出國報告(出國類別： 其他公務有關活動)

出席 2014 年 12 月經濟合作發展組織(OECD)「競爭委員會」會議報告

服務機關： 公平交易委員會

姓名職稱： 蔡蕙安　委員

杜幸峰　視察

梁詠鈞　科員

赴派國家： 法國巴黎

出國期間： 103 年 12 月 13 日至 20 日

報告日期： 104 年 1 月 23 日

目　　錄

附錄:

壹、參與會議之緣起及目的：

經濟合作發展組織(OECD)「競爭委員會」（Competition Committee, CC）及其下轄之第2工作小組(WP2)、第3工作小組(WP3)每年固定在2月、6月及10月於法國巴黎OECD總部召開3次會議。惟2014年6月會議決議，原訂本年10月舉行之例會，延至12月15-19日舉行，且原每年3次例行會議，自2015年起改為每年2次，每次5日，2015年會議預定於6月及10月舉行。

「競爭委員會」各項會議主要討 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。

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）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。

貳、 OECD「競爭委員會」與會人員

經濟合作發展組織（OECD）自1961年9月成立，目前共有34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、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。本次出席「競爭委員會」會議人員，除前開OECD 會員國代表外，尚有歐盟、工商諮詢委員會（BIAC）、本次會議前正式成為「準會員」(associate member)的羅馬尼亞、及「競爭委員會」參與者(participants, 即以前之observers，自2013年5月起改稱為participants)，包括我國、巴西、保加利亞、埃及、立陶宛、俄羅斯、南非、印尼、哥倫比亞、馬爾他、祕魯、埃及、烏克蘭等國代表。

會議共分為12月15日「競爭與管制第二工作小組」(WP2)、12月16日「合作及執法第三工作小組」(WP3)及12月17-18日「競爭委員會」(CC)三場會議。本次我國出席會議人員為公平交易委員會蔡蕙安委員、綜合規劃處杜幸峰視察及法律事務處梁詠鈞科員。另經濟部智慧財產局亦指派林雨歆專員參團，出席12月17-18日「競爭委員會」會議。

參、「競爭與管制第二工作小組」(WP2)會議

12 月 15 日「競爭與管制第二工作小組」(Working Party No. 2 on Competition and Regulation, WP2)會議，會議由 WP2 主席 Alberto Heimler 先生主持，本日討論議題包括:

一、討論「競爭評估工具書」(Competition Assessment Toolkit):

(一) 秘書處於會前提出「競爭評估工具書第 3 冊:競爭評估操作手冊」(Competition Assessment Toolkit, Volume 3: Operational Manual) 草稿最終版內容概要供會員檢視。本手冊主要在提供會員如何評估法規及政策對競爭之影響，及如何修正規範或政策，以提升競爭。手冊中同時也對如何檢視管制或規範對競爭之影響，從各種實際觀點提供可使用之解釋。

(二) 本手冊草案內容共分 7 章: 第 1 章說明競爭法主管機關為何實施評估、競爭評估之類型(新管制檢視、市場研究及產業檢視)及評估之過程，第 2 章為如何選取欲檢視之公共政策，說明如何選取受影響產業、界定擬偵測之產業活動及釐清主要影響之政策。第 3 章說明如何運用檢測清單(Checklist)，第 4 章闡釋對潛在限制競爭之檢視，第 5 章至第 7 章說明如何尋求不同政策方案及如何運用質、量分析比較這些方案，及做出政策建議。

(三) 秘書處請各會員國於會後提供國內相關學術研究報告，以充實本手冊內之例示及資料庫內容，並讓參考使用者可瞭解手冊中對價格及其他政策，如勞工、環保等的影響。

(四) 各國代表對工具書內容大都表示支持。俄羅斯代表建議，應提供可能替代政策供參考。主席表示，本工具書主要讓會員瞭解過去已做過之研究，並請會員國代表回國後，能提供相關學術研究報告，以供秘書處列為各競爭法主管機關參考運用之資料。

二、墨西哥對金融市場研究報告:主席邀請墨西哥聯邦經濟競爭委員會(Federal Economic Competition Commission，COFECE) 主任委員 Ms. Alejandra Palacios Prieto 報告該會對墨國金融市場研究報告，內容略以:

(一) 墨國 2014 年 1 月開始進行金融改革，以強化該國之金融產業。為瞭解金融產業競爭狀況，墨國國會指示 COFECE 進行市場研究，以為提升金融市場競爭之倡議及提出政策建議之用。

(二) COFECE 提出之報告總計有 800 多頁，對金融市場各項可能涉及限制競爭之行為，如自動提款機(ATM)之跨行提領手續費、金融市場活動涵蓋範圍、金

融服務轉移之限制、國營銀行之競爭中立、擁有大量客戶資料之銀行保險業，其運用是否涉及競爭議題等進行檢視，並提出可能之政策建議。

(三) 主席提問，本研究目的是僅為倡議或有其他用途?墨國代表答以:本研究最主要做為倡議，用以向政府提出政策建議及提升金融市場競爭。

三、拉丁美洲 6 國市場研究計畫:

(一) 秘書處報告 OECD 在英國外交部資助下，自 2014 年 6 月起對中南美洲智利、哥倫比亞、墨西哥、秘魯、哥斯大黎加及巴拿馬等 6 國進行市場研究，並擬將研究結果與先進國家之最佳典範做比較。

(二) 主要的研究方向包括:廠商行為、市場結構、市場資訊不對稱、消費者行為、政府部門介入及國營事業等。主要目的在研究如何改善被檢視國家之法律及制度架構，並提出如何建構及運用市場研究的一般及較高層次之指導原則，以供這些國家參考。

(三) OECD 將在本年 3 月 18-19 日舉行研討會，邀請所有拉丁美洲國家參加。會中將報告此一研究結果，並對各競爭法主管機關提供市場研究訓練及能力建置。

(四) 哥斯大黎加代表發言表示，哥國至今未曾進行定期市場研究，感謝 OECD 提供此一研究報告及能力建置之機會。

四、以色列報告:以色列代表報告該國前(2013)年 12 月通過，去(2014)年 12 月 11 日正式實施之「提升競爭及降低經濟集中度法」(Law for the Promotion of Competition and Reduction of Economic Concentration)，報告內容略以:

(一) 在以色列大部分公司之所有權由公部門擁有，包括政府及猶太團體。這些公司在民營化過程中大多售予最高競標者，如何減少集中度的概念很少被納入考量。

(二) 以國在前年通過「提升競爭及降低經濟集中度法」，規定政府在民營化、授予公權力或特許及其他政府資產權利分配予民營單位經營時，應先就可能之競爭影響向以國反托拉斯局局長(Director General of the Israel Antitrust Authority)提出諮詢。

(三) 該法亦規定政府須成立「降低集中化委員會」(Committee for Minimization of Centralization)，由反托拉斯局局長擔任主席，提供各政府單位在民營化或許可授予權利過程中、對整體集中度(overall concentration)及關鍵設施(essential facilities)分配之諮詢意見。

(四) 例如，反托拉斯局在 Eilat 港民營化過程中即建議政府不得將港口設施售予具市場支配地位之交通運輸公司。

(五) 主席提問為何該法通過後一年方實施?以色列代表答以:為有更多時間讓市場參與者調適該法之施行。

五、結構拆解:本議題主要在檢視 OECD 總理事會 2011 年修正之「有關產業結構拆解建議書」(Recommendations of the Council concerning Structure Separation in Regulated Industries),請各會員國提出使用建議書經驗,及檢視建議書是否修訂，其修訂是否僅專注於檢視傳統產業，如瓦斯、電力、電信及鐵路，或考量擴及其他產業，如自來水、郵政服務、巴士或港口等。

(一) WP2 邀請英國皇家學院商學系(Business School, Imperial College, UK)教授 Martin Cave 報告，略以:

1、管制性產業才需要考慮是否結構拆解的選項。例如 GOOGLE 案，歐盟所提之拆解方案即不在本案討論範圍內，因為 GOOGLE 非管制產業。至於是否進行管制拆解是依一般規定亦或經驗法則，其實並沒有定論。一般而言,管制拆解通常是由獨立體系運作者(Independent System Operator, ISO)，如能源產業管制者所提出，其拆解程度可分 3 級:會計拆解(accounting separation)、功能拆解(functional separation)及架構拆解(structural separation)。

2、傳統產業拆解，如郵政，一般郵件可能競爭有限，但大宗郵件(bulk-mail)就有可能競爭、而得以拆解。自來水事業的零售亦可為例，如澳洲在墨爾本及東南昆士蘭省地區、英國在英格蘭及蘇格蘭的自來水事業拆解，即為很好的案例。

(二) 澳洲代表建議應擴及港口之檢視，理由如次:

1、澳洲港口為國營，目前正考慮朝向民營化，並在垂直整合引進競爭機制，可能之解決方案則有價格管制或結構拆解。

2、ACCC 今年處理 Melbourne International RORO & Auto Terminal Pty Ltd. (MIRRAT)取得墨爾本港口汽車站經營承租權結合案時,曾以 4 項附加條件做為救濟措施，其中一項即為結合方須承諾遵守該倉儲公開使用(open access)及停泊分配規定之管制。

3、港口因為具使用獨占特質，且其垂直整合可考量結構拆解，故建議納入考量。

(三) 英國代表建議將巴士市場納入檢視，以確保關鍵設施公平使用(fair access of key facilities)。主席問新加入者是否也可爭取使用權?英國代表答以:這應該不在本議題討論範圍。

(四) 俄國代表發言表示，對於港口納入檢視提議應非常謹慎。因為以俄國經驗，海港之營運十分複雜，港口自由化結果不必然代表營運成本會下降。主席表示，在此一情況，垂直拆解可能是必要的。瑞士代表建議，或許可以考慮使用會計分離。

六、討論「競爭法主管機關執法決定事後評估手冊」(Discussion on the Ex-Post Evaluation of Competition Agencies' Enforcement Decisions):該手冊主要為提供競爭法主管機關在做成執法決定後，如何評估其決定成效之指引。會議中邀請瑞士日內瓦大學 Damien Neven 教授及英國東英吉利大學 Amelia Fletcher 教授 2 位專家對手冊草案提出評論。

(一) 秘書處報告指出，該手冊主要在強調事後評估之優點，並鼓勵競爭法主管機關更常態性及有系統的對執法決定進行評估。手冊提供了競爭法主管機關各種不同方法及之案例，尤其是在結合決定的評估。

(二) Neven 教授表示，報告應以案件事前決議之特性，對比事後評估結果之解釋，以強調案件評估之整體性。

(三) Fletcher 教授表示，手冊的目的應該是如何確保競爭法主管機關真正學到該學習的經驗，而最重要的即是在最後一個步驟「找出關鍵教訓」(identify key lessons)，並建立一套評估證據之體系。在評估被禁止或未遵照附加條件的結合案時，找出可能限制競爭行為加以評估，但如何評估已准許的結合案件決定亦是十分重要。

(四) 主席表示，手冊的目的亦在教導各國競爭法主管機關利用評估案件結果，較容易說服法官。

(五) 美國代表建議，在本手冊中「事後」(ex-post)一詞應予一致，且各國需要的不是一步一步教導如何烹飪的食譜(cookbook)，而是一本參考用書，故建議改名為「參考指南」(reference guide)。

(六) 歐盟建議，手冊中應增加何時進行評估，及進行評估之目的之說明。例如，歐盟通常在準備提出新政策前進行評估。手冊中的案例則建議增列參考資料及文獻。

(七) 德國建議在手冊中加入競爭法主管機關進行事後評估之誘因。

七、討論「延續事後評估工作」(Extension of the Ex-Post Evaluation Workstream):2014 年 2 月例會討論「策略主題」時，部分會員建議延續「競爭政策評估」之討論，並建議秘書處可對部分競爭法主管機關執法決定進行實際事後評估。秘書處在同年 6 月會議中亦請會員提出可能討論方向。

(一) 秘書處建議在 2015 年 4 月舉行 1 場研討會，主要針對評估手冊草案進行應用研討，並以實際案例，包括非結合案件，做為研討內容。

(二) 歐盟代表表示，研討會應著眼於手冊的實用性，選用的案例亦應為已做過評估之實際案例。研討會內容應安排至少 2 天，且提供更多誘因以吸引專家願意參與此一研討會。

(三) 澳洲代表表示，在討論案例時，希望能安排更多不同國家結合補救措施事後評估案例之討論，尤其是補救措施的國際合作案例。

(四) 主席裁示，研討會應安排於 2015 年春季，會議文件資料及研討會結果請秘書處提報當年度 6 月例會。

八、「使用拍賣競標與招標」聽證會(Hearings on the Use of Auctions and Tenders):本議題主要討論拍賣競標與招標的效用及其成果，並考量得標贏家在提供高品質服務、投資及維護資產之適當誘因，及何種屬性的招標方式可確保有效的成本效益與服務結果。

(一) 秘書處背景資料報告:

1、拍賣競標 (auction，下稱競標)與招標通常使用於出售政府資產、政府授予特許，或公共工程採購。採用競標方式可以讓政府獲得競爭的好處，但僅是使用招標並不一定會確保有效率之成果，標案的設計及執行才是關鍵。通常政府不僅會關切價格事項，也會關切非價格因素，如帶動經濟成長或社會基礎建設。

2、標案的設計主要關鍵在於如何促進廠商參與、減少共謀的範圍及降低違約與未達標案要求水準之風險。政府在評估價格以外的各項因素及品質與價格之間的衡平時，可採用各種不同的程序；例如，各項因素同時評估、二階段評估程序、最低品質標準或個別議價等。而在評分上，則應考慮價格與非價格之衡平，如競標者在品質與價格調整上之靈活性。

3、政府在開標後尚有其他挑戰，如雙方對標案性質之詮釋、履約能力之監督、對標案內容執行之認定、合約條款及品質之要求及懲罰與獎勵技巧等。

4、競(投)標者需考慮的是，取得標案後投資的風險，例如，標期之期限、是否

因須定期重新競標而可獲得補償、在失去特許後是否可取回投資金額、或價格管制是否能取得適當的投資報酬等。政府則需綜合考量提供服務品質與投資，及其執行之獎勵與懲罰，綜合訂定價格上限。

5、對於重新協商標案，其主要理由可能有:環境突然改變、得標者無法完成契約或錯估成本與價值、策略性行為(如故意低價搶標)等。重新協商後之結果可能調整價格或成本補償金額，通常較有利得標者，但對政府可能會付出較高的調整成本。解決之道可能有:降低資訊不對稱、降低未提供履約保證風險及明文重新協商之原因、尋求專家意見並蒐集更多相關資訊、確保合約的履行與監督及在合約中設計加入防止重新協商之條款。

(二) 美國馬利蘭大學 Peter Cramton 教授報告競標之設計，略以:

1、良好的競標設計可提升資源配置效率及價格資訊，降低風險強化競爭，減少市場機制失靈的機會。

2、競標機制可在下列市場中運用:電信頻譜、電力、自然資源(原木、石油等)、(溫室氣體)排放額度、金融證券及採購。

3、競標方法所欲達成的目標在效率、透明化、公平性及簡單性，其原則是愛因斯坦所說的:「讓所有事物都變得越簡單越好，而不僅簡單一點而已」(Make things as simple as possible, but not simpler)。

4、以電信頻譜之競標為例，電信頻譜具稀有、異質但類似之性質，廠商所競爭的是科技及商業計畫，具有高度複雜的替代及互補性。而政府之目標很明確:確保效率，有效運用稀有的頻譜並強調競爭的重要性。在競標的設計上，要能促進投資，強化替代性，鼓勵廠商發掘真正價格，誠實競標。如義大利在 2010 年舉行 4G 頻譜拍賣，採用「同時上升競標拍賣制」(Simultaneous ascending auction)，競標者僅能以與筆現場出價，共計出價 470 回，最終得標總值為 39.5 億歐元。泰國 2012 年 3G 頻譜競標，由 3 家市場現有廠商競標 1 張執照，競標結果以高於拍賣最低底價 2.8%之金額成交。美國 AWS-3 無線頻譜拍賣，在 2014 年 11 月 13 日開始競標，經過 20 日完成 91 回合競價，以 437.44 億美元賣出。

5、在電力方面，電力市場的目標可分短期效率－以現有資源用最低成本營運，及長期目標－有效運用適當數量的各種資源。電力市場不論何時何地，都必須平衡供給與需求，而市場劃分可分為短期(5-60 分鐘)，在現貨市場中買賣，中期(1-3 年)，則可考慮簽定雙方合約或在能源期貨市場取得，長期(4-20

年)則須考慮火力或水力系統的建置，預先購足所需能源。

6、在設計上，沒有任何競(投)標設計可臻完美程度，必須依產業量身打造，而且不能忽略必要的要素:鼓勵參與，要求實績，避免勾結及貪腐。

(三) 美國由聯邦通訊委員會(FCC)代表報告該國拍賣無線頻譜經驗。

(四) 義大利米蘭理工大學教授 Marco Ponti 報告義大利交通部門競標經驗，略以:

1、交通運輸是極其複雜的產業，因其包括鐵路、公路、航空、海運等不同型態之載具，貨運及客運，服務與基礎建設、自然壟斷與法定獨占，不同的外部性，公營與民營及不同的社會目標，這也導致不同的政策與結果。

2、基礎建設方面，義大利的鐵路主要管制問題在於，為了促進運輸服務的競爭，把鐵路網路與服務分離，以及在缺乏任何投資下，鐵路完全由國家出資。收費高速公路因為過去幾乎未管制及特許期限非常長，造成不論是公營或民營都有很高的利潤，而分期攤還成本則幾乎都未達成。空運部分雖因最近新成立的管制機關而有些管制措施，但對起降之時段分配(slot allocation)仍是非常落後。港口部分則沒有真正的競爭特許機制，全由政府投資。

3、服務特許方面，除了高鐵與貨運服務外，主要由地方公共交通部門決定服務特許的發給。交通產業通常具高生產成本及低費率特性，如欲提高競爭通常遭遇二項主要問題:強大的「剩餘價值請求權」(residual claimant)，虧損由國家支付；及廣大的營運幅員，可能涵蓋整個城市或地區，不易有新的進入者可以挑戰。

4、整體而言，至少在歐洲境內，交通部門要有 1 個強而有力的管制機關是有其必要性的。而在個別部門，鐵路方面需要民營化，高速公路則相反，必須考量資產及營運公有化之選擇。而空運及港口則需要更確實的管制。

5、義大利的經驗建議，必須考量「目前被綁架的程度」(level of capture)及其可能暗藏之玄機(hidden agenda)。最好的解決方式是降低「被綁架的的程度」，讓政策對這些特許者可以有直接之效果。

(五) 歐盟報告對政府採購及授予特許(accession)之新規定，略以:

1、歐盟改變政府採購及特許規定之目的在於使程序更簡化及更具彈性，讓更多廠商(中小企業、跨國公司)可以進入市場。

2、依下列基準，採「最具經濟利益投標者」(Most Economically Advantageous Tenders，MEAT)原則評斷是否給予合約:價格或成本(採成本有效性方法，例如生命週期成本)、最佳價格/品質比(best price-quality ration, BPQR)、及對組

織之評估，是否有具足夠能力及經驗之員工可執行合約，且可排除或限制機關僅使用價格或成本做為單一標準。

3、合約的修改必須有法律依據，且為「最低限度」(*de minimis*)，不超過合約10-15%並低於門檻，且合約修正內容須明確規定不得有其他新的採購事項。

4、特許:特許事業通常具有網路特性，如能源、自來水、廢棄物處理、道路基礎建設等，惟尚有其他新產業可考量採用特許。特許為政府准許廠商開發某一工作或服務，其意義為營運風險－需求或供給或兩者－之轉移，而這些風險轉移並不保證得標者可回收其投資成本。特許的期限一般都超過 5 年，但也不超過投資成本回收所需之期間。

九、未來討論題目及其他事項:主席宣布，明年 6 月將舉行「定期海運航線運輸競爭問題」圓桌會議(Roundtable on Competition Issues in Liner-Shipping)。

肆、「合作與執法第三工作小組」會議:

12 月 16 日舉行「合作與執法第三工作小組」(Working Party No. 3 on Co-operation and Enforcement, WP3)。會議由 WP3 主席美國司法部反托拉斯署署長 Mr. William Baer 主持，本日討論議題包括:

一、「在寬恕政策中使用資格保留」圓桌會議(Roundtable on the Use of Markers in Leniency Programs): 本議題主要為配合「競爭委員會」延長「國際執法合作」長期策略主題架構的決議提出討論。會議重點著眼於寬恕政策中使用資格保留時所產生的相關議題。本議題共有 26 篇報告，共分三個面向討論：（1）參與違法聯合行為業者，誰有資格申請資格保留；（2）申請資格保留時所需具備之要件；（3）各國資格保留制度之異同。主要討論略以：

(一) 秘書處報告:

1、秘書處採 56 個國家作為研究樣本，其中包含 35 個 OECD 成員國與 21 個非 OECD 成員國。在 56 個國家裡僅有 3 個國家並未採行「寬恕政策」制度。再者，在 53 個採行「寬恕政策」之國家中，有 42 個國家於其「寬恕政策」中，訂有「資格保留制度」。

2、觀察 42 個國家於寬恕政策中採行「資格保留」制度的國家中，其申請態樣大約可分成 a.無標準申請文件態樣，主管機關採行彈性方式讓申請者遞交申請文件；b.採用標準文件態樣，明確規範申請者所應提供之資訊(如我國)。並且申請者得申請「資格保留」制度之時機點亦可分成：a.主管

機關察覺卡特爾行為之前（如奧地利）；b.在主管機關進行搜尋卡特爾行動之前（如日本）；c.在主管機關有充分證據進行調查程序之前（如澳洲、芬蘭）d.在主管機關將案件提交法院之前（如智利）

3、在採行寬恕政策的 42 個國家中，其中有 18 個國家國家（包含 15 個 OECD 會員國與 3 個非會員國）允許預期申請寬恕政策之卡特爾參與者使用匿名的方式與主管機關接觸。採用此種方式的優點為：(1)吸引卡特爾參與者及早與主管機關接觸；(2)降低卡特爾參與者個人身分曝光的風險，並且得測試主管機關是否開啟調查程序。

4、在 42 個國家中就有關「資格保留」制度的申請人數，其中有 11 個國家不僅限於第 1 位申請者，其他卡特爾行為參與者，若符合「資格保留」制度之要件，亦得申請「資格保留」制度。採行此制度之國家，其主要目的係對於尚未申請寬恕政策之卡特爾參與者施加壓力，及早與主管機關進行合作。

5、卡特爾參與者利用「資格保留」制度，而得暫時保留寬恕政策免除/減輕罰鍰資格，並給予提供證據之時間，各國規範亦不一致：(1)依據個案情況不同者，例如：哥倫比亞、南非、英國、新加坡、挪威、我國等；(2)2 週：日本；(3) 15 天：印度、南韓、立陶宛、葡萄牙；(4) 28 天：澳洲、紐西蘭；(5) 30 天：巴西、加拿大、土耳其、美國、烏克蘭；(6) 8 週：奧地利、德國；(7) 2 個月：法國；(8)3 個月：智利；(9)未明確規定：希臘、盧森堡。

(二) 美國：

1、「資格保留」制度為寬恕政策之一部分，惟「資格保留」制度並非明確規定於寬恕政策之相關法律之中，而係描述於「Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters」（FAQs），在調查程序中或開啟調查程序前都可申請，惟申請者必須以書面的方式為之，明確說明涉及事業、產品或服務等事項。

2、DOJ 接受申請者之審請後，採用裁量的方式來檢視申請者是否獲得資格保留。申請者遞交申請書時，並應履行下列事項：(1)報告尚未被主管機關發覺之違法行為；(2)應立即停止其所參與之違法行為；(3)應說明其所參與之卡特爾行為並持續有效的配合主管機關之調查；(4)應誠摯的為合作行為，例如個別董事或行政人員之自白；(5)在可能的情況下，公司應

賠償受害人所受損害；(6)公司無有強迫他事業參與聯合行為，且非屬領導者或發起者。。

(三) 歐盟:

1、「資格保留」制度是在 2006 年被引進，並規範於「2006 Leniency Notice」。「資格保留」制度被引進之前，在 1996 年與 2002 年的 Leniency Notice 中已經介紹「資格保留」制度。

2、歐盟的資格保留制度僅限於第一個申請減輕罰鍰者，採此方法之目的乃係取決於申請者所提供之資訊必須有助於主管機關發現卡特爾行為並進行調查，因此當主管機關已進行調查時，則不得申請之。此種制度也導致申請者除必須把握第一順位外，仍須即時提供最有價值之資訊以取得「資格保留」。資格保留補充事證時間，歐盟並未明確規定，而是採取彈性的方式。「資格保留」之申請得以書面或口頭方式為之。

(四) 韓國:

1、韓國公平交易委員會係藉由韓國「獨占管制及公平交易法」(the Monopoly Regulation and Fair Trade Act）之授權，而制訂「寬恕政策實施公告」(The Public Notification on Implementation of Leniency Program）並在其中訂定「資格保留」制度。韓國公平會在實施「資格保留」制度的過程中，為提高「資格保留」制度的可預測性與透明度，經歷 6 次的修正。其中在 2005 年中，將原本僅能減免 70%的規定修正為全部免除罰鍰，另在 2006 年將「資格保留」申請修正為得以口頭或書面方式為之。

2、韓國的「資格保留」制度，與各國制度大同小異，皆是欲申請寬恕政策的卡特爾參與者，由於掌握的卡特爾行為證據不充分，而申請暫時保留申請順位，申請者必須在 15 天內提出滿足寬恕政策要件之證據，否則將將會喪失申請順位。

(五) 日本：「資格保留」制度有助於寬恕政策之實行，故於 2005 年修正反壟斷法加入寬恕政策時，一併修正。日本的「資格保留」制度，當申請者以書面聲請，須於提交後 2 個禮拜內符合若干要件，倘若 2 週內無法滿足「資格保留」之申請要件，時間並不會延展，亦即申請人即喪失資格。申請人提交「資格保留」之申請時，必須於申請書中表明涉案之商品或服務、聯合行為合意之時間及地點、聯合行為之態樣等情事。當申請人滿足「資格保留」制度之要件後，立即自動獲得（automatically）免除或減輕罰鍰之暫時資格，無須經

過主管機關之裁量。

(六) 德國:

1、依據德國寬恕政策的相關規定,第一位申請者可以獲得免除罰鍰之地位，第二位申請者可以獲得減免 50%罰鍰之地位，故不論是申請免除或減輕罰鍰，皆會利用「資格保留」制度，來暫時保留其免除或減輕之地位。且當「資格保留」之申請者滿足「資格保留」制度之相關要件後，即自動獲得（automatic）暫時保留其免除或減輕之地位。

2、當申請者提出「資格保留」之申請後，有 8 週之時間來補足寬恕政策之相關法規要求，此 8 週時間不得延長。假設申請者在時間內無法滿足寬恕政策相關法律要求時，即喪失其優先順位，由後續申請者往前遞補。

3、申請者欲利用「資格保留」制度來暫時保留其免除或減輕之地位時，得以書面、口頭、電話、傳真等方式提出申請。以書面提出時，其內容不得超過 2 頁，以電話申請時，時間不得超過 20 分鐘。

4、申請者申請之時間點對於寬恕政策或「資格保留」之申請者顯得相當重要。因為第一位申請者除得免除罰鍰外，其所提供之相關事證之證明力之要求較低，其後之申請者僅得依序減輕罰鍰，其所提供之證明力之要求也會越來越嚴格。

(七) 澳洲:澳洲的寬恕政策規定，若第一順位申請者滿足寬恕政策之要件，ACCC 應作成免除罰鍰之決定。而「資格保留」制度則是當第一順位申請者需時間補足寬恕政策要件時，而給予暫時保留第一順位的制度。申請者得以書面或口頭方式為「資格保留」制度之申請，並得以假設的/匿名的（hypothetical/anonymous）方式申請，當 ACCC 審查後認定申請人所提供之資訊係符合「資格保留」制度要件時，申請者必須向 ACCC 表明身分。當 ACCC 做出給予申請者保留第一申請順位的決定後，申請者須於 28 天內補足寬恕政策所需之要件。此 28 天的補足事證時間，ACCC 得視取證難易而給予調整。

(八) 加拿大:

1、加拿大競爭法（Competition Act）確保加拿大的消費者處於競爭且富於創新的市場環境。而寬恕政策有助於加拿大競爭局偵測或調查違法之卡特爾行為。第一申請者必須在加拿大競爭局（Competition Bureau）發現違法卡特爾行為之前揭露違法卡特爾行為存在，此時加拿大競爭局亦會向

「加拿大公訴服務署」(the Public Prosecution Service of Canada, PPSC，為決定是否給予申請者減輕或免除處罰之最終決定機關）報告第一申請者提出證據之情況，以使第一申請者當無法獲得寬恕政策免除罰鍰之資格時，得在後續的法院審判中獲得減輕量刑之考量。又若第一申請者向 PPSC 提交相關違法卡特爾證據，此與向加拿大競爭局提出申請相同。

2、豁免政策（Immunity Program）或寬恕政策（Leniency Program）可適用於事業與個人，目的係幫助加拿大競爭局有效發性違法競爭行為，並幫助偵測類似違法行為。

3、加拿大的競爭法規定，第一位申請者得依據免除政策提出免除刑罰之申請，並得提出免除「資格保留」之申請（Immunity Marker）。當申請者提出免除刑罰「資格保留」時，其必須於 30 天內補足相關條件，以其最終獲得免除刑罰之決定。其餘後續申請者僅得依據寬恕政策之規定提出減免刑罰之申請，並亦得提出減輕刑罰之「資格保留」申請(Leniency Marker)，其有關減輕刑罰「資格保留」之要求與免除刑罰「資格保留」要件相似。

4、在申請資格保留之階段，申請者得以假設方式提出違法卡特爾行為資訊。在此時，申請者無須揭露個人相關身分資料（hypothetical/anonymous），當競爭局做出給予「資格保留」的決定後，此時申請者必須向加拿大競爭局揭露其個人相關身分資料，並履行其他法規規範相關要件。

5、不管是免除或減輕刑罰之「資格保留」的申請方式，皆得以口頭或書面方式提出申請。若以口頭方式提出申請，申請者必須確保其所提出之資訊是完整的。加拿大競爭局得根據申請者所提出之資訊，以決定是否將申請者相關資訊提交於 PPSC，以使申請者獲得免除或減輕處罰之決定。

6、再者加拿大競爭局對於免除政策或寬恕政策申請者個人身分與所提供資訊具有保密義務，除非申請者簽署「保密權利拋棄聲明」（waiver）或基於法律規定揭露資訊。

(九)哥倫比亞

1、哥倫比亞的「資格保留」制度係規範於 2896/2010 號指令中。依據指令中第 5 條與第 6 條之規定，申請者申請「資格保留」時必須符合：a.指出其在參與卡特爾行為中之角色地位；b.提供所參與卡特爾行為之資訊；c.在指定時間內提供卡特爾行為之違法證據，當 SIC（Superintendence of

Industry and Commerce）認為申請者符合前開 3 要件之後，申請者即獲得暫時保留減輕或免除的地位。

2、哥倫比亞「資格保留」制度之目的係為保留申請者於寬恕政策中的減輕或免除處罰地位，故在哥倫比亞的「資格保留」制度之利用，不限於一位，亦適用於後來之申請者(第一位：全免；第二位：70％；第三位：50％；第四位：30％)。後續申請者所提供之事實資料與證據資料，其證明力的要求也會越來越嚴格。

(十)墨西哥:

1、墨西哥聯邦經濟競爭委員會（COFECE）認為寬恕政策提供違法卡特爾參與者得以申請減輕或減除罰鍰的一個途徑。第一位申請者得利用寬恕政策，申請獲得免除罰鍰之決定。第二位申請者如符合寬恕政策之要件，得獲得減輕 50％處罰之決定。

2、墨西哥之「資格保留」制度係在 2007 年規範於寬恕政策中。「資格保留」制度有助於 COFECE 獲得違法卡特爾行為之相關事實與證據，故違法卡特爾參與者，只要有意利用寬恕政策獲得減輕或免除處罰之決定者，皆得利用「資格保留」制度來暫時保留其在寬恕政策中之資格順位。當事業或個人欲利用「資格保留」制度來暫時保留其申請順位時，得以口頭或電子郵件的方式為之。

3、COFECE 對於「資格保留」申請之許可審查方式法律並無明文規定，因此申請者為滿足申請「資格保留」要件所提供之資訊程度與補充事證時間，該會係以個案決定(case by case)。為避免歧異過大，COFECE 已訂定內部「寬恕政策指導原則」(Leniency Program Guide)。

4、在申請者獲得聯邦經濟競爭委員會「資格保留」之許可，並於指定時間期滿後，COFECE 與申請者得舉行會談，申請者須將其所獲得之資訊提出，供該會審查其是否得藉此展開調查或發現違法卡特爾行為存在，如申請者滿足前開要求者，得進一步獲得寬恕政策中減輕或免除罰鍰之決定。

(十一) 我國在本議題亦提出書面報告，說明在寬恕政策中資格保留之運用情形。就本會所提之報告，主席對我國之提問為:「保密規定在資格保留申請初期是否影響本會與其他競爭法主管機關協調卡特爾之調查?」本會代表回答略以:「我國『聯合行為違法案件減輕或免除罰鍰實施辦法』第 20 條明定本會對於申請免除或減輕罰鍰事業之身分資料，除經該事業事前同意者外，應予保密。

且我國法制目前並無保密權利拋棄聲明之設計，然本會於聯合行為案件調查中，倘就寬恕政策申請人之身分資料有與他國競爭法主管機關進行資訊交換或分享之必要時，本會現行實務作法係依據同法第 20 條規定，由本會請申請人簽署書面(參採 ICN 拋棄保密聲明書格式)，拋棄保密權利，亦即透過取得申請人『事前同意』方式，免除本會保密義務而得以交換資訊。」

二、現有國際合作協定中所含條文內容清點報告：秘書處彙整各國對 ICN 與 OECD 於 2012 年國際執法合作問卷中填答其所簽署之「國際合作協定」(包括雙邊合作協定、瞭解備忘錄、區域協定、自由貿易協定等)資料內容，及各國公開資訊內容提出報告，探討是否可能草擬「第二代國際合作協定」內容範本(model law)。美國雖表示支持，但建議更進一步檢視各國所簽訂之「第一代協定」內容及探討機密資訊交換列入協定條款之可能性。俄羅斯表示，此一部分涉及外交承認及機關間執法決議相互承認問題，應更為謹慎。日本則表示「範本」應具有彈性，以適應各國不同之國情，以目前而言要草擬「範本」可能過於樂觀，而且未來此一文件要提交總理事會做為 OECD 文件的可能性不大。英國建議可先就 3-5 個條款進行討論，跨出第 1 步。主席請各國再仔細考量後由秘書處再提出報告。

三、討論「報告總理事會有關 2012 年打擊公共工程圍標建議書之實施」(Report on the Council on Implementation of the 2012 Recommendation on Fight Bid-Rigging):本議題主要為準備向總理事會報告施行 2012 年打擊公共工程圍標建議書之經驗及修正建議。

(一) 日本:報告該國公共工程採購單位及日本公平交易委員會使用該建議書偵測圍標案之經驗。

(二) 歐盟:報告歐盟修訂採購程序，提升競爭對話及 E 化招標過程之經驗。

(三) 哥倫比亞:報告該國 2013 年由經濟研究組建立「打擊圍標裝置」(ALCO)網站，以達成施行該建議書目標。

(四) 加拿大:競爭主管機關與政府採購機關簽訂備忘錄，共同打擊圍標。

(五) 澳大利亞:澳洲政府採購非僅中央政府權責。ACCC 對中央、地方及領域內採購單位及政府採購對象與供應者進行宣導並採取執法行動。

(六) 韓國:韓國公平交易委員會加強與政府採購單位之合作，共偵測 48 件卡特爾案件，並對圍標者處以高達 10 億美元之罰鍰。

四、其他事項:

(一) OECD 投資委員會「負責任之企業行為工作小組」(Working Party on Responsible

Business Conduct, WPRBS)說明企業常有為公共利益問題、如工安、金融安全等，而從事聯合或杯葛競爭對手之行為，或與競爭法有所衝突，WPRBS 代表提問此一衝突應如何化解?在這些公共利益前提下企業應如何與競爭法機關互動?各國代表對此一問題大都表示無法回答。美國代表表示，如果是限制競爭行為，競爭法主管機關應予處理，但如果須平衡公共利益與競爭，則必須立法專案處理(如工安、薪資聯合議價、金融安全等)。澳洲表示，公共利益題通常需要進行公共聽證或諮詢，方能決定是否可豁免於競爭法之適用。主席請秘書處繼續與 WPRBS 聯絡，以決定是否可進行議題討論。

(二) 未來討論議題:主席宣布 WP3 明年 6 月將討論「中間產品之國際卡特爾」(International Cartel with Intermediate Goods)。

伍、「競爭委員會」會議:

12 月 17 日至 18 日舉行競爭委員會(Competition Commission, CC)會議，由主席 Dr. Frédéric Jenny 主持，討論事項如下

一、12 月 17 日:

(一) 選舉委員會成員及主席:競爭委員會依例選出 2015 年委員會成員及新任委員會主席，選舉結果委員會成員為澳洲、比利時、加拿大、法國、德國、日本、瑞典、英國及歐盟、主席仍由 Dr. Frédéric Jenny 續任。

(二) 各工作分組主席及國際組織協調人報告:

1、WP2 主席 Alberto Heimler 報告 12 月 15 日會議情形及結論

2、WP3 主席 Wi1liam Baer 報告 12 月 16 日會議情形及結論。

3、ICN 協調人加拿大競爭局局長 John Pecman 報告: (1)ICN 將與 OECD 秘書處建立新的聯繫程序，以找出雙方工作重疊部份，並改善兩個組織間之協調工作。(2)ICN 卡特爾工作小組於 2014 年 10 月 1-3 日在臺灣臺北市舉辦卡特爾研討會，有超過 150 人參加。倡議工作小組於 11 月 6-7 日在模里西斯舉辦倡議研討會，參加人數約為 60 人。結合工作小組於 12 月 1-2 日在印度新德里舉行，參加人數亦超過 150 人。P 局長並對在我國主辦之卡特爾研討會結果公開讚許。(3)ICN 將在 2015 年 4 月 28 日至 5 月 1 日在澳洲雪梨舉辦第 14 屆年會，請各國踴躍報名。(4) 2016 年第 15 屆 ICN 年會預定將於新加坡舉行。

4、聯合國貿易發展會議(UNCTAD)協調人 François Souty 博士報告:UNCTAD 於 2014 年 7 月 8 日至 10 日在日內瓦舉行競爭法專家會議。該會議討論內容包括

:競爭政策對消費者之好處、對特定案件之非正式國際合作、競爭法主管機關溝通策略做為提升機關效能之工具等。

(三) 競爭與投資:

1、OECD投資委員會主席Menfred Schekulin報告有關將於2015年提報部長會議的「投資政策架構」(Policy Framework for Investment)中競爭專章草案，請會員提供意見。該架構報告係OECD提供各政府如何設計及施行政策以創造有利競爭之投資環境，以吸引投資，其內容包括競爭政策在內等10項政策。主席請各會員以書面提供意見，以修訂該專章內容。

2、秘書處報告「競爭政策與基礎建設投資」(Competition Policy and Infrastructure Investment)，討論競爭政策與基礎建設投資流動相關問題，如競爭法主管機關結合審查是否影響外國直接投資(FDI)，FDI與市場結構，及競爭法主管機關對卡特爾行為調查之標準等。

(四) 各國競爭政策年報:本次會議共有包括我國在內的 26 個國家提交 2013 年競爭政策年報，會中並邀請墨西哥、義大利、哥斯大黎加、秘魯等國家進行口頭報告。

(五) 未來討論議題:CC 明年 6 月會中將討論競爭中立(Competitive Neutrality)議題，並舉行「寡占:寡占市場之競爭行為與勾結」圓桌會議(Roundtable on Oligopoly: Competitive Behaviour and Collusion on Oligopoly Markets)。

(六) 「智慧財產權與標準設定」聽證討論(Hearing Discussion on Intellectual Property and Standard Setting):

1、主席首先說明本議題涉及智慧財產權(尤其是專利權)與標準之間的關係;亦即，一方面，在標準制定過程中，如有參與人隱瞞其技術受有專利保護一事，則可能在標準成立後造成如專利箝制(patent hold-up)、專利伏擊(patent ambush)等情形，因此應著重標準制定過程中的透明性。另一方面，在標準制定後，智慧財產權人有以「公平合理不歧視」(Fair, Reasonable and Non-Discriminatory, FRAND)條款為授權之義務，此部分除應以標準制定組織(Standard Setting Organization, SSO)之智慧財產權政策加以確保，對於其內涵應如何解釋、權利人有無履踐其 FRAND 授權義務與其得否請求禁制令之間關係等，亦值討論。主席因此提出四項本段議程之討論主題，包括：智慧財產權與標準之關係、FRAND、禁制令，以及其它可用以解決相關爭議之手段。

2、秘書處就背景文件報告進行說明，略以:

(1) 標準與專利權及競爭市場之微妙關係：在專利權方面，標準之目的在於使技術廣為流通，但專利權係用以排除他人對技術之實施，二者之目的似有不同；在競爭市場方面，競爭法期待事業間之完全競爭，但標準常涉及水平競爭對手間之合作，並有可能導致數量限制或聯合抬高價格等負面效果，因此是需要留意的對象。

(2) 針對目前標準運用爭議較多的資通訊產業，秘書處指出其研發活動的特性有二，其一係互補性研發(complementary innovation)，亦即競爭對手間各自研發一部分產品所需之技術，因此需要仰賴對方的技術方能完成產品，此會造成交互授權之現象，並易造成授權金堆疊(royalty stacking)之現象。另一特性為累積式研發(cumulative innovation)，亦即該領域之研發係在現有技術水平之上持續進行改良與創新，在此情況下，要決定第一個創新與後續創新之間的貢獻程度，是有困難的。

(3) 在標準制定的過程中，雖然通常有很多參與者，但是實際上積極參與的數量很有限，此是因為標準制定的過程需要進行多次討論、提出諸多文件與說明，時程亦通常很漫長，因此有足夠資源能夠持續參加者相當有限；從另一方面來說，願意投入此等資源參與標準制定過程者，通常都有其策略目的，最主要的便是促使其技術被納入標準中。

(4) 依歐洲電信標準協會(European Telecommunication Standards Institute SEPs, ETSI)之定義，標準關鍵設施(SEPs)應是該產品技術上—而非商業上—所必要者，亦即對於該設備或方法之製造、銷售、租賃、以其他方式處分、修繕、使用或運用，考量到通常技術功能以及標準制定當時之技術水準，無法不對該專利造成侵權。然而，目前亦有研究主張，商業上有所必要的專利亦可成為 SEPs，譬如該專利之標的是一項消費者通常會期待在該設備具有之功能。然而，秘書處之報告上並未說明 SEPs 包括商業上所必要專利之見解，是否漸被採納。此外，秘書處說明，專利權人應向 SSO 提出聲明以取得 SEPs 之資格，而其程序上之要件以及附隨產生的 FRAND 授權義務，則須視該 SSP 的智慧財產權政策而定。

(5) 標準之制定與市場力量之關係:從 SEPs 的定義以及 SSO 參與者之參與動機來看，技術加入標準似乎會對市場力量有所增益，2007 至 2008 年間亦有幾分研究持相同看法。不過，2010 年的一份實證報告經分析通訊及

影像之專利資料庫後，認為納入標準對於專利之價值或重要性之影響，其實微不足道。然而，實務上，歐盟執委會及美國法院均有認定 SEPs 建構巨大市場力量之案例；美國聯邦貿易委員會(USFTC)及司法部(USDOJ)則認為，如果標準制定後，轉換至另一技術會對標準使用者造成相當成本，則 SEPs 權利人便可利用此地位。由此觀點來說，SEPs 權利人有無市場優勢地位(dominance)，與專利箝制的風險息息相關。

3、WIPO 代表 Giovanni Napolitano 先生進行簡報，略以:

(1) 智慧財產權制度有鼓勵創新之目的，亦即鼓勵提出新的、具差異性的產品來進行競爭，差異性是智慧財產權制度所重視的；相對地，標準重視的是產品與程序的一致性，標準之建構，可能對於發展替代性的產品或程序有不利效果，限縮發展替代性技術或迴避設計之空間。面對此不同追求，在制度之思考上，必須兼顧鼓勵創新、建立對消費者及產業均有利的標準，以及維護產業競爭三個面向。

(2) 強制性標準(mandatory standards)與自願性標準(voluntary standards)應有所區隔。在強制性標準方面，標準運用者如無法實施某 SEPs，可援引關鍵設施理論(Essential Facility Doctrine)解決，但如果是自願性標準，因為理論上仍有選用其他技術之可能性，是否仍可援引關鍵設施理論以實施該 SEPs，便較有疑義，但應認仍有此空間，另外應也有主張專利權人濫用權利、其權利不可執行(unenforceable)之可能。此外，其亦表示 FRAND 條款之內涵目前仍相當模糊不清，WIPO 對此亦甚為關切，後續有可能對此議題進行討論。

4、國際電信聯盟(International Telecommunication Union, ITU)Antoine Dore 先生分享標準相關實務，略以:

(1) ITU 為一歷史悠久之跨政府組織，目前有 193 個會員國及超過 700 個民間組織參與其中，長期致力於電信及無線電方面標準之制定。其分享 ITU 智慧財產權政策，ITU 智慧財產權政策之目的在於確保經全部或部分納入標準之專利，任何人均應能不受不當限制地使用。

(2) ITU 智慧財產權政策包括揭露原則及授權承諾，前者指標準制定之參與人應對於有可能成為 SEPs 的專利或專利申請案，揭露其存在；後者指 SEPs 權利人應提出一項聲明，表示其願以 RAND 或免權利金之授權條款，對所有運用該標準之人為授權。

(3) ITU 亦察知標準確實可能有其不利益，譬如，如同秘書處所述的，標準制定之結果可能會對大型企業較為有利，因其可以負擔參與制定過程之成本；另外，標準亦可能產生使用者難以轉換至其他技術，從而被侷限於必須繼續使用該標準的困境中，亦即所謂鎖定效果(lock-in effect)。另外，一項標準可能因為產品應用領域不同，而對於複數產業具有影響力，譬如資通訊產業之標準，可能會因技術應用到其它領域(如汽車行車電腦)，而對汽車產業造成影響，此部分應一併考量。

5、Charles River Associates 之代表 Anne Layne-Farrar 小姐就專利箝制與授權金堆疊方面之研究成果報告，略以:

(1) 箝制是一個廣為人知的價格理論，其構成要件有二：特定資產之投入(因此產生鎖定效果)，以及事後利用鎖定效果謀利之行為。以此來看，在標準制定的過程中，尚無專利箝制之現象，也因此，多數案例在設定授權金時，均採取「事前標準」(ex ante approach)，亦即以標準制定過程中，各個技術仍在競逐被納入標準之時點，判斷 SEPs 權利人如在正常交易談判中所能獲致之授權金。此外，實務上肯認，取得禁制令之可能性將加重專利箝制之風險。

(2) 在權利金堆疊方面，實務上做法有相互不同之處，亦即，有法院將授權金堆疊之可能性納入決定 FRAND 條款時之參酌因素，並且藉由將權利人所要求授權金比率套用到所有 SEPs 權利人身上，來評估有無堆疊之現象；此如 Microsoft v. Motolora 及 In re Innovatio 兩案。但相對地，亦有法院要求主張權利金堆疊之一方，必須確實提出該個案中權利金堆疊之證據，不得僅推論將有此現象；例如 Ericsson v. D-Link(本案此部分見解經美國第二審法院維持)。

(3) 對於應有證據之見解，如僅以推論方式認定有授權金堆疊之現象，在不同 SEPs 對標準及對產品的貢獻度不同時，即會出現問題。譬如說，某標準中有 5 項不同的 SEPs，貢獻度總計為 10 分，但比例上 SEP1 貢獻度 5 分、SEP2 貢獻度 2 分，而 SEP3 到 SEP5 貢獻度均為 1 分。而舉例來說，如果 SEP1 之權利人起訴請求 FRAND 權利金，並主張權利金應為 5 單位，法院如應用「將權利人所要求授權金比率套用到所有 SEPs 權利人身上」之推論方法，將得出所有 SPEs 權利人將要求 5*5=25 單位之權利金，大於所有 SEPs 對該標準之價值(10)，因此將認為有權利金

堆疊之現象，並削減 SEP1 權利人所請求之權利金。但在本案例中，SEP1 權利人所請求的權利金其實是合於其貢獻度的。相反地，如果 SEP5 權利人起訴請求FRAND權利金並主張權利金應為2單位，法院計算之後，會認為所有 SEPs 權利人所要求的權利金之加總，相當於 SEPs 對標準之貢獻，應可允許，但此時 SEP5 之權利人將受有超過其貢獻度之權利金。不過，事實上個別 SEP 對標準的貢獻度實際上是很難計算的。

(4) 對於實際上有沒有專利箝制或授權金堆疊的情況，目前並無專利箝制的實證研究資料，而對於權利金堆疊的證據也不全，主要可能因為大部分授權契約皆未公開。然而，以權利金堆疊來說，如果在標準相關產業，權利金堆疊是一種結構性的現象，那麼應當會有如終端產品價格停滯或上揚、產業創新狀況停滯、專利授權形成市場進入障礙以至於未有新廠商進入市場等等情況，但是目前並無相關證據顯示有此現象。面對此專利箝制與權利金堆疊之理論與實際證據有差距的狀況，可能因為市場機制已減緩發生風險，譬如專利池或標準設定組織內之專利權人們，已藉由相互合作來避免發生此種情形，主張專利權之成本亦對過度主張權利之行為有抑制效果等，其並認為，目前多數情況中，市場機制已可解決專利箝制與授權金堆疊的風險。

6、 主席請與會代表就上開報告表示意見。美國代表表示，其認同制定標準之必要性，其認為標準可促進創新，但競爭法主管機關應著重維護標準不被濫用，亦即應確保落實 FRAND 條款。對於先前所提及雖有專利箝制或授權金堆疊的理論但實務上少有實證一事，其表示正因如此，競爭法主管機關更應留意是否表示該等情況不為人知，而應著重監管 FRAND 之承諾能否落實。歐盟與韓國之代表則認為目前應有專利箝制之現象，而不僅止於理論。

7、 之後主席邀請大家針對 FRAND 授權之主題表示意見。首先由 ITU 代表介紹 ITU 智慧財產權政策之作法，略以:

(1) ITU 會要求(潛在)SEPs 權利人揭露其專利之存在，並承諾願以 FRAND 條款為授權；所有參與其標準制定者皆須合致此要求。在揭露義務方面，對於為必要專利或有成為必要專利可能者，皆須揭露；時程上應當儘早為之，但實際上權利人常常在標準制定的後階段方為揭露，另外揭露義務不限於標準制定過程中方有，即使在標準制定完成經採認

後，權利人對於必要專利仍應加揭露。

(2) 2012 年 ITU 曾舉辦研討會檢視其智慧財產權政策之效益，後續由其下之智慧財產小組針對 SEPs 權利人是否可獲發禁制令、FRAND 授權條款中合理之要件如何認定、何謂不歧視議題進行後續研究，但目前尚無具體共識。

(3) 所謂不歧視如何認定之議題，在於其標準制定參與人，對於不歧視要件是否指授權條件是否須完全相同有不同見解。有部分參與者認為應完全相同，亦即 SEPs 權利人便無法基於某些因素而為有限度之不同待遇，但如此之解釋在在某些情況可能會產生疑慮，譬如被授權人的產業領域其實不同(使用標準之程度不同)，或被授權人為中小企業，而應考量鼓勵、協助中小企業運用標準之公益目的。

8、美國代表表示，FTC 及 DOJ 對於 SEPs 權利人行使權利相關問題，會藉由發表建議性意見(advisory opinions)、啟動調查、在個案法院審理程序中以法庭之友之身份提供意見，以及做成政策宣言(policy statement)等方式闡述其立場。渠等基本見解是 FRAND 授權條款可避免權利人收取過高之權利金；在某些情況，SEPs 權利人若獲得禁制令或國際貿易委員會(International Trade Commission, ITC)之排除令，將造成不利於公共利益之情形。美國代表並表示，前述 Ericsson v. D-Link 之爭議經上訴第二審後，美國聯邦巡迴上訴法院(Court of Appeals for the Federal Circuit)最終並未決定 FRAND 授權金比率為何，而係以地方法院對陪審團之指示未盡充分，而發回更審。所謂地方法院對陪審團之指示未盡充分，主要即指法院應明確指示，FRAND 授權金之評估，應僅基於該專利權技術所增益之價值(incremental value)，而不得基於該標準整體之價值，或該 SEPs 因被納入標準所增加之價值。

9、歐盟代表則表示，其關於 FRAND 授權金比率之爭議案件，仍在會員國法院審理中，而基於各會員國法制之差異，結果如何實難預料。基本上，其亦認為 FRAND 授權金應以 SEPs 本身之價值為基礎，但這個基礎便很難計算；以研發成本為基礎之方式並不實用，相似專利之授權金或其他 SSO 對相近技術之授權條款相關資料亦難以蒐集，而單一 SEPs 之貢獻也很難計算。不過，以歐盟執委會之立場來看，其並不會擔任 FRAND 授權金比率決定者之角色，而是運用禁止超額定價(excessive price)之法規工具加以節制。

10、 印度代表簡報該國做法。印度競爭法對於水平聯合行為之禁止，設有基於效率而為聯合之例外條款，可適用於標準之情況，但是，對於將濫用優勢地位之相關規定適用到 SEPs 問題之實務經驗，仍然相當淺薄，跨單位之間的合作亦有待加強。印度目前有兩件負有 FRAND 授權義務之權利人，遭印度競爭委員會(Competition Commission of India, CCI)認定授權條件具差別待遇而違背 FRAND 承諾之案例，但目前皆尚未確定。

11、 日本代表指出，負有 FRAND 授權義務之權利人如果要求超額之授權金，依據其公平交易委員會(JFTC)指導準則，在競爭法的評價上，可能會被視為拒絕授權；不過，其目前並無實際案例，亦即，對於何謂前述之超額授權金尚有所不明。其對於 FRAND 授權金之認定，目前僅有 2014 年 5 月由其智慧財產高等法院(知的財産高等裁判所，Intellectual Property High Court)在 Samsung v. Apple 一案中所做成之判決。在該案中法院審酌雙方協商授權契約之事實背景(Apple 曾數次提出含計算基礎之授權金提案)，認為 Samsung 請求禁制令構成權利濫用，不應允許，但其仍可請求合於 FRAND 授權條件之授權金，以作為損害賠償。在此部分，法院先計算涉案標準(UMTS)對侵權產品售價之貢獻比例，再計算該標準內 SEPs 之貢獻度；而為避免 SEPs 授權金累積之總量過高，在後者之計算上應設定上限計算(本案最終設定為 5%)。經過前述方法計算之數額，復按該標準中 SEPs 之個數平均計算。依此計算後，本案 Samsung 可得之 FRAND 授權金近 1 千萬日圓。

12、 韓國代表介紹其公平交易委員會(KFTC)所處理 Apple 主張 Samsung 違背競爭法之案件。該案中 Apple 之主要主張為，Samsung 為負有 FRAND 授權義務之主體，其尋求禁制令已構成具市場優勢地位之廠商不公平地運用專利侵權訴訟手段之行為(unfair use of patent infringement by market dominant firm)。對此 KFTC 則未採納，其認為 FRAND 授權契約之潛在被授權人，如果有拒絕接受合於 FRAND 授權條款之契約、拒絕給付合於 FRAND 授權條款之授權金，或拒絕或設法延宕與 SEPs 權利人協商成立合於 FRAND 之授權契約，便難以被認定為有意願締結 FRAND 授權契約。而本案中 Apple 之行為，包括在協商授權契約之過程中另案提起專利侵權訴訟等，無法顯示其已致力於與 Samsung 締結契約，因此其主張並無理由。

13、 下一階段禁制令主題，由 Cleary Gottlieb Steen & Hamilton 律師事務所之合

夥律師 Maurits Dolmans 先生為背景介紹，略以:

(1) 原則上，依據標準及 FRAND 授權承諾之原理，應認為 SEPs 權利人除非有主觀因素(如潛在被授權人拒絕或延宕協商)等情況，否則不應請求禁制令，方為應然之理。

(2) 在歐盟方面，雖然各會員國之法例不同，但通常會核發禁制令。某些會員國(如英國)在審酌是否核發禁制令時會考慮衡平法之因素，但一般來說仍傾向核發禁制令，除非經過審酌雙方權益衡平後，認為禁制令之核發將對被告造成重大損害；德國法院則幾乎均會核發禁制令。然而，當此原則適用在 SEPs 時，即會產生疑慮，包括專利經納入標準之後，因為降低了潛在被授權人尋求其他替代技術之可能性，權利人之協商力量相對增強；相對地，潛在被授權人則面臨轉換成本之壓力；此外，在涉及 SEPs 之情況，如果核發禁制令，不僅將對於爭議雙方所在市場有影響，對於其下游市場也將造成排除效果，影響層面較大。

(3) 在這種背景下，部分法院已開始改變態度，如英國法院在 IPCom 與 Nokia 的爭議中，認為在權利人 IPCom 已做成 FRAND 授權承諾，Nokia 亦願意以 FRAND 授權條款締結契約之背景下，不應允許核發禁制令，法院因而運用衡平法原則，酌定授權金比率。不過這種案例仍屬少數。

(4) 在美國方面，基於 eBay 案所確立之核發禁制令四項審酌因素，禁制令之核發相當程度受到權利人屬性之影響，除其為大學學校或獨立發明人之情形，一般情況核發禁制令之比率已顯著降低，權利人自己並未實施該專利時，更不易取得禁制令。此外，在 Apple v. Motolora 的一審審理過程中，面對雙方基於不同基礎提出之禁制令請求，Posner 法官均予准許，期望藉此迫使兩造儘速進行協商，這種做法也值得一提，不過本案判決經上訴審法院部分廢棄發回。

(5) 面對這種問題，確實可能引發競爭法之問題，這可能有幾個面向，其一在於標準之制定過程中可能會在數個類似技術中選擇其一納入標準，此可能會有(聯合)杯葛(boycott)之行為，限制技術與技術之間的競爭；其二在於專利權人之市場力量可能因為該專利被納入標準之後而顯著增加；其三在於 SEPs 的授權金如果增加，可能會對下游產業之競爭造成影響。在下游產業影響之面向，特別應注意專利箝制之問題，專利箝制在授權契約協商過程中確實可能發生，目前所見可能僅為冰山一

角。

(6) 關於競爭法主管機關之態度，歐盟執委會在 Apple 與 Motorola 之爭議中，以 SEPs 權利人為該專利之唯一供給者、欲使用該技術之人通常無法轉換使用其它技術之情況，來認定 SEPs 權利人具備市場優勢地位，且其尋求禁制令之行為構成市場優勢地位之濫用。不過，實務上僅是推定 SEPs 權利人具有市場優勢地位，還未達到視為會具有市場優勢地位之程度。此譬如說，在案例中，曾有主張，因為潛在被授權人可能自己也擁有 SEPs，可與原 SEPs 權利人協商交互授權，因此，此時原 SEPs 權利人不具備獨立於其客戶而行為之力量(the power to behave independently from one's customers)，不合致具備市場優勢地位之定義。

(7) 所謂市場優勢地為之濫用(abuse)方面，亦有不同意見，也就是是否只要 SEPs 權利人尋求(seeking)禁制令便會構成濫用，亦或 SEPs 權利人尋求並執行(enforcing)禁制令，方會構成濫用。此爭點在於人民應有尋求司法救濟之權利(right to access to a court)；僅是向法院尋求禁制令便會構成濫用的話，是否會構成對前述權利之限縮，但另一方面，雖僅是向法院尋求禁制令而尚未執行，專利箝制之效果可能已經顯現。其它可能被認定為違背競爭法之行為，如將 SEPs 之授權與非 SEPs 之授權或與潛在被授權人交互授權之條件相連結。

14、美國代表表示，在禁制令之議題，2013 年 1 月份 US 專利商標局(USPTO)與 DOJ 所發布之政策宣言中，即已表示如 SEPs 權利人若獲得禁制令或 ITC 之排除令，在某些情況，是會造成不利於公共利益之情形的，因此 ITC 在處理上應當把核發排除令對於競爭之影響亦納入考量；2013 年 8 月亦有美國總統基於公共利益而對 ITC 之排除令加以否決之例子。在司法面，則如前述，係依據 eBay 案的四項審酌因素進行判斷。在實際案例方面，對於 Google 購買 Motolora 之後，拒絕受到 Motolora 先前就其 SEPs 所為 FRAND 承諾之拘束之案例，FTC 認為 Google 應繼受 Motolora 先前之 FRAND 承諾，並不得尋求禁制令，除非有特殊情事，譬如被告不受美國法院管轄權所及，或拒絕依據法院或仲裁人所定 FRAND 條款締訂契約等。不過，在本案中，Google 是被認定違反 FTC 法第 5 條，亦即關於不公平競爭方法之規定，該等行為接著是否會被認為違反休曼法(Sherman Act)第 2 條關於

獨占之規定，尚不明確。

15、歐盟代表指出，專利以及 SEPs 的數量在過去幾年中均急速增加，相關問題已經引起歐盟的注意。SEPs 可能象徵市場力量，且可能是象徵其未加入標準則無法擁有的市場力量。對於禁制令之核發，各會員國之作法則不盡相同，包括如法院是否會援引衡平法原則判斷是否核發禁制令，此在英國法院為肯定答案，在德國法院則否；或者如訴訟被告是否得主張原告為 SEPs 權利人，其尋求禁制令之行為構成市場優勢地位之濫用、違背競爭法之抗辯，此在德國，依據其判決先例(即所謂橘皮書標準決定，Orange Book Standard decision)所建立之原則，有此空間，但在荷蘭則否。而在 Huawei v. ZTE 案中，德國法院就禁制令之核發提出數項問題請求歐盟法院(Court of Justice of the European Union, CJEU)為先行裁決(Preliminary Ruling)，本案目前仍由 CJEU 審理中，CJEU 如作成先行裁決，對相關問題有指引效果。在歐盟之層級，有兩個案例可顯示執委會之見解。首先是歐盟執委會於 2014 年 4 月 29 日在 Motolora 案中所為決定，本案 Motolora 擁有 2G 領域的 SEPs，Google 併購 Motolora 之後在德國對 Apple 提起專利侵權訴訟，並取得禁制令。Apple 則向歐盟執委會提出 Motorola 違背競爭法之訴求。但雙方協商授權契約之過程有事證顯示 Motorola 並未致力於協商合於 FRAND 之授權契約，包括 Apple 曾提出 6 次授權提議，亦同意接受雙方依據德國法院所擇定之授權金來締結契約，但 Motorola 以禁制令為脅迫使 Apple 接受其原不可能接受之條款，包括放棄挑戰 Motorola 所擁有 SEPs 之有效性等等。經執委會檢視後，認為 Motorola 負有依 FRAND 條款授權之義務，而 Apple 願依 FRAND 條款獲得授權，則問題在於由中立第三方決定授權金，Motorola 應無由請求禁制令。執委會在本案中並表示，潛在授權方並不會因為其期望挑戰 SEPs 之有效性、其有無構成侵權，或該 SEPs 是否真屬該標準之必要專利等等事項，便被認定欠缺依據 FRAND 條款締訂授權契約之意願。另一件為 Samsung 案，該案事實背景與前述 Motolora 近似，經執委會對 Samsung 在歐盟境內的授權實務展開調查後，Samsung 向執委會提出承諾書，表明對於依據一定架構授權協商之對象，不會提起禁制令，該承諾經執委會於 2014 年 4 月 29 日接受。前述授權架構包括雙方應先行協商 12 個月，如仍未能達成協議時，可依雙方同意交付仲裁，或由一方提請法院決定授權條款。

16、德國代表表示在德國確實有對原被告雙方皆核予禁制令，將促使雙方和解之想法；法院所考量的是細緻地平衡雙方的協商力量。芬蘭則指出負有FRAND 授權義務之 SEPs 權利人並非當然不得請求禁制令，因為 FRAND 授權承諾僅在確保第三人可使用 SEPs，權利人仍得加諸一定授權條件，而非要求 SEPs 權利人必須無條件地對外授權。義大利則表示在 2012 年 Samsung v. Apple 案中，Samsung 請求核發禁制令亦遭駁回，此因法院考量雙方當事人之衡平及消費者利益後，認 Samsung 所遭受的是可以填補的經濟性損害。

17、最後針對其它可用以解決相關爭議之手段之主題，主席首先邀請歐洲專利局(European Patent Office, EPO)之代表進行報告，略以:在今天所討論的種種議題中，是專利局的角色無法解決的，但仍可以向競爭法主管機關提供協助。其提出五項專利局可以提出協助的事項，第一項為在競爭法案件中提供專利方面專業知識，如 2008 至 2009 年間因執委會競爭總署調查藥品方面案件，便將 EPO 相關領域之審查官借調至競爭總署達 7 個月。第二項為協助使用公開之專利資料庫(如 PATSTAT、EP-A、EP-B)；藉由此途徑可有助於評估個別公司專利組合之大小、結構與強度。第三項是對競爭法規之訂定修正提供專家建議。第四項是運用標準相關文件來進行先前技術之審查。一般來說，正常標準制定過程中之文件應當被認為屬於非機密的性質，因此可認定屬於公開文件，在專利案件審查中應可援引為先前技術之基礎；但這方面的文件不易取得及使用。因此，EPO 透過與 SSO 簽訂合作協議，將標準相關文件納入其資料庫，以使審查官可以檢索，以提升專利品質；目前已有約 160 多萬份相關文件經此途徑納入 EPO 資料庫。第五項是協助評估某一專利對某一標準來說是否確實具備必要性，此是因為有些被主張為 SEPs 者可能並非該標準之必要專利，或者其必要性在標準制定過程中已有改變，甚至是該專利中並非所有請求項內容都具備必要性等，如能加以釐清，或者可以降低專利箝制之風險。

18、Cleary Gottlieb Steen & Hamilton 律師事務所之合夥律師 Maurits Dolmans 先生指出，最重要的其他解決手段，便是 SSO 可以在其智慧財產權政策中納入兩項要求，一是規定 6 個月的協商期間，如協議不成則提付仲裁決定授權條款;二是列舉不合於 FRAND 授權承諾之條款,如將 SEPs 與非 SEPs 綁在一起授權、要求被授權人以無償或低授權金為交互授權。目前已有部

分 SSO 開始在其智慧財產權政策中納入此等要求。

19、BIAC 代表發言指出:

(1) 對於標準與 SEPs 相關議題近期很受關注，但實際上在產業面所面臨的問題要比其所受到的關注來得低。BIAC 的會員有是 SEPs 權利人的，也有是被授權人的，當雙方就專利授權產生爭議，此本質上是商業爭議，也就是契約糾紛，爭執重點在於授權範圍、授權金計算基礎等事項能否達成協議。在此種情況下，雙方自然會進行協商來避免爭議。目前我們看到的案例應僅是少數，多數情況雙方皆能成立授權契約。

(2) BIAC 認為競爭法主管機關應僅在有必要時方為介入，亦即市場競爭受到阻礙的情況。大家較為關切是在於 SEPs 之排除效果，此問題可進一步分為兩方面來說。第一方面，針對以禁制令為手段排除競爭的情況，BIAC 指出實際上歐美法院皆會考量權利人之損害是否大到足以正當化禁制令之核發，譬如考量有無金錢所無法填補的損害等，且實際上在資通訊領域核發禁制令的案例並沒有那麼普見。第二方面，有主張認為如果 SEPs 權利人在標準制定過程中隱瞞其專利資訊或拒絕依 FRAND 條款為授權，那麼其 SEPs 排除效力實際上是透過對 SSO 的欺瞞(fraud)而取得的。

(3) BIAC 認為，競爭法縱加檢視，也不應該忽略事實上仍存在可取代該 SEPs 的其他選擇的可能性；而且，在標準制定過程中，費時漫長且往來文件繁多，不能忽略專利權人有不知道其專利被列為 SEPs 之可能性。綜此，BIAC 建請競爭法主管機關對於是否介入此類爭議採取審慎態度。

20、主席總結認為今日對於擬定的主題充分討論交流，對於釐清此類議題之內涵及競爭法介入之時機與界線均有幫助，後續如能對於 SEPs 價值之認定發展分析方法，將有助於釐清 FRAND 條款之內涵。

二、 12 月 18 日

(一)「競爭法主管機關制度設計之改變」圓桌會議(Roundtable on Changes in Institutional Design of Competition Authorities): 本議題主要討競爭法主管機關制度設計之變革，包括功能調整、內部組織制度調整、委員遴選及任命方式之設計等。

1、主席指出，本議題共有 32 個國家提出書面報告，內容大致分為(1)機關內部

組織變動。有機關進行小幅變動，也有機關經常進行內部調整，但主要是沒有一個所有機關都可適用的一致性調整模式。(2)在機關的合併上可分:與消費者保護(消保)機關合併、與管制機關合併及與其他機關合併。合併的考量理由除節省人事成本外，尚有:提升決議的品質、強化執法目標、及降低執法的複雜性等因素。(3)合併後內部管理:如何調合內部經濟與法律觀點及共同合作執法、如何調合競爭與消保觀點與執法工作、如何分配有限資源於競爭、消保、管制及其他功能及如何平衡各項不同功能。(4)如何強化機關之獨立性。

2、ACCC前任主委Allan Fels就競爭法主管機關的多重功能及機關合併提出報告，略以:

(1) 競爭管制主管機關可能具備的執法功能包括:競爭法、消保法、公共事業管制(如電信、能源、交通及其他)及關鍵設施之進入制度。其執法方式可為:價格監督或管制、大企業與小事業間之交易關係、國家競爭政策之倡議及施行。

(2) 競爭與消保工作可為相輔相成，因為競爭可以保護消費者，而提倡消費者保護也可促進競爭。但有時候會二者政策上亦會有所衝突。例如，新開放的管制事業應以保護競爭為優先，或保護消費者為優先，可能會造成衝突。

(3) 競爭法主管機關與消保機關合併的優點有:協調容易、執法專長整合、政治能見度高(消費者看得見)、以偏向市場機制及競爭機制方式執行消費者保護及以偏向消費者觀點執行競爭法。但其必須承擔之成本有:因法律實質及施行的差異可能造成整合困難而限制了其原先之好處、消費者保護須要協調、聯繫政府各層級機關而可能造成制度上的複雜與因難度、執法優先順序上可能有所衝突而無法平衡政策目標。

(4) 競爭法主管機關與管制機關間合併所需面對的挑戰有: (1)目的相同，但執法工具可能有所差異。(2)管制目的與競爭的觀點及哲理可能有所不同。(3)競爭法主管機關告訴廠商什麼不能做，而管制機關告訴廠商可以做什麼(前者禁止，是事後行為，後者為指示，大都為事前行為)。

(5) 競爭法主管機關與管制機關合併可以考量的方法有: (1)全面管制或特定產業管制之選擇，(2)國家層級管制或分散到地方管制，(3)競爭法主管機關是否一定得與管制機關合併或僅需部分合併、或分開但可以協

調。

(6) 機關合併問題在於執法的專業化，政策間協調可能產生衝突且需政府全面監督。如果分開，個別機關間所需其他領域專長是否足 够?合併後是否可得到預期的協調效果?這些問題沒有一定的標準答案，而競爭法主管機關與消保機關合併的主張似乎比與其他機關合併的主張較強烈，而這些主張與歷史、國家大小及環境都有相關。

3、主席說明，本次報告中有 7 個競爭法主管機關與消保機關合併，3 個分離，4 個表示有考慮合併但未完成。

4、芬蘭表示，芬蘭競爭局在 2013 年與消保機關合併成為「競爭及消費者保護局」，目前所遇到的問題為:競爭及消保人員之間仍有隔閡。目前競爭人員因具調查權而較有權力，該局曾提議提升消保官之權力，而未來機關運作可能消保人員會較佔優勢。

5、愛爾蘭競爭局在 2008 年 10 月 31 日與消保機關合併，競爭人員有較高職等及薪資，但消保人員較易面對媒體解釋問題，該局目前正在考慮平衡競爭與消保之間的資源。

6、丹麥競爭及消費者保護局則報告競爭與消保合併的優點:競爭人員得以瞭解分析及倡議之重點，而且也較易吸引消費者的注意。對新進人員而言，他們可以在競爭或消保之間有較大的移動空間。在調查案件上，雖仍有分競爭與消保，但如有必要，消保官亦可支援競爭法案件之調查。

7、USFTC 代表報告，該機關 1914 年成為消費者保護機構，但在 1930 年加入了調查競爭損害之職責而成為競爭法主管機關。目前 USFTC 主要職掌在於調查競爭及個人隱私資料之保護，惟這僅為該機關權責之一部份。

8、英國「競爭與市場局」(Competition and Markets Authority, CMA)報告:該局係由原兼負消費者保護職責之「公平交易局」(OFT)及「競爭委員會」(CC)合併而成之機關，該局主要的職責在專注於市場議題，而非競爭或消保議題。

9、韓國公平交易委員會報告，KFTC 在 2008 年加入消保權責，目前執法以競爭及消保並重。

10、冰島競爭局報告該局在 1993 年－2005 年為競爭兼具消保機關。2005 年後成為負責競爭單一職責之機關，主要目標在於維護整體經濟之效率。在 10 年後該局回顧此一決定應該是正確的，因為該局的決議品質提升，並縮短

調查過程與時間。

11、日本在 2009 年成立消費者保護事務機關，JFTC 不再負責虛偽不實及引人錯誤廣告調查業務，得以更專注於競爭法案件之調查。但 JFTC 仍與消保機關維持緊密之聯繫合作。

12、西班牙國家與市場競爭局(National Authority for Markets and Competition, CNMC)報告該局 2013 年由競爭法主管機關與產業管制機關(電信、能源、郵政及交通)合併之經過。

13、荷蘭「消費者與市場局」(Authority for Consumer and Markets, ACM)報告該局在 2013 年由競爭、消保及管制機關(郵政及電信)合併，其優點為可跨功能解決問題，設定執法優先順序，該局認為合併之優點已超越原先之挑戰。

14、義大利競爭局報告該局與產業管制機制分離，可專注於競爭之執法，而產業管制機關也有更專注於產業發展之優點。

15、澳洲 ACCC 亦為競爭、消保及管制合併之機關，澳洲目前正討論 ACCC 是否再加入關鍵設施進入(access of essential facilities)機制管制之功能。

16、美國喬治華盛頓大學教授，前 USFTC 主任委員 William Kovacic 教授報告競爭法主管機關獨立性及其與政治程序之關係，略以:

(1) 競爭法主管機關獨立的最終意義在於與政治組織脫離，不受政治壓力干擾。政治壓力是普遍存在的，競爭法主管機關是具權力的政府機關，一旦有了權力就會有壓力，問題是應如何使政治壓力轉向。

(2) 競爭法主管機關是無法完全獨立自治的。最基本的問題就是，需要取得預算經費。政治力量可透過預算審核、政治倡議或人事干預施予壓力，而競爭法主管機關也須與民意代表機構有一定的關聯，取得其支持。

(3) 競爭法主管機關獨立最主要的目的就是要保護內部最重要核心任務:誰在調查、誰受調查、何時處分、如何處分。競爭法主管機關要能抗拒案件壓力、但必須解釋其政策立場並能接受外部稽核。

(4) 機構獨立的設計必須考量:預算來源是否受到政治侷限?核心人員的去留是否受政治干擾?是否可做為獨立執法單位?但獨立仍需有其監督機制:法院、立法機關、民眾對機關的評斷。

(5) 為平衡自治與責任，競爭法主管機關必須作以下有意義的揭露:(1)明確的政策陳述及目標，(2)常規性的公共諮詢，(3)具教育性解釋的決議，(4)常規性的評估結果，(5)公共政策的策略運用，(6)平抑選擇性的官方報

告。

(6) 為了機關經常性的運作,競爭法主管機關面對政治須要:注意政治資本的平衡(政治資本的累積及花費要兼顧)；累積政治生態的期望值(尋求支持者同盟)、注意維持政治組合的平衡，及成為政治學的領導者。

17、OECD「政府治理與領土發展處管制政策組」組長(Head, Regulatory Policy Division, OECD Public Governance and Territorial Development Directorate) Nick Malyshev 就「OECD 管制者治理最佳典範原則」(OECD Best Practice Principles for the Governance of Regulators)提出報告，略以:

(1) OECD 經濟管制者網絡(The Network of Economic Regulators, NER)為 OECD 會員及非會員超過 70 個產業管制者所組成，定期分享管制業務與經驗。

(2) OECD 在 2014 年公布「管制者治理最佳典範原則」，內容要點為:機關的明確定位、預防不當影響及維持可信度、決策及治理架構、責任及透明度、義務職權、預算財源、執行評估。

(3) 管制機關在何種情況下「獨立」較為適當?例如:需要維持公眾信賴及公正的決策、需要競爭中立、需要保護公平決策而可以對特定公益造成重大影響、維護組織、財務及決策之獨立性。

(4) 至今我們所談的獨立都是名義上或法律上的獨立，所謂獨立應是實務上的。例如，弱勢的獨立可能混淆政策與管制功能而削減了管制效果與信任度。

18、本會在此一議題亦提出本會在組織改造時之制度、內部組織改變，及在組織改造過程中與當時行政院消費者保護委員會、經濟部貿易調查委員會及行政院公共工程委員會討論是否合併之經過，惟因時間限制，主席僅對會員國提出問題，並未對包括我國在內之各「參與者」報告提問。

陸、 心得與建議

一、WP2 本次討論「結構拆解」及「競標與投標」議題，有助於本會對促進管制事業(交通、電信、瓦斯、自來水、郵政服務、港口等)競爭之瞭解。又考量此一議題與管制產業及公共工程採購相關，建議將 OECD 資料送相關行政機關參考。

二、CC 本次討論「智慧財產權與標準設訂」議題，討論資訊通訊科技產品必要專

利設定與競爭之關係。本會雖未提出報告，但此一議題與我國高科技產業發展及本會執法方向有密切關聯，經濟部智慧財產局亦指派代表與會參加，本議題會議資料及會議紀錄於 OECD 公布後，建議送經濟部智慧財產局參考。

三、CC本次討論「競爭主管機關制度設計之改變」議題，因與各國競爭法主管機關制度之改變及未來發展息息相關，各國參與討論十分熱烈，本會亦提出書面報告分享經驗。各國經驗亦可為本會未來組織調整方案之參考。

四、本次會議資料相當豐富，各議題討論內容及各國報告值得本會參考。為利同仁瞭解本會議討論內容，相關會議文獻資 料將建置於本會BBS 網站供同仁參閱利用。

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Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development **03-Dec-2014**

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COMPETITION COMMITTEE

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Working Party No. 2 on Competition and Regulation

DRAFT AGENDA OF THE 58th MEETING OF WORKING PARTY No. 2

15 December 2014

-- Starting at 10.00 a.m. --

To be held on 15 December 2014 in Room CC 12 of the Conference Centre, 2 rue André Pascal, 75116 Paris, France.

Please contact Ms. Cristiana Vitale if you have any questions regarding this document [E-mail: cristiana.vitale@oecd.org].

JT03367879

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English - Or. English

DRAFT AGENDA OF THE 58TH MEETING OF WORKING PARTY NO. 2

15 December 2014, from 10.00 – 18.00
OECD Conference Centre, Room CC12
2, rue André-Pascal, 75116

I. ADOPTION OF THE DRAFT AGENDA DAF/COMP/WP2/A(2014)3/REV2

II. ADOPTION OF DRAFT SUMMARY RECORD FROM LAST MEETING

-- Draft Summary Record from the last meeting DAF/COMP/WP2/M(2014)2

For information:

-- Executive Summary of the Roundtable on the Financing of the Roll-out of Broadband Networks DAF/COMP/WP2/M(2014)2/ANN3/FINAL

-- List of Participants to the meeting of June 2014 DAF/COMP/WP2/M(2014)2/ANN1

-- Summary of Discussion of the Roundtable on the Financing of the Roll-out of Broadband Networks DAF/COMP/WP2/M(2014)2/ANN2/FINAL

-- Summary of Discussion of the Hearing on Public-Private Partnerships DAF/COMP/WP2/M(2014)2/ANN4/FINAL

-- Summary of Discussion of the Hearing on the Evaluation of Competitive Impacts of Government Interventions DAF/COMP/WP2/M(2014)1/ANN2/FINAL

III. COMPETITION ASSESSMENT TOOLKIT

For discussion:

-- Note by the Secretariat DAF/COMP/WP2(2014)2/REV2

IV. STRUCTURAL SEPARATION: REVIEW OF THE RECOMMENDATION

V. PROJECT ON MARKET STUDIES IN SIX LATIN AMERICAN COUNTRIES

VI. UPDATE BY ISRAEL

VII. MANUAL ON THE EX-POST EVALUATION OF COMPETITION AGENCIES' ENFORCEMENT DECISIONS

For discussion:

-- Note by the Secretariat DAF/COMP/WP2(2014)14/REV1

VIII. EXTENSION OF THE EX-POST EVALUATION WORKSTREAM

For discussion:

-- Note by the Secretariat DAF/COMP/WP2(2014)16

IX. HEARING ON THE USE OF TENDERS AND AUCTIONS

For reference:

-- Issues note by the Secretariat DAF/COMP/WP2(2014)15

X. FUTURE TOPICS AND OTHER BUSINESS

ANNOTATIONS

PROPOSED TIMETABLE

10h00 – 10h15	**Items I - II**
10h15 – 11h00	**Item III (**Competition Assessment Toolkit)
11h00 – 12h10	**Item IV** (Structural Separation)
12h10 – 12h20	**Item V** (Market Studies in six Latin American countries)
12h20 – 12h30	**Item VI** (Update by Israel)
12h30 - 14h30	**LUNCH**
14h30 – 15h45	**Item VII** (Manual on Ex-post Evaluation)
15h45 – 16h00	**Item VIII** (Ex-post Evaluation workstream)
16h00 – 17h45	**Item IX** (Hearing on Tenders and Auctions)
17h45 – 18h00	**Item X** (Future Topics and Other Business)

Item III

Assessing the competitive impact of different types of government policies can yield substantial benefits, whether for businesses -- by increasing the purchasing, production, marketing and sales options - or for consumers -- by enhancing choice, lowering prices, and/or raising quality. The *Competition Assessment Toolkit* provides methods and techniques for determining the likely impact on competition of various types of policies, such as permits, price regulations, advertising restrictions and many others.

The Secretariat will present the final version of the Operational Manual (Volume 3) of the Competition Assessment Toolkit. The purpose of the volume is to provide an accessible explanation, from a very practical perspective, of how to review regulations for their competitive effects. In order to reduce duplication between Volumes 1 and 2, on the one hand, and Volume 3, on the other, changes have also been made to the first two volumes. These changes also include updates to reflect new developments and an expansion of the topic on the benefits of competition, in particular with respect to productivity. The three volumes will be circulated in advance. Some delegations will report on their experience in performing competition assessments.

Item IV

In 2011, the experience of countries with structural separation was reviewed and the Structural Separation Recommendation amended. Four years have elapsed and a new review is called for by the Recommendation. The discussion will consider whether the focus of the review should remain on traditional sectors, such as gas, electricity, telecoms and railways, or whether to consider the extent to which structural separation may be appropriate also in other sectors, such water, postal services, buses and ports. This session will benefit from the presence of Prof. Martin Cave (Imperial College, UK).

Some delegations will discuss their experience in some sectors, which have not been covered by previous reviews.

Item V

The Secretariat will provide a brief update on a project launched in June 2014. This project will take stock of the experience with market studies of six Latin American countries (Chile, Colombia, Mexico, Peru, Costa Rica and Panama) and contrast it against the best practices of some of the most experienced jurisdictions. It will lead to: (i) an OECD report with policy recommendations on how to improve the legal and institutional framework in the reviewed countries, as well as general and high-level guidance on how best to structure and run market studies that these countries can refer to; and (ii) a two-day regional conference to present the findings of the project, raise awareness among senior government officials, and provide training/capacity building for competition officials.

Item VI

Israel will present the Law for the Promotion of Competition and Reduction of Economic Concentration, which was approved by the Israeli Parliament in December 2013. This law, inter alia, provides that government agencies are required to consult with the Director General of the Israeli Antitrust Authority with regard to the competitive effects of privatisations, the granting of licenses, and other forms of allocation of rights on government's assets to private entities. This law also establishes a committee for minimisation of centralisation, tasked with considering the impact on market competition in the allocation of contractual rights and in privatisation procedures, which is chaired by the Director General. Government agencies are required to consult with this committee.

Item VII

The *Manual on the ex-post assessment of competition authorities' enforcement decisions* will provide guidance on what authorities need to consider if they decide to perform this kind of assessments and will offer a wealth of detailed examples and references (both academic papers and studies conducted by CAs). Its aim is to be a useful reference document for economists in competition agencies that are tasked with performing ex-post assessments. A draft of the Manual will be discussed. This document will be circulated in advance of the meeting. Two experts, Prof. Damien Neven (University of Geneva, Switzerland) and Prof. Amelia Fletcher (University of East Anglia, UK) will provide their views and comments on the Manual.

Item VIII

In February 2014 there was a brief discussion in the Bureau, and subsequently in the Competition Committee, on the possible extension of the strategic theme on the *Evaluation of Competition Policy* to allow the Secretariat. This discussion was spurred by proposals from three delegations, which suggested that the Secretariat could perform the ex-post evaluation of a number of enforcement decisions from different competition agencies.

In June 2014, the Secretariat proposed to the Committee a range of possible options for bringing forward this project, with an indication of the resources needed to complete them and the risks involved. The Committee asked the Secretariat to further explore these options with the delegates to understand which one could be successfully completed.

The Secretariat will present the outcome of this exercise and will make a concrete proposal on how to bring the work on ex-post evaluation to completion.

Item IX

Tenders are often proposed to guarantee the efficient allocation of the rights to be the monopoly provider of a service or the monopoly user of a resource. However, the mere use of tenders does not ensure an efficient allocation of the rights, and their design and implementation play a major role in determining the outcome. A hearing will discuss the use that has so far been made of tenders and the results that have been achieved and will consider which features best ensure an efficient outcome providing the winners of the rights with the appropriate incentives to provide high quality services cost-efficient services and to invest and to maintain the assets.

Two experts, Prof Peter Cramton (University of Maryland, US) and Prof Marco Ponti (Polytechnic University of Milan, Italy), will give presentations on this topic, and an issue paper prepared by the Secretariat will support the discussion.

Item X

The Working Party will have an extensive discussion on possible topics for future meetings, in particular those to be held in June 2015 (in addition to the already agreed Roundtable on competition issues in liner-shipping) and in October 2015. The next meeting of Working Party No. 2 is scheduled for 15 June 2015.

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

10-Dec-2014

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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Working Party No. 3 on Co-operation and Enforcement

DRAFT AGENDA OF THE 120TH MEETING OF THE WORKING PARTY No. 3

16 December 2014

To be held on 16 December 2014 from 9:30 to 17:30 at the OECD Conference Centre, in room CC 12, 2 rue André Pascal, 75116 Paris.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

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English - Or. English

DRAFT AGENDA OF THE 120TH MEETING OF WORKING PARTY NO. 3

16 December 2014, beginning at 9.30 a.m.

OECD Conference Centre, Room CC 12

2 rue André-Pascal, 75116 Paris

I.	**ADOPTION OF THE DRAFT AGENDA**	DAF/COMP/WP3/A(2014)3/REV2
II.	**ADOPTION OF THE SUMMARY RECORD OF THE LAST MEETING**	
	-- Summary record from the last meeting of 16 June 2014	DAF/COMP/WP3/M(2014)2
	Approved by written procedure:	
	-- Summary of Discussion of the Roundtable on Remedies in Cross-Border Merger Cases	DAF/COMP/WP3/M(2013)3/ANN2/FINAL
	-- Summary of Discussion of the Hearing on Enhanced Enforcement Co-operation (June 2014)	DAF/COMP/WP3/M(2014)2/ANN2/FINAL
	For information:	
	-- Executive Summary of the Roundtable on Remedies in Cross-Border Merger Cases	DAF/COMP/WP3/M(2013)3/ANN3/FINAL
	-- Executive Summary of the Hearing on Enhanced Enforcement Co-operation (June 2014)	DAF/COMP/WP3/M(2014)2/ANN3/FINAL
	-- List of participants for the meeting of 16 June 2014	DAF/COMP/WP3/M(2014)2/ANN1
III.	**ROUNDTABLE ON THE USE OF MARKERS IN LENIENCY PROGRAMS**	
	For discussion:	
	-- Note by the Secretariat	DAF/COMP/WP3(2014)9
	-- Submissions by delegations:	
	Australia	DAF/COMP/WP3/WD(2014)34
	Austria	DAF/COMP/WP3/WD(2014)30
	Canada	DAF/COMP/WP3/WD(2014)35
	Chile	DAF/COMP/WP3/WD(2014)52
	Estonia	DAF/COMP/WP3/WD(2014)36

Germany	DAF/COMP/WP3/WD(2014)37
Hungary	DAF/COMP/WP3/WD(2014)33
Ireland	DAF/COMP/WP3/WD(2014)54
Japan	DAF/COMP/WP3/WD(2014)39
Korea	DAF/COMP/WP3/WD(2014)40
Mexico	DAF/COMP/WP3/WD(2014)53
New Zealand	DAF/COMP/WP3/WD(2014)41
Poland	DAF/COMP/WP3/WD(2014)31
Portugal	DAF/COMP/WP3/WD(2014)42
Slovak Republic	DAF/COMP/WP3/WD(2014)43
Turkey	DAF/COMP/WP3/WD(2014)55
United Kingdom	DAF/COMP/WP3/WD(2014)44
United States	DAF/COMP/WP3/WD(2014)51
European Union	DAF/COMP/WP3/WD(2014)45

and

Brazil	DAF/COMP/WP3/WD(2014)47
Bulgaria	DAF/COMP/WP3/WD(2014)48
Colombia	DAF/COMP/WP3/WD(2014)49
Lithuania	DAF/COMP/WP3/WD(2014)32
Russian Federation	DAF/COMP/WP3/WD(2014)46
Chinese Taipei	DAF/COMP/WP3/WD(2014)50
BIAC	DAF/COMP/WP3/WD(2014)38

IV. REPORT/INVENTORY PREPARED BY THE SECRETARIAT ON PROVISIONS CONTAINED IN EXISTING INTERNATIONAL CO-OPERATION AGREEMENTS

-- Note by the Secretariat DAF/COMP/WP3(2014)10

V. REPORT TO THE COUNCIL ON IMPLEMENTATION OF THE 2012 RECOMMENDATION ON FIGHTING BID RIGGING IN PUBLIC PROCUREMENT

VI. OTHER BUSINESS AND FUTURE TOPICS

1. Presentation by the Secretariat to the Working Party on Responsible Business Conduct of the Investment Committee.

2. Presentation by the Secretariat to the Competition Committee of the Note on “Commerce Affected by Cross-Border Private Cartels” DAF/COMP/WP3(2014)11

3. Discussion on future work.

ANNOTATIONS TO THE DRAFT AGENDA

Proposed Timetable

9:30 – 9:35	**Items I.** and **II.**
9:35 – 11:00	**Item III.** Roundtable on the Use of Markers in Leniency Programs
11:00 – 11.15	*Coffee break*
11:15 – 12:30	**Item III.** Roundtable on the Use of Markers in Leniency Programs
12:30 – 14:30	*Lunch break*
14:30 – 16:00	**Item IV.** Report/Inventory on provisions contained in existing international co-operation agreements
16:00 – 16.15	*Coffee break*
16.15 – 17:00	**Item V.** Report to the Council on implementation of the 2012 Recommendation on Fighting Bid Rigging in Public Procurement
17:00 – 17:30	**Item VI.** Other business and future topics

Item III. (from 9.35 to 12.30). Under this agenda item, WP3 will host a Roundtable on the "*Use of Markers in Leniency Programs"*. The roundtable will have an open discussion of the purpose and benefits of marker systems in leniency programmes for both enforcement agencies and leniency applicants. The roundtable discussion will also touch upon the principal components of markers and the differences existing in various national regimes.

Many competition authorities rely on leniency policies to detect, investigate and prosecute hard-core cartels. To encourage leniency applicants to come forward as early as possible, many authorities have adopted "marker" systems. Marker systems allow a prospective leniency applicant to approach the authority with some initial information about their participation in a cartel in exchange for a commitment by the authority to hold the applicant's 'place in line' for amnesty/leniency (i.e., grant a "marker"), for a finite period of time, while the applicant gathers additional information to complete its amnesty/leniency application.

Markers can therefore be seen as a mechanism to spur the race for leniency by reducing the initial barriers to entry into the leniency programme and by providing transparency and predictability to parties regarding their leniency status (first-in, second-in, etc.). At the same time, commentators have noted that there are differences in marker policies across jurisdictions with respect to their availability, the information requirements, timing, and scope, which may dis-incentivise companies engaged in international hard-core cartels from using the leniency programmes.

A short Secretariat paper will assist delegates in preparation for this discussion. It will put into context this discussion and recapitulate in a non-exhaustive way the issues to be discussed. The discussion will also benefit from 26 country submissions.

Item IV. (from 14.30 to 16.00). Under this agenda item, WP3 delegates will discuss the inventory prepared by the Secretariat of the main provisions in existing international co-operation agreements between competition authorities.

On 16 September 2014, the OECD Council adopted the Recommendation concerning International Co-operation on Competition Investigations and Proceedings, which instructs the Competition Committee to consider developing model bilateral/multilateral agreements on international co-operation. To date, a considerable number of co-operation agreements have already been concluded to promote co-operation between competition enforcers. The discussion will focus in particular on provisions which are common to many existing co-operation agreements, as well as provisions which are more innovative and/or atypical.

The session is aimed at starting the process for considering a possible model co-operation agreement that would provide useful inputs to member countries when they negotiate bilateral or multilateral co-operation agreements with their counterparts, and would contribute to greater convergence among the various agreements. A Note from the Secretariat will assist delegates in preparation for this discussion.

Item V. (from 16.15 to 17.00). Under this agenda item, WP3 will start the preparatory work for the "*Report to the Council on implementation of the 2012 Recommendation on Fighting Bid Rigging in Public Procurement*". WP3 will discuss some of the experience that members and participants have had in working with the Recommendation. Delegations who would like to speak on this topic are invited to contact the Secretariat as soon as possible.

Item VI. (from 17.00 to 17.30). Under "*other business"*, WP3 will hear presentations from the Secretariat:

- A presentation from the Secretariat to the Working Party on Responsible Business Conduct (WPRBS) of the Investment Committee. The WPRBS is interested in reaching out to competition delegates to better understand the legal concerns under competition law in the context of collective action by companies pursuing social, environmental, labour or other improvements related to responsible business conduct in their supply chains or among their business relationships.

- A presentation from the Secretariat to the Competition Committee on a piece of research concerning the volume of commerce affected by cross-border private cartels. The findings of this research are summarised in a short Secretariat Note available on OLIS [DAF/COMP/WP3(2014)11].

As for future work, delegates are reminded that the next meeting of WP3 will be on 16 June 2015. At the December meeting, delegates will be asked to confirm their interest in holding a roundtable on the "*Relationship between Public and Private Enforcement*" and to decide on a second substantive topic for the June meeting. In addition, WP3 will continue its work under the long-term work stream on international cooperation benefitting from the outcome of the December 2014 session on model co-operation agreements. We will also consider topics for the next WP3 meeting that will take place in 27 October 2015.

Some of the topics that have been suggested in recent meeting are: (i) How to design effective amnesty/leniency programmes; (ii) Public interest considerations in merger assessment; (iii) How to define the "jurisdictional nexus" in merger control regimes. This list should not be considered exhaustive, and delegations should feel free to send other ideas for consideration by the Working Party to the Secretariat.

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

09-Dec-2014

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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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DRAFT AGENDA OF THE 122nd MEETING OF THE COMPETITION COMMITTEE

17-18 December 2014

The 122nd Meeting of the Competition Committee will be held on 17-18 December 2014 in Room 12 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris. On Wednesday 17 December the meeting will start at 10.00 am.

Please contact Ms Patricia Hériard-Dubreuil, Deputy Head of Competition Division, if you have any questions regarding this document. [Tel.: +33 (01) 45 24 91 41; Email: Patricia.HERIARDDUBREUIL@oecd.org]

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ELECTION OF CHAIRMAN AND VICE CHAIRMEN FOR 2015

I. ADOPTION OF THE DRAFT AGENDA DAF/COMP/A(2014)3/REV2

II. APPROVAL OF THE DRAFT SUMMARY RECORD OF THE LAST MEETING

For approval:

--	Summary Record of 121st Comp. Committee meeting	DAF/COMP/M(2014)2
--	Summary Record of Discussion on Relations with Non-Members	DAF/COMP/M(2014)2/ADD1 **(CONFIDENTIAL)**

For information:

--	List of Participants	DAF/COMP/M(2014)2/ANN1
--	Executive Summary of the RT on Airline Competition	DAF/COMP/M(2014)2/ANN4/FINAL
--	Summary record of the RT on Airline Competition	DAF/COMP/M(2014)2/ANN5/FINAL
--	Executive Summary of the RT on Competition and Generic Pharmaceuticals	DAF/COMP/M(2014)2/ANN6
--	Summary Record of the RT on Competition and Generic Pharmaceuticals	DAF/COMP/M(2014)2/ANN3/FINAL
--	Summary of discussion on Antitrust Compliance	DAF/COMP/M(2014)2/ANN2

III. REPORTS BY WORKING PARTY CHAIRMEN AND BY COORDINATORS

IV. COMPETITION AND INVESTMENT

For discussion:

--	Policy Framework for Investment -- Draft Competition Chapter Secretariat Note	DAF/COMP/WD(2014)134
--	Competition Policy and Infrastructure Investment Secretariat Issues paper	DAF/COMP/WD(2014)133

V. ANNUAL REPORTS ON COMPETITION POLICY

For reference:

-- Note by the Secretariat on Mexico — DAF/COMP/WD(2014)118

-- **Reports to be presented by the Delegates at this meeting:**

Germany	DAF/COMP/AR(2014)25
Italy	DAF/COMP/AR(2014)26
Norway	DAF/COMP/AR(2014)27
Bulgaria	DAF/COMP/AR(2014)29
Costa Rica	DAF/COMP/AR(2014)30
Peru	DAF/COMP/AR(2014)31
South Africa	DAF/COMP/AR(2014)38

-- **Additional reports for this meeting:**

Australia	DAF/COMP/AR(2014)33
Austria	DAF/COMP/AR(2014)34
Chile	DAF/COMP/AR(2014)35
France	DAF/COMP/AR(2014)36
Hungary	DAF/COMP/AR(2014)37
Japan	DAF/COMP/AR(2014)32
Korea	DAF/COMP/AR(2014)39
Netherlands	DAF/COMP/AR(2014)40
New Zealand	DAF/COMP/AR(2014)41
Portugal	DAF/COMP/AR(2014)42
Slovenia	DAF/COMP/AR(2014)43
Switzerland	DAF/COMP/AR(2014)44
The European Union	DAF/COMP/AR(2014)45
Egypt	DAF/COMP/AR(2014)46
India	DAF/COMP/AR(2014)47
Indonesia	DAF/COMP/AR(2014)48
Malta	DAF/COMP/AR(2014)49
Chinese Taipei	DAF/COMP/AR(2014)51
Ukraine	DAF/COMP/AR(2014)50

VI. RELATIONS WITH NON MEMBERS — CONFIDENTIAL

For discussion

Request for Associate Invitation — DAF/COMP/WD(2014)122 and
Note by the Secretariat — DAF/COMP/WD(2014)122/ADD1

For information

2014 LACF: Note by the Secretariat — DAF/COMP(2014)26

VII. HEARING DISCUSSION ON INTELLECTUAL PROPERTY AND STANDARD SETTING

For discussion

-- Background Note by the Secretariat	DAF/COMP(2014)27
-- Notes by Experts	
Paper by Mr. Antoine Dore (ITU)	DAF/COMP/WD(2014)82
Paper by Mr. Maurits Dolmans (CGSH)	DAF/COMP/WD(2014)83
Paper by Mr. Nuno Pires de Carvalho (WIPO)	DAF/COMP/WD(2014)130
Papers by Dr. Anne Layne-Farrar (CRA)	DAF/COMP/WD(2014)84 DAF/COMP/WD(2014)132
-- Notes by Delegations	
Finland	DAF/COMP/WD(2014)112
Germany	DAF/COMP/WD(2014)113
Italy	DAF/COMP/WD(2014)127
Japan	DAF/COMP/WD(2014)114
Korea	DAF/COMP/WD(2014)115
United States	DAF/COMP/WD(2014)116
EU	DAF/COMP/WD(2014)117
and	
Russian Federation	DAF/COMP/WD(2014)119
BIAC	DAF/COMP/WD(2014)128

VIII. ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES

-- Notes by experts	
Paper by Professor Alan Fels	DAF/COMP/WD(2014)85
Paper by Professor William Kovacic	DAF/COMP/WD(2014)86
-- Notes by Delegations:	
Australia	DAF/COMP/WD(2014)87
Belgium	DAF/COMP/WD(2014)88
Czech Republic	DAF/COMP/WD(2014)89
Denmark	DAF/COMP/WD(2014)90
Estonia	DAF/COMP/WD(2014)91
Finland	DAF/COMP/WD(2014)92
France	DAF/COMP/WD(2014)104
Greece	DAF/COMP/WD(2014)93
Hungary	DAF/COMP/WD(2014)123
Iceland	DAF/COMP/WD(2014)94

Ireland	DAF/COMP/WD(2014)95
Italy	DAF/COMP/WD(2014)96
Japan	DAF/COMP/WD(2014)97
Korea	DAF/COMP/WD(2014)98
Mexico	DAF/COMP/WD(2014)99
Netherlands	DAF/COMP/WD(2014)100
New Zealand	DAF/COMP/WD(2014)101
Portugal	DAF/COMP/WD(2014)102
Poland	DAF/COMP/WD(2014)135
Spain	DAF/COMP/WD(2014)103
United Kingdom	DAF/COMP/WD(2014)105
United States	DAF/COMP/WD(2014)106
EU	DAF/COMP/WD(2014)107

and

Brazil	DAF/COMP/WD(2014)129
Bulgaria	DAF/COMP/WD(2014)108
Colombia	DAF/COMP/WD(2014)109
Indonesia	DAF/COMP/WD(2014)124
Latvia	DAF/COMP/WD(2014)131
Lithuania	DAF/COMP/WD(2014)136
Russia	DAF/COMP/WD(2014)125
South Africa	DAF/COMP/WD(2014)110
Chinese Taipei	DAF/COMP/WD(2014)111
BIAC	DAF/COMP/WD(2014)126

IX. ACCESSION REVIEW OF LATVIA [CONFIDENTIAL]

-- Draft Agenda DAF/COMP/ACS(2014)2

-- Report by the Secretariat DAF/COMP/ACS(2014)3

X. OTHER BUSINESS

a) Trust and Business project
Oral presentation by the Secretariat

b) Future topics

For reference:

Note by the Secretariat DAF/COMP/WD(2014)17/REV1

Schedule

The provisional schedule for the Competition Committee session is as follows:

Wednesday 17 December

10:00 am – 10:15 am	**Item I-II**
10:15 am – 11:15 am	**Item III**
11:15 am – 12:30 pm	**Item IV** (Investment)
12:30 pm –1pm	**Item V** (Annual Reports)
2:30 pm – 3:00 pm	**Item VI** (CONFIDENTIAL)
3:00 pm – 6:00 pm	**Item VII** (Hearing on IP and Standard Setting)

Thursday 18 December

09:30 am – 12:30 pm	**Item VIII** (RT on Changes in Institutional Design)
12:30 pm – 1:00 pm	**Item V** (Annual Reports) Cnt'd
2:30 pm – 5:00 pm	**Item IX** (Accession of Latvia—CONFIDENTIAL)
5:00 pm – 5:30pm	**Item X** (Other Business)

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ANNOTATIONS

The Competition Committee is called upon to elect its Chairman and Vice chairmen at its December session as provided by the OECD Rules of procedure of the Organisation (Rule 15 d). To prepare this election a consultation with delegates was carried out by the Chair [COMP/2014.239, dated 24.11.2014].

Item III.

The Chairs of Working Party N° 2 and Working Party N°3 will report on their meeting respectively held on 15 and 16 December 2014.

The UNCTAD co-ordinator may report on UNCTAD related developments.

The ICN co-ordinator may report on ICN related developments.

Item IV.

Competition delegates will be invited to discuss the meaningful questions about Competition policy setting to mobilise investment with the participation of Manfred Schekulin, Chair of the Investment Committee. The objective of this discussion is twofold:

i) feed into the competition chapter of the revised *Policy Framework for Investment –PFI* to be adopted at the 2015 MCM (www.oecd.org/investment/pfi.htm). The PFI helps government to design and implement policy reforms to create an attractive, competitive environment for domestic and foreign investment. It raises issues for policy makers in ten policy areas, including competition, which underpin a healthy environment for investors. A draft of the new competition chapter (DAF/COMP/WD(2014)134) will serve as a reference to this discussion, which will focus on substantive issues. In light of this discussion and of drafting suggestions received after the meeting, the competition chapter will be revised.

ii) focus Competition delegates' attention on the role of competition as a driver of infrastructure investment based on a Secretariat issues paper (DAF/COMP/WD(2014)133) with a view to stimulate their interest for contributing to an OECD/G20 related project.

Item V.

Competition Delegates are invited to submit their country report as usual while taking note that only some of them will be presented to the December 2014 Competition Committee meeting. Countries listed in the Agenda will be invited to make an oral presentation at this session. 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.

Item VI.

Competition Delegates will meet in a confidential session to review a request by a non-member to receive an Associate invitation.

Item VII.

Delegates will recall that the Competition Committee agreed to hold a discussion on "Intellectual Property and Standard Setting" with a focus on new competition issues arising from standards and intellectual property, that have emerged since the 2010 discussion, with a particular emphasis on the Information and Communications Technologies (ICT) sector and the patents that are essential for implementing a standard (standard-essential patents, SEPs). A Secretariat paper, country contributions and some lead country presentations (see Chairman Jenny's letter requesting country contributions -- COMP/2014.169) will provide the background to the discussion, to be held on **Wednesday 17 December starting at 3:00 pm.** This roundtable will benefit from the participation of Dr. Theon van Dijk (EPO), Mr. Antoine Dore (ITU), Mr. Maurits Dolmans (CGSH), Dr. Anne Layne-Farrar (CRA) and Mr. Giovanni Napolitano (WIPO).

Item VIII.

Delegates will recall that the Committee decided to hold a roundtable on "Changes in Institutional design of Competition Agencies". Country contributions (see Chairman Jenny's letters requesting country contributions -- COMP/2014.192 and COMP/2014.198) will provide the background to the discussion, to be held on **Thursday 18 December starting at 9:30 am.** This roundtable will benefit from the participation of Prof. Alan Fels (CI, Australia) and Prof. William Kovacic (George Washington University, US).

Item IX.

An accession review of Latvia will take place in a confidential session on **Thursday 18 December (2:30pm-5pm).** A separate agenda for this confidential item is available on OLIS under DAF/COMP/ACS(2014)2.

Item X.

a) Trust and Business project (TNB). The Secretariat will make a short oral presentation of this new OECD multidisciplinary Initiative (tentative timing: **Wednesday 17 December, morning**).

b) Future topics. Competition delegates will decide on future topics for substantive discussions to be held in the June and October 2015 sessions of the Committee. For June 2015, the Committee identified Competitive neutrality with a) a discussion on competition enforcement related issues and b) a mapping out discussion of competitive neutrality issues in other policy areas such as investment, corporate affairs and trade. The Committee also agreed to hold a roundtable on Oligopoly: competitive behavior and collusion in oligopolistic markets.

Reminder

Future meeting dates
[also on Olis under DAF/COMP/WD(2014)81]

2015

- 15-19 June (inclusive) – Working Parties and Committee
- 26-30 October (inclusive) – Working Parties, Committee and GFC

2016

- 13-17 June (inclusive) – Working Parties and Committee
- 28 November-2 December (inclusive) – Working Parties, Committee and GFC

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

05-Dec-2014

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3/WD(2014)50
Unclassified

Working Party No. 3 on Co-operation and Enforcement

USE OF MARKERS IN LENIENCY PROGRAMS

-- Chinese Taipei --

16 December 2014

This document reproduces a written contribution from Chinese Taipei submitted for Item III of the 120th meeting of the Working Party No. 3 on Co-operation and Enforcement on 16 December 2014.

More documents related to this discussion can be found at:
http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

JT03368008

English - Or. English

1. Relationship between Leniency Programs and the Marker System

1.1 A Brief Description of Chinese Taipei's Leniency Policy

1. The leniency program was introduced in Article 35-1 of the Fair Trade Act (FTA), which was added in the amendment on November 23rd, 2011. Details of the leniency program are set forth in the "Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases" (hereinafter referred to as the "Leniency Regulations"), which was enacted in accordance with Paragraph 2 of Article 35-1 of the Fair Trade Act. The Leniency Regulations were promulgated and took effect on January 6th, 2012.

2. The Leniency Regulations originally stipulated that enterprises could only apply for leniency in writing, and any applications submitted orally would not be accepted. After referring to the leniency programs of the EU and Japan, the Leniency Regulations was amended on August 22nd, 2012 to allow applications for leniency to be made either in writing or orally.

3. Corresponding to international trends in competition law:

    1. The FTA imposes administrative fines on enterprises participating in concerted actions (precedence of administrative remedies over judicial adjudication). Hence, the content of Chinese Taipei's leniency program is similar to that of the leniency program adopted by the EU.

    2. As described in the general provisions of the Leniency Regulations, Chinese Taipei's competition law and policy were reviewed by competent authorities of competition law from over seventy countries. The peer review report of the Global Forum on Competition of the OECD on February 9th, 2006, suggested that the FTC adopted a leniency program to fight against hard core cartels. Considering that collecting evidence on concerted actions has indeed become increasingly difficult in the years in which the Fair Trade Act has been in force, the FTC amended and promulgated Article 35-1 of the FTA on November 23rd, 2011 to correspond to international trends in competition law. The amendment introduces the leniency program/policy with a view to effectively deterring illegal concerted actions.

    3. Amnesty plus is a design of the leniency program to encourage other enterprises within a cartel to come forward with evidence, which may be insufficient when the leniency program only grants full immunity to one applicant. Amnesty plus expands the scope of the leniency program and allows the competent authority to uncover other illegal concerted actions. Chinese Taipei's leniency program uses a "limited number of applicants" and a "diminishing reduction of fines" to encourage potential applicants to come forward as early as possible and provide the FTC with evidence of illegal concerted actions. Hence, although only the first applicant is granted full immunity, 4 subsequent applicants are also granted reductions in their administrative fines. The limit on the number of applicants encourages potential applicants to come forward, and enables the FTC to gather sufficient evidence on concerted actions, achieving the legislative purpose of the leniency program. Hence, Chinese Taipei's current leniency program does not offer amnesty plus.

1.2 Relationship between Leniency Programs and the Marker System

4. Relationship between Leniency Programs and the Marker System

    1. The leniency program specified in the Leniency Regulations requires cartelists to come forward with evidence of illegal concerted actions before the FTC is aware of the agreement or initiates an investigation, and to assist with the investigation in return for immunity or a fine reduction. The purpose of the leniency program is to improve the results of investigations and thus deter

illegal concerted actions. In other words, enterprises participating in a concerted action may be granted immunity or a fine reduction if they come forward with evidence before the FTC is aware of the agreement or initiates an investigation, and assists with the investigation.

2. The "marker" system is a part of the leniency program that allows the first enterprise to come forward even though it has insufficient evidence to temporarily preserve its status as the first applicant, provided that it can gather sufficient evidence within a specified time period.

3. The Leniency Regulations put the "marker" system in writing in Article 11, which states that enterprises intending to apply for immunity, but that are currently unqualified to file the application as set forth in Paragraph 1 of Article 10 because they do not have the information and evidence stated in Articles 3 to 5, may first apply to preserve the priority status that they may be granted for immunity from being fined, and then gather the required information and evidence within the period specified by the FTC to gain immunity. In other words, the marker system in Chinese Taipei only applies to the applicant for full immunity, i.e., the first enterprise to come forth, and is not applicable to any subsequent applicants for a fine reduction.

2. Regulations of the Marker System

2.1 Legislative Purpose of the Marker System

5. Adopting the "marker" system will allow the competent authority to save on investigation costs, discover illegal actions in time, and prevent further harm from being done. It allows the competent authority to gain information on illegal concerted actions as early as possible. Enterprises may use the "marker" system to temporarily secure immunity before they obtain substantial evidence of an illegal concerted action, and are thus more motivated to voluntarily come forward.

2.2 Application Procedures and Effects

6. An enterprise that intends to apply for the preservation of its priority status in accordance with Article 11 of the Leniency Regulations may do so either in writing or orally, and shall state the reason for its application and the facts of the concerted action, including the product or service involved, the form of concerted action, the enterprises involved, the time and place of the agreement, the duration of the concerted action, and the geographical area influenced by the concerted action; the enterprise shall also describe the evidence that it intends to produce.

7. After the FTC receives an application from an enterprise to preserve its priority status for immunity, the FTC examines the application by focusing on the following in the order given: (1) First, the FTC checks if any other enterprises have already filed an application for the same concerted action. (2) Next, the FTC verifies whether the applicant is truly and sincerely preparing to produce the evidence. (3) Finally, the FTC considers the reason given by the applicant before deciding whether or not to approve the application for the preservation of priority status for immunity.

8. After an enterprise's application to preserve its priority status for immunity is approved, the enterprise shall follow the FTC's instructions in each of the following situations:

1. If the application was filed before the FTC was aware of the agreement or initiated an investigation, the applicant must describe the details of its involvement in the concerted action, and produce evidence that the FTC is unaware of or does not have. The applicant must give the FTC a general understanding of the facts of the concerted action, as well as the time, place, content, and other matters concerning the agreement between the parties to engage in the concerted action, so that the FTC may initiate an investigation.

2. If the application was filed after the FTC launched an investigation, the applicant must describe the details of its involvement in the concerted action, and produce evidence it already has during the application that can prove its involvement in the illegal concerted action. Furthermore, the statement and evidence of the applicant must be of significant help in the FTC's investigation on the concerted action in question.

9. The evidence referred to above must be produced within the period specified by the FTC. The period will be determined by the FTC based on considerations of various factors, such as the difficulty for the enterprise to acquire such evidence, but will be 30 days in principle. The specified period may be extended where necessary after gaining the FTC's approval. The enterprise's priority status that was preserved, however, will become ineffective if an application for an extension is not filed before the specified period expires.

3. "Anonymity" in the "Marker System"

3.1 Regulations on "Anonymity" in the Leniency Regulations

10. Considering that disclosing the applicant's identity during the investigation might have adverse effects on the applicant and will also affect the FTC's investigation and evidence gathering, and that the identity of the applicant cannot be protected in the administrative remedy process after the FTC issues a disposition without a legal basis, the FTC has stipulated in Article 20 of the Leniency Regulations that the identity of the enterprise applying for immunity or a fine reduction shall be kept confidential unless the enterprise agrees otherwise. The FTC is responsible for keeping the identity of the applicant confidential, and conversation records and documents containing the applicant's true identity may not be provided to any agencies, groups or individuals other than investigation and judicial agencies unless otherwise stipulated. Prior consent may be given voluntarily by the enterprise, but is not an obligation of the enterprise applying for immunity or a fine reduction.

11. Paragraph 1 of Article 20 of the Leniency Regulations stipulates that the identity of the enterprise applying for immunity or a fine reduction shall be kept confidential unless the enterprise agrees otherwise. Hence, when an enterprise applies to preserve its priority status for immunity under the marker system, the FTC shall keep the identity of the enterprise confidential unless the enterprise agrees otherwise.

3.2 The leniency program of Chinese Taipei currently does not include stipulations or a policy on "confidentiality waivers"

12. The "confidentiality waiver" was designed for cases that involved the exchange of classified information between countries. Law enforcement experiences of other countries show that confidentiality waivers play a considerable role in investigations into international cartels. In other words, when the enterprise applying for leniency signs a confidentiality waiver, the competent authority may inform other competent authorities of competition law regarding the cartel investigation when the investigation is first launched, and may exchange or share information regarding the case in question. The extent of information exchange is based on the competition law and relevant laws of each country.

13. Although the leniency program of Chinese Taipei does not include provisions on confidentiality waivers, during an investigation on concerted actions, if the FTC needs to exchange or share information about the enterprise applying for leniency with other competent authorities of competition law, the FTC may still gain the enterprise's "prior consent" in accordance with Article 20 of the Leniency Regulations, and it will relieve the FTC of its obligation to keep the enterprise's identity confidential. Furthermore, the Leniency Regulations do not limit the form of the applicant's "prior consent." If the applicant voluntarily agrees to provide its identity to other competent authorities of completion law, in practice the FTC will have the applicant sign a written consent form as evidence of the applicant's prior consent.

14. The use of confidentiality waivers in leniency programs is currently a topic of great concern in international society, because countries all believe information exchange (especially the exchange of classified information) to be important in investigations, especially international cartel investigations. The FTC will continue to follow developments regarding this topic, and will use it as a basis for considering whether or not to add provisions on "confidentiality waivers."

4. Case Study

15. Toshiba-Samsung Storage Technology Korea Corporation (hereinafter referred to as "TSSTK"), Hitachi-LG Data Storage Korea Inc. (hereinafter referred to as "LDSK"), Philips & Lite-On Digital Solutions Corporation (hereinafter referred to as "PLDS") and Sony Optiarc Inc. engaged in a concerted action in the optical disc procurements of Dell Inc. and Hewlett-Packard Company between September 2006 and November 2009. Before or during the tender process, the four companies would contact each other via e-mail, telephone, or meetings to exchange information, such as their offer and expected place in the tender, and reached agreements on several occasions on the final price and place in the tender. Furthermore, the companies often exchanged information sensitive to competition, such as production capacity and output. This conduct was sufficient to impact the supply and demand in the domestic optical disc drive market, and violated Article 14 of the Fair Trade Act. The FTC therefore issued disposition on September 19th, 2012. Besides ordering the companies to immediately cease their unlawful act, the FTC imposed administrative fines of NT$25 million, NT$16 million, NT$8 million and NT$5 million on the companies.

16. One of the enterprises concerned in this case learned that the FTC had adopted the leniency program, and thus voluntarily came forward and applied for immunity in accordance with the Leniency Regulations. The enterprise also submitted a written application to the FTC to preserve its priority status for immunity because it did not have sufficient evidence. The enterprise provided all the facts of its involvement in the cartel, including the product or service involved, the form of concerted action, the enterprises involved, the time and place of the agreement, the duration of the concerted action, and the geographical area influenced by the concerted action, within 30 days after filing the application. It also produced evidence of the facts to gain immunity from an administrative fine. After examining the evidence provided by the enterprise, the FTC granted a "conditional consent," in which it instructed the enterprise to cease all participation in the concerted action during the FTC's investigation, and to assist with the investigation. The enterprise was granted immunity from an administrative fine after complying with the conditions in the FTC's "conditional consent."

17. This is the first international cartel case decided by the FTC since the leniency program was introduced on November 23rd, 2011. It is also the first case where an enterprise applied for full immunity for an administrative fine and also applied for the "marker" system for the immunity. The case was exceptionally meaningful to the FTC's law enforcement as both of the applications were approved. Since the enterprise did not sign a confidentiality waiver, the FTC was required to keep the identity of the enterprise confidential in accordance with Article 20 of the Leniency Regulations. After the disposition was issued, TSSTK found the decision to be unacceptable and filed for an administrative remedy on October 18th, 2012; the procedures for administrative remedies are currently ongoing.

5. Conclusion

18. The FTC adopted a leniency program to correspond with the international trend, and put the marker system down in writing. This leniency program, however, has only been in effect for a short amount of time, and there is currently only 1 case where an enterprise applied for a marker under it. Still, the FTC has ongoing consultations and applications.

19. In order to let the public fully understand the relationship between the leniency programs and the marker system, the FTC not only provides relevant laws and information on its website, but also actively provides details of the leniency program and marker system to enterprises. The FTC thus hopes to encourage enterprises to apply for leniency, and also deter enterprises from participating in concerted actions, thereby preventing hard-core cartels from forming, while maintaining trading order throughout the market.

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

28-Nov-2014

English - Or. English

Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

DAF/COMP/AR(2014)51
Unclassified

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN CHINESE TAIPEI

-- 2013 --

17-18 December 2014

This report is submitted by Chinese Taipei to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 17-18 December 2014.

JT03367359

English - Or. English

CHINESE TAIPEI

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 latest amendment to the Fair Trade Act (FTA) came into effect on November 25, 2011. There has been no change in the FTA since then.

1.2 Other relevant measures including amended guidelines

2. The Fair Trade Commission (FTC) amended the following guidelines in 2013:

- "Disposal Directions (Policy Statements) on the Business Practices of Digital Convergence Related Enterprises";
- "Regulations on the Confidentiality and Disclosure of Commissioners' Meetings' Documents";
- "Disposal Directions (Guidelines) on Investigations in Multi-Level Sales Cases";
- "Disposal Directions (Policy Statements) on the Use of Endorsements and Testimonials in Advertising"; and
- "Disposal Directions (Guidelines) on Handling Cases Governed by Article 21 of the FTA."

1.3 Government proposals for new legislation

3. The FTC's proposed amendment was approved by the Cabinet on Dec. 13, 2012, and it is currently pending in the Congress. The key points of this proposed amendment include:

- Revising the pre-merger notification threshold and review period;
- Introducing the procedure of commitment;
- Increasing the expiration length of power to impose administrative penalties;
- Differentiating administrative penalties for various violations; and
- Applying the rule-of-reason standard to RPM.

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 also bans resale price maintenance but requires the FTC to apply the rule-of-reason standard to other types of vertical restraints.

5. In 2013, the FTC processed 2,213 cases, including 1,973 cases received in 2013 and 240 cases carried over from the preceding year. By the end of 2013, 1,987 cases had been closed, and 226 cases were pending. A total of 379 complaint cases applicable to the Act were concluded in 2013 and, of these, 80 concerned anti-competitive practices.

6. Decision rulings on complaints and FTC self-initiated investigations were undertaken in relation to 214 cases in 2013, and only 29 of these fell into the category of anti-competitive practices. The FTC also initiated investigations into 6 anti-competitive cases.

Decision Rulings by the FTC in 2011 (Unit: Number of cases)

Year	Anti-competitive Practices	Abuse of Monopoly	Mergers	Concerted Actions	Resale Price Maintenance	Vertical Restraints
2013	29	3	6	7	10	3

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)

2.1.2.1 Case 1: Cartel

7. The FTC decided on March 13, 2013 to impose the largest fine on 9 independent power producers (IPPs) of a single cartel, which is a total of NT$6.32 billion (US$213.08 million) for colluding to jointly refuse to adjust the prices of power they sold to TPC, a state-owned power company which is the main supplier in the retail electricity market in Chinese Taipei, during the period from August 2008 to October 2012.

8. In response to the increases in the natural gas price between December 2003 and July 2007, the TPC held several negotiation meetings with IPPs between August and October 2007 and eventually reached a conclusion to revise the contract provision concerning the adjustment of fuel cost in order to reflect the price change of natural gas in time. Furthermore, the TPC and IPPs also agreed to continue discussions on other factors affecting the purchased price, such as interest rate.

9. Following the aforesaid agreement, from September 4, 2008 to September 26, 2012, in 19 negotiation meetings, of which 13 were held by TPC and 6 were convened by the Bureau of Energy (BOE), MOEA, no conclusions could be reached. The Legislative Yuan suspected the existence of cartels and then the FTC decided to initiate an investigation on October 2, 2012.

10. Based on the FTC's investigation, it was found that for the TPC, the 9 IPPs were a few of private power suppliers that were charted by the government. All of these 9 IPPs supplied electricity with thermal power plants, and the power generated by them was only able to be sold to the TPC. In this sense, the IPPS could be treated as competitors in the domestic market of electricity generation. The collusion among IPPs may violate the FTA although each IPP signed the power purchase agreement (PPA).

11. The FTC's investigation showed that the 9 IPPs reached a consensus through the IPP Association on their refusal of the TPC's proposal for the capacity rate adjustment. From August 2008 to October 2012, the 9 IPPs met at least 20 times through the IPP Association to discuss how to respond to the TPC's requests for negotiating a lower capital rate. Moreover, each IPP Association member, who represented each IPP, also took the opportunity to attend the negotiation meetings to exchange ideas for achieving the goal of refusing to lower the purchase prices.

12. The FTC concluded that the IPPs had established a mutual understanding to restrain the freedom of each IPP from negotiating with TPC over price adjustment, and such conduct distorted competition in the power generation market, which violated Article 14 of the FTA. Considering seriousness of the case and the critical impact of the unlawful act in the market, the FTC decided to impose fines which didn't exceed 10% of the total sales of the offenders in accordance to Paragraph 2, Article 41 of the FTA that has been effective since November 25, 2011.

13. However, the Petitions and Appeals Committee of the Executive Yuan determined that the FTC failed to justify the amount of the administrative fine and revoked the original sanction. The FTC re-issued the sanction by imposing a total of 6.05 billion fines on the 9 IPPs, ranging from NT$1.82 billion to NT$100 million, respectively, on November 13, 2013. The decision on penalty was revoked again by the Petition and Appellation Committee in May 2014 and the FTC issued a new decision reducing the total fine from NT$6.05 billion to NT$6.007 billion on July 10, 2014. Apart from the penalty decision, the IPPs appealed the decision on violation of the FTA to the Taipei High Administrative Court. The Court disagreed with the FTC's finding that a horizontal conspiracy existed between 9 IPPs in this case so it revoked the FTC's decision in October 2014.

2.1.2.2 Case 2: Resale Price Maintenance

14. In April 2013, the FTC received complaints that Apple Asia LLC (hereinafter referred to as Apple Asia) required the telecommunication companies to sell iPhone at certain prices. The FTC hence decided to initiate an investigation into the allegations of resale price maintenance.

15. The investigation of the FTC showed that Apple Asia is a subsidiary of the US's Apple Inc. (Apple) and is responsible for the sales of Apple's products in Chinese Taipei. Currently, the major distribution channels for iPhone products in the domestic market are the top 3 telecommunication companies: Chunghwa Telecom, Taiwan Mobile, and Far EasTone. Each of them entered a distribution contract with Apple Asia respectively. In view of the transaction process conducted under the contract in question, the ownership of the iPhone products would be transferred to the telecommunication companies after full payment was made. Moreover, each telecommunication operator would take the responsibility on its own risk for storage and overstock following the transfer of ownership.

16. The FTC discovered that, under the terms and conditions of the contract between Apple Asia and the three domestic telecommunication operators, each telecommunication company was obligated to submit the initial rate for its iPhone plan (bundled packages of handset prices associated with various telecom rates) to Apple Asia for approval. The FTC further found that each of the three telecommunication companies did submit their respective rate packages to Apple (emails were sent to apple.com) for review, and received "approval" or "confirmation" prior to going to the market.

Furthermore, the emails between Apple and domestic telecommunication operators showed that Apple had requested all three operators to amend and adjust the handset prices, handset subsidies, and the price differences between old and new contracted phones. Ultimately, it was through the contract between Apple Asia and domestic telecommunication operators, Apple could grant its approval to such price adjustments, which were duly followed by the telecommunication operators.

17. The FTC concluded that the conduct of Apple Asia has clearly deprived telecommunication operators of the freedom to determine prices of iPhone in accordance with their cost structure and market competition conditions, to the extent of restricting intra-brand and inter-brand competition, thereby violating Article 18 of the FTA. In addition to a cease order issued, the FTC also imposed an NT$2 million administrative fine on December 25, 2013.

2.2 Merger and acquisitions

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

18. 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)

Year	Cases under Processing			Results of Processing				
	Carried Over from 2011	Received in 2012	Total	Mergers not Prohibited	Mergers Prohibited	Termination of Review	Combined into other Case	Cases Pending at Year-end
2013	7	51	50	30	-	19	1	8

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
2013	30	5	21	2	9	18

Note: More than one type of merger may be applicable to 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

2.2.2.1 Case 1: Mobile Payments Joint Venture

19. The FTC decided on Jan. 23, 2013 not to prohibit the joint venture which will be set up by Chunghwa Telecom Co., Ltd., Taiwan Mobile Co., Ltd., Asia Pacific Telecom Co., Ltd., VIBO Telecom Inc., EasyCard Investment Holding Co., Ltd., and Far EasTone Telecommunications Co., Ltd. to operate a Trust Service Management (TSM) platform. However, the FTC attached 11 conditions to ensure that the overall economic benefits would outweigh the disadvantages from the competition restrictions thereof incurred.

20. After measuring the market power of merging parties and co-ordinated effect as well as entry barriers in the telecommunication market, the FTC was of the view that this merger would not

result in substantial lessening of competition within this market. And furthermore, mobile number portability allows consumers to switch to a new service provider without difficulty.

21. However, the joint venture would also relate to vertical integration associated with the secure element market, the micropayment tool market, the smartcard ticketing market and the mobile payment platform market. Some competition concerns remained, such as differentiated treatment between the new business and the merging enterprises, boycotts against specific businesses, obstructions to prevent other mobile payment platform operators from entering the mobile payment market, which is likely to result in market foreclosure.

22. The FTC concluded that it was necessary to attach conditions to the implementation of this joint venture in order to eliminate the likelihood of disadvantages derived from competition restrictions and protect the overall economic benefits. The conditions included:

1. Four years after the new business is set up, the total shares held by or the capital contributions from the merging parties (and their subsidiaries and affiliates) may not exceed one half of the voting shares or total capital of the new business.

2. Four years after the new business is set up, the shares held by or the capital contributions from EasyCard Investment Holding Co., Ltd. (and its subsidiaries and affiliates) may not exceed one tenth of the voting shares or total capital of the new business.

3. Without justification, the new business and the merging enterprises may not prevent competitors (including mobile communications service providers and smartcard ticketing businesses) from entering or exing from (through share holding, acquisition or disposal) the new business. The new business and the merging enterprises shall make a public offering according to law and based on the principle of open and free capital investment, and the investors recruited shall include but not limit to the competitors of the merging enterprises.

4. The new business may not engage in any business or services related to exclusive financial service. However, such an operation is excluded when its overall economic benefit outweighs the disadvantages from competition restrictions with the FTC's approval in writing.

5. To ensure that other payment platforms could take part in the competition, the new business and the merging enterprises may not refuse, without justification, requests from other mobile payment platforms for connection directly or through an interface or obstruct other mobile payment platforms from entering the market.

6. Without justification, the new business may not treat the merging enterprises (and their subsidiaries and affiliates) preferentially on the terms for service providers or secure element suppliers.

7. Without justification, the new business may not treat any service provider or secure element supplier differentially.

8. The new business and the merging enterprises may not engage in any practices to restrict competition or impede fair competition, such as boycotting, against any specific enterprises.

9. Two months before the TSM platform begins operation, the new business is required to provide the FTC with the management regulations for the TSM platform (including but not

limited to details of co-operation between service providers and secure element suppliers) and publicly announce the regulations before they take effect.

10. Two months before the TSM platform begins operation, the new business is required to provide the FTC with a set of regulations regarding the protection of personal and transaction information and publicly announce the regulations before they take effect.

11. Five years after it is set up, the new business is required to provide the FTC with the following information before the end of March each year: a list of shareholders, total sales in the previous year, the number of names of service providers worked with, the regulations for the operation of the TSM platform, and new business items not registered in the declaration.

3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

23. 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 contents of the Act be the core of economic policy.

24. The FTC has completed a comprehensive review of all relevant laws and regulations since 2001 to minimise 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.

25. In 2013, the FTC organised and participated in various consultation meetings with other government authorities related to competition issues, as summarised in the following:

- Organised a meeting inviting the Council of Agriculture, Ministry of Welfare and Health, Ministry of Economic affairs, Ministry of Justice, and the Department of Consumer Protection of the Executive Yuan for the "Application of Relevant Laws and Regulations to False Labeling and Advertising on Seedlings, Fertilizers, Ranch Products, Packaged Rice, and Organic Foods" to co-ordinate the divisions of applicable laws and competent authorities.

- Participated in the meeting organised by the National Communication Commission and Executive Yuan for the "Prevention of Broadcasting and Television Monopoly and the Maintenance of Diversity Act" (draft) meetings and provided the Commission's opinions on the draft. The draft is now pending in the Legislative Yuan for review.

- Participated in the pricing meetings of junior-high and elementary schools' text books collective procurement for the 2013 school year and provided opinions on the prices of papers.

- Organised two meetings to discuss the "Procedures for Fighting Illegal Stocking and Price Gauging of Vegetables" with Council of Agriculture, Council of Economic Planning and Development, Department of Consumer Protection of the Executive Yuan, Ministry of Economic Affairs, Ministry of Justice and National Police Agency of the Ministry of Interior.

4. Resources of competition authorities

4.1 Resources overall

4.1.1 Annual budget

26. NT$341.146 million in 2013 (approximately equivalent to US$11.46 million in Dec. 2013).

4.1.2 Number of employees (person-years)

27. There were 212 employees at the end of the year 2013, 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.

28. In terms of the educational background percentages, 28%, 21%, 7%, 5% and 39% of the employees majored in law, economics, business administration, accounting and other related fields (including information management, statistics, and public administration), respectively.

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

Category	No. of employees
Lawyers	60
Economists	45
Other professionals & support staff	107
All staff combined	212

4.2 Human resources (person-years) applied to:

4.2.1 Enforcement against anti-competitive practices and merger review

30. Apart from the Department of Fair Competition, which has 32 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.

31. 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 sectors. There are 30 staff members in the Department of Service Industry Competition and 27 in the Department of Manufacturing Industry Competition.

4.2.2 Advocacy efforts

32. In 2013, 9 of the 26 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 organised 95 seminars in 2013 for the public, students, and local governments to introduce the regulations of the FTA.

33. Furthermore, in 2013, the FTC held 3 seminars for the various business sectors to introduce the leniency program and administrative fines to ensure acquaintance with the new provisions of the FTA. The FTC also held 5 seminars for business sectors to introduce the "Code of Conduct for the Antitrust Compliance of Enterprises."

4.3 Period covered by the above information

34. January through December 2013

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

- The FTC studied and published reports on competition policy issues in 2013 with the following titles. All of them are only available in Chinese.

- A Study of Cross-Border Cooperation on Anti-trust Enforcement from the Extraterritorial Application of Competition Law.

- A Study on Regulations on the Business Conducts of Franchise Enterprises.

- A Study and Analysis of Competition Cases in the Tobacco and Wine Markets after Deregulations of the two Markets.

- A Study on Article 21 of the FTA on Regulations of Advertisement and its Interactions with other Related Acts.

- A Study on the Interface between of Professional Personnel Laws and the Fair Trade Act.

35. The FTC also engaged in outsourced research, and published the following research reports in 2013. A short English abstract is available for both reports.

- A Study on Factors to Be Considered in the Application of "Rule of Reason" in the Non-Price Vertical Restraints.

- A Study on the Application of Economic Analysis on Competition Law Issues.

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

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ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES

-- Note by Chinese Taipei --

17-18 December 2014

This document reproduces a written contribution from Chinese Taipei submitted for Item VIII of the 122nd meeting of the OECD Competition Committee on 17-18 December 2014.

More documents related to this discussion can be found at http://www.oecd.org/daf/competition.

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CHINESE TAIPEI

1. The competition authority in Chinese Taipei, Fair Trade Commission, Executive Yuan, was established on January 27, 1992. In harmony with the reform of government organisation, the "Organic Act of the Fair Trade Commission" was promulgated on November 14, 2011 and went into effect on February 6, 2012. It was renamed the Fair Trade Commission (FTC) accordingly. This paper will illustrate the history of the institutional change of the FTC, independent status, as well as the debates while several proposals relating to consolidation of the FTC with other agencies were submitted during the organisational reform period.

1. Institutional Design of the FTC before 2012

1.1 The Structure of the Fair Trade Commission

2. The competition law of Chinese Taipei, the Fair Trade Act (FTA), was promulgated on February 4, 1991 and entered into force on February 4, 1992. The Act covers two areas: anti-competition and unfair competition. As a matter of fact, the FTA was part of the economic liberalisation policy planned in the 1980s so that the FTC was originally designed to be a law enforcement unit within the Ministry of Economic Affairs (MOEA) when drafting the FTA. However, as the legislative process took several years to come into force, the status of the FTA was elevated to that of a ministry-level agency to accommodate changes in the socioeconomic environment. Eventually the "Fair Trade Commission Organic Statute" (Organic Statute) that was promulgated on January 13, 1992.

3. According to the FTA (1992) and the Organic Statute (1992), the FTC was a second-level agency under the Executive Yuan; i.e., a ministerial-level agency that is responsible for policy and legislation as well as enforcement. There were nine full-time commissioners, including the chairperson and the vice-chairperson. Commissioners were to be nominated by the Premier and appointed by the President to serve a 3-year term and could be reappointed after the expiration of his/her term. Each commissioner was required to have an academic background and experience in law, economics, finance, accounting or management. Meanwhile, because the terms of all the commissioners began and expired at the same time, the Commission was referred to as the "First-term", "Second-term" Commission, and so forth. There were seven terms before the FTC was reformed in 2012.

4. FTC staff is organised by sector and by function: five departments and five supporting offices to be respectively responsible for anti-competition and unfair competition in service and manufacturing industries, policy planning, legal affairs and administrative support.

1.2 The Organisational Features of the FTC

5. Article 28 of the FTA stated, "the Fair Trade Commission shall carry out its duties independently in accordance with the law and may dispose of the cases in respect of fair trade in the name of the Commission." Article 13 of the Organic Statute (1992) also specified, "the commissioners may not take part in any political party activities during their service in the Fair Trade Commission and shall exercise their duties independently according to law." These two provisions served as double protection for the independence of the commissioners and the agency.

6. According to the Organic Statute (1992), the FTC was a collegial agency. The commissioners meet once a week and decisions were made by majority vote of a quorum of the membership which was more than half of the total. All meeting records, except confidential matters, should be open to the public. The number of commissioners with the same political party could not exceed one half of the total number of commissioners. Commissioners were required to be beyond party affiliations and exercise their duties independently so that unnecessary interference in the Commission's policies and law enforcement from political parties or other agencies could be prevented.

7. Although the FTC was subordinated to the Executive Yuan, its independence was well guarded due to the following institutional design: 1) the Commission operated under a collegial system in which meeting decisions were achieved with the approval of the majority of the commissioners; and 2) the commissioners were political appointees protected by a fixed term tenure and therefore not placed under supervision in the administrative system. Besides, there were comments from scholars that when the chairperson of the FTC, a ministerial-level decision-making body, attended Executive Yuan Council meetings to present the standpoint of the Commission toward a policy, the role of the FTC changed from an independent law enforcer into a participant in policy making. It was unique in its institutional design[1].

2. Government Reform and Restructuring of the FTC

8. The government of Chinese Taipei started to plan the reorganisation of administrative agencies in the 1990s. The objective was to build a "streamlined, flexible and effective government" to boost national competitiveness. After years of study and review, related legislation was finally completed in 2010. The most important pieces of legislation included the "Basic Code Governing Central Administrative Agencies Organizations" (the Basic Code), promulgated and enacted on June 23, 2004, and the "Organic Act of the Executive Yuan" promulgated on February 3, 2010 to take effect on January 6, 2012.

9. Article 3 of the Basic Code defines "independent agency" as "a commission-type collegial organisation that exercises its powers and functions independently without the supervision of other agencies, and operates autonomously unless otherwise stipulated." Article 4 provides that the organisation of independent agencies is to be governed by law. And moreover, Article 21 prescribes that "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."

10. Furthermore, Article 9 of the "Organic Act of the Executive Yuan," the Executive Yuan enumerates three independent agencies, which are equivalent to second-level agencies in the central government, the Central Election Commission, the National Communications Commission and the Fair Trade Commission. On the basis of the aforementioned regulations in the Basic Code, the FTC drew up the draft "Organic Act of the Fair Trade Commission" (Organic Act). It was passed by the Legislative Yuan on October 28, 2011 and officially took effect on Feb. 6, 2012. The main changes made to the FTC as a result of the organisational reform include: 1) reinforcement of the FTC's independent status; 2) reduction in the number of commissioners from nine to seven; 3) the appointment of commissioners subject toconsent by the Legislative Yuan; 4) extension of the commissioner's term and the adoption of staggered terms.

[1] Su, Yeong-Chin: "Between Self-governance and Regulation," Wu-Nan Book Inc., p. 9.

2.1 The Institutional Changes of the FTC

11. According to the Organic Act, the seven commissioners hold full-time positions for a 4-year term and the term is renewable. They are nominated by the Premier and the appointment is subject to consent by the Legislative Yuan. When nominating commissioners, the Premier is to designate one of the commissioners to be the chairperson and another the vice-chairperson. As result of the staggered terms, 3 of the 7 commissioners under the Organic Act, excluding the chair and vice chair, were appointed to serve for a term of 2 years and in 2015 the 3 positions will be appointed to serve for a 4-year term.

12. Besides the changes in the appointment of commissioners, the Organic Act stipulates 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.

13. Another important change in the organisation is to set up the Information and Economic Analysis Office to strengthen the capacity of the Commission in economic analysis and the collection of economic and industrial data. In addition, the five Departments, i.e., the First, Second, Third, Planning and Legal Affairs, were renamed the Department of Service Industry Competition, Department of Manufacturing Industry Competition, Department of Fair Competition, Department of Planning and Department of Legal Affairs to highlight their functions. These units have continued to work on cases involving violations of the FTA as well as draw up fair trade policies and regulations.

2.2 Reinforcement of Independent Status

14. As mentioned above, while the FTC may remain a subordinate agency of the Executive Yuan, the name "Executive Yuan" has been removed from its title so that the independence of the agency is emphasised.

15. To further reinforce the independence of the FTC, the proposed amendment to the FTA states that appeals against decisions made by the FTC would be taken directly to the Administrative Court. The reason for this amendment is that, under current administrative system, the FTC is considered as a subordinate agency of the Executive Yuan, so the FTC's sanctions and decisions would be appealed to the Appeal and Petition Committee of the Executive Yuan first as set forth in Subparagraph 7 of Article 4 of the Administrative Appeal Act. Considering the purpose of the regulations regarding independent agencies stipulated in the Basic Code, intervention and supervision from superior agencies on the decisions made by independent agencies should, within the boundaries of the law, be eliminated so that the professionalism and credibility of independent agencies can be maintained. Therefore, the proposed amendment specifies that appeals are to be made to Administrative Court to minimise inappropriate administrative intervention. Currently, the drafted amendment is being reviewed by the Legislative Yuan.

3. Debates on Consolidation of the FTC with other Agencies

16. During the government organisational reform, a number of proposals with regard to the consolidation of the FTC with other agencies were put forward, including its annexation with the Consumer Protection Commission to become the "Fair Trade and Consumer Protection Commission," the International Trade Commission (ITC) of the MOEA to be merged with the to-be-established "Fair Trade and Consumer Protection Commission," and the placement of government procurement complaint review work under the FTC as suggested by the Public Construction Commission (PCC) in 2009. However, after meetings and consultations, none of the above-mentioned proposals were adopted.

3.1 Discussion on Consolidation with the Consumer Protection Commission

17. The Consumer Protection Commission (CPC) of Chinese Taipei was set up on Jul. 1, 1994 to be responsible for formulating and supervising the implementation of consumer protection policies. It was also a collegial organisation with 11-19 members to serve a 3-year term. The Vice-Premier would be assigned by the President as the Chair of the CPC and the members included heads of related ministries, representatives from consumer protection organisations, corporate managers, and scholars as well as relevant field experts.

18. The main consideration behind the idea to consolidate the two commissions was that the legislative purposes of the FTA and the Consumer Protection Law were overlapping to some extent[2]. In addition to this, the duties of the two agencies were complementary to each other and the consolidation could effectively maintain market functions and protect consumer interests while the goal of streamlining government organisation would also be achieved. Moreover, the proposal had been encouraged by the fact that the competition authorities in several countries back then also concurrently served as a consumer protection agency, such as the US Federal Trade Commission and the Australian Competition and Consumer Commission. Therefore, the consolidation of the two commissions into an independent agency was deemed positive for government efficiency and the allocation of resources.

19. During the government reorganisation period, the two agencies met several times to discuss how they could be consolidated. The focus was set on how the two agencies with systemic and functional dissimilarities could be combined to create a new agency. As a competition authority, the FTC had the power to investigate and sanction enterprises that violate the FTA, and the FTC was a quasi-judicial body in terms of its function and independence. By contrast, the CPC was a co-ordination agency mainly to co-ordinate and oversee various competent authorities. In terms of functionality, it was not an independent agency. Consolidation of the two into an independent agency was bound to have an impact on the consumer protection operations and weaken the original functions of the CPC.

20. After several meetings and discussions, the Vice Premier decided at a meeting held in Apr. 2005 that the two agencies would not be consolidated. The organisation and functions of the CPC remained the same. Later, on Jan. 1, 2012, the CPC was restructured and annexed into the Executive Yuan as the Consumer Protection Committee and its operative units became the Department of Consumer Protection, Executive Yuan as the staff unit of the Consumer Protection Committee.

3.2 Discussion on Consolidation with the ITC

21. During 2004 when the consolidation between the FTC and the CPC was being discussed, the MOEA also suggested that its subordinate the ITC could be included as part of the new "Fair Trade and Consumer Protection Commission" to be created. The main reasons were 1) to be in line with major WTO members that have an independent and unprejudiced quasi-judicial agency to carry out trade remedy

[2] Article 1 of the FTA provides that, "this Act is enacted for the purposes of maintaining trading order, protecting consumers' interests, ensuring fair competition, and promoting economic stability and prosperity," while Article 1 of the Consumer Protection Law stipulates that, "the Consumer Protection Law is enacted for the purposes of protecting the interests of consumers, facilitating the safety of the consumer life of nationals, and improving the quality of the consumer life of nationals."

measures[3] and 2) to conform to the requirements of objectivity and neutrality that would demonstrate the significance of investigations on trade injury.

22. The viewpoint of the FTC toward the proposal was that, despite both agencies' being collegial organisations and having the quasi-judicial authority to investigate businesses and industries, the consolidation was still debatable when the objectives in the protection of legal interests, the operations of the duties and the structure of independent agencies were taken into consideration[4]. As for the CPC, on the other hand, the ITC's "import relief" measures were to cope with dumping at low prices and the imposition of "countervailing duty" would be responses to unjustified subsidisation by foreign governments. However, when businesses engaged in dumping at low prices or received subsidies, the results could be advantageous to consumers. Hence, the operations of the ITC were entirely different from consumer protection work and the merger with the ITC would result in conflict with the spirit of consumer protection.

23. The three agencies met to review and discuss the proposal and the meeting minutes were presented to the Government Reform Committee of the Executive Yuan for evaluation. As mentioned above, after the CPC confirmed that it would not be consolidated with the FTC, and thus the proposal no longer needed any further consideration.

3.3 The Proposal to Place Government Procurement Complaint Review Work under the FTC

24. In 2009, the Public Construction Commission (PCC) put forth the suggestion that its government procurement complaint review work be placed under the responsibility of the FTC. The main reason was that the review and mediation of complaints with regard to government procurement required independence, objectivity and fairness. In order to accelerate the handling of disputes, experts had already suggested that the Complaint Review Board for Government Procurement should be made an independent

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3 According to the Foreign Trade Act and the Organic Regulation of the International Trade Commission, Ministry of Economic Affairs, the duties of the ITC include 1) Conduct investigation under paragraph of Article 18 of the Foreign Trade Act. 2) Deliberate an institution. Make injury determination, and draft trade remedy recommendation of the investigation prescribed in the preceding paragraph. 3) Conduct injury investigation under Article 19 of the Foreign Trade Act. 4) Provide advisory comments on improper relief issues. 5) Conduct research regarding import relief issues.

4 The reasons behind the objection of the FTC included:

1) In the legal interests of protection, anti-dumping and anti-subsidy measures and the imposition of countervailing duty in cases involving import relief were mainly to prevent the dumping of foreign goods in the domestic market. The purpose was to protect domestic industries as industrial and trade policies were involved. The objectives of competition law, however, were to maintain market order and ensure that price advantages, quantity, quality, better service or other conditions were adopted to seek trading opportunities. Competition policies were a concern and the purpose was to promote competition and protect consumers.

2) Recommendations made by the ITC regarding behavioral remedy measures in import relief cases could not all be realised without the supervision of the MOEA and the co-operation of related competent authorities. This was inconsistent with the definition of an independent agency.

3) In practice, competition authorities in other jurisdictions may investigate whether there is a violation of competition law with regard to those abusing anti-dumping measures in cases that would lead to anti-competition or unfair competition. If the responsibility of the ITC were to be placed under the new agency, it would, on one hand, have to investigate trade injury based on the application from concerned parties and, on the other hand, initiate an investigation on the applicant should the trade injury application was considered as a conduct against the competition law. Under such circumstances, contradictions could occur as competition authority seldom dealt with anti-dumping cases.

agency. As the FTC is an independent agency with full-time commissioners to review cases under a collegial system, placing the complaint review work within the jurisdiction of the FTC would not increase the number of central government agencies and it would be consistent with the principle of organisational reform.

25. The FTC responded by stating that: 1) the Government Procurement Act (GPA) was governed by the PCC and the issues involved in the GPA were different from the functions of the FTC; 2) disputes over contract performance between procurement agencies and suppliers should be settled in accordance with the GPA or Civil Code. For these reasons, it would be inappropriate to place the work under the FTC and, as a consequence, the suggestion was not taken into consideration.