



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

**Cancels & replaces the same document of 07 July 2010**

**Working Party No. 2 on Competition and Regulation**

**DRAFT SUMMARY RECORD OF 45th MEETING OF WORKING PARTY No. 2 HELD ON 14 JUNE  
2010**

*The attached document is submitted to Working Party No. 2 of the Competition Committee FOR APPROVAL at its forthcoming meeting on 25 October 2010.*

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## **DRAFT SUMMARY RECORD OF 45TH MEETING OF WORKING PARTY NO. 2**

### **I. ADOPTION OF THE REVISED DRAFT AGENDA**

1. The revised draft agenda for the 45<sup>th</sup> meeting was approved.

### **II. APPROVAL OF DRAFT SUMMARY RECORD FROM LAST MEETING**

2. The draft summary record for the 44<sup>th</sup> meeting was approved.

### **III. ROUNDTABLE ON STANDARD SETTING AND COMPETITION POLICY**

3. The Working Party No. 2 held a roundtable that addressed competition law and policy related to standard setting. Few jurisdictions reported cases with respect to SSOs. But problems of standards attracted interest of jurisdictions outside these areas, including in areas such as the professions, the food industry and insurance. There were 16 submissions. Presentations were made by Damien Geradin and Paul Lugard.

4. The discussion emphasised that standard setting is particularly complicated from a competition perspective when standard setting involves intellectual property. Many patents must be put together to create a standard. The Blu-ray standard, for example, involves more than 2000 patents. This creates a problem for royalty payments. Cross-licensing is very important because many producing companies have their own intellectual property. Cross-licensing is the alleged solution to the patent stacking problem. There is little evidence on extent of cross-licensing. Industry representatives argued that excessive royalty payments should not be considered such an important issue because of the extent of cross-licensing that ensures royalty payments are limited. A question was raised about whether the royalty stacking would serve as an undue barrier to entry to new producers without intellectual property rights of their own to trade. There was a debate about whether competition law enforcement is a solution. Ways to reduce the potential for “patent ambushes” by essential patent holders were discussed. Disclosure requirements are very important to ensure SSOs know in advance when market power may be used, particularly if disclosure includes an indication of licensing terms that would be given. There was a view that competition law should be an option when companies hide existence of patents in standard setting discussion. According to that view, patent ambushes should not be judged based on whether the outcome would have been different, absent the ambush. One speaker suggested that patents for a product can be usefully licensed as a package, rather than separately. The roundtable emphasised that standards can have substantial competition impacts even when they do not involve intellectual property rights. Illustrations were provided from a variety of sectors. For example, the voltage for train lines in Italy is different from most countries and this has, at least in the past, limited potential competitors from entering the market. Many industries were mentioned, including insurance, elevator certification, environmental standards, detergents, mineral water, food labeling, concrete reinforcement bars, vehicle security, professions and gas pipes. The institutional structure of standard setting and certification can also create important competition challenges.

### **IV. STRUCTURAL SEPARATION**

5. The Working Party No. 2 developed the OECD Council Recommendation concerning Structural Separation in Regulated Industries in 2001. The Working Party submitted a report to the Council on

Experiences with the Structural Separation Recommendation in 2006. Since that report was prepared, there have been a number of interesting and valuable experiences with structural separation, notably in the telecommunications sector and the gas sector. Dieter Helm spoke about structural separation in the gas sector. He argued that structural separation to develop domestic competition ignored the reality that there were increasingly organised oligopolistic suppliers of gas in Europe. He suggested that domestic competition would have minimal success if there were few options for alternative suppliers. He suggested, however, that the technology of gas extraction has undergone a dramatic change that will result in much increased supplies from new suppliers, meaning that these monopolistic supply relationships may be reduced in the future. The European Commission presented recent developments in the gas sector for structural separation, including recent cases that identified various inefficiencies with behavioural remedies in the gas sector that may make structural separation into an important remedy. The Austrian delegation presented a case on LPG gas which suggested the risks of non-separation between LPG supply and LPG tanks. For telecommunications, a presentation was given by Martin Cave. The speaker noted that there is a holdup problem when investment is being considered, as private investors will fear expropriation of their sunk investments by regulators who do not allow full recuperation of costs. With public investment, the costs of separation can be paid by the public, avoiding a holdup problem. This was followed by presentations from the British and Italian regulators, as well as from Australia and Sweden. In the UK, where structural separation may be most advanced (in the form of functional separation), the number of unbundled lines has increased substantially since functional separation was introduced. Significant deregulation has been allowed as a result. In Italy, a system of behavioural rules is just starting to take effect, so it is too early to judge outcomes. The Secretariat noted that, as new technologies are being installed, technical choices are being made that may restrict competition in the future. Increasingly, forms of separation are being adopted in telecommunications, though these fall short of full ownership separation.

## **V. MOBILE PHONE ROAMING**

6. The Secretariat briefed the delegates about a proposed recommendation related to mobile phone roaming that includes a recommendation for actions and priorities for competition authorities. The Secretariat welcomes comments.

## **VI. TRADE SERVICES RESTRICTIVENESS INDEX**

7. The Secretariat briefed delegates on the ongoing development of a trade services restrictiveness index that is based on detailed examination of national laws, including for barriers to domestic competition that would be of interest to our delegates. The Working Party No. 2's roundtables have served as a resource for the Trade Directorate in its preparation of these indices.

## **VII. COMPETITION ASSESSMENT: DEVELOPMENTS**

8. Due to time constraints, the agenda item on competition assessment was not discussed.

## **VI. OTHER MATTERS**

9. The next roundtable will address emissions trading permits. Depending upon their design, environmental regulations can favour incumbents relative to entrants. This concern is reflected in on-going discussions about the impacts of allocating tradable permits for free rather than auctioning (i.e. in the European Union's Emissions Trading Scheme). The system of trading emissions quotas is an economic instrument for reducing undesirable emissions. Nonetheless, the introduction of such quota systems can yield substantial competition issues especially when businesses active in the same market are not treated identically. In one country, a company may receive quotas for free, while in another, they must pay. The

modes of attributing quotas are important for ensuring that there are not excessive allocations of quotas in the first place. The absence of quotas in some countries can expose companies to a risk of “carbon leakage” in which work that previously was done in one country moves elsewhere (but is still performed) after the country introduces quotas that are not implemented elsewhere. This creates a pressure for public aid. The competition issues can be even more complex in the case of direct regulations (e.g. performance and technology-based standards) in which permits to operate are not tradable. Unfortunately, there is little systematic evidence on the effects of regulations on entry/exit. This project would review the implications of different policy measures on incentives for entry/exit and assemble international best practice.