FTA, if any enterprise fails to perform the undertakings required, the FTC may prohibit the merger, prescribe a period for such enterprise to split, to dispose of all or a part of the shares, to transfer a part of the operations, or to remove certain persons from their positions, or make any other necessary dispositions, and may impose an administrative penalty of no less than TWN 200 000 (Taiwanese new dollars) and no more than TWN 50 million upon such enterprise.

2.1 Conditional clearance: Morgan Stanley and CNS

16. The recent merger of Morgan Stanley Equity Asia IV, L. L. C (Morgan Stanley), An Shun Development Co., Ltd. (An Shun), Bo Kong Development Co., Ltd. (Bo Kang) and its affiliates [including China Network Systems Co., Ltd. (CNS), Global Digital Media Co., Ltd. (Global Digital), Keelung Cable TV and nine other cable television services (hereinafter referred to as the A Business Group)] was a case example in which the FTC approved the merger with attached number of conditions.

17. Morgan Stanley planned to conduct a multi-level shareholding structure through NHPEA and bring in capital from company B and Far Eastone Telecommunications Co., Ltd. (Far Eastone Telecom) to acquire the shares of An Shun, An Chan Development Co., Ltd., Bo Kang and Bo Shuo Co., Ltd. from Malaysia-based Evergreen Jade SDN BHD, Goodwill Tower SDN BHD and company C in Chinese Taipei. After acquisition, Morgan Stanley would indirectly hold all the shares of An Shun and Bo Kang, as well as close to 100% of the shares of the affiliates of both companies (including the A Business Group). This case complied with the definition of a merger in the FTA, as well as the market shares of 11 cable television services of the A Business Group achieving the filing thresholds specified in the FTA; therefore, a merger notification was filed with the FTC.

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2 Such as requesting merging enterprises to dispose of the shares or assets in their possession, assign part of their operations, or remove personnel from certain positions.

3 Such as requesting merging enterprises to continue to provide essential facilities or input elements to enterprises outside the merger, to license such enterprises to use their intellectual property rights, not to engage in exclusive dealings, not to have discriminatory treatment, or not to impose tie-in sales.

18. The decision of the FTC: Besides posting a public announcement on its website, the FTC sent letters to request that the National Communications Commission, Cable Broadband Institute in Chinese Taipei and related enterprises provide their opinions in writing, and also held a seminar attended by specialists and scholars, related competent authorities, the enterprises involved and the related association or institute to collect opinions from different sectors. Following consulting with stakeholders, the FTC concluded that the overall economic benefit would be greater than the disadvantages resulting from competition restraint with certain conditions. These are as follows:

1. The merging enterprises and the companies they control or their affiliates were not allowed to engage in the following practices before Far Eastone Telecom, the companies it controlled and its affiliates filed with the FTC merger notifications regarding their intention to merge with certain enterprises and obtain the approval of the FTC:

    - Appointing the directors, supervisors or managers of Far Eastone Telecom, the companies it controlled or its affiliates that would account for more than half of the total number of the board directors of any of the merging enterprises and companies they controlled or their affiliates.
    - Assigning shares or capital contributions to Far Eastone Telecom, the companies it controlled and its affiliates to enable them to gain more than one third of the voting shares or the total capital of any of the merging enterprises.
    - Allowing Far Eastone Telecom to control either directly or indirectly the business operations or appointment and dismissal of personnel of any of the merging enterprises by signing contracts or through other measures
    - Engaging in joint management with Far Eastone Telecom or the companies it controlled and its affiliates through the provision of technical and consulting services or entrusting Far Eastone Telecom or the companies it controlled and its affiliates to manage cable TV or channel agency operations.

19. The reason the undertaking was attached was to prevent Far Eastone Telecom or the companies it controlled and its affiliates from directly or indirectly controlling the operations or appointment and dismissal of personnel, or engaging in joint management or entrusted management with any of the merging enterprises by assigning contracts, providing technical or consulting services, or adopting any other approaches before filing merger notifications regarding their intentions to merge with certain enterprises and obtaining the approval of the FTC.

2. After receiving the merger decision from the FTC and before Far Eastone or any of the companies it controlled and its affiliates filed merger notifications with the FTC regarding the intention to merge with certain enterprises, Morgan Stanley had to provide the following information:

    - Copies of cooperation (including but not limited to technical and consulting services) agreements signed between the merging enterprises and Far Eastone Telecom or companies it controlled and its affiliates, and the list of consultants providing services (including but not limited to technical and consulting services) and their experiences; revisions or changes made to related information were also to be provided.

    - A list of contents of services (including but not limited to technical and consulting services) provided by Far Eastone Telecom or companies it controlled and its affiliates every six months.

20. Considering that the merging enterprises had not yet signed service agreements with Far Eastone Telecom and also to ensure that the merging enterprises would carry out the first undertaking, this undertaking was attached as a supervisory measure.

3. Without justifiable reasons, the merging enterprises and companies either controlled or affiliated could not adopt differential treatment toward Far Eastone or companies it controlled and its affiliates and their horizontal competitors. Considering that the total number of subscribers of the cable TV service operators affiliated to CNS was the largest among the five multiple system operators (MSO) while Global Digital was an agent for 11 popular channels, the merging enterprises therefore had rather considerable market power. Since Far Eastone Telecom was about to change from being a creditor to becoming the biggest shareholder, this undertaking was attached to eliminate doubts about the merging enterprises and the companies they controlled and their affiliates adopting unjustifiable differential treatment toward Far Eastone or the companies it controlled and its affiliates and their horizontal competitors.

2.2 Prohibition decision: Holiday KTV and Cashbox

21. Holiday KTV Co., Ltd. (Holiday KTV) and Cashbox Partyworld Co., Ltd. (Cashbox) were both KTV service providers. Holiday KTV planned to merge with Cashbox Partyworld and both companies therefore filed a merger notification with the FTC.

22. The case was a horizontal merger. The FTC requested that the filing enterprises present their statements and make certain promises. At the same time, the FTC invited concerned agencies, scholars and specialists, the filing enterprises, upstream and downstream businesses and consumer groups to attend the seminar to provide their opinions. The FTC requested that related associations and guilds provide their views as well. After assessing the proposed merger based on the data gathered, the FTC concluded that: (i) Each of the filing companies was the main competitor of the other. The market shares of the other KTV service providers were extremely small. Hence, after the merger, the two companies would become a monopoly in the KTV market of Chinese Taipei as well as in the main regional markets (Taipei City and Taipei County). As a consequence, competition in the KTV market would be seriously harmed. (ii) After the merger, consumers would not have enough countervailing power against the two companies and their interests would be seriously affected. (iii) After the merger, the filing companies would be able to obtain certain economic benefits, but the economic benefits that the overall market and consumers would receive would be insignificant. In addition, there was no guarantee that they could benefit. (iv) The merger was not the only way for the filing companies to obtain economic benefits. (v) The filing companies made the promises of "not raising prices within five years and absorbing raw material cost increases as feedback to consumers" and "maintaining operations using two different brand names and existing locations." However, after assessing likely changes in consumers' interests under different circumstances, whether or not the promises could eliminate any likely competition restriction as a result of the merger, whether or not the overall economic benefit could increase, and the likelihood of the two companies fulfilling their promises, the FTC concluded that the promises were not enough to ensure that the level of market competition would remain the same as that before the merger. Moreover, it was difficult to ensure that the overall economic benefit of the merger would outweigh the disadvantages resulting from competition restraint. Finally, the FTC decided that the disadvantages resulting from competition restraint would be greater than the overall economic benefit and therefore prohibited the merger.

23. Holiday KTV and Cashbox filed an administrative litigation over the definition of product market and the basis for the calculation of the market share in the case, as well as the discrepancies between the FTC's decisions made in 2003 and 2006. The Taipei High Administrative Court thought that the legislators had authorized the FTC to establish necessary supplementation to merger review criteria and announce the Merger Directions. The court, in principle, respected the decisions made by the FTC according to the

Merger Directions and only reviewed the legality of such decisions. The FTC had reviewed this case in accordance with the Merger Directions and also conducted quantitative and qualitative analysis on the advantages and disadvantages of the merger. The FTC's review was in compliance with regular procedures adopted in merger regulation. Besides, no irrelevant factors to the merger had been taken into consideration. Therefore, the FTC's decision passed the court's legality review. Meanwhile, the FTC had made different decisions at different time points because of the dissimilar parameters applied. Therefore, there was no contradiction with the principle of impartiality. In view of the above-mentioned factors, the Taipei High Administrative Court concluded that the FTC's prohibition decision had been legally sound and therefore overruled the appeal.

3. Conclusion

24. The purpose of the FTA in Chinese Taipei is to maintain trading order and protect consumer interests, ensure free and fair competition, and promote economic stability and prosperity. The FTC reviews merger notifications in advance to prevent the market structure from deteriorating, the over-concentration of economic power and competition restrictions as a result of enterprise mergers. The merger review standards of the FTC are the overall economic benefit and the disadvantages resulting from competition restriction as specified in the FTA. Meanwhile, the considerations to be taken into account in reviewing horizontal, vertical and conglomerate mergers have been clearly listed in the Merger Directions. For mergers in specific industries, the FTC has also established corresponding administrative rules for such enterprises to follow as well as to serve as reference when the FTC reviews related cases.

25. In recent years, the number of FTC merger prohibition decisions was far less than conditional clearance. Before deciding to attach conditions/undertakings, the FTC will send written requests and hold seminars to obtain the opinions of related competent authorities, concerned enterprises, third parties and the public and then the opinions will be taken into consideration. These measures may vary from case to case. The undertakings/conditions that the FTC attached in the merger cases so far are mostly behavioral measures.

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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN CHINESE TAIPEI

-- 2015 --

29-30 November 2016

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TABLE OF CONTENTS

1. Changes to competition laws and policies, proposed or adopted

1.1 Summary of new legal provisions of competition law and related legislation

1. The Fair Trade Act (FTA) was amended and the amended version promulgated on February 4, 2015. In addition, there was another amendment promulgated on June 24, 2015 by adding Article 47-1 of the FTA. The February amendments to the FTA were considered to be the widest in range, largest in scale and most influential legal reforms since the FTA was first enforced more than twenty years ago; 70% of the provisions were amended. The new FTA contains fifty articles in seven chapters and the significant changes in the amendments are depicted as follows:

- The name of the competent authority of the FTA has been changed to the "Fair Trade Commission" (FTC) in order to accommodate the enforcement of the Organizational Act of the Executive Yuan and the Organic Act of the Fair Trade Commission. Meanwhile, as the FTC is the designated agency given the authority to enforce the FTA while local autonomous groups do not have such authority, the regulations in the old version of the FTA regarding local competent authorities have been removed to prevent confusion of jurisdiction between the central and local governments and legal disputes thereof incurred.

- To make the structure and content of the regulations in the FTA more reasonable and appropriate, the articles regarding the legislative purpose and terminology in Chapter I General Principles have been revised. The title of Chapter II has been renamed Restraints of Competition and the types of practices regulated include monopolization, mergers, concerted actions, resale price maintenance and other conduct likely to lead to competition restrictions. The types of practices placed under regulation in Chapter III Unfair Competition include false, untrue or misleading representation or use of symbols, imitation of unregistered famous trademarks, inappropriate giving of gifts and prizes in promotional activities, slandering, and other deceptive or obviously unfair conduct.

- In order to ensure that the regulations on monopolization can be compatible with domestic economic development and that the regulatory and administrative resources are reasonably allocated, related provisions have been revised to authorise the FTC, the competent authority, to adjust and announce the threshold in the definition of monopolistic enterprises.

- Merger regulations are widely revised. (i) It is specified that the amounts of shares held by and the turnover of affiliate businesses (sister companies included) are to be calculated together, whereas situations in which controlling shareholders are natural persons or groups are also covered by new regulations so that effective control of concentration of economic power in the market can be achieved and evasion of law can be prevented. (ii) A regulation has been added to give the FTC the authority to announce the sales threshold for any specific industry in order to cover the situations in different industries and markets. (iii) The review period has been extended to 60 days to allow the FTC to have more time to solicit opinions from industrial, government and academic sectors toward merger cases incurring critical disputes and to make detailed assessment. (iv) Types of merger that have no impact on the market structure and need not be filed have been added, such as the case where an individual enterprise making a reinvestment to set up a wholly-owned subsidiary which has no impact on the market structure need not file a merger notification so that the corresponding administrative cost can be saved.

- Provisions on circumstantial evidence for concerted actions have been added. It is specified that the FTC may act in accordance with the market condition, product or service characteristics, the cost and profit, and rationality of behavioral economics to assume that mutual understandings

with respect to concerted actions do exist so that investigations and determent of illegal concerted actions can be more effective.

- It is specified that the imposition of restrictions on resale prices is prohibited. However, in line with international tendencies, a proviso stating "those with justifiable reasons are not included" has been added and it is also specified that the same regulation and proviso apply to enterprises providing services.

- The original provisions regarding trade secrets have been deleted. The range of trade secrets and types of infringement conduct set forth in the Trade Secrets Act are more comprehensive than those included in the old FTA. Therefore, Subparagraph 5 of Article 19 in the old FTA has been deleted.

- Regulations on counterfeiting have been amended and it is also specified that registered trademarks cannot be applied for counterfeits. Related regulations set forth in the Trademark Act are once again to be adopted. Since this article is a supplementary regulation to the Trademark Act, the regulations on the administrative liability and criminal liability entailing counterfeiting have been removed and only civil liability is to be taken into account.

- An investigation suspension system has been added; enterprises are encouraged to take the initiative to stop or correct their activities while administrative agencies can exercise their supervisory authority to eliminate at the earliest time practices that are likely to jeopardize market order.

- Different amounts of fines have been established for different types of violations. The amount of the fine for conduct leading to competition restrictions has been doubled and the period given to the competent authority to impose sanctions has been extended from three years to five years to make fine imposition more reasonable as well as increase the effect of determent. In addition, in cases where violations are committed by trade unions or other business organizations, besides the union or organization, the individual members actually participating in the violation may also be fined in order to prevent individual businesses from evading their responsibility.

- Provisions on exemption from following the petitioning procedure have been added to allow concerned parties to file with judicial agencies for remedies by adopting the administrative litigation procedure directly to respond to sanctions imposed by the FTC according to the FTA.

- As the Multi-Level Marketing Supervision Act was promulgated to enter into force on January 29, 2014, regulations regarding multi-level marketing set forth in the old FTA have been removed.

2. The second amendments on June 24, 2015, added Article 47-1 to the FTA, authorizing the FTC to set up an anti-trust fund and provide rewards for the reporting of illegal concerted actions.

- Capital sources of the preceding anti-trust fund contain 30% of the fines imposed according to the FTA; interests accrued on the fund; budgetary allocations; and other relevant incomes.

- The fund shall be used for the purposes, including rewards for the reporting of illegal concerted actions; promotion of cooperation, investigation and communication matters with international competition law enforcement agencies; subsidies to the related expenses incurred from litigations associated with the Act and rewards reporting of illegal actions; deployment and maintenance of databases in relation to the Competition Law; research and development on the systems in

association with the Competition Law; education and advocacy of the Competition Law; and other necessary expenditures to maintain the market order.

1.2 Other relevant measures including amended guidelines

3. The FTC stipulated and amended 61 guidelines according to the FTA amendments in 2015, and the significant stipulations and amendments are as follows:

- "Enforcement Rules of Fair Trade Act of 2015";
- "Enforcement Rules of Multi-Level Marketing Supervision Act of 2015";
- "The Threshold of Total Sales at Which an Enterprise is Exempted from Being Deemed as a Monopolistic Enterprise";
- "Principles of the Fair Trade Commission Regarding the Definition of Relevant Markets";
- "Thresholds and Calculation of Sales Amount Which Enterprises of a Merger Shall File with the Fair Trade Commission";
- "Regulations Governing the Amount of Gifts and Prizes Offered by Businesses";
- "Directions for Records Reading";
- "Regulations on Payment of Rewards for Reporting of Illegal Concerted Actions";
- "Disposal Directions (Guidelines) on Automobile Spare Parts Trading";
- "Regulations Governing Management and Utilization of the Antitrust Fund";
- "Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases";
- "Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 and 15 of the Fair Trade Act";
- "Regulations for the Examination of Financial Holding Company Merger Cases";
- "Directions for Enterprises Filing for Merger";
- "Disposal Directions (Guidelines) on Handling Extraterritorial Merger Filings";
- "Disposal Directions (Guidelines) on Handling Merger Filings";
- "Directions for Enterprises Applying for Concerted Actions";
- "Disposal Directions (Policy Statements) on the Sales of Elementary and Junior High School Textbooks";
- "Disposal Directions (Guidelines) on the Reviewing of Cases Involving Enterprises Issuing Warning Letters for Infringement on Copyright, Trademark, and Patent Rights";

- "Disposal Directions (Guidelines) on Technology Licensing Arrangements";
- "Disposal Directions (Guidelines) on the Business Practices of Franchisers";
- "Disposal Directions (Guidelines) on the Application of Article 25 of the Fair Trade Act";
- "Disposal Directions (Policy Statements) on Cross-Industry Management Behaviors of the Digital Convergence Enterprises";
- "Disposal Directions (Policy Statements) on Telecommunications Enterprises";
- "Disposal Directions (Policy Statements) on the E-Marketplace";
- "Disposal Directions (Policy Statements) on Bottled Liquefied Petroleum Gas (LPG) Manual Distribution Center Operations";
- "Disposal Directions (Guidelines) on Gas Safety Equipment Sales";
- "Disposal Directions (Policy Statements) on Real Estate Brokerage";
- "Disposal Directions (Policy Statements) on the Financial Industry";
- "Disposal Directions (Guidelines) on Trade Practices Between Department Stores and Branded Products Suppliers";
- "Disposal Directions (Policy Statements) on the Distribution Industry";
- "Disposal Directions (Policy Statements) on the Motorcycle Industry";
- "Disposal Directions (Guidelines) on Domestic Civil Aviation Enterprises Filing for Mergers and Concerted Actions";
- "Disposal Directions (Guidelines) on Investigation Suspension";
- "Disposal Directions (Guidelines) on Cases Handled by Administrative Guidance";
- "Operating Directions for Cases Involving Recusal from Investigation";
- "Disposal Directions (Guidelines) on Additional Fees Charged by Distribution Enterprises";
- "Disposal Directions (Guidelines) on the Charging of Penalty Fees for Prepayment of Housing Loans by Financial Enterprises".

2. Enforcement of competition laws and policies

2.1 Action against anti-competitive practices, including agreements and abuses of dominant market positions

2.1.1 Summary of Activities

4. The Act permits the existence of monopolies as long as they do not abuse their market power. Concerted actions are strictly forbidden by the Act. However, while some exceptions are allowed for, these do require the FTC's prior approval and its decision is based on the public interest. The Act bans resale price maintenance in principle but requires the FTC to apply the rule-of-reason standard to other types of vertical restraints.

5. In 2015, the FTC processed 1,791 cases, including 1,666 cases received in 2015 and 125 cases carried over from the preceding year. By the end of 2015, 1,651 cases had been closed, and 140 cases were pending. A total of 138 complaint cases applicable to the Act were concluded in 2015 and, of these, 34 concerned anti-competitive practices.

6. Decision rulings on complaints and FTC self-initiated investigations were undertaken in relation to 144 cases in 2015, and only 24 of these fell into the category of anti-competitive practices. The FTC also initiated investigations into 15 anti-competitive cases.

Decision Rulings by the FTC in 2015 (Unit: Number of cases)

Year	Anti-competitive Practices	Abuse of Monopoly	Mergers	Concerted Actions	Resale Price Maintenance	Vertical Restraints
2015	24	1	2	12	7	2

Note: The number of illegal actions may exceed the number of cases involving decision rulings because a case may involve more than one illegal action.

2.1.2 Description of significant Anti-competitive cases (including those with international implications)

- Case 1: Cartel of 10 Aluminum and Tantalum Capacitor Companies

7. The FTC resolved at the 1,257th Commissioners' Meeting on December 9, 2015 that seven aluminum capacitor companies and three tantalum capacitor companies participated in meetings or bilateral communications to exchange sensitive business information such as prices, quantity, capacity, and terms of trade to reach agreements, and the conduct was sufficient to affect the market function of capacitors in Chinese Taipei. Since the practices were in violation of Paragraph 1, Article 14 of the FTA at the time, the FTC therefore imposed administrative fines of NT$5,796,600,000 in total (approximately equivalent to US$181.15 million).

8. The FTC stressed that this case has shown the successful results of its efforts in international enforcement cooperation with other competition authorities over the years. The FTC had worked with the competition authorities of the US, EU and Singapore in investigation activities since the beginning of the investigation. In addition to coordinating a synchronized investigation action on March 28, 2014, the FTC also exchanged enforcement experiences with these agencies through telephone conferences or email. The FTC's decision is the first among competition agencies and will be a major concern internationally as the investigation is still taking place the EU, the US, Japan, Korea, Singapore and China, etc.

9. The FTC's investigation has revealed that Japanese capacitor companies convened several multilateral meetings and engaged in bilateral communication since the 1980s, and exchanged sensitive business information to reach agreement. Products involved in this case have included aluminium capacitors and tantalum capacitors. There are seven aluminium capacitor companies, including Nippon Chemi-Con Corporation (NCC), Hong Kong Chemi-Con Limited (NCC HK), Taiwan Chemi-Con Corporation (NCC TW), Rubycon Corporation (RUBYCON), ELNA Co., Ltd. (ELNA), SANYO Electric (Hong Kong) Ltd. (SANYO HK), and Nichicon (Hong Kong) Ltd. (NICHICON HK), which have been involved in this case, each to a different extent and duration in terms of attending meetings. Starting from at least 2005 to January 2014 at the latest, the companies convened the MK Meeting (Market Study Meeting), CUP Meeting (Cost Up Meeting), and SM Meeting (Hong Kong Sales Manager Meeting) in Japan and other countries, or conspired bilaterally via e-mail, telephone or gatherings to exchange sensitive business information for reaching agreements. In addition, the three tantalum capacitor companies, namely, NEC TOKIN Corporation (NEC TOKIN), Vishay Polytech Co., Ltd. (VISHAY POLYTEC), and Matsuo Electric Co., Ltd. (MATSUO) also exchanged sensitive business information in the above-mentioned MK Meeting and conspired bilaterally via e-mail, telephone or gatherings to reach agreement.

10. Aluminium capacitors are mainly used in larger electronic products, e.g., PCs, household appliances, home video game consoles, and power supplies. Tantalum capacitors are principally used in thin and small electronic products, e.g., notebooks, mobile phones, and handheld game consoles. Domestic electronics companies largely rely on the companies involved in this case for the supply of capacitors. Even though there are a few aluminium capacitor companies in Chinese Taipei, their scale is far smaller than that of the Japanese capacitor companies. On the other hand, there are no domestic tantalum capacitor companies; all tantalum capacitors are fully imported. The total sales revenue from the aluminium capacitors and tantalum capacitors of the companies involved in this case is estimated at NT$50 billion and NT$16 billion, respectively, during the term of their concerted action. The aluminium capacitor companies NCC, RUBYCON and NICHICON are the top three aluminium capacitor companies in the world. The tantalum capacitor companies involved in this case also have considerable global market shares. Hence, the companies involved in this case have had a direct, substantial impact on the domestic markets with reasonably foreseeable effects.

11. The FTC indicated that the leniency program was introduced to the FTA on November 23, 2011. The case has a significant meaning for the FTC's enforcement as this was one of a few applications and involved the imposition of heavy fines following the introduction of the leniency program. The FTC is required to keep the identity of the leniency applicant confidential in accordance with the "Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases."

12. The FTC believed that the above-mentioned companies attended meetings to discuss prices and exchange sensitive business information and that such behaviour were sufficient to affect the market function of the domestic aluminium capacitor and tantalum capacitor markets. This was in violation of Paragraph 1, Article 14 of the FTA at the time. Furthermore, the unlawful conduct spanned nearly a decade and the illegal profit gained from Chinese Taipei's market was considerably high. Therefore, the FTC determined that this case was a severe violation punishable by a fine of no more than 10% of each company's sales revenue in the previous accounting year in accordance with Paragraph 2, Article 41 in the old FTA. The total fines in relation to this case were the highest to have been imposed on international businesses since the establishment of the FTC.

- Case 2: Dell's Boycott in a Tender of Server Antivirus Software

13. The FTC decided at the 1225th Commissioners' Meeting on April 29, 2015 that the Chinese Taipei Branch of Dutch-based Dell Inc. (hereinafter referred to as Dell) had violated Subparagraph 1 of Article 19 in the old version of the FTA by forcing other enterprises not to supply a specific enterprise in

order to achieve the purpose of hurting the said enterprise. Since the conduct was likely to restrict competition, the FTC imposed an administrative fine of NT$2 million (approximately equivalent to US$62,500) on the company.

14. The FTC received complaints that Dell was engaging in a boycott in violation of the FTA and launched an investigation. The findings indicated that when the Environmental Protection Bureau of Tainan City Government put up a tender in 2013 for the maintenance and consolidation of the air quality database operation platform, the Southern Branch of Chunghwa Telecom was awarded the project and appointed a collaborating supplier to procure the SonicWall Server Antivirus software needed for the project. Between March and June 2013 when the said collaborating supplier was negotiating with distributors for SonicWall products, Dell made the distributors refuse to provide a quotation or sell to the collaborating supplier on several occasions. In the end, the collaborating supplier was unable to obtain through domestic distributors the SonicWall products needed for contract performance.

15. SonicWall products constituted online security equipment released by US-based SonicWall LLC, which was a subsidiary of Dell Inc. SonicWall LLC had signed contracts with Weblink International Inc. (hereinafter referred to as Weblink International) and Zero One Technology Co., Ltd. for them to serve as distributors to sell Sonic Wall products in the country. Although Dell did not sell SonicWall products directly, it still had the responsibility to help the distributors promote SonicWall products and the distributors had to report to or acquire certificates of authorization from the original equipment manufacturer through Dell. In other words, Dell had the status of helping the original equipment manufacturer decide whether the distributors could acquire supplies at special project prices or obtain certificates of authorization from the original equipment manufacturer. Despite the fact that SonicWall products did not account for a large percentage of the domestic online information security equipment market, they were specified in the procurement project of the Environmental Protection Bureau of Tainan City Government and could not be replaced with information security products of other brands.

16. The FTC's investigation showed that, after winning the tender put up by the Environmental Protection Bureau of Tainan City Government in March 2013, the Southern Branch of Chunghwa Telecom appointed a collaborating supplier to procure the SonicWall products needed for the project and so the collaborating supplier asked Weblink International to give a quotation. However, when Dell found out, it informed Weblink International "not to process the matter and not to give any quotation." Later, in June 2013, the collaborating supplier turned to Taifon Computer Co., Ltd. (hereinafter referred to as Taifon Computers) for a quotation. Again, Dell requested that Taifon Computers have nothing to do with the project of the Environmental Protection Bureau of Tainan City Government. The collaborating supplier went back to Weblink International for a quotation and Dell once again demanded that Weblink International "not provide any supplies for the project of the Environmental Protection Bureau of Tainan City Government if any party should ask about prices or place an order."

17. The boycotting practice of Dell made the collaborating supplier unable to find any sources for SonicWall products in the country between March and August 2013. Although the collaborating supplier was eventually able to purchase the products overseas, Dell changed the authorization expiration date and made the products become invalid. As a result, the Southern Branch of Chunghwa Telecom could not complete the acceptance inspection as scheduled. The conduct of Dell also deterred other suppliers interested in bidding in the future and a chilling effect was created.

18. The FTC concluded that the aforesaid practice of Dell had met the description of "causing another enterprise to discontinue supply, purchase or other business transactions with a particular enterprise for the purpose of injuring such particular enterprise" specified in Subparagraph 1 of Article 19 of the Fair Trade Act at the time. It was a restriction of competition.

2.2 Mergers and acquisitions

2.2.1 Statistics on the number, size and type of mergers notified and/or controlled under competition laws

19. Mergers involving parties reaching a certain sales volume or a particular level of market share require the giving of notification to and obtaining no objection from the FTC. The FTC makes its decision based on whether the benefits to the economy as a whole will exceed the anti-competitive effects of the proposal.

Notifications for Mergers (Unit: Number of cases)

	Cases under Processing			**Results of Processing**				
Year	Carried Over from 2014	Received in 2015	Total	Mergers not Prohibited	Mergers Prohibited	Termination of Review	Combined into other Cases	Cases Pending at Year-end
2015	10	60	63	26	-	35	2	7

Statistics on Enterprise Mergers (Unit: Number of cases)

Year	Cases not Prohibited	**Type of Merger (Article 6, Paragraph 1 of the Fair Trade Act)**				
		Subparagraph 1	Subparagraph 2	Subparagraph 3	Subparagraph 4	Subparagraph 5
2015	26	4	21	4	5	20

Note: More than one type of merger may be applicable in some cases. Therefore, the total number of cases under different types of mergers exceeds the total number of approved cases.

2.2.2 Summary of significant cases

- Case 1: Vertical Merger between ASE and TDK

20. The FTC decided on July 8, 2015 not to prohibit the intended joint investment between Advanced Semiconductor Engineering Inc. (hereinafter referred to as ASE) and Japan-based TDK Corporation (hereinafter referred to as TDK) according to Paragraph 1, Article 13 of the FTA.

21. ASE planned to provide 51% of the capital and TDK 49% to set up a joint venture named ASE Embedded Electronics Incorporated. According to the percentage of shares in its possession, each company would appoint directors to participate in the management of the joint venture. TDK would license the new enterprise to use its "semiconductor embedded substrate technology" and patent to develop, produce and market IC embedded substrates. The condition met the merger type set forth in Subparagraphs 2, 4 and 5 of Paragraph 1 of Article 10 of the FTA. At the same time, ASE accounted for more than one quarter of the IC packaging and testing market share in 2014 whereas the sales of both merging parties in the same year also exceeded the amount announced by the FTC and achieved the merger filing thresholds specified in Subparagraphs 2 and 3 of Paragraph 1 of Article 11 of the FTA, while the proviso set forth in Article 12 of the same act did not apply. Therefore, a premerger notification needed to be filed with the FTC.

22. The main business of ASE was IC packaging and testing and the principal operation of TDK and the joint venture in the country was to be the use of the "semiconductor embedded substrate" technology to produce IC embedded substrates which were required in IC packaging and testing processes. There existed an upstream-downstream relationship and the merger was therefore a vertical merger involving the IC packaging and testing material market and the IC packaging and testing market in the country. After evaluation, the FTC concluded that the technology to be applied by the joint venture would not be the only one available for the production of IC embedded substrates. There were other alternatives; in addition, no

barriers to entry in the relevant market existed. Hence, after the merger, the choice of trading counterparts for other competitors would remain unchanged, the level of difficulty for enterprises outside the merger to enter the relevant market would not be heightened, the merging parties would not be able to abuse their market power, and no market foreclosure would result from the merger. Based on the above, the FTC concluded that the merger could not lead to any significant restriction of competition and the overall economic benefits from the merger would be greater than the disadvantages from any competition restriction thereof incurred. Consequently, the FTC did not prohibit the merger.

- Case 2: Conglomerate Merger between Semiconductor ICs and Information Products

23. The FTC decided at the 1222nd Commissioners' Meeting on April 8, 2015 that the overall economic benefit from the merger between WPG Holdings Co., Ltd. and Genuine C&C Inc. would outweigh likely disadvantages from competition restrictions thereof incurred and therefore did not prohibit the merger.

24. WPG Holdings Co. Ltd. (hereinafter referred to as WPG Holdings) intended to acquire 50% of the issued common stocks of Genuine C&C Inc. (hereinafter referred to as GCNC). In addition to 16.29% of the shares of GCNC already held by World Peace Industrial Group, a subsidiary of WPG Holdings, WPG Holdings would directly and indirectly possess 66.29% of the shares of GCNC after the public acquisition. The result would meet the merger description specified in Subparagraphs 2 and 5 of Paragraph 1 of Article 10 of the FTA. Meanwhile, the turnovers of both merging enterprises in 2013 also achieved the merger-filing threshold; hence, WPG Holdings acted according to Subparagraph 3 of Paragraph 1 of Article 11 of the FTC and filed a merger notification with the FTC.

25. WPG Holdings was mainly a semiconductor IC agent whereas GCNC was primarily an agent for information products. As there was no substitutability between the products the two enterprises were agents for, the case was considered to be a conglomerate merger. After merging, the two enterprises could consolidate resources to provide more comprehensive services in the supply chains of semiconductor ICs and information products and bring benefits of economies of scale. Furthermore, their upstream and downstream clients could still do business with other suppliers as long as the product prices and service quality were reasonable. In other words, there would be countervailing power to cope with the two enterprises.

26. Concluding that the merger entailed no significant likelihood of restrictions of competition and that the overall economic benefit would be greater than the disadvantages thereof incurred, the FTC therefore acted according to Paragraph 1 of Article 13 of the FTC and did not prohibit the merger.

3. The role of competition authorities in the formulation and implementation of other policies

27. In its first amendment in 1999, the new provision of the Act required that the Act not be applied to acts performed in accordance with other laws only if such other laws do not conflict with the legislative purpose of the Act. This amendment thereby affirms that the spirit and content of the Act be the core of economic policy.

28. The FTC has completed a comprehensive review of all relevant laws and regulations since 2001 to minimize potential conflicts among laws, to advocate free and fair competition, and to ensure the presence of a healthy operating environment in which all businesses are able to compete fairly. As a result, the FTC will continue to be aware of developments in various markets, perform reviews of other laws to determine whether they are in compliance with the Act and consult with relevant industry competent authorities to prevent related laws and regulations from impeding competition.

29. In 2015, the FTC organized and participated in various consultation meetings with other government authorities related to competition issues, as summarized in the following:

- Participated in the operation of the "Executive Yuan Response Team for Avian Influenza" and attended a meeting organized by the Executive Yuan for the "Response Center of Avian Influenza Control" to work with the Council of Agriculture (COA) to understand poultry-related market conditions. In addition, the FTC issued letters to warn relevant groups to comply with the FTA when the outbreak of the flu commenced. Meanwhile, the FTC investigated whether the poultry operators raised chicken prices during the flu outbreak in order to maintain trading order in the poultry market.

- Participated in the meetings of the "Special Task Force for Commodity Price Stabilization." The FTC reported on "Response Measures of Commodity Price Stabilization during Chinese New Year." Furthermore, to effectively monitor market conditions, the FTC established communication channels with competent authorities and immediately responded to the media and public opinion in order to efficiently maintain trading order.

- Participated in a coordination meeting organized by the Department of Consumer Protection, Executive Yuan for "Electric Slaughter Plants Lowering Prices of Meat Chickens" and representatives from the Charoen Pokphand Enterprise, Great Wall Enterprise Co., Ltd., the COA and the Ministry of Justice (MOJ) were also invited. After negotiating, both Charoen Pokphand and Great Wall agreed to reduce some of the prices of cuts of meat chickens.

- Participated in a meeting organized by the National Development Council (NDC) for the "Government Billboard Platform of Price Information" to report and discuss relevant issues regarding "Planning and Cross-Agency Cooperation of the Government Billboard Platform of Price Information." According to the meeting conclusion of the "Special Task Force for Commodity Price Stabilization," the NDC designed and established the website of the "Government Billboard Platform of Price Information." This platform also contains price information from the website of the "Special Task Force for Commodity Price Stabilization" and provides reference price ranges of commodities that the Ministry of Finance collects through the digital signature systems of convenience stores and supermarkets. The FTC actively cooperated and provided opinions for the processing of the public suggestions of the said platform.

- Participated in a meeting organized by the Ministry of Economic Affairs (MOEA) for the "Emergency Response Team for Drought Disaster" to discuss the possibility that phase three water rationing might cause possible panic rental and buying as well as illegal hoarding of material goods, such as waterwheels, bottles of mineral water, and buckets. The FTC then monitored market conditions for the said material goods to maintain trading order.

- Organized a meeting of "Amendments to Regulations for the Examination of Financial Holding Company Merger Cases" (draft) and invited the Financial Supervisory Commission (FSC) to widely discuss the review procedures and substantial standards. The FTC and the FSC then co-issued the "Regulations for the Examination of Financial Holding Company Merger Cases" on July 9, 2015, adding that the FTC may consult with the FSC and review regulations on special factors when financial holding companies file for merger notification in order to keep abreast of policy objectives of developments in the financial industry, supervision policy, and market competition.

- Organized a meeting of the "Prevention of Transnational Capital Sucking through the Cloud Network" and invited the Department of Prosecutorial Affairs, MOJ, the Investigation Bureau,

MOJ, the National Police Agency, Ministry of the Interior, the Banking Bureau, FSC, and the National Communications Commission to discuss possible cooperation mechanisms. The conclusion of the meeting was that relevant agencies were to mutually cooperate closely in their work, including improving links of official websites, providing advocacy materials, and supporting advocacy activities so as to effectively prevent illegal conduct.

- Organized the coordination meeting of "Monopolizing and Manipulating Produce Prices" and invited the COA. The meeting concluded that when the COA copes with price fluctuations due to the supply-and-demand imbalance of produce and investigates allegedly illegal conduct in accordance with the Agricultural Products Market Transaction Act, the COA may refer the case to the FTC if enterprises are involved in manipulating produce prices, or to the prosecutors if enterprises intend to drive up prices or hoard goods.

- Organized the seminar on "Fair Trade Commission Disposal Directions (Policy Statements) on the Sales of Elementary and Junior High School Textbooks" and invited local education authorities from Kaohsiung City, Tainan City, Pingtung County, Taipei City, and New Taipei City to solicit possible suggestions and advocate competition law.

- Organized the seminar on "Disposal Directions (Guidelines) on Automobile Spare Parts Trading" (draft) and invited the Ministry of Transportation, the Industrial Development Bureau, MOEA, the Automotive Research & Testing Center, Vehicle Safety Certification Center, industry representatives, scholars and experts to attend and solicit ideas. After referring to comments made in the seminar, the FTC issued the "Disposal Directions (Guidelines) on Automobile Spare Parts Trading" on November 17, 2015.

4. Resources of competition authorities

4.1 Resources overall

4.1.1 Annual budget

NT$337.556 million in 2015 (approximately equivalent to US$10.72 million in Dec. 2015).

4.1.2 Number of employees (person-years)

30. There were 215 employees at the end of the year 2015, including all staff in the operations and administrative departments and 7 full-time Commissioners. The operations departments include the Department of Service Industry Competition, Department of Manufacturing Industry Competition, Department of Fair Competition, Department of Planning and the Department of Legal Affairs. Over 91% of employees have bachelor degrees with majors in different subjects at the university level.

31. In terms of the educational background percentages, 26%, 24%, 8%, 6% and 36% of the employees majored in law, economics, business administration, accounting and other related fields (including information management, statistics, and public administration), respectively.

32. As a result, the structure of the human resources of the FTC is as follows:

Category	No. of employees
Lawyers	55
Economists	52
Other professionals & support staff	108
All staff combined	215

4.2 Human resources (person-years) applied to:

4.2.1 Enforcement against anti-competitive practices and merger review

33. Apart from the Department of Fair Competition, which has 31 staff and is responsible for unfair competition practices, such as false and misleading advertisements, counterfeiting and multi-level sales cases, the Departments of Service Industry Competition and Manufacturing Industry Competition of the FTC handle all kinds of anti-competitive cases, including the abuse of dominant market positions, merger reviews, cartels and various vertical restraints.

34. The Department of Service Industry Competition is responsible for cases related to the services and agricultural sectors, and the Department of Manufacturing Industry Competition is responsible for cases related to the manufacturing sector. There are 32 staff members in the Department of Service Industry Competition and 28 in the Department of Manufacturing Industry Competition.

4.2.2 Advocacy efforts

35. In 2015, 10 of the 25 staff members in the Department of Planning of the FTC were primarily in charge of public outreach programs. However, since most of the outreach programs for competition advocacy were case-oriented, almost every department staff member played an active role in outreach activities. The FTC organized 78 seminars in 2015 for the public, students, and local governments to introduce the regulations of the FTA.

36. Furthermore, in 2015, the FTC held 3 seminars for the various business sectors to introduce the leniency program, administrative fines, and the new amendments to the FTA in order to ensure acquaintance with the new provisions of the FTA. The FTC also held 1 seminar for business sectors to introduce the "Code of Conduct for the Antitrust Compliance of Enterprises."

4.3 Period covered by the above information

January through December 2015

5. Summaries of or references to new reports and studies on competition policy issues

37. The FTC studied and published reports on competition policy issues in 2015 with the following titles. All of them are only available in Chinese.

- A Study on the Role of a Competition Authority in Improving Government Administration.
- A Study on the Relationship between Management Behavior of the Search Engine Industry and the FTA.
- A Study on Regulations of Automobile (including Parts) Industry under Competition Law.
- A Study on Synergy between the Operation of the Multi-Level Marketing Protection Institution and the TFTC Enforcement.
- A Study on the Reporting Rewards System—Taking Competition Law for Example.

38. The FTC also engaged in outsourced research, and published the following research reports in 2015. A short English abstract is available for both reports.

- Research on the Market Price Warning System of Important Material Goods.
- Research on the Ex-Post Impact Assessment of Merger Decisions.

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

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English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

ROUNDTABLE ON "PRICE DISCRIMINATION"

-- Note by Chinese Taipei --

29-30 November 2016

This document reproduces a written contribution from Chinese Taipei submitted for Item 7 of the 126th OECD Competition committee on 29-30 November 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/price-discrimination.htm

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [E-mail: Antonio.Capobianco@oecd.org].

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CHINESE TAIPEI

1. This report will explain laws and regulations as well as cases of price discrimination of the Fair Trade Commission (hereinafter referred to as the "FTC") of Chinese Taipei.

1. Provisions of the Fair Trade Act pertaining to Price Discrimination

2. Article 9 of the Fair Trade Act (hereinafter referred to as the "FTA") provides that: "Monopolistic enterprises shall not engage in any one of the following conducts: 1. directly or indirectly prevent any other enterprises from competing by unfair means; 2. improperly set, maintain or change the price for goods or the remuneration for services; 3. make a trading counterpart give preferential treatment without justification; or 4. other abusive conducts by its market power." The primary purposes of regulating monopolistic enterprises are[1]: to prevent market foreclosure or the elimination of competition; and to prohibit monopolistic enterprises from abusing their market position, which may lead to a loss of consumer surplus and further lower the allocation efficiency of social resource. In this regard, a monopolistic enterprise engaging in price discrimination may violate the FTA.

3. Even if an enterprise is not a monopolistic enterprise, price discrimination by the enterprise with market power may constitute an anticompetitive conduct, prohibited by the FTA. According to Subparagraph 2 of Article 20 of the FTA, discrimination means that an enterprise sells the same product or provides service to different enterprises competing at the same level with different prices or non-price conditions, which may impede horizontal competition between its trading counterparts through vertical restraints. A differentiated treatment, however, is not per se illegal in Chinese Taipei. The above-mentioned provision does not require an enterprise must set the same prices for all its trading counterparts.

[1] Article 8 of the FTA provides that, "An enterprise shall not be deemed a monopolistic enterprise as defined in the preceding article if none of the following circumstances exists:

1. the market share of the enterprise in the relevant market reaches one half of the market;

2. the combined market share of two enterprises in the relevant market reaches two thirds of the market; and

3. the combined market share of three enterprises in the relevant market reaches three fourths of the market.

Under any of the circumstances set forth in the preceding paragraph, where the market share of any individual enterprise does not reach one tenth of the relevant market or where its total sales in the preceding fiscal year are less than the threshold amount as publicly announced by the competent authority, such enterprise shall not be deemed as a monopolistic enterprise.

An enterprise exempted from being deemed as a monopolistic enterprise by any of the preceding two paragraphs may still be deemed a monopolistic enterprise by the competent authority if the establishment of such enterprise or any of the goods or services supplied by such enterprise to the relevant market is subject to legal or technological restraints, or there exists any other circumstance under which the supply and demand of the market are affected and the ability of others to compete is impeded.

The differentiated treatment is illegal when the conduct restrains competition in the relevant market without justifications[2].

4. According to Article 26 of the Enforcement Rules of the Fair Trade Act, the following factors shall be taken into consideration when determining "just cause" referred to in the above-mentioned provision: (1) Supply and demand conditions in the market; (2) Cost differences; (3) Transaction amounts; (4) Credit risks and other reasonable grounds. In determining whether the discrimination mentioned in the preceding paragraph is likely to restrain competition, the totality of the following factors shall be considered: (1) The intent and purposes of the parties; (2) Market position; (3) The structure of the market to which they belong; (4) The characteristics of the goods or services; and (5) The impact that carrying out such restrictions would have on market competition. The above-mentioned factors are taken into consideration when determining whether or not price discrimination by enterprises is distorting competition between downstream purchasers.

5. The FTC has established regulations for the cable television, telecommunications, and electronic marketplaces, in which price discrimination may be a violation of the FTA. In the case of the Explanation of the Fair Trade Commission of Regulations on the Telecommunications Industry, several just causes for price discrimination by monopolistic enterprises are listed as follows: (1) Average pricing based on the obligation to universal service. (2) Off-peak pricing adopted to increase network utilization. (3) Provide subscribers with combination rates, package rates, or quantity discount rates. (4) Ramsey pricing[3] to recover fixed cost or common cost. (5) Pricing to reflect on different connection costs between internal and external subscribers.

2. Development of price discrimination in the digital economy

6. In the case of electronic marketplaces, which are the main digital trading spaces used by enterprises for e-commerce, a virtual open space is provided on the Internet as a trading platform using network technology, and brings enterprises together from upstream to downstream to form an online trading community. Electronic marketplaces allow buyers and sellers to quickly find suitable trading partners and products and complete transactions for products or services. The FTC established the "Explanation of the Fair Trade Commission of Regulations on Electronic Marketplaces" on the basis of two principles "maintaining fair and reasonable market competition order in e-commerce" and "not going against the nature of network technology and not obstructing its development potential," so that participants of electronic marketplaces may understand relevant regulations in the FTA.

7. In the actual operations of an electronic marketplace, there may be potential exclusive clauses, or product information disclosed on the platform may benefit certain participants of the electronic marketplace. The differentiated treatment may cause higher cost or lower utility for other participants in the electronic marketplace. If the exclusive restrains competition in the relevant market, it may be deemed as a violation of the FTA.

8. When determining the impact of exclusive conduct on competition, a number of factors can be taken into consideration, including whether or not it increases the cost of competitors and whether or not it

[2] Subparagraph 2 of Article 20 of the Fair Trade Act states that, "No enterprise shall engage in any of the following acts that is likely to restrain competition: …2. treating another enterprise discriminatively without justification. …"

[3] Ramsey pricing refers to setting higher prices for consumers with less elastic demand and lower prices for consumers with more elastic demand under the condition that total revenue is equal to total cost (i.e., there is no excess profit), in order to gain the greatest social surplus without affecting the enterprise's normal operations.

lowers the downstream competitiveness of its rivals in the service market provided by the electronic marketplace. In addition, from the perspective of customers, factors that must be taken into consideration include the scope of damages caused by restricting competitors from using the electronic marketplace, as well as the cost of alternatives adopted by these enterprises to prevent or reduce their losses. When evaluating the scope of damages, it is necessary to consider the potential impact on market competition from the enterprises excluded from the market, and whether or not exclusive conduct is a reasonable and necessary means that provides the benefit of promoting competition, and is capable of compensating the losses from restraining competition. As electronic marketplaces become more mature, concerns of violating the FTA may be raised, but these concerns are not new and can still be analyzed using traditional methods of the FTA. The explanation above is specific to the characteristics of electronic marketplaces, using conduct that is likely to violate current provisions of the FTA, and improving the legal environment for operating electronic marketplaces.

3. Case examples for Price discrimination in Chinese Taipei

3.1 The case of warehouse rent collection by TIPC Ltd.

9. Chinese Taipei's local harbor administrative agencies, Taichung Harbor Bureau and Keelung Harbor Bureau, were merged into a state-owned company, TIPC Ltd. (TIPC) on March 1st, 2012. TIPC and its subsidiaries own all international ports and their facilities in Chinese Taipei, and operate the international ports exclusively in accordance with the Commercial Port Law. Since no other enterprises can copy or replace the ports and facilities owned by TIPC, it is deemed a monopolistic enterprise as referred to in the FTA.

10. In 2012, the FTC received complaints that, when collecting rent for warehouse buildings in the Port of Taichung, TIPC used the current value of buildings as the basis for calculating rent for those new entrants who did not co-build the building with TIPC. However, for those incumbents who did co-build the building with TIPC, the rent was calculated by original cost of construction and the annual growth rate of the consumer price index was also excluded. TIPC was thus alleged to violate provisions of the FTA on monopolistic enterprises abusing their market position by discriminatively treating downstream freight loading and unloading forwarders without justification. The FTC's investigation revealed that TIPC should be able to consider fair competition in its downstream market once a tenancy agreement expires, and adjust conditions of the agreement accordingly. Yet, it extended its contracts with trading counterparts using old trading conditions. As a result, when downstream stevedores gain the right to rent or continue renting port facilities, new entrants will have to pay higher rent than existing market participants due to different calculation formulas used for the buildings, raising concerns of restraining competition in the stevedoring market.

11. The FTC considered that TIPC leased the buildings to downstream stevedores at different times, which resulted in different applicable laws, and that it has no motive for illegal conduct or intention for unfair competition. Moreover, TIPC began formulating a common formula for calculating rent after commercial ports were restructured. It is clear that TIPC had intended to rectify the different formulas for calculating rent. Therefore, the FTC did not impose a fine but required TIPC to revise, announce, and implement the rent calculation formula for commercial port facilities before January 1st, 2015.

3.2 The case of price discrimination by Chung Hwa Pulp Corporation against its distributors

12. Copper plate paper and wood free paper are the main types of cultural paper used in Chinese Taipei. Chung Hwa Pulp Corporation has had roughly a 25% share of the cultural paper market in each of the last two years, the highest in the cultural paper market. Cultural paper is a highly open market, imported paper is tax free, shipment is fast, and there are no barriers to entry. Moreover, paper factories in

Indonesia and China are rapidly increasing their production capacity, so it is very hard for paper factories in Chinese Taipei to compete with international paper corporations. The ratio of imported cultural paper has sequentially increased each year over the last three years and reached 42% in 2014, which is far higher than the market shares of Chung Hwa Pulp Corporation. It is apparent that foreign paper corporations have entered the cultural paper market of Chinese Taipei and are competing with local enterprises.

13. There is a significant difference in the amount of cultural paper purchased by distributors in different areas of Chinese Taipei, in which the demand of the northern area accounts for 60% and that of the central area only accounts for 10%. Hence, Chung Hwa Pulp Corporation discriminatively set prices based on purchases, and the price per pound was NT$0.2-0.3 lower for distributors in the northern area than for distributors in the central area. The quotation from Chung Hwa Pulp Corporation given to distributors already included the shipping fee, which was on average NT$1,000 per ton. The distance of shipments in the northern and central areas was not considered, and the shipping fee was shared according to the sales ratio (northern to central is roughly 6:1). However, Chung Hwa Pulp Corporation did not restrict distributors from selling paper products to other areas.

14. The FTC's investigation showed that, if the price in the central area was higher than in the northern area, considering that the quotation from Chung Hwa Pulp Corporation already included the shipping fee, the shipping fee per pound for distributors in the central area was NT$0.32 higher than for distributors in the northern area, which was extremely close to the average price difference between distributors in the two areas (no higher than NT$0.3 per pound). This showed that Chung Hwa Pulp Corporation did indeed discriminatively set prices based on sales volume. However, Chung Hwa Pulp Corporation did not have significant market power, even if it did discriminatively set prices for different areas, and with imported paper able to immediately and fully participate in competition in the cultural paper market, the damage to competitors was limited.

15. The FTC concluded that, taking into consideration the market power and price raising ability of Chung Hwa Pulp Corporation, as well as competition between brands, dividing distribution areas for price discrimination was not likely to restrain competition in the cultural paper market, and was not a violation of Subparagraph 5 of Article 20 of the FTA based on current evidence. However, price differences between areas may result in insufficient trading liquidity across areas, damaging the rights of consumers in certain areas, and limiting competition within the brand. The Commission has thus warned Chung Hwa Pulp Corporation to take note of relevant provisions of the FTA.

4. Conclusion

16. Besides analyzing the evidence for each case, the FTC also chooses a suitable economic analysis method based on the data it has collected and the characteristics of the relevant industry. When determining whether or not a case has violated provisions of the FTA, the following factors may be taken into account by the FTC : (1) Practices and trading manner of the specific industry; (2) Opinion of the industry's competent authority regarding the fee rate (a non-economic investigation may be challenged by other policy stances); (3) If specific enterprises are subjected to discriminative treatment; (4) Pricing standard; (5) Distribution channel structure and trading volume; (6) Business risk and cost; (7) Quantity and characteristics of the product in the market; and (8) If the enterprises are at the same competition stage.

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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution from Chinese Taipei

-- Session III --

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INDEPENDENCE OF COMPETITION AUTHORITIES--FROM DESIGNS TO PRACTICES

-- Chinese Taipei --

1. This paper explains changes in the organizational design of the independence of the Fair Trade Commission (FTC), the central competition authority in Chinese Taipei, from when it was set up until its independence was further reinforced as a result of the structural reform in 2012 and the latest amendment to the Fair Trade Act in 2015.

1. The independence of the FTC prior to 2012

2. Chinese Taipei's competition law, the Fair Trade Act (hereinafter referred to as the FTA) was promulgated on February 4, 1991 and went into effect a year later, in 1992. Article 25 of the FTA (1991) provides that, "In order to administrate matters in respect of fair trade as set forth in this Law, the Executive Yuan shall establish the Fair Trade Commission". Hence, the "Organic Statute of the Fair Trade Commission" [1] (hereinafter referred to as the Organic Statute) was promulgated on January 13, 1992 and the "Fair Trade Commission, the Executive Yuan" was established on January 27, 1992 accordingly.

3. According to the Organic Statute, the FTC was a ministerial level agency under the Executive Yuan (i.e., the Cabinet) and its responsibilities included the formulation and implementation of fair trade policies and laws. Although there was no statutory definition of the independent agency, the FTA (1991) and the Organic Statute ensured the FTC to some extent its independence in the following aspects.

4. As specified in the Organic Statute, the FTC was a collegial body[2] with nine (9) full-time commissioners, including one Chairperson and one Vice Chairperson, who all were recommended by the Premier and appointed by the President. Each commissioner should serve a term of three years and might be re-appointed[3]. Every appointed commissioner had to have knowledge and experience in law, economics, finance, tax, accounting, or management[4].

5. It was set forth in Article 28 of the FTA, "The Fair Trade Commission shall carry out its duties independently in accordance with the law and may dispose of cases in respect of fair trade in the name of the Commission." Meanwhile, it was also prescribed in Article 11 of the Organic Statute, "The number of commissioners with the same political party shall not be more than one-half (1/2) of the total number of commissioners". Article 13 stated that "Commissioners of the Commission shall be beyond party affiliations and shall act independently in performing their duties under the law." All the aforementioned provisions were designed to protect the independence of the commissioners as well as the agency from intervention of political parties or other agencies in the policy formulation and law enforcement of the FTC.

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1 The Organic Statute had been amended in 2000 and 2002, respectively, and was repealed on May 20, 2015 due to government structural reform.

2 Article 15 of the Organic Statute.

3 Article 11 of the Organic Statute.

4 Article 12 of the Organic Statute.

6. Article 15 of the Organic Statute also stipulated, "The Commission shall meet once a week and special meetings may be held if necessary. To adopt a resolution at the meeting of commissioners, a majority of the commissioners is required to be present at the meeting and a majority of the commissioners present shall vote in favor thereof." Furthermore, Article 15-1 stated that, "A Commissioners' Meeting is not open to the public. However, the minutes of the Commissioners' Meeting shall be made public, except for matters that are required to be kept confidential. All participants, attendants and record keepers present at a Commissioners' Meeting shall refrain from divulging the processes of pros and cons of the Meeting's resolutions and any other particulars that a Commissioners' Meeting resolves to be kept confidential." These provisions were designed to ensure that the commissioners could feel free to express their opinions without any interference or pressure from any specific party or specific group. Moreover, commissioners would not necessarily worry about being accused of their personal views and thus they were able to carry out their duties independently.

7. From the above-mentioned points, while the FTC was part of the administrative system under the Executive Yuan, its organization was designed to provide high-level protection for its independence: 1) as a collegial body-every decision was made by a majority vote of the commissioners; and 2) each commissioner's term was fixed and the commission was therefore not subject to the change of ruling parties.

8. Nevertheless, the design was not fully safeguard the FTC's independence. Firstly, commissioners nominated by the Premier would be appointed directly by the President; the procedure was not checked by the Legislative Yuan (i.e., the Congress). Moreover, in addition to judicial review, the FTC's decisions could be appealed on the merits to the Appeal and Petition Committee of the Executive Yuan. This had been the major challenge to the independence of the FTC. Fortunately, these challenges were addressed when the FTC was restructured in 2012 and the FTA was amended in 2015.

2. The independence of the FTC after government restructuring in 2012

9. Chinese Taipei began to develop its government restructuring reform in the 1990s for building a more "streamlined, flexible and effective government" and enhancing its competitiveness. The "Basic Code Governing the Central Administrative Agencies Organizations" (hereinafter referred to as the Basic Code) promulgated by the Legislative Yuan on June 23, 2004, set forth meaning of an "independent agency" clearly.

10. The term "independent agency" is defined in Article 3 of the Basic Code as "a commission-type collegial organization that exercises its powers and functions independently without the supervision of other agencies, and operates autonomously unless otherwise stipulated." Article 4 states that the organization of an independent agency has to be governed by laws. As for the composition of an independent agency and the appointment and dismissal of its members, Article 21 provides as follows: "The term of office, and proceedings for the appointment, suspension and discharge of commission members of independent agencies shall be clearly stipulated. Nominations for full-time commission members of second-level independent agencies must be submitted to the Legislative Yuan for approval. For other independent agencies, commission members shall be appointed by the head of the first-level agency. When making appointments mentioned in the preceding paragraph, the head of the first-level agency shall designate one of the members as head of the agency and another member as deputy head. The number of commission members referred to in Paragraph 1 shall be five to eleven in principle unless otherwise required. The number of members belonging to the same political party shall not exceed a certain proportion."

11. In the Organization Act of the Executive Yuan promulgated on February 3, 2010, the FTC is defined as one of the second-level independent agencies[5] under the Executive Yuan. On the basis of the above-mentioned laws, the FTC drew up the draft "Organic Act of the Fair Trade Commission" (hereinafter referred to as the Organic Act). It was passed by the Legislative Yuan on October 28, 2011 and went into effect on February. 6, 2012. After the reform, the title of the FTC was also changed from the original "Fair Trade Commission, Executive Yuan" to "Fair Trade Commission." The FTC remained a politically impartial agency and became more independent.

12. Before 2012, FTC's commissioners as prescribed in the Organic Statute were recommended by the Premier and appointed by the President. Under the 2011 Organic Act, commissioners nominated by the Premier are subject to consent by the Legislative Yuan. The FTC is still an administrative agency under the Executive Yuan, but the new organizational design gives the Premier only the power to nominate the commissioners and the approval of the Legislative Yuan is required before the nominees can be appointed. In other words, the Congress is able to review candidates nominated by the Premier so as to diminish the Executive Yuan's influence and thus ensure the commission's impartiality and independence.

13. After restructuring in 2012, the number of commissioners has been reduced from nine to seven and the office term has been extended from three years to four years. At the same time, staggered terms of office have also been adopted to make it possible for old commissioners to pass on their experiences to new ones and ensure consistency and continuity of the FTC's decisions[6]. All commissioners must have the knowledge and experience with regard to law, economics, accounting or management[7] and commissioners shall also be politically impartial and prohibited from participating in political party activities and they shall perform their duties independently according to law[8]. In addition, the Organic Act provides that the Premier may dismiss commissioners under one of the following situations: 1) too ill to perform their duties; 2) committing illegal acts, reckless disregard of duties, or other misconducts; and 3) held in detention or indicted for criminal commitments[9]. This provision aims to ensure that each commissioner is a man with integrity required by his duty.

14. After the Legislative Yuan approved the nominations, the Premier shall designate one of the commissioners as the Chairperson and another as the Vice Chairperson. If both the Chairperson and the Vice Chairperson have left the positions or are unable to exercise their duties, the Premier has to designate one of the commissioners as the acting chairperson[10]. As mentioned previously, the FTC is a collegial body. All policies and case decisions are made by majority vote through full discussion among the commissioners in order to prevent any decision from being made upon the inclination of one single individual. Each commissioner has one vote in a case and every decision requires majority attendance of the commissioners and the consent of the majority of the attending commissioners[11]. Under such circumstances, the Chairperson is unable to make a decision alone at Commissioners' Meeting. As a

5 Article 9 of the Organizational Act of the Executive Yuan: "The Executive Yuan establishes the following independent administrative institutions equivalent to the second-level agencies of the Central Government: (1) Central Election Commission; (2) Fair Trade Commission; and (3) National Communications Commission."

6 Article 4 of the Organic Act.

7 Article 6 of the Organic Act.

8 Article 8 of the Organic Act.

9 Article 7 of the Organic Act.

10 Paragraph 1 of Article 4 and Article 5 of the Organic Act.

11 Article 10 of the Organic Act.

consequence, the Executive Yuan can't give instructions on or interfere with the policy-making or case investigations and decisions of the FTC by designating the Chairperson.

3. The decision-making independence of the FTC has been strengthened since the 2015 FTA amendment

15. The amendment to the FTA enacted on February 4, 2015 was a significant overhaul of competition law in Chinese Taipei. The most important change for agency independence in this amendment is the direct application of the administrative litigation procedure when a concerned party appeals the FTC's decision. This helps maintain the professionalism and credibility of the FTC as an independent agency and prevent unnecessary administrative intervention.

16. Before the 2015 amendment, the administrative sanctions or decisions made by the FTC could be appealed to the Appeal and Petition Committee of the Executive Yuan, according to Subparagraph 7 of Article 4 of the Administrative Appeal Act. As a result, the sanctions or decisions made by the FTC would be reviewed by the Executive Yuan to decide whether they were legal and appropriate. Statistics showed that, between February 1992 and January 2015, 5.5% of the administrative decisions of the FTC were revoked after the Executive Yuan reviewed the cases. The percentage was not high. Given that the administrative appeal decision can't be appealed by the FTC, administrative reviews had a certain impact on the independence of the FTC.

17. As defined in the Basic Code, an independent agency is to exercise its powers and functions independently without the supervision of other agencies and operates autonomously unless otherwise stipulated. If the sanctions and decisions made by the FTC had to be reviewed by the Executive Yuan, it would affect to some extent the independence of the FTC. Considering the FTC's decision-making independence, Article 48 of the 2015 amendment states that the Administrative Litigation Act shall apply directly and such cases will be reviewed by judicial courts, rather than the Executive Yuan. The amendment has made it possible for the FTC to fulfill its duties as a real independent agency and its autonomy so that unnecessary administrative intervention is minimized.

4. FTC's staff employment and budget

18. As an administrative agency, the FTC only can recruit employees who passed civil service examinations. The professional backgrounds of employees at the FTC include those majored in law, economics, management, accounting, and so on. Promotions of staff members are conducted by an internal committee of the FTC according to civil service regulations. The FTC also designs a number of training programs for all staff to cultivate the expertise the FTC needs. As all civil servants, all FTC staff members have to abide by the administrative impartiality regulation.

19. In terms of the FTC's budget, as a subordinate agency of the Executive Yuan, the FTC requires the approval of the Directorate-General of Budget, Accounting and Statistics of the Executive Yuan for its budget plans and expenditure verification. In the meantime, the central government general budget needs to be reviewed by the Legislative Yuan, and the Legislative Yuan may invite the Chairperson of the FTC to answer questions when it reviews the FTC's budgets or draft amendments to the FTA. In addition to funding from the central government, the FTC was given right to set up its own fund under Article 47-1 of the FTA[12] in 2015 amendment proposed by legislators. The most important sources of this fund is from

[12] Article 47-1 of the FTA: "To strengthen the investigation and sanction over concerted actions and promote the healthy development of market competition, the competent authority may set up an anti-trust fund.

Capital sources of the preceding anti-trust fund are as follows:

30% the sanctions imposed by the FTC under the FTA and the fund can only be used strictly on the purposes articulated by Article 47-1.

20. The Executive Yuan and the Legislative Yuan may sometimes request that the FTC investigate certain industries or enterprises. The FTC will evaluate whether the requests for such investigations involve the FTA. If they are beyond the jurisdiction of the FTC, the Chairperson will turn down the requests. Otherwise, the FTC will launch investigations and hand down sanctions according to law.

5. Conclusion

21. Although competition policy is an important means of maintaining trading order and protecting the interests of consumers, the government has to take other policy targets into consideration as well, particularly when the characteristics of certain industries causes contradictions between industrial and competition policies. As for law enforcement of the FTA, the fundamental economic law has to be precedence in cases where competition is a concern. If there are other applicable laws, such laws may apply only when there is no contradiction with the legislative purposes of the FTA[13]. The FTC exercises its functions independently according to law, and may launch investigations upon complaints or ex officio. In other words, the FTC has discretion to make decisions to investigate and hand down sanctions to maintain its independence.

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1. 30% of the fines imposed according to the Act;
2. Interests accrued on the fund;
3. Budgetary allocations;
4. Other relevant incomes.

The fund under Paragraph 1 shall be used for the following purposes :

1. Rewards for the reporting of illegal concerted actions;
2. Promotion of cooperation, investigation and communication matters with international competition law enforcement agencies;
3. Subsidies to the related expenses incurred from litigations associated with the Act and rewards reporting of illegal actions;
4. Deployment and maintenance of databases in relation to the Competition Law;
5. Research and development on the systems in association with the Competition Law;
6. Education and advocacy of the Competition Law;
7. Other necessary expenditures to maintain the market order.

The previous paragraph governing the scope of reporting reward, the qualifications of informer, the criteria of rewarding, the procedures of rewarding, the revocation, abolishment and recovery of reward, and the maintenance of confidentiality of the informer's identity shall be determined by the competent authority."

[13] Article 46 of the FTA: "The Act has precedence over other laws with regard to the governance of any enterprise's conduct in respect of competition. However, this stipulation shall not be applied to where other laws provide relevant provisions that do not conflict with the legislative purposes of this Act."

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Global Forum on Competition

SANCTIONS IN ANTITRUST CASES

Contribution by Chinese Taipei

--Session IV--

1-2 December 2016

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SANCTIONS IN ANTITRUST CASES

-- Chinese Taipei --

1. This report explains the criteria and considerations adopted by the Fair Trade Commission (the FTC) of Chinese Taipei when imposing sanctions in antitrust cases.

1. Sanction-related provisions under the Fair Trade Act

1.1 Administrative sanction

2. The term "enterprise" used in the Fair Trade Act (FTA) refers to a company, a sole proprietorship or partnership, any individual or organization (such as a business association) engaging in transactions through the provision of goods or services. In other words, all natural persons and juristic persons engaging in transactions by providing goods or services are subject to the FTA.

3. Anticompetitive conducts prohibited under the FTA includes abuse of monopoly power (Article 9), horizontal concerted action (Article 15), unjustified resale price maintenance (Article 19), and boycotting or tie-in sales as well as other unlawful vertical restraints (Article 20). Under Paragraph 1, Article 40 of the FTA, the FTC can impose an administrative fine on the above infringements, ranging from a minimum of NT$ 100,000 up to NT$ 50 million (approximately equivalent to US$ 3,175 to US$ 1,587,300 at the exchange rate 31.5 of NTD/USD in October 2016). In addition to administrative fine, the FTC can also order the offender to cease or rectify its conduct or take necessary corrective action.

4. If the enterprise fails to follow the FTC's decision to cease or rectify its conduct or take any necessary corrective action in the prescribed period, except for subsequent orders to cease or rectify the conduct, the FTC can further impose an administrative fine ranging from NT$ 200,000 to NT$ 100 million (approximately equivalent to US$6,350 to US$3,174,600 at the exchange rate 31.5 of NTD/USD in October 2016) until the company that engaged in anti-competitive conducts ceases or corrects its unlawful conduct.

5. In certain serious violations, nevertheless, the profits that enterprises obtained from such unlawful conduct far exceeded the limit for administrative fines set forth in Paragraph 1, Article 40 of the FTA. To ensure such unlawful conduct would be given severe punishments and to deter future attempts, a large amount of administrative penalties will be imposed on the violators engaging in abusing dominant positions or concerted actions. In accordance with Paragraph 2, Article 40 of the FTA, the FTC may impose an administrative fine of up to 10% of the total sales income of an enterprise in the previous fiscal year without being subject to the limit of the administrative fine set forth in the preceding paragraph if the enterprise is deemed by the FTC as being in serious violation of Articles 9 and 15 (referred to as abuse of monopoly power and concerted actions).

1.2 Criminal Sanction

6. Article 34 of the FTA provides that, any enterprise violated Article 9 or Article 15 is ordered by the FTC to cease or rectify its conduct or take necessary corrective action and then fails to comply with the order within the period given or have the same violation again, its legal representative or responsible

person shall be punished by imprisonment for not more than three years or detention, or by a criminal fine of not more than NT$ 100 million, or by both such fine and imprisonment.

7. In terms of vertical restraints such as resale price maintenance and anti-competitive vertical agreements (Article 19 and Article 20), sanction for refusal to comply with the order by the FTC or recidivist includes a maximum 2 years sentence of imprisonment or detention, or/and a criminal fine of not more than NT$ 50 million, according to Article 36 of the FTA.

8. As mentioned above, criminal prosecution is possible, but only for failure to comply with the FTC's cease and desist order, or a repeat offender. The FTC and Ministry of Justice reached a cooperation arrangement accordingly in 1997 for facilitating mutual coordination and collaboration between two agencies. From February 1992 to August 2016, the FTC referred 28 cases to prosecutor offices. In eight of those cases, the persons involved were convicted and most of them were ordered to pay fines and only few were also sentenced to prison terms of up to eight months.

1.3 Civil Liabilities

9. In addition to administrative and criminal sanctions, enterprises may be held responsible for civil liability. Chapter V of the FTA specifies that an injured party may request the removal and prevention of damage, damage compensation and publication of the content of the verdict in newspapers[1]. When the injured party files a claim for compensation for the harm caused by any intentional violation of the FTA, the court may determine the amount of compensation exceeding the actual harm, up to treble damages though, on the basis of the seriousness of the violation.

2. Determination of administrative fines by the FTC

10. The main legal basis for the FTC to determine the amounts of fines are the Administrative Penalty Act, the Enforcement Rules of the Fair Trade Act (Enforcement Rules) and the "Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 and 15 of the Fair Trade Act". The Administrative Penalty Act and the Enforcement Rules apply to all violations of the FTA (both anticompetitive and unfair competition conduct prohibited under the FTA), and the "Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 and 15 of the Fair Trade Act" apply only to serious violations of abusing monopoly power and concerted actions.

11. According to Paragraph 1 of Article 18 of the Administrative Penalty Act, considerations for determining the amount of fine include the culpability of the act in breach of duty under administrative

[1] Article 29 of the FTA: "*If any enterprise violates any of the provisions of this Act and thereby infringes upon the rights and interests of another, the injured may request the removal of such infringement; if there is a likelihood of infringement, prevention may also be claimed*."
Article 30 of the same act: "*Any enterprise that violates any of the provisions of this Act and thereby infringes upon the rights and interests of another shall be liable for the damages arising therefrom*."
Article 31: "*In response to the request of the person being injured as referred to in the preceding article, a court may, taking into consideration of the nature of the infringement, award compensation more than the actual damages if the violation is intentional; provided that no award shall exceed three times of the amount of damages that is proven. Where the infringing person gains from its act of infringement, the injured may request to assess the damages exclusively based on the monetary gain to such infringing person".*
Article 32: "*No claim for damages as prescribed in this Chapter shall be allowed unless the right is exercised within two years after the claimant knows the act and the person liable for the damages; nor shall the claim be allowed after the lapse of ten years from the time of infringing conduct is committed*."
Article 33: "*In filing a suit with a court in accordance with this Act, the injured may request the content of the judgment to be published in a newspaper at the expenses of the infringing party*."

law, the impact resulted therefrom and the benefits gained from such an act. Additionally, the financial ability of the person penalized may also be taken into account. Meanwhile, the more specific factors to be taken into account when assessing a fine as stipulated in Article 36 of the Enforcement Rules include:

1. Motivation, purpose, and expected improper benefit of the acts.
2. The degree of the act's harm to market order.
3. The duration of the act's harm to market order.
4. Benefits derived on account of the unlawful act.
5. Scale, operating condition, and market position of the enterprise.
6. Types of, number of, and intervening time between past violations, and the punishment for such violations.
7. Remorse shown for the act and attitude of cooperation in the investigation.

12. Aggravating circumstance set forth in Paragraph 2 of Article 6 of the "Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 and 15 of the Fair Trade Act" where:

1. The enterprise in concern has organized or encouraged the unlawful conduct.
2. The enterprise in concern has implemented supervision or sanctioning measures to ensure that the concerted action is upheld or executed.
3. The enterprise in concern has been sanctioned for violation of Article 9 or 15 of the Act within the past five years.

The reasons for a fine reduction stated as follows:

1. The enterprise in concern has immediately ceased the unlawful act when the competent authority began the investigation.
2. The enterprise in concern has shown real remorse and cooperated in the investigation.
3. The enterprise in concern has established compensation agreements with the victims or has taken remedial measures.
4. The enterprise in concern has participated in the concerted action under coercion.
5. Fine reduction is encouraged or approved by other agencies or can be granted in accordance with other Acts.
6. As described above, the FTC will decide the most appropriate amount of the fine in each case by taking into consideration the factors specified in the aforesaid laws and regulations as well as by referring to similar cases in the past.

3. Practical issues on ability to pay

13. After receiving the FTC's sanction decision, the enterprise that is unable to pay the fine in one lump sum due to its current financial condition or natural disasters or unforeseen incidents, may provide the FTC relevant documents, such as balance sheet, income statement or record of sales and tax declarations for the two most recent years, to prove its inability to pay the fine at once and provide reasonable collateral or checks for seeking the FTC's approval of installment payment. When a fine is more than NT$ 10 million, the FTC can also permit the up to 60 monthly installments. However, for enterprises that fail to pay any such installments, the FTC will investigate the property of such enterprises and make requests to the Administrative Enforcement Agency of the Ministry of Justice for administrative enforcement. As of August 31, 2016, the percentage of fine received was respectively 95.28% in 2011, 95.63% (including checks yet to be cashed) in 2012, 97.75% in 2013, 99.84% in 2014 and 99.80% in 2015. According to Article 116 of the Administrative Litigation Act, upon the offender's request, the court may seek the opinion of the FTC to determine the existence of irredeemable damage and urgency, and then decide whether the request for suspending the enforcement is justified and ensure the suspension will not have a significant impact on the public interest.

4. Case example: Nine independent power producers (IPPs) in violation of the Fair Trade Act

14. In March 2013, the FTC fined nine independent power producers (IPPs) for concerted action. This was the first case after the 2012 FTA amendment increased the administrative fine up to 10% of the total sales income in the previous fiscal year for those serious violations. The FTC, after assessing the market status of each independent power producer, the level of harm to the relevant market, the sales of each company and the degree of cooperation throughout the investigation, imposed total administrative fines of NT$ 6320 million on the 9 IPPs and ordered the IPPs to immediately cease the unlawful act. The total amount was the largest ever fine imposed by the FTC in its history.

15. The IPPs filed an appeal to the Appeal and Petition Committee of the Executive Yuan[2]. The Committee did not challenge the fact that the IPPs had engaged in a concerted action, but revoked the fines and ordered that the FTC come up with other legally appropriate sanctions within two months. The reason for this decision was that the Executive Yuan thought the duration of the conduct had begun before the 2011 FTA amendment, the fines therefore should be reassessed how the 2011 amendment applied to this case. The Committee also doubted the calculation of profits received by IPPs' unlawful conducts. On November 13, 2013, the FTC decided, according to the decision of the Executive Yuan reducing the fine for each independent power producer by NT$30 million. The total fines was reduced to NT$ 6,500 million.

16. The IPPs, in addition to appeal the Executive Yuan's decisions on concerted actions to the Administrative Court; also appealed the FTC's second decision on sanctions to the Executive Yuan. The Executive Yuan revoked the FTC's new sanction for the second time on the reasons that the FTC did not consider the differences in the duration of operation of each independent power producer, power rate structure, the number of meetings attended, the profitability of each company, the duration of participation in the illegal act, and the level of cooperation during the investigation as well as other statutory factors and the spirit of the leniency policy etc. Following the decision of the Executive Yuan, the FTC made the decision on the fines for the third time on July 9, 2014. Considering Paragraph 2 of Article 41 of the FTA, the "Regulations for Calculation of Administrative Fines for Serious Violations", Article 18 of the Administrative Penalty Act and Article 36 of the Enforcement Rules, the FTC reconsidered the factors in the above-mentioned regulations and reduced the fine for each independent power producer by one third or two thirds. The new amount of fines was totalled NT$ 6070 million.

[2] The decision was before 2015 FTA amendment so the decision had to be reviewed by the Appeal and Petition Committee of the Executive Yuan.

17. The IPPs filed the third appeal to the Executive Yuan for the FTC's decision on fines. Given that the substantial parts of the case (i.e., whether the alleged conduct constituted the concerted actions or not) are still under review by the Administrative Court. The Executive Yuan decided that, the sanction decision should be pending until the Administrative Court's final decision on concerted actions, according to Article 86-1 of the Administrative Appeal Act[3].

5. Conclusion

18. As mentioned previously, the FTC can impose administrative sanctions on those enterprises that violate the FTA. One of such sanctions is pecuniary fine. When deciding the amount of administrative fine, the FTC will take into account considerations set forth in the FTA, the Enforcement Rules and the "Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 and 15 of the Fair Trade Act". Reasons that are both advantageous and disadvantageous (increasing or decreasing the penalty) to the offender will be clearly stated in the FTC's decision. In addition, the FTC also keeps track of offenders that have been sanctioned to see if they have rectified their conduct. The results will be reported to the FTC's Commissioners' Meetings every month. Any offender fails to cease or rectify its conduct, the FTC will issue another cease and desist order and consecutively impose an administrative fine until the offender really cease or rectify its conduct or take necessary corrective action.

19. Recently practical observations are as below:

- Since the FTC issued the "Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 and 15 of the Fair Trade Act" on April 5, 2012, the Regulations have been applied to three cases. In practice, the most common reason for a fine decrease was that "the enterprise in concern has immediately ceased the unlawful act when the competent authority began the investigation."

- To deter anti-competitive practices, the 2011 amendments not only increased the fines from NT$ 500,000 and NT$ 25 million to NT$ 100,000 and NT$ 50 million, but also entitled the FTC to impose a turnover-based fine on a serious violation of abuse of monopoly power or a concerted action. Increasing the cost of violation for enterprises, and since 2006, prison terms and fines handed down by judicial courts to offenders who repeatedly engaging in concerted actions and vertical anti-competitive conducts, are the possible reasons why the number of repeated offenses has declined in recent years. Besides, the FTC issued an internal notice on August 31, 2016 for the considerations of determining the amount of fines on repeated offenders.

[3] Article 86 of the Administrative Appeal Act, "*While the decision of the administrative appeal depends on the existence or non-existence of certain relationship of law, and such relationship of law is pending in an litigation or administrative remedy proceeding, before the legal relation has been affirmed, the agency with jurisdiction of administrative appeal may cease the administrative appeal proceeding and notify the administrative appellant and intervener appellant immediately.*

When the agency with jurisdiction of administrative appeal ceased the administrative appeal proceeding stipulated in last Paragraph, the period to make the administrative appeal decision stipulated in last Paragraph shall be recalculated from the next day after the relationship of law has been confirmed."