出國報告(出國類別： 其他公務有關活動)

出席 2015 年 6 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

陳瑾儀　視察

赴派國家： 法國巴黎

出國期間： 104 年 6 月 13 日至 21 日

報告日期： 104 年 8 月 17 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) 會議主要討論競爭政策及競爭法之制定及執法方向與技巧，以促進執法活動之國際化及促進各國各項政策及法規之透明化；並制定競爭法執行之最佳實務，促進各國之執法合作並對開發中國家進行能力建置。「競爭委員會」各項會議每年固定在2月、6月及10月於法國巴黎OECD總部召開3次例會，除2月例會因包括「全球競爭論壇」(Global Forum on Competition, GFC)，會期為5日外，其他6月及10月例會會期為4日。惟自2015年起改為每年舉行2次例會，每次會期固定為5日，本年6月會議於6月15日至19日舉行。

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各項會議。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。

本次會議共分為6月15日「合作及執法第三工作小組」(WP3)，6月16-18日「競爭委員會」(CC)及6月19日「競爭與管制第二工作小組」(WP2)三場會議。本次我國出席會議人員為本會蔡蕙安委員、綜合規劃處杜幸峰視察及服務業競爭處陳瑾儀視察3人。

參、「合作及執法第三工作小組」(WP3)會議

6 月 15 日舉行「執法及合作第三工作小組」(Working Party No. 3 on Enforcement and Co-operation, WP3)會議，由 WP3 主席美國司法部反托拉斯署署長(Assistant Attorney General, US Department of Justice) Mr. William Baer 主持，本日討論議題包括:

一、「政府及私人反托拉斯執法之關係」圓桌會議(Roundtable on the "Relationship between Public and Private Antitrust Enforcement"):

(一) 本圓桌會議主要探討OECD會員及與會各國對反托拉斯法私人執法(private enforcement，即依反托拉斯法自行提出訴訟)之現狀，並檢視提升私人執法的方法及可用工具，討論焦點在政府執法(public enforcement)及私人執法間之實際關係，如私人執法與政府執法如何取得平衡、私人執法與政府執法如何互補，及受損害廠商如何經由私人執法取得合理賠償。

(二) 本議題計有澳洲、美國、歐盟、加拿大等24個國家提出書面報告，會中並邀請法國高等法院法官Irène Luc報告法國私人反托拉斯訴訟程序，美國北加州地方法院負責承審面板刑事及民事案法官Susan Y. Illston報告其在審理面板案時，如何在配合美國司法部反托拉斯署(USDOJ)之刑事訴訟，如何調整各州代表受害者所提之民事訴訟及受害廠商民事訴訟時程安排之經驗。另德國鐵路公司反托拉斯團隊私人執法組組長Dr. Tilman Makatsch報告則從公司法人角度，提出反托拉斯訴訟之挑戰及所需面臨之程序。

(三) 法國高等法院法官Irène Luc報告法國私人反托拉斯訴訟程序，略以:

1、 法國競爭局(French Competition Authority，FCA)是法國唯一可對違法限制競爭行為加以處分及處以罰鍰之行政機關。但限制競爭受害人尚可依法國2005年12月所公布之「商業法」(Commercial code)，申請由專門商業法院執法。這些專門法院與FCA有併行管轄權，可宣判某項行為是否為限制競爭，並要求被告停止該項行為，惟專門法院並無權力對被告違法行為處以罰鍰。這些商業法院可以判決其認為限制競爭之契約條款無效，並判給補償金或給予賠償。另法官對於緊急限制競爭案件亦可利用緊急程序，命其停止限制競爭行為。

2、 限制競爭受害人可先向FCA提出申訴要求其調查並禁止違反競爭法行為，再依循後續行動(follow-on actions)，向商業法院提出賠償訴訟，或是單獨採取行動，直接向商業法院提出訴訟，尋求法院認定限制競爭行為並予以判定賠償，但受害者採取此一直接訴訟時，損害金額係由法官自行計算。目前法國共有8個

專門商業法院可提供自行訴訟，但不論是FCA所做之處分或商業法院所做之判決，僅有巴黎上訴法院可供政府及私人執法提出上訴救濟。

3、限制競爭行為之直接或間接受害人皆可提出民事訴訟，但賠償金額僅限於受損害金額，且依法為全額賠償，惟法國法律並無懲罰性賠償規定。而在訴訟程序上，反托拉斯法之訴訟並無特別程序之規定，一樣適用民事訴訟程序，且受害人須證明事業有違法行為所遭受損失，行為與損害間的因果關係，以及須量化所遭受的損失。目前法國巴黎上訴法院認為事業只要從事限制競爭或不公平競爭行為，必然會導致原告的損失，減輕原告方面部分的舉證責任。

4、2014年公布生效之Hamon法，提供了消費者團體或組織集體訴訟之管道。團體訴訟被視為是後續行動，必須先取得競爭法主管機關、內國法院或歐盟法院之判決，且已無上訴之可能後，再依法國消費者保護法提出訴訟。該訴訟僅適用於個人，不包括公司，且僅限於重大損失，而截至目前為止，尚未有涉及競爭法的團體訴訟被提起。

5、在政府執法及私人執法平衡上，並無特別困難。法國法院可以用禁制令要求諸如：FCA及歐盟等行政機關提供案件檔案，以供原告在損害賠償訴訟中去證明事業的限制競爭行為及其所遭受的損害，但是倘涉及寬恕政策的案件，則法院除考量證據接觸原則外，尚需將FCA保存寬恕政策的利益以及受害人獲得賠償的利益納入考量，藉以平衡與反托拉斯有關的政府執法與私人民事訴訟的利益。法官可依訴訟雙方要求，請FCA提供案件資料，而FCA亦可在考量風險及公共利益後拒絕法院提供案件資料之請求，但必須說明原因。

6、法官Irène Luc並認為，如競爭法主管機關、歐盟競爭委員會以「法庭之友」身分提供意見給內國法院，可視為政府執法有助於私人民事損害賠償訴訟的方式。

(四) 美國北加州舊金山地方法院法官Susan Illston以其審理面板案(TFT－LCD) 時，如何配合美國反托拉斯署(USDOJ)之刑事訴訟，及調整各州代表受害者所提之民事訴訟及受害廠商民事訴訟時程安排經驗提出報告，略以：

1、本案刑事部分係由美國司法部（USDOJ）提出告訴，民事訴訟則分別由23州之州檢察總長代表其州內消費者提出訴訟，另有受害廠商自行提出民事訴訟。但上開訴訟全部集中於北加州地方法院，由渠審理，且這些訴訟同時進行。就民事部分，直接受害者(如電腦、手機廠商)可以自行提告，但間接受害者(消費者、產品顧客)則須由各州檢察總長或律師代為訴訟求償。

2、 本案共有8家製造商及8位公司高階經理人提出認罪協商，這些經理人除了罰金外，並被處以1-3個月的有期徒刑。另外有3位公司經理人接受刑事審判，被處以2-3年的有期徒刑。公司罰金總計達13.92億美元。

3、 公司的認罪協商並不能免於民事賠償責任，因為尚有受害者求償訴訟。直接受害者可於聯邦地方法院自行提出訴訟，消費者、間接購買者則由州檢察總長或律師代為提出集體訴訟，目前共有23州代表其居民提出求償訴訟，總求償金額達10.8億元。

4、 做為本案承審法官，渠必須平衡私人及政府之執法時程，甚至為刑事部分之審理，有延緩民事訴訟之必要。而對於私人執法所請求國外競爭法主管機關提供寬恕政策資訊全未被允許過。

5、 在美國，反托拉斯訴訟制度十分健全，但亦不可能發生重複求償之現象，消費者也不能以個人名義提出求償訴訟。

(五) 美國DOJ代表：

1、 美國仰賴聯邦、各州及個人執法共同對反托拉斯法律之執法，以收其嚇阻之成效。三者角色及執法方式不同，但其結果相輔相成。聯邦及各州之執法有相同之任務－保護公共大眾免於限制競爭行為之損害;聯邦執法在保護所有國內之消費者及商業利益，各州之執法專注於保護其州內消費者利益，而私人執法則尋求其因限制競爭所受損利益之賠償。

2、 美國聯邦反托拉斯法保障個人可對限制競爭之加害人提起私人民事訴訟，且規定個人可對違法廠商要求3倍懲罰性賠償，提供個人執法之經濟誘因，以嚇阻限制競爭行為，並有集體訴訟規定，提供消費者獲得救濟管道。但在訴訟過程中政府執法可能亦會因為私人執法而受延遲。

3、 USDOJ並不會協助私人執法原告或律師尋求賠償訴訟，但私人執法通常在政府執法行動後，立即提出訴訟，且政府執法成果，包括認罪協商，皆成為私人執法之庭上證據，而原告僅需證明其受損害金額即可。

4、 聯邦法院會積極監督私人損害求償訴訟時程。私人訴訟通常在聯邦執法訴訟中即提出，司法部反托拉斯署會依個案估私人訴訟是否會妨礙刑事調查與訴訟，如果是，反托拉斯署律師則會協調或尋求私人訴訟暫緩或限制其訴訟範圍。

(六) 以色列：以國反托拉斯法第50條規定受損害個人得提起私人訴訟，惟原告得證明被告違反反托拉斯法且自己因而受損害，並需自行計算受損害金額。因為證據取得不易，在以國鮮有個人因反托拉斯法而透過訴訟尋求賠償。惟該國目前

已計畫透過修法改正此一情形，並加入3倍賠償之條款，以鼓勵私人對限制競爭行為提出訴訟。預計此一修法草案將在幾個月後在國會中審議。

(七) 法國：

1、大多數歐盟國家反托拉斯執法上恰與美國相反。在美國，90%以上的反托拉斯案件訴訟為私人執法，在歐盟國家競爭執法全賴政府競爭法執法機關，而私人執法僅為補償性質。但是，競爭法之有效執法並不能僅仰賴政府執法，也需要對受害者予以補償。歐盟法庭（CJEU）認為，在過去10年中，私人訴訟受害補償的本質與政府執法共同維護了整個區域的競爭法有效執法。

2、法國有關競爭法的直接訴訟仍屬非常少數，但最近有明顯增加之趨勢。自1986年至2013年6月所進行的163件訴訟中，其中80%是過去10年中提出的而絕大多數（約85%）所提出之訴訟與FCA處理案件是無關聯的。而2014年所通過施行的Hamon法，更提供了由消費者提出團體訴訟之法律基礎。

(八) 歐盟：

1、政府執法與私人民事執行間的互動關係可聚焦在四個方面，分別是：受反托拉斯行為(歐盟運行條約第 101 條及第 102 條)侵害的受害人接觸歐盟委員會或其他會員國競爭主管機關檔案中證據的權利、競爭主管機關在調查程序中取得的機密資訊在內國法院的保護、在非歐盟法院要求歐盟委員會提供檔案的證據開示程序(discovery)以及內國法院對於競爭主管機關侵權決定認定的影響。

2、有關接觸證據權利的部分，2014 年 104 號「反托拉斯損害賠償訴訟」指令對於在歐盟內國法院的損害賠償訴訟中關於競爭主管機關檔案的公開有特別的規定，要求內國法院的資訊公開不能不適當地影響歐盟委員會或其他會員國競爭主管機關關於競爭法執行的有效性，尤其不能干涉到正在進行調查中案件或寬恕政策或和解程序。所以內國法院無法在損害賠償訴訟中要求當事人或第三人去揭露其申請寬恕政策所為的陳述或和解的陳述，可參該指令第 6 條第 6 項規定。

3、有關機密資訊在內國法院保護的部分，此處所稱的機密資訊，包括營業秘密或其他機密資訊，通常係指事業的產銷資訊、市場占有率、市場計畫、成本評估及銷售策略等等，一旦洩漏就會導致提供資訊者或第三方非常嚴重的損害，從而有保護的必要。歐盟的官員依據歐盟運行條約第 339 條負有保護其內部檔案的機密資訊的專業秘密義務，但 2014 年 104 號「反托拉斯損害賠償訴訟」指令規定，內國法院認為該機密資訊跟損害賠償訴訟相關時(比如：量化損害)，

可命令歐盟委員會提供該等機密資訊，須注意此時內國法院負有與歐盟競爭總署相同的保密義務。而且歐盟委員會有權先去證實內國法院關於機密資訊保護的方式是否足夠達到遵循歐盟法律的程度，倘委員會認為無法達到時，歐盟委員會就可以不提供機密資訊給內國法院。

(九) 德國鐵路公司(DB AG)的反托拉斯私人民事執行部門(該部門於2013年因德國公司法要求DB公司強制履行對供應商關於卡特爾的損害賠償義務而設立，截至目前為止已有65個案件在觀察名單中)主管Tilman Makatsch博士的報告重點：

1、 過去幾年德國政府在卡特爾案件上，課予的罰鍰增加非常多，以遏止個別卡特爾行為人、一般大眾去從事此等行為及避免對經濟造成損害。在此同時，私人民事執行則面臨有資訊不對稱、花費大量時間及訴訟成本、法律上重大的不確定性等問題。公共執法與私人民事執行最大的衝突可以在寬恕政策及其後的損害賠償訴訟中可看出端倪，競爭當局會擔心如果事業基於寬恕政策的申請所提交的資料，在之後的法院的損害賠償訴訟中被揭露的風險很高時，則事業很可能不願意提出寬恕政策的申請。

2、 在美國，雖然個人的刑事制裁可以被豁免是其申請寬恕政策的主要原因，但仍存在有公共執法與私人民事執行間前揭同樣的衝突。為解決此衝突，2004 年美國反托拉斯刑事處罰改革法(Antitrust Criminal Enhancement and Reform Act)增加行為人更願意申請寬恕政策的誘因，只要適用寬恕政策的行為人的損害賠償可以從 3 倍降低成 1 倍，且其損害賠償責任僅侷限對其自身交易的客戶及渠等自有的侵害。為解決此等衝突，德國競爭當局係透過創設單一窗口程序(one stop shop procedure)，整合政府公共執法與私人民事執行，不過渠建議改採兩段式程序(Two-Step procedure)。兩段式程序主要內容為:

   (1) 第一階段由德國聯邦卡特爾署做出宣告系爭行為違反競爭法的決定。

   (2) 過渡階段(interim phase)，為便利潛在的原告與從事卡特爾行為的事業間達成和解協議，如果有和解協議，則罰鍰金額可以降低。

   (3) 第二階段則由德國聯邦卡特爾署做出罰鍰決定，競爭法主管機關須將事業所簽署的和解協議及給付第三方損害賠償的總額納入考量，最多可以扣除15%的罰鍰。

3、 兩段式程序，其利益在於節省事業及兩造雙方高額的訴訟成本(包括律師費、專家報告及其他機會成本)，加速程序的進行(和解提供雙方關於損害賠償的金

額值得信賴的基礎,也使得尋求賠償的第三方得以提早在過渡期間與事業達成和解)，也因為提早和解變成常見的情況，而使得寬恕政策所取得的資訊變得不那麼重要，更可減輕法院的工作量使其聚焦在有爭議的案件，亦符合歐盟2014年損害賠償指令第18條第3項規定，競爭主管機關在做成罰鍰決定前，應將事業和解所付的損害賠償金額納入考慮。

二、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 to the Counci1 on Implementation of the 2012 Recommendation on Fight Bid-Rigging):秘書處提出向總理事會報告書草案，並由巴西、波蘭、斯洛伐克、墨西哥、挪威等5國提出實施該建議書之經驗報告。

三、「現有國際合作協定中之條文盤點」(Inventory on Provisions Contained in Existing International Cooperation Agreement):由秘書處提出各國競爭法合作協定(包括自由貿易協定、經濟夥伴關係協定及司法互助條約等)所包含條文，作為會員國未來簽署合作協定之參考。各國代表咸認本項盤點文件對各國未來加強合作將有莫大助益，並同意未來將該文件置於OECD網站上供各國作為參考典範文件。部分國家並提議將各國所簽之合作備忘錄(MOU)納入盤點。

四、未來討論議題:會員同意本年10月會議將討論「卡特爾案件中有關中間產品之司法管轄權」(Jurisdictional Issues in Cartel Cases Involving Intermediate Goods)議題，並同意另一議題為「在結合管制體制中如何定義管轄權連結關係」(How to Define the "Jurisdictional Nexus" in Merger Control Regimes)。明年則將討論「結合審查中競爭法主管機關考量之非競爭因素有那些」(What Non-Competition Factors Competition Authorities Consider in Merger Review)。

肆、「競爭委員會」會議:

6月16日至6月18日舉行「競爭委員會」(Competition Committee, CC)會議，由CC主席Dr. Frédéric Jenny 主持。

肆之一、CC第一日（6月15日）會議

一、「破壞性創新」聽證會:

(一) 秘書處報告：由OECD「科學、科技及創新處數位經濟政策組」組長(Head of Digital Economic Policy Division, Directorate for Science, Technology and Innovation) Jeremy West撰寫秘書處參考資料，其報告略以：

1、 「破壞性創新」中所謂「破壞」意指對市場產生急劇改變。這些變化不是科技的逐漸改變，亦非正規、可預測的改進變化，而是突破性帶來市場前所未見的不規則急劇變化。再者，破壞性創新最特別的是減少或甚至摧毀現有廠商的市占率(例如智慧型手機替代了傳統手機)，或開創了新的市場(如電視)。提升數位相機的畫素並不屬破壞性創新，但發明數位攝影則是破壞性創新。

2、 破壞性創新不僅包括產品及製程，還包括新的商業模式。共享經濟(sharing economy)如 Airbnb, Uber 並非新創科技，而是運用網路及智慧型手機媒合私人部門耐久財之超額供給及對其之需求所產生的新型商業模式。

3、 破壞性創新所追求的破壞目標通常是較大的市場，較穩固的現有廠商，或無效率的市場。有時候市場中的現有廠商本身即可能是破壞者，如 Nestle 本身已有咖啡品牌 Nescafe，又在市場中推出 Nespresso 膠囊咖啡機。廠商亦可能進入別的市場進行破壞，如 Apple 進入音樂及電子書市場。未來可能被破壞目標候選人還包括：信用卡交易市場、房貸、超市等。

4、 這些破壞者的力量可能既龐大又迅速，讓現有廠商措手不及，來不及應變。網路提供了這些破壞者全球市場之基礎，且增加額外顧客的邊際成本幾近於0，所以能快速崛起。但業者不一定需要網路才有破壞。如 IKEA 組合傢俱破壞傢俱市場，Walmart 對於美國零售市場之破壞即不需網路。

5、 對破壞性是否進行管制或以其他法律進行規範，各國目前未有定論，但問題是，競爭法主管機關應如何面對此一破壞性創新對市場的影響

(二) 英國前公平交易局執行長John Fingletong報告略以：

1、 「破壞性創新」指的是對傳統產業或運作模式的挑戰，且亦可能挑戰傳統管制之方式。

2、 破壞性創新會帶來更好的商品，更有效率的運作方式，使得工作更容易，市場運作更好。

3、 我們所必須檢視的問題是，管制是否會成為阻礙破壞性創新進入市場的最佳手段？現有廠商是否可能運用管制來阻止創新對市場之破壞性？管制是否有可能破壞了創新可能對社會經濟所帶來的好處？管制者是否可以創新的方式運用資料來降低對社會利益管制所來之競爭成本而有益於消費者？

4、 對競爭法主管機關而言，這又是另一項新的挑戰。競爭法主管機關可用工具有：執法、倡議及國際合作。在執法方面，網路因素可能對傳統反托拉斯執法帶來新的考量因素。而在市場定義上，傳統市場定義工具也應隨市場的快

速變動而有所變化，探究到底是「壟斷性破壞」或「破壞壟斷」(monopolizing disruption or disrupting monopolies)。

5、 對於管制，競爭法主管機關應可採「公共利益倡議」－對消費者有利，讚成破壞性創新－來對應限制競爭之管制。對於管制機關，競爭法主管機關可建議其採創新式管制，並發展以市場機制為主之創意式解決方式，如採自律方式或利用「大數據」以得到較佳之管制效果。

6、 破壞性創新是全球性現象，且可能跨多個產業同時進行，競爭法主管機關應進行國際合作以面對此一挑戰。

7、 F氏認為，許多「破壞」反而能使市場運作更好，因為他們挑戰管制，競爭法主管機關應有所準備，對地方或國家管制機關進行倡議。而傳統執法工具在此時仍有相當之關聯性，對於未成功之破壞者予以適當之維護，而對於傳統業者之檢舉應以經濟面之思量來面對。競爭法主管機關面對這些跨國跨市場之新奇議題應以更緊密之合作分享經驗及其心得。

(三) 美國密西根大學教授Daniel Crane以美國汽車經銷產業為例:

1、 美國汽車銷售模式的演進有著長遠之歷史。1920 年代三大汽車公司採直營及授權之混合模式銷售策略。在 1930 年代不斷有汽車製造商涉嫌濫用其市場優勢地位之指控，到 1940 年代，經銷商們開始尋求聯邦立法保護但未成功，到 1950 年代轉而向州政府尋求立法保護。州政府之立法主要在於：不可強迫經銷商接受其不要之車款，車廠不得無故終止經銷商資格，不得在經銷商之銷售領域新增其他授權經銷商及製造商不得直營經銷，以防止其以優勢價格削弱經銷商之銷售業績。

2、 2012 年以來，美國的汽車市場已有 Telsa Motors 跟 Elio Motors 等新進業者參進，而其經過網路「直接銷售」(direct distribution)，不透過經銷商販售方式對新進業者十分重要，理由在於當經銷商不想推銷某些車型，經銷商會用錯誤告知及錯誤誘因方式去促銷。以 2008 年加入的電動車製造商 Fisker 為例，因為透過經銷商之間接販售方式，導致該公司於 2012 年破產，依據 2014 年消費者報告中秘密研究發現：85 個經銷商中有 13 個經銷商不鼓勵消費者購買電動車，且 85 個經銷商中有 35 個經銷商推薦消費者購買一般傳統汽車。

3、 經銷商為打擊直接銷售，持續遊說立法中，目前除密西根州及西維吉尼亞州有立法外，其他州仍呈現僵局狀態，其主張包括：維持經銷制度才可以打破製造商在「零售的獨占」(retail monopoly)，可確保合適的售後服務市場的妥適，可

符合州立法的要求，更可以提供保固及召回服務等。通用及福特公司也支持經銷商之主張，但學者認為此等主張除誤解經濟學理論外，實證研究顯示直接銷售可以節省 8%的成本，新進業者 Telsa Motors 跟 Elio Motors 也有提供合適的售後服務的誘因，沒有證據顯示製造商會比經銷商更不遵守法律，且召回決定不是由經銷商決定的。再者，聯邦交易委員會（USFTC）的委員及其員工均曾有相關文件會演說表示支持直接銷售。

(四) Uber公司法務長Salle Yoo從該公司角度看破壞性創新，略以：

1、 Uber是由需求所引發之創新。該公司創辦人的最初想法是:「只要按一下按鈕，即可叫車」(Requesting a car at the push of a button)。該公目前已在58個國家311個城市提供服務，主要服務可分4種：

(1) Uber pop：以自己的私人轎車提供較低價格之兼職接送服務。

(2) Uber taxi：利用Uber提供一般計程車服務，價格與計程車計費標準相同。

(3) Uber Black：職業駕駛人提供豪華車接送服務。

(4) Uber SUV：職業駕駛人提供休旅車接送服務，可搭載更多乘客。

2、 Uber所提供之服務是有益於消費者，只要利用智慧型手機下載APP，輸入派車請求及路線，即可要求派車並清楚自己所搭乘路線與費用、且可透過信用卡付費，不須提領現金，安全可靠。在芝加哥市，52%的Uber服務是在服務不足的地區，客戶包括美國現任第一夫人Michelle Obama女士。

3、 對於司機，Uber提供了彈性提供服務且可兼職賺得第2份收入的機會，又可減少空車巡迴於市區，減少空污及能源消耗。

4、 各國計程車司機或公會對於Uber之競爭有不同反應。但大都反對Uber的競爭，要求管制機關介入處理或禁止以智慧型手機叫車服務。但此一反對或抗爭結果對消費者不利，且將減損社會生產力。

5、 Uber的立場是：限制市場進入是不合理的，因為不利於司機及消費者。計程車市場應予鬆綁改革，並支持對創新有利的管制，如2007年競爭委員會所討論「計程車服務管制及競爭」(Taxi Services, Regulation and Competition)議題中所提之建議。

(五) 工商諮詢委員會（BIAC）肯認創新對經濟成長的重要性，認為管制環境及反托拉斯政策應正視創新的重要性，配合新創商業模式，且應創造及刺激發明創新之誘因。而最要的是，競爭法應以正規及有效的執法方式，阻止現有廠商以聯合或共同限制創新者進入市場而傷害消費者及其他使用者之潛在福祉。

BIAC建議競爭法主管機關應該：

1、評估商業交易是否有（i）可激發創新或 (ii)阻礙或降低當事人引入破壞性創新模式之效果。

2、發展更全面性之創新分析架構，考量各種不同可能的競爭來源及其可能提升福祉來源。

3、更深入研究阻礙創新之見解，例如，對雙邊市場之研究。

4、考量重新評估創新後所附帶之限制與對破壞性創新之限制的相對重要性。

5、更清楚認知傳統結合管制工具及反托拉斯分析，尤其是SSNIP測試，可能無法適當定義受破壞性創新所影響之相關市場，而競爭效果分析，尤其是封閉式競爭研析可能無法正確指認破壞性創新之競爭效果。

6、反應競爭範圍及結合管制是否適當之問題，以允許其他機關介入相關之破壞性創新案件。

7、考量使用暫時措施以保障快速變動之市場。

(六) 美國代表表示：

1、美國對創新一向給予支持。創新是 經濟動力與競爭的特徵，但也可能對立法與管制機構造成挑戰。破壞性創新，包括創新商品、服務及商業模式，常會提供消費者較新較好及較低價格的商品及服務，但可能不符合管制模式之框架而引起管制機關之關切。

2、競爭法主管機關可扮演重要的倡議角色，對管制機關倡議這些創新不必然會限制競爭，利用執法防止現有廠商阻礙新競爭者進入市場，並利用研究及市場調查方法，促進對新科技及商業模式的瞭解。

3、USFTC已就此一問題舉行研討會，討論競爭法執法機關對「分享經濟」(sharing economy)關切之議題及競爭倡議。

4、在汽車行銷方面，USFTC所要傳達的是，應該允許消費者選擇如何買到自己想要的汽車，USFTC要質疑的是，為何要立法阻止廠商直接銷售汽車給消費者？對於可能潛在的新服務(如Uber)加以管制而造成市場進入障礙，USFTC的立場是，業者可提供更具彈性的服務，但在司機、安全性及價格上應具透明化。

5、USDOJ代表表示，在執法上，反托拉斯署會考量創新的市場進入，與處理航空產業概念相同，即對不同的創新商業模式，應給予開放進入市場的機會。

(七) 歐盟從反托拉斯法角度檢視破壞性創新與國家措施的關係：

1、「破壞性創新」係指商品或服務在一開始在市場的底層扎根，而後持續不斷地往上移，最後取代既存的競爭者的過程。通常存在於高度管制的行業，既有業者會認為此乃不公平的競爭，而國家會採行新措施或額外措施做因應。

2、國家的措施倘涉及對象是公營事業或具有特許權之事業，且授予該等事業獨占地位並不是問題，可能涉及歐盟運行條約第106條，而國家措施倘創造不可避免的濫用風險(諸如：獨占力延伸到鄰近市場、差別待遇等)，或鼓勵限制競爭協議的發生，則可認為此時國家措施具有限制競爭性質。

3、CC主席提問，歐盟是否曾應用第106條？有多少案例？歐盟代表答以，至目前為止，僅有少數案例。

(八) 英國公平競爭與市場局（CMA）以處理汽車保險破壞性創新案經驗，討論破壞與平台競爭(disruption and platform competition)，略以：

1、網路對商業模式的破壞主要來自於平台(platform)。保險費率比較網站（Insurance Price Comparison Websites，PCWs）及Uber/Lyft即屬此類破壞者。

2、PCWs透過強化汽車保險業中的競爭提升消費者的實質利益，但新的搜尋及比價方法不斷的推陳出新，也創造了其本身「需要新方法」的問題，且這些網站也引發了真實的競爭關切問題，如「最惠國待遇」（MFNs，即自動給予最優惠價格）問題，CMA 運用市場調查來處理此一案件。

3、新的搜尋科技不斷出現，也衝擊如何制訂新的管制方法之問題，而真正的競爭問題應該是，在不同平台間是否有產生競爭？我們是否有足夠的執法工具來處理這些問題？

(九) 奧地利代表表示，「新科技」不一定是「新創」科技，競爭政策主要在保障公平競爭，其他政策，如勞工、賦稅、安全等亦須一併考量。

(十) John Fingleton表示，本議題未來尚須討論的包括「點對點議題」(peer-to-peer)，「消費者保護議題」，「大數據議題」(big-data)－尤其是在零售業方面，以及「金融業議題」-如何支付及銀行、信用卡公司是否可能造成壟斷。

二、各工作小組報告：

(一) WP2主席Alberto Hemler報告本(104)年4月22日辦理「競爭法主管機關執法決定事後評估能力建置研討會」(Capacity Bui1ding Workshop on the Ex-Post Eva1uation of Competition Authorities' Enforcement Decisions)現場視訊參與情形及本次會議擬討論議題（WP2將在19日舉行）。

(二) WP3主席William Baer報告15日WP3會議結果。

(三) UNTAD聯絡人Souty博士報告本年7月6-10日UNCTAD將舉辦會議議程及預定對斐濟與巴布亞幾內亞進行同儕檢視。

三、「寡占市場之競爭執法」(Roundtable on “Competition Enforcement in Oligopoly Markets”)：主席表示，寡占市場在卡特爾執法及結合審議上常有爭議，本次圓桌會議主要探討各國競爭法主管機關運用不同的執法及非執法手段之相對優、劣勢，包括卡特爾、濫用市場地位、結合管制、市場調查及競爭倡議。本議題提交報告會員相當踴躍，共有包括我國在內的19個國家提出報告，秘書處亦提出背景文件。

(一) 歐盟代表先就經濟理論提出報告：

1、傳統經濟學理論完全競爭、壟斷及寡占大家都很熟悉。在寡占市場中，賣方僅為少數，每位賣家都有能力影響市場，而在商品定價上會考量其他家的「猜測」，市場在均衡狀態時，這些「猜測」都是正確的。

2、賽局理論常被應用在寡占市場分析。賽局理論模型可分：

(1) 靜態（單回合）賽局（static (“one-shot”) game）：如經濟學的靜態分析，賣家不考慮其行為在此一「特定期間」是否可能影響未來的結果，他們僅是以「賺得最大利潤」為目標而猜測對手之行為。

(2) 動態賽局(dynamic game)：今天的決定將影響未來，即賣家隨時猜測對手之行為而決定自己之定價，而且對手也會猜測自己的行動而改變策略，形成動態之影響。甚至也可能會有更複雜的動態賽局，如加入投資影響。

(3) 重複賽局(Repeated game)：簡單的動態賽局理論，一個期間接一個期間不斷重複靜態賽局，但不加入複雜因素，如加入投資而改變實質之資本狀態。而此一重複賽局模型可加入「勾結」、「背叛」、「懲罰」等因素。

3、不斷地重複靜態賽局，即有可能導致從靜態均衡移至較接近獨占之狀況。經濟學者不斷研究為何有如此結果，而賽局理論正好提供此一現象解釋之工具。這些分析也應用在執法上，如歐盟所謂Airtours標準被運用於其水平結合指導原則中。

4、這些標準基本上是針對市場參與者為了要將價格提升至高於靜態均衡價格所必須解決的所謂「寡占問題」。在歐盟水平結合指導原則中，將其區分為下列大標題：達到共同行為之條件，監督及處分背判，阻礙市場機制、外部反應等。

5、經濟學中亦點出會使提升價格高於均衡價格變得更困難或變得更容易的各種

因素，但經濟學中並沒有說明提高價格是否合法。在某些市場中賣方僅有少數且銷售同質可替代商品，寡占者可能不必透過溝通即可達成提高價格，但在其他市場中則必須透過溝通才能可能達到此一效果。競爭法似乎會區分這2種行為，認為前者是合法後者為違法，這種區分是否合理亦引發不斷的爭議。

(二) 哈佛大學法律及經濟學系教授Louis Kaplow就寡占市場中的聯合定價問題提出報告：

1、在市場中，如果價格是因競爭而導致價格齊一，廠商不須負責任。但如果有確實證據顯示聯合定價，廠商必須為此負責。惟若在中間灰色地帶，寡占廠商有明顯的共同行為使價格齊一，又沒有明顯的勾結證據，競爭法主管機關應如何處理？

2、在寡占市場中，對於價格齊一現象競爭法主管機關會有三種執法可能：（1）沒有任何責任：任何案件皆不得運用外部情況證據；（2）僅在有明確證據顯示抬高價格為共同行為，而非個別獨立行為才需負責；（3）僅在有前開共同行為，且可以引用情況證據證明其共同行為涉及某種型式之溝通對話時，需要負責。而在法律及語意上對所謂的「協定」、「共謀」、「聯合行為」其真正定義經常引起爭論。我們所必須討論的應該是針對我們尋求解決的社會問題，如何偵測其存在，如何評估其處分及如何處理合意性勾結及默契性勾結。

3、對於寡占市場卡特爾行為，如何成功偵測其共同行為是主要的目標，這些證據可以從下列分析：（1）以市場為基礎之證據（market-based evidence）針對共同效果所偵測的是：定價之態樣（如何形成、持續期間，價格戰等）；價格的抬升（幅度為何）；促進的行為及非「平行定價」的態樣。（2）內部證據；（3）不同形態之訊息溝通。

4、合意性協議大家知道是該禁止的，但以加油站外標價方式或召開記者會宣布價格方式是否也是該禁止之訊息溝通方式？競爭法主管機關要明列各種禁止訊息溝通方式確實是有其困難，加上當事人一定隱匿其行為，情況證據如何引用即為一項挑戰，且在證明上常會產生推論上的邏輯矛盾。

5、在寡占市場中，訊息溝通方式對廠商而言，廠商除必須相互依賴外，且需以市場中尋求適當方式完成溝通交換訊息，這對寡占廠商而言是有相當程度的困難，對執法機關而言，如何判定這種訊息交換是違法也是非常不容易的事。

6、K教授建議，我們應該專注在「如何使寡占市場（價格齊一）能創造最大的社會福利」，而非傳統的「如何證明協議是否存在，判定廠商是否違法而損害社

會福利」。這部分，我們有賴更多的實證研究來證明。

(三) 工商諮詢委員會（BIAC）提出其意見，略以：

1、寡占市場不見得一定是限制競爭的市場。市場中少數廠商不一定就不會競爭，而市場中有許多廠商也不一定保證不會有勾結。重點是：市場中的競爭是否充分。

2、廠商間因平行行為所產生的較高且相同價格，如果沒有違反競爭法，就不應成為執法機關關切之重點，它只是因為競爭而自然形成之結果，競爭法主管機關因而進行調查執法是不當的。

3、競爭法主管機關應慎用市場調查研究報告，且市場調查常花費鉅大，應謹慎限制，而市場管制更應在特殊情況下才能使用。

(四) 日本：日本在1977年規定價格提高平行行為必須先向JFTC報備以促進競爭。但此一制度在2005年即宣告廢止，其理由為：管制的現實情況已改變。而貨品不斷的平行漲價亦暗示缺乏防止及阻嚇效果，以及此一制度造成廠商及行政機關沈重之負擔。

(五) 比利時Liege大學教授Nicolas Petit報告略以：

1、寡占市場中大都是穩定的均衡，一般的競爭法執法機關以事前防範，藉由結合管制來防止共同效果，默契性聯合定價的產生。同時，在事後執法上，透過對違法價格協議的執法來處分寡占者的促進默契性聯合定價的行為。但是這也可能收到反效果。假設以可口可樂及百事可樂的結合為案例，全世界應該沒有任何競爭法主管機關會准許這個結合案，但是也因為如此，市場可能產生平行定價行為，造成價格長期穩定，市場不會有競爭出現。

2、如果有市場外部的破壞，如技術創新、低價廠商搶進市場或稅制改革，改變了產業成本，原來的均衡就有可能被干擾而有所變動。但是，此一破壞也可能無法達到競爭效果，因為既有寡占廠商可能會進行勾結，重新設定均衡價格而繼續保有勾結利潤。亦即，在此情況下寡占廠商有濫用集體市場力優勢，分享獨占利潤之空間。

3、寡占廠商所採用的適應策略以期在破壞後重定價格而轉移競爭效果的行為，應被認是違反競爭法行為。其主要的核心證據可從下列證明：（1）已存在某種程度勾結；（2）有破壞出現；（3）出現重新定價策略；（4）破壞後重返勾結均衡之可能。其中最主要的行為有可能是經濟文獻中所說的單方發出信號策略，即單向溝通構成勾結。

4、卡特爾的執法常因需要明確的證據而無法執行，而濫用集體市場優勢力量及獨占可適用在大部分國家的競爭法且適用於寡占市場行為。

(六) 主席對我國所提交報告所提之問題為：提出有關公平交易法第7條及第14條修訂內容及工業用紙案問題，請本會說明，本會代表答以：「我國公平交易法修法草案於2015年2月4日經立法院三讀通過，並於2月4日公布。此次修法有70%以上條文修正，是公平法通過20餘年來最大幅度修訂。公平法第7條及第8 條獨占事業之定義及獨占事業認定標準的修訂在確保對獨占事業之管制，其中之概念亦含寡占概念，以配合國內經濟發展趨勢。同時，為有效打擊卡特爾，增訂第14條第3項「聯合行為之合意，得依市場狀況、商品或服務特性、成本及利潤考量、事業行為之經濟合理性等相當依據之因素推定之」條文。工業用紙案即為本會引用間接證據而為高等行政法院所撤銷原處分之案例。公平會認為該3家寡占廠商有不同之成本壓力、經營策略及生產產能，但其卻在同一期間提高相同幅度之價格。公平會亦同時發現，3家紙廠定期在同業公會聚會或高爾夫球場聚會時，討論價格發展趨勢及技術發展，爰公平會認為3家廠商違反當時公平交易法第14條而處以總計1千萬元新臺幣罰鍰。惟臺北高等行政法院認為公平會並未取得前開廠商交換資訊之事證，且渠等調漲價格日期及幅度並不相同，又被處分人確實面臨成本上揚之共同因素，公平會所舉間接事證又無法排除被處分人間之行為屬於寡占市場價格跟隨行為之可能性，故於2011年撤銷公平會處分。公平會對此一判決提起上訴，最高行政法院在2012年判決廢棄臺北高等行政法院判決並發回更審，臺北高等行政法院再於2013年撤銷公平會處分，公平會再次提起上訴，目前該案業由最高行政法院發回臺北高等行政法院更審中。」

肆之二：CC第二日（6月17日）會議

一、OECD與非會員國家關係報告(Relation with non-members):由秘書處競爭組全球關係經理(Global Relations Manager) Ania Thiemann報告OECD在2014-2015年與其他非會員國家之接觸及合作關係成果，略以:

(一) OECD分別在印尼、馬來西亞、印度及非洲等國家、地區舉行能力建置活動或研討會。

(二) 2014年舉行全球競爭論壇(GFC) ，共有112個國家406位代表參加。本年度GFC將於10月29-30日舉行，主題「競爭與就業」及「競爭法累犯者」預計將邀請

70個以上非會員國家參加。

(三) OECD目前正與中國大陸積極洽談國際合作事宜，並加強與ICN、世界銀行、拉丁美洲競爭論壇及UNCTAD等國際組織合作。

(四) CC主席Dr. Jenny提問3項問題: (l)OECD如何為非會員之計畫排定優先順序?(2)OECD如何瞭解這些計畫之施行效果?(3)如何與ICN就政府計畫進行合作?OECD秘書處競爭組組長答以:OECD通常視各國之需要及預算排定計畫之優先順序，也會在各項計畫實施後，要求填答意見與回饋，以瞭解計畫實施成效。ICN聯絡人加拿大競爭局局長John Pecman也答復， ICN與OECD一向保持良好溝通，以避免ICN與OECD在計畫上重疊而浪費資源。

二、「競爭中立」聽證會(Hearing Neutrality):聽證會共分2部分:

(一) 政策專家報告：

1、 OECD國營事業及民營化工作小組(Working Party for State Owned Enterprises and Privatization, WPSOPP)副主席Lars Eric Fredriksson報告國營事業與公司治理，略以：

(1) WPSOPP在近幾年來已就國營事業與競爭關係完成多項工作成果，包括：「2005國營事與公平競爭環境準則」(The 2005 OECD SOE Guidelines and a level playing field)，2011年「OECD競爭中立工作小組與國營事業：挑戰與政策選項」(2011: OECD WP Competitive Neutrality and SOEs: Challenges and policy options)，2011年「OECD競爭中立工作小組與澳洲國營事業」(2011: OECD WP Competitive Neutrality and SOEs in Australia)，「2012年（與競爭委員會共同發表）「競爭中立：維持公營及民營事業公平競爭環境」(2012: Report (with COMP) on “Competitive Neutrality: Maintaining a Level Playing Field Between Public and Private Business”)及2014年「競爭中立：夥伴與申請入會國的國家行為」(2014: OECD Competitive Neutrality: National Practices in Partner and Accession Countries)

(2) 為確保國營事業與民營企業在公平競爭環境下競爭，WPSOPP準備修訂前開2005年準則，重新定義可以接受的「國營事業」一詞，加入國營事業所有權定義及其認定理由，及改寫「市場中的國有事業」(SOEs in the Marketplace)一章，專門處理國有事業與民營企業間競爭問題。

(3) 未來仍有許多挑戰，尤其是施行方面，許多政府部門仍不夠透明，更要面對的是國營事業在國際上是非常活耀的事實。目前OECD正在籌組跨委員

會的「全球市場中的國營事業」專案小組（SOEs in the Global Marketplace），歡迎會員國家自願加入。

2、 OECD投資委員會(Investment Committee)副主席Michae1Tracton報告跨境投資之公平處理，略以：

(1) 國營事業不論是在貿易或投資上皆具有先天上的優勢地位，在市場上可能造成競爭扭曲。

(2) 對於國營事業公平考量問題通常在動機上是政治議題而非經濟議題。雖然其所涉及是經濟利益，但基本上其應該是政治議題。

3、 歐盟貿易總署(DG Trade)官員Tiina Pitkanen報告貿易政策與非歧視政策，略以：

(1) 競爭中立是跨國界議題。國營事業所享受的財務及管制優勢使其在貿易與投資上扭曲了公平競爭。而在市場上必須考量這些有意創造的優勢及降低不必要的扭曲才能平衡市場競爭狀態。貿易政策的目標即為：減少國營事業所創造的市場扭曲及節制不當的保護主義。

(2) OECD貿易委員會在2013-2014年對貿易與投資方的工作成果包括：提升對競爭中立的內容與特質之認知，盤點現有管制方式及其可能改變，並舉辦「國營事業之貿易與投資研討會」以加強對話。

(3) OECD同時向企業發出有關「國營事業對國際市場競爭影響」之問卷調查，主要結論有：外國政府較常視國營事業是給予特別待遇，事業所有權是主要關鍵，回應者最主要的關切在於財務及管制形制的支持、國營事業常以低價或提供更好的原料給予廠商優勢，這些優勢可以來自中央政府或地方政府。

(4) 如何分辨政府服務或商業行為是主要目標，歐盟內部對國營事業的處理方法有：所有事業皆需受制競爭法之規範，國家補助亦須依歐盟規定，政府採購及國內市場規範皆須遵守競爭中立原則。對外則以一般原則進行貿易談判。

(5) OECD過去及未來工作成果可以協助各國提升透明度，分析市場競爭所受到之扭曲，整合對國營事業之定義及不同規範（貿易政策、投資、競爭、補助、政府採購及公司治理等）間之互動。

4、 OECD傷害性稅賦行為論壇(Forum on Harmful Tax Practices)共同主席Edward Markus報告傷害性稅賦競爭及扭曲，略以：

(1) 經濟學理論普遍支持競爭中立性，主要在避免市場扭曲，減少對課稅之抗拒及可有較高營業收入的空間。在法制體系上須要有給予平等對待之權利及公平競爭之環境，而政府稅賦政策是可以對競爭產生影響的一環。

(2) 利用（或濫用）立法或條約設立免稅或低稅率之技巧，對競爭可能產生扭曲，如對特定納稅者給予特別免稅或稅率規定（跨國企業對本土企業、資訊科技產品模式等）。缺乏透明度亦可能因而造成傷害，如對特定納稅人給予優惠，或銀行金融機關的暗盤等。

(3) OECD「傷害性稅賦行為論壇」（FHTP）對傷害性稅賦行為已進行研究討論，1998年所公布之「傷害性稅賦之競爭：新興全球議題（Harmful Tax Competition: An Emerging Global Issue）」報告中，針對特別優惠制度及低稅或免稅體制，以及OECD會員與非會員國間差異進行研究，並提出評估傷害性優惠待遇體制之標準，

(4) OECD對於稅賦方面的工作努力可對會員國家、公民及經濟活動帶來更公平競爭的環境。

(二) 企業專家報告:

1、OECD總理事長辦公室顧問Ms. Isabell Koske報告OECD對產品市場規範（Product Market Regulation, PMR）指標，略以：

(1) PMR可分為三大區域:國家管制、創業障礙及貿易投資障礙。國家管制如政府所有權（國營事業，由政府直接控制）及對產業營運管制（如以法令對價格直接進行管制或監控管制）。創業障礙分程序管制（如取得營運執照）、行政負擔（設立公司行政程序）及對現有廠商之管制保護（如法律障礙、反托拉斯豁免）等。貿易投資障礙則有對投資貿易明列規範之障礙（如直接投資管制、關稅障礙）及非明列障礙（差別待遇、非關稅障礙）等。

(2) 在國家管制指標部分由4個部分組成：國營事業之範圍（中央、地方政府擁有之份額，考量之範圍共30個產業），政府在網路產業涉入之程度（政府在最大廠商中所擁有之股份，考量之產業包括電力、瓦斯、鐵路運輸、航空運輸郵政及電信等6大產業），政府直接控制（法律或憲法所賦予政府權限直接控制或有特別投票權）及國營事業之治理。

(3) 在國家對產業營運管制方面考慮2項指標：價格管制及透過法令管制，考量之產業包括：航空運輸、公路貨運、電信、電力/瓦斯、自來水及專門職

業服務。

(4) 競爭法主管機關可運用這些指標，建立與整體經濟表現之關聯，參考國際中其他國家之表現，尋求管制之優先順序，並隨時注意這些指標之變動。

2、OECD通信、基礎建設及服務政策工作小組(Working Party on Communication，Infrastructure，and Service Policy)副主席Bengt Molleryd報告網路中立性之電信之競爭扭曲及教訓，略以：

(1) 在網路1.0時代，電信市場在初開放時，通常基礎建設（銅線）也會開放競爭，在某些國家此一基礎建設直接開放競爭意味著對產業建立起超高進入障礙。網路的使用權即是引發管制介入動機的主要瓶頸，以期建立公平競爭環境。

(2) 進入「網路2.0時代」，光纖網路建設需要大量資金，產業利潤下降，成本升高，導致廠商不斷進行整合。政府介入主要在預防市場獨占。

(3) 政府介入網路確保網中立性是必要的，市場競爭可促進網路取得之方便性，降低減損網路中立性之風險。如果整合趨勢持續，政府可考量垂直拆解分割的可能（如紐西蘭之做法）。寬頻網路是網路體系中不可失敗的最重要一環。

3、「國際交通論壇」(International Transport Forum, ITF)經濟學家Alain Lumbroso報告交通事業之競爭扭曲。

(1) ITF是由34個OECD會員國及23個非會員國所組成之論壇，每年舉行1次部長會議並發表聲明，另有舉辦部長與專家座談會、產業研討會、雙邊或網路會議等，2015年共有1100人參與會議。

(2) 國家交通政策目標通常包括：與全球市場連結、基礎建設、可以負擔、可使用、競爭性及堅實的國家產業。積極追尋這些目標可能引發對國家競爭中立之質疑，但或許我們可以從不同角度看競爭中立性。

(3) 從「創造正向扭曲」(Creating positive distortion) 角度來看，市場競爭結果不一定是社會所要的，這迫使政府引入市場扭曲，扭曲可能包括營運損失、政府提供服務之義務、補助、基礎建設投資；而運輸政策扭曲市場是為了「較大部分民眾之利益」。

(4) 交通運輸服務中常見國營事業（大眾運輸、鐵路、航空、交通基礎建設），他們也常受競爭法豁免，但在航空業中「公平競爭環境」的呼聲日益升高。我們是否需考慮保護主義或傳統競爭思維？

(5) 交通運輸可從2個面向考量：依經濟學需求與供給提供之服務，或以大眾利益為主之公用事業。如果以連結民眾為優先考量，政府不可能以競爭中立採行交通運輸政策。如果以大眾利益為目標，競爭中立投資原則是無法轉化滿足交通運輸之目標的。

二、「競爭執法中之競爭中立」圓桌會議(Roundtable on "Competitive Neutrality on Competition Enforcement"):本議題共有包括我國在內的24個國家提出書面報告，會中並邀請比利時Liege大學法律系教授 Nicolas Petit，法國Toulouse大學商學院教授Pierre Buigues及香港大學法律學系教授Thomas Cheng參與討論。

(一) 秘書處報告本議題背景，略以：

1、 2014年OECD部長會議「支持OECD會員及非會員經濟體對促進全球企業公平競爭環境，包括…競爭中立、負責任商業行為、管制政策及競爭法執法的國際合作等各項的努力。」

2、 如以圓圈表示政府對市場的介入，我們可畫出最外層（第1層圓圈）為政府介入市場之措施，第2層（中間層圓）是政府可能對市場造成扭曲之措施，第3層（最內層圓圈）則表示可能造成限制競爭之扭曲措施。第2層及3層所需要的是競爭中立之規定及工具，而第3層更需要競爭法之執法之配合。

3、 執法單位可能包括產業管制機關，如何對在產業中政府措施做出平衡之執法，實為管制及執法單位之最大挑戰，如何對扭曲措施提出救濟補償也是另一項討論之課題。

(二) 法國Toulouse大學商學院教授Pierre Buigues以「政府市場介入所引起之挑戰」(Challenges arising from State interventions in the Market)提出報告，略以：

1、 就政府介入市場的定義做跨國比較是非常困難的，因為各國「政府介入」之定義不同，且沒有假設之「如果沒有政府介入的均衡狀態」可供比較。

2、 以國家補助及政府介入而言，「補助」(subsidy)項目即有多個類型：現金補助(cash subsidy)、信用補助(credit subsidies)、賦稅補助(tax subsidies)、實物補助(in-kind subsidies)，而介入之型態也可分政府採購介入、管制介入及國營事業等。各種不同的類別補助或政府介入，對市場扭曲結果也會有不同的差異，在各國程度也不同。

3、 政府介入通常都有其政治或經濟目的，如針對市場失靈、平均所得、預防某些特定民生必須品產業或廠商消失、提升家戶所得或降低價格等。而政府為這些目的所介入之方式或措施及其可能造成市場扭曲效果，以及所達成之成效如何

評估亦是很難做跨國比較。目前有關此類研究文獻仍非常有限，也少有證據可以顯示長期政府介入可以顯著的提升產能。

4、建議各國政府在採取介入措施時，應考量採定期強制評估，限制計劃之期限及介入幅度，所有政府介入之計畫皆需透明化，並邀請競爭法主管機關提供對市場競爭影響之意見。

(三) 比利時Liege大學法律系教授Nicolas Petit報告「從程序觀點看競爭中立對競爭法主管機關之意函」(Implications of Competitive Neutrality for Competition Agencies: A Process Perspective)，略以：

1、國營事業應在競爭主管機關訴訟案程序中應不得有不當之優勢。所謂優勢可分下列4階段：案件之選擇、調查、評估及救濟。

2、在競爭訴訟案件中國營事業成為被告時，不應有不當之程序不對等，而在國營事業為檢舉人或原告時，不應有過度「熱忱」而對被告太過嚴苛。當國營事業是「他方」（第三人）時，競爭法主管機關應不得偏離競爭中立原則。

3、P教授認為，競爭中立扭曲通常因為明顯偏頗而發生，而且常在決策時變成慣例。競爭法主機關的裁量應受競爭中立的約束，而嚴守競爭中立原則可使競爭法主管機關不會有偏離經濟大方向之風險。

(四) 香港大學法律學系教授Thomas Cheng報告「從亞洲觀點看競爭中立」(Competitive Neutrality from an Asian Perspective)，略以：

1、競爭中立問題可從3個層次的形式討論：國營事業之限制競爭行為，政府賦予國營事業不正當優勢地位、民營對公營。

2、在中國大陸，目前對國營事業之政策為：（1）在影響國家安全產業中具支配地位並不斷擴大，在國家經濟地位中居最高地位；（2）在較競爭之產業中則與其他非國營事業平等競爭；（3）自然獨占產業（電信或電力）則僅與國營事業競爭；（4）作為產業政策之主要手段，培養為指標企業。

3、在印度，煤業為印度煤碳公司所獨占，2012年以前該公司以差別待遇價格供應民營電廠，給予公營電廠較優惠價格。石油產業中、對柴油之補貼僅限於國營石油公司；而國營石油公司對其國營印度航空之油品售價亦比公司低約8%－8.5%。

4、中國大陸的反壟斷法第5章第32-37條即有對濫用行政權力排除、限制競爭之規定。其他亞洲各國競爭法以倡議方式促進競爭，如在印度，印度競爭

委員會（CCI）可以採取適當之措施促進競爭，韓國公平交易委員會（KFTC）可以對有限制競爭之法律或管制提出意見。馬來西亞正進行部分國營事業民營化之工作。

5、亞洲國家國營事業在海外投資可能因為國家安全理由受阻，如中國大陸華為投資美國3Com及3Leaf。但有些國家也可能以優惠貸款、保證貸款或租稅補貼方式，歡迎這些國營事業來投資。在處理這些投資案時，投資國與接受投資的地主國就很難處理競爭中立，因為這些地主國可能急需外國投資，其競爭法主管機關僅能提供部分執法；而這些投資事業的母國也難以處理競爭中立議題，因為此類案件形同出口卡特爾，其競爭法主管機關也沒有誘因或知能襄助此類案件。

(五) 就本議題本會亦就處理政府介入市場及國營事業限制競爭議題提出我國報告。秘書處對我國所提交報告原擬提問有關倡議及非執法方法之問題，惟因時間關係，主席僅對會員國報告提問，對各參與國（包括我國）所提報告則未提問。

肆之三、CC第三日 (6月18日)會議

一、「競爭主管機關制度設計之改變」續行討論:本議題除延續103年12月會議議題繼續討論。會中主席邀請希臘、匈牙利，墨西哥、比利時、美國、荷蘭、義大利、英國等國家就機關之優先順序、人員配置策略及調查機關與決議機關之整合或分離等問題提出經驗報告。

二、哥倫比亞入會申請：本議題為機密會議，僅限會員參加。

三、2014年競爭政策年度報告：由美國、愛爾蘭、波蘭、墨西哥提出報告。

四、丹麥競爭政策深入檢視：由丹麥先報告其競爭法執行概況，後;由愛爾蘭、墨西哥、紐西蘭、荷蘭等國提問問題，由丹麥競爭及消費者局局長負責答復各國提問。

伍、「競爭與管制第二工作小組」（WP2）會議:

6 月 19 日舉行「競爭與管制第二工作小組」(Working Party No. 2 on Competition and Regulation, WP2)。會議由 WP2 主席 Mr. Alberto Hemler 主持，本日討論議題包括:

一、結構拆解報告:會員國同意將結構拆解建議書提交 10 月競爭委員會討論。

二、「定期航運競爭議題」圓桌會議(Roundtable on "Liner Shipping")：本議題計有包括我國在內的12個國家提出書面報告，討論重點略以：

(一) 歐盟：關於定期航運的競爭議題，主要分成同盟(conference)及聯營(consortia)

兩部分：

1、同盟部分：

(1) 其對象主要係針對制定費率或價格維持的合意。

(2) 1986 年開始豁免歐盟競爭法規則，理由係基於定期航運會議具有穩定價格，確保託運人可獲得可信賴的服務，而且鑒於它一般有助於提供合適有效的海運服務時刻表的效果等因素，到 2006 年則廢止該規則，理由是沒有證據顯示該會議模式可導致更穩定的費率或更值得信賴的託運服務結果。

2、聯營部分：

(1) 其對象主要係針對共同派船（Vessel Sharing Agreement，簡稱 VSAs）、艙積（量）之合意、無涉費率制定之其他合意或策略聯盟，其要件可再細分為有共同的服務、船舶共享以取得規模並分散風險、針對營運方面進行合作，並未對價格作勾結。

(2) 自 1995 年開始，聯營未達 30%市場占有率門檻，可以被豁免於歐盟競爭法，但倘超過 30%市場占有率門檻，並不當然違法，而須進一步評估。

(二) 日本：

1、目前的國際定期船多為貨櫃船，定期船的船運數量、航線及日期都是事前決定。船舶公司為提供託運人穩定的運送服務，除擁有一定規模的船隊外，也擁有及管理許多貨櫃儲運場及大量的貨櫃，因此需要龐大的資金，而形成只有一定數量的公司參與的寡占市場結構。再者，提供定期運送服務的船舶公司主要都是透過諸如運費、固定服務的提供、轉運服務的提供、服務提供的頻率以及資訊服務的改善這些方面來彼此競爭。

2、海運運費一般都是基本運費(basic rates)再加附加費，諸如：燃油附加費(the Bunker Adjustment Factor ，簡稱 BAF)及幣值變動附加費，都是由海運同盟(shipping conferences)決定的。而依據日本海運法，海運同盟決定的運費只要是事先通知向日本運輸部門，且建立費率協議在國際海運是習慣、慣例的理由，而可被日本禁止私的獨占及確保公平交易的法律豁免，目前像 ANZESC，FESAMEC，JGARSPC 等海運同盟都有向日本運輸部門事先通知，從而豁免日本禁止私的獨占及確保公平交易的法律的適用。

3、聯營(consortium)跟策略聯盟(Alliance)部分，除非在運費、市場劃分、供給數量的限制有協議，會被視為惡性的卡特爾行為外，如果依據日本海運法規定事先通知向日本運輸部門，亦可被日本禁止私的獨占及確保公平交易的法律豁免。

日本海運法第 28 條亦規定，如果事業利用不公平的商業行為，導致實質限制競爭結果而使使用者的利益受侵害，則禁止私的獨占及確保公平交易的法律仍有適用餘地。

4、 2010 年 6 月日本開始一連串的法規改革，國際海運部分可豁免日本禁止私的獨占及確保公平交易的法律的部分也被檢討是否要修正，日本運輸部門表示仍繼續維持此等豁免，主要理由為日本重要貿易夥伴仍有維持此等豁免機制，且考量歐盟競爭法將海運運費的豁免廢除後，導致運費價格的大幅波動等負面疑慮，但日本運輸部門也不排除將其他國家未來的發展、託運人的利益、日本經濟的影響納入評估是否修正此豁免機制。

(三) 我國：本會有提出書面報告，重點略以：

1、 台灣四面環海，進出口貿易有 90%以上係透過海運運送完成，而我國船舶運送業國際航線之營運方式分為定期與不定期航線業務，定期航線以貨櫃運送為主、不定期航線以散裝貨物之運送為主，所提供之國際航線經營範圍遍及亞洲、美洲、歐洲、澳洲、非洲等五大洲。

2、 我國定期航運產業之主要特徵包括：(1)定期航運業者組織龐大；(2)互換艙位、租傭艙位及策略聯盟為定期航運產業重要合作方式；(3)多角化經營：例如長榮海運、陽明海運投入碼頭經營及轉投資物流產業等。

3、 實務上，航政主管機關對於直接涉及運費、票價，並設有國際常設組織或非常設聯盟者，均會商公平會認可。若無正式組織且「協議成員之銷售、行銷、定價、文書作業均獨立行使」者，則僅須申請航政機關核轉主管機關交通部認可。若合作內容僅限艙位租傭、互換，無涉及其他相關聯合行為，則適用船舶運送業管理規則第 15 條，報請航政機關登記後，始得攬貨並簽發載明合作營運船舶名稱之載貨證券。自 2013 年 1 月 30 日航業法修正公布後，在我國經營船舶運送業務者，其欲參加或設立國際聯營組織，依航業法第 34 條第 1 項規定，應檢附組織章程、聯營作業計畫及相關文件，申請航港局核轉交通部會商公平會認可。我國公平交易法對於事業間之聯合行為原則禁止、例外始予許可，故船舶運送業者倘欲參加或設立國際聯營組織，應向公平會申請聯合例外許可，始得豁免。惟自 2013 年 1 月 30 日航業法修正公布迄今，尚無船舶運送業者依航業法第 34 條規定申請參加或設立國際聯營組織，亦無船舶運送業者因前揭事由向公平會申請聯合例外許可之案例。

4、 修法後之管制密度較修法前嚴格，雖目前暫無申請案例，惟隨著近年國際間定

期航運策略聯盟之盛行，長榮海運亦一改先前不結盟的策略，於 2012 年與 CKYH 聯盟開啟亞歐航線合作，後復於 2014 年正式加入該聯盟，在前開趨勢下，航運業者間之競爭強度越形增強，將形成強大的競爭壓力，故航運業者間策略聯盟、協議或合作行為之情形勢必更加多樣化及緊密，惟這些新型態之協議或合作模式是否符合競爭法的規範，將使競爭法主管機關介入的機會增加，故公平會不排除將針對定期航運產業策略聯盟之發展現況、營運模式及對市場競爭之正負面影響進行研究，並重新檢視我國航運相關法令及政策、市場結構、競爭狀況及其他經濟及社會因素變化情形，適時與航運主管機關倡議競爭政策。另公平會亦將更積極介入處理定期航運產業的市場競爭行為，包括事業之結合、聯營行為、參加或設立國際聯營組織、甚至目前經交通部備查之國際航運協議之內容是否造成反競爭效果等市場競爭議題。

5、 主席對我國提問問題為，「報告中有提及航政主管機關對於直接涉及運費、票價，並設有國際常設組織或非常設聯盟者，均會商公平會認可。貴會至今收到多少會商認可的案件，且採用何種分析標準?」，我國代表口頭回應重點如下：

(1) 自 2013 年航業法修正後，船舶運送業者欲參加或設立國際聯營組織，須經航政主管機關許可，航政主管機關先會商本會取得認可後，才作成最後決定。實務上，自修法後截至目前為止本會尚未收到此等案件，但在航業法修法前，船舶運送業者仍須依航業法規定申請備查。本會觀察發現此等航運聯盟，無論名稱為 Agreement 或 conference 皆強調只有艙位的互易互利，對運價的協議屬於自願性，無強制力。

(2) 公平交易法原則禁止聯合行為，僅於諸如：為加強貿易效能，而就國外商品之輸入採取共同行為之例外情形，且須有益於整體經濟與公共利益情形下，始許可此等聯合行為，此外高度的市場占有率、僵化的運價費率、市場結構及合作內容亦會納入考量範圍。以海運聯營組織為例，其曾代表陽明海運公司等 15 家事業申請聯合運送政府機關及公營事業機構進口物資器材案(2005)及其後續申請延展案(2008、2011、2014) 本案經衡酌國際經貿情勢發展，且國內國籍船舶運送業所屬國籍船舶尚無單獨承運機關(構)海運勞務採購之能力，聯合承運具有降低管銷、運輸成本及港埠費用，有效利用運具，提供機關(構)穩定之海運運輸服務等因素，故有聯合承運之必要，故本會予以許可，但為避免產生符合運送辦法資格之國籍船舶運送業者加入本聯合行為之不當限制，並防止申請人濫用聯合行為許可取得之優

勢而為不公平競爭行為，擬附加「不得拒絕其他符合『政府機關及公營事業機構進口物資器材海運運送作業辦法』之國籍船舶運送業者加入本聯合行為」、「不得利用因許可取得之市場地位，而有妨礙他事業公平競爭或其他濫用市場地位之行為」及「申請人聯合承運政府機關及公營事業機構進口物資器材，應將專責機構協調規劃之承運權重比例送本會備查」3 項負擔，以利本會監督本聯合行為實施之情形。

(3) 未來，本會仍將定期地檢討航運相關法令及政策、市場結構及市場競爭狀況及其他經濟及社會因素變化情形，適時倡議競爭政策。

(四) 比利時 Antwerp 大學教授 Christa Sys 解釋市場集中程度及產業價格已隨時間產生變化，並建議競爭法主管機關應持續監控此一變化如何影響海運供應鏈之變動（如碼頭營運）。西班牙 Garrigues 法律事務所律師 Luis Ortiz Blanco 則認為海運同盟是堂堂正正之卡特爾，競爭法機關沒有理由對定期海運給予競爭法之豁免，並贊成歐盟取消豁免之決定。

(五) 義大利大學任教 Claudio Ferrari, Alessio Tei 以及 Francesco Parola 學者的見解略以：

1、 同盟的合意通常是指運送人間針對航線、價格設定、有時候針對共同獲利或收入、容量管控、分配路線及提供忠誠折扣給託運人等之契約協議，而聯營可能被認為是會議以及策略聯盟的補充。

2、 聯營的合意有艙位互租(slot charter)、艙位互換(slot exchange)、船舶共享(vessel sharing)等情形。艙位互租係向同屬聯營的成員租用在船上貨櫃的艙位，由於不涉及船舶營運的問題，是最常見的合作模式。艙位互換很類似艙位互租，但包含互惠的租用，所有成員都有一定數量的船舶，當有需要時可以將貨櫃的艙位出租給聯營成員或向聯營成員租用貨櫃的艙位。船舶共享則是最強大的合意形式，運送人在此情況傾向將其船舶容量分享給其成員，藉此提升船舶的使用率。這些可能性讓聯營變得非常有彈性，且無參進障礙。

3、 全球性的策略聯盟通常發生在定期船處理世界各地的共同運送服務，換言之，聯盟成員可以共同承擔投資風險及增加船舶利用率，聯盟不只限於單一貿易航線，而是涵蓋所有主要的東西向及南北向的運送服務。聯盟重在成本合理化而且沒有涵蓋共同銷售、共同決定價格、共有資產、共享盈虧及共同管理之行為。在某些案例中，策略聯盟往往是事業進一步整合的第一步。

三、「競標與招標聽證會:更深入之議題」聽證會 (Hearing on Tender and Bidding:

Further Issues)：本議題延續去年「競標與招標」議題，討論「異常低價搶標」（abnormally low tenders，ALT）行為及風險，以及各種針對此一行為之不同處理方法、對效率影響及其結果，略以：

1、ALT 指投標者在採購體制中以異常低之價格投標，而對公共工程品質產生高風險，且使契約實現之時有產生違約之可能。但目前尚無明確之標準確認何為超低或異常低價。

2、討論中各國皆認為在決標過程中應剔除這些異常低價投標者。招標者可運用各種不同方法減少策略低價之誘因，以降低重新議價之可能，並減少資訊不對稱所引起之成本低估。秘書處在會議前曾請各國填答有關此一議題之問卷，並於會中彙整報告。

3、OECD公共部門廉正組組長Janos Bertok認為好的採購政策可以確保政府對商品及服務之採購可得到最有效率之效果。義大利CONSIP公司研究主任Gianluigi Albano認為不應以政府底價或對手之價格來指認這些ALT，而應以履約保證或擔保債券履約評估機制及契約設計及降低資訊不對稱方式來預防。歐洲重建與發展銀行(EBRD)資深顧問Graeme C1ark認為某些方式可以在標案設計時避免ALT，但同時也應在程序上評估指認出這些ALT，並予以拒絕參標。WTO秘書處公共工程採購組組長Robert Anderson則提供WTO最新政府採購協定簽署情形及政府採購部門在競爭機制、反貪腐工作與貿易自由化之最新成果。

陸、 心得與建議

一、本次為 OECD 從每年 3 次會議改為每年 2 次會議之第 1 次舉行，每一次會議為期 5 日，會議期間討論緊湊，每一議題報告既深入又具參考性，建議能加派本會同仁參與，擴大本會對各議題之深入瞭解。

二、CC 本次討論「破壞性創新」議題與我國經濟發展有密切關聯，CC 將持續討論此議題，且 WP2 將在各管制產業中探討創新對產業之影響（如金融產業），建議本會多方蒐集此一議題之資訊，並結合產業意見以期為未來執法提早因應。

三、「競爭中立」議題成為各國際組織討論焦點，且在各項經貿談判中不斷被提出，建議本議題資料可送交經貿主管機關（國發會及經濟部）參考。

四、WP2討論之「定期航運」及「低價搶標」議題擬於會議紀錄確認後，函送交通部及行政院公共工程委員會參考。

五、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。

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

23-Apr-2015

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3/A(2015)1
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Working Party No. 3 on Co-operation and Enforcement

DRAFT AGENDA OF THE 121st MEETING OF THE WORKING PARTY No. 3

15 June 2015

To be held on Monday 15 June 2015 from 10:00 to 17:30 at the OECD Conference Centre, in room CC 12, 2 rue André Pascal, 75116 Paris.

Please contact Ms. Naoko Teranishi if you have any questions regarding this document [phone number: +33 1 45 24 83 52 -- E-mail address: naoko.teranishi@oecd.org].

JT03375108

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DRAFT AGENDA OF THE 121ST MEETING OF WORKING PARTY NO. 3

15 June 2015, beginning at 10.00 a.m.

OECD Conference Centre, Room CC 12

2 rue André-Pascal, 75116 Paris

I.	**ADOPTION OF THE DRAFT AGENDA**	DAF/COMP/WP3/A(2015)1
II.	**ADOPTION OF THE SUMMARY RECORD OF THE LAST MEETING**	
	-- Summary record from the last meeting of 16 December 2014	DAF/COMP/WP3/M(2014)3
	Approved by written procedure:	
	--- Summary of Discussion of the Roundtable on Investigation of Consummated and Non-notifiable Mergers (February 2014)	DAF/COMP/WP3/M(2014)1/ANN2
	-- Summary of Discussion of the Roundtable on the Use of Markers in Leniency Programmes	DAF/COMP/WP3/M(2014)3/ANN2
	For information:	
	-- Executive Summary of the Roundtable on Investigations of Consummated and Non-notifiable Mergers (February 2014)	DAF/COMP/WP3/M(2014)1/ANN3
	-- Executive Summary of the Roundtable on the Use of Markers in Leniency Programmes (December 2014)	DAF/COMP/WP3/M(2014)3/ANN3
	-- List of participants for the meeting of 16 December 2014	DAF/COMP/WP3/M(2014)3/ANN1
III.	**ROUNDTABLE ON THE RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT**	
	For discussion:	
	-- Background paper by the Secretariat	DAF/COMP/WP3(2014)14
	-- Submissions by delegations:	
	Canada	DAF/COMP/WP3/WD(2015)9
	Chile	DAF/COMP/WP3/WD(2015)14
	Finland	DAF/COMP/WP3/WD(2015)5
	Israel	DAF/COMP/WP3/WD(2015)16

Italy	DAF/COMP/WP3/WD(2015)7
Japan	DAF/COMP/WP3/WD(2015)3
Portugal	DAF/COMP/WP3/WD(2015)15
Slovak Republic	DAF/COMP/WP3/WD(2015)13
Sweden	DAF/COMP/WP3/WD(2015)4
United Kingdom	DAF/COMP/WP3/WD(2015)8
United States	DAF/COMP/WP3/WD(2015)11
European Union	DAF/COMP/WP3/WD(2015)2

and

Bulgaria	DAF/COMP/WP3/WD(2015)6
Colombia	DAF/COMP/WP3/WD(2015)1
Indonesia	DAF/COMP/WP3/WD(2015)18
Lithuania	DAF/COMP/WP3/WD(2015)10
BIAC	DAF/COMP/WP3/WD(2015)12

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

For discussion:

-- Draft outline of the report on the Implementation of the 2012 Recommendation on fighting bid rigging in public procurement — DAF/COMP/WP3(2014)15

V. INVENTORY ON PROVISIONS CONTAINED IN EXISTING INTERNATIONAL CO-OPERATION AGREEMENTS

For discussion:

-- Note by the Secretariat — DAF/COMP/WP3(2014)12

VI. OTHER BUSINESS AND FUTURE TOPICS

ANNOTATIONS TO THE DRAFT AGENDA

Proposed Timetable

10:00 – 10:05	**Items I.** and **II.**
10:05 – 11:30	**Item III.** Roundtable on the Relationship between Public and Private Antitrust Enforcement
11:30 – 11.45	*Coffee break*
11:45 – 13:00	**Item III.** Roundtable on the Relationship between Public and Private Antitrust Enforcement
13:00 – 15:00	*Lunch break*
15:00 – 16:00	**Item IV.** Report to the Council on implementation of the 2012 Recommendation on Fighting Bid Rigging in Public Procurement
16:00 – 16.15	*Coffee break*
16.15 – 17:15	**Item V.** Inventory on provisions contained in existing international co-operation agreements
17:15 – 17:30	**Item VI.** Other business and future topics

Item III. (from 10.05 to 13.00). Under this agenda item, WP3 will host a Roundtable on "*the Relationship between Public and Private Antitrust Enforcement"*. The discussion on the relationship between public and private enforcement will offer an opportunity to explore the current status of private enforcement in OECD and non-OECD jurisdictions. There is broad agreement that private enforcement can substantially improve the functioning of a competition regime. There is also broad agreement that individuals and firms who suffer injury from anti-competitive conduct should be entitled to reasonable compensation. At the same time, it is important to strike the right balance between public and private enforcement. Antitrust policy and antitrust law enforcement, including private enforcement, should be viewed as an integrated policy system in which numerous factors contribute to the complementary goals of deterrence and compensation. Obtaining the right balance between these tools and goals is the key to ensuring that private enforcement (i) does not adversely affect the effectiveness of public enforcement, and (ii) encourages greater compliance with antitrust rules, while avoiding litigation that is wasteful and could discourage socially beneficial conduct.

The discussion will benefit from a Secretariat Note and country submissions, as well as from the participation of Judge Irène Luc (France), Judge Susan Y. Illston (United States District Court, Northern District of California), and Dr. Tilman Makatsch (Head of Private Enforcement in the Antitrust Team of Deutsche Bahn AG).

Item IV. (from 15.00 to 16.00). Under this agenda item, WP3 will continue to prepare the "*Report to the Council on the implementation of the 2012 Recommendation on Fighting Bid Rigging in Public Procurement*," which is due to the Council in 2015. At the June 2015 meeting, WP3 delegates will be asked to provide comments on a first draft of the outline of the report to Council which the Secretariat will distribute in advance of the meeting. At the same time, delegates who are interested in sharing their experience with the Recommendation are welcome to do so and to inform the Secretariat to ensure that sufficient time is set aside for their presentations. These presentations will provide further inputs for the final report.

Item V. (from 16.15 to 17.15). As a part of the ongoing work on international co-operation, it was decided at the meeting in December 2014 that WP3 will develop an inventory of provisions in co-operation agreements. Under this agenda item, WP3 delegates will discuss the draft inventory prepared by the Secretariat of the main provisions in existing international co-operation agreements. This project stems from the provision of the Recommendation of the OECD Council 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.

Item VI. (from 17.15 to 17.30). Under Other Business, delegates are reminded that the next meeting of WP3 will be on 27 October 2015. At the June meeting, delegates will be asked to confirm their interest in holding a roundtable on the "*Jurisdictional issues in cartel cases involving intermediate goods*" and to decide on a second substantive topic for the October 27 meeting. Some of the topics that have been suggested in recent meeting include "*Public interest considerations in merger assessment*" and "*How to define the "jurisdictional nexus" in merger control regimes*". Delegations should feel free to send other ideas for consideration by the Working Party to the Secretariat.

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Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development **12-Jun-2015**

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DRAFT AGENDA OF THE 123rd MEETING OF THE COMPETITION COMMITTEE

16-18 June 2015

The 123rd Meeting of the Competition Committee will be held on 16-18 June 2015 in Room 12 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris. (starting on Tuesday 16 June at 10.00 am.)

Please contact Mr Antonio CAPOBIANCO, Senior Competition Expert, if you have any questions regarding this document. [Tel.: +33 (01) 45 24 98 08; Email: Antonio.CAPOBIANCO@oecd.org].

JT03378449

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DAF/COMP/A(2015)1/REV1
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I. ADOPTION OF THE DRAFT AGENDA — DAF/COMP/A(2015)1/REV1

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

For approval:

--	Summary Record of 122nd Comp. Committee meeting	DAF/COMP/M(2014)3
--	Summary Record of Accession Review of Latvia	DAF/COMP/ACS/M(2014)1 **(CONFIDENTIAL)**

For information:

--	List of Participants	DAF/COMP/M(2014)3/ANN1
--	Summary of the Discussion on Intellectual Property and Standard Setting	DAF/COMP/M(2014)3/ANN2/FINAL
--	Executive Summary of the Discussion on Intellectual Property and Standard Setting	DAF/COMP/M(2014)3/ANN3/FINAL
--	Summary of the Discussion on Changes in Institutional Design	DAF/COMP/M(2014)3/ANN4/FINAL
--	Evaluation of the Competition Division's work in 2014	DAF/COMP/WD(2015)8
--	Use of the Competition Committee's work product 2014	DAF/COMP/WD(2015)9

III. HEARING ON DISRUPTIVE INNOVATION

For discussion:

-- Issues Paper by the Secretariat	DAF/COMP(2015)3
-- Scoping Note by the Secretariat on Future Work	DAF/COMP/WD(2015)14
-- Notes by delegations:	
Unites States	DAF/COMP/WD(2015)54
BIAC	DAF/COMP/WD(2015)48

For information:

Documentation available at
www.oecd.org/daf/competition/disruptive-innovations-and-competition.htm

IV. REPORTS BY WORKING PARTY CHAIRMEN AND BY CO-ORDINATORS

V. HEARING ON OLIGOPOLY MARKETS

For discussion:

-- Issues Paper by the Secretariat	DAF/COMP(2015)2
-- Notes by experts	
Note by Louis Kaplow	DAF/COMP/WD(2015)13
Note by Jorge Padilla	DAF/COMP/WD(2015)51
Note by Nicolas Petit	DAF/COMP/WD(2015)52
-- Notes by Delegations:	
Australia	DAF/COMP/WD(2015)15
Canada	DAF/COMP/WD(2015)11
Chile	DAF/COMP/WD(2015)39
Israel	DAF/COMP/WD(2015)17
Japan	DAF/COMP/WD(2015)36
Korea	DAF/COMP/WD(2015)5
Portugal	DAF/COMP/WD(2015)43
United Kingdom	DAF/COMP/WD(2015)44
United States	DAF/COMP/WD(2015)45
and	
Bulgaria	DAF/COMP/WD(2015)16
Costa Rica	DAF/COMP/WD(2015)37
Egypt	DAF/COMP/WD(2015)12
Indonesia	DAF/COMP/WD(2015)4
Russian Federation	DAF/COMP/WD(2015)3
Chinese Taipei	DAF/COMP/WD(2015)24
Ukraine	DAF/COMP/WD(2015)46
BIAC	

Documentation also available at www.oecd.org/daf/competition/oligopoly-markets.htm

VI. RELATION WITH NON-MEMBERS

For reference:

-- Note by the Secretariat	DAF/COMP(2015)4

VII. EXPERIENCES WITH THE USE OF MARKET STUDIES

For information:

More information at
www.oecd.org/daf/competition/competition-and-market-studies-in-latin-america-2015.htm

VIII. HEARING ON COMPETITIVE NEUTRALITY

IX. ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT

For discussion:

-- Issues Paper by the Secretariat	DAF/COMP(2015)5
-- Notes by experts	
Note by Pierre Buigues	DAF/COMP/WD(2015)34
Note by Thomas Cheng	DAF/COMP/WD(2015)49
Note by Nicolas Petit	DAF/COMP/WD(2015)50
-- Notes by Delegations:	
Australia	DAF/COMP/WD(2015)19
Belgium	DAF/COMP/WD(2015)35
Chile	DAF/COMP/WD(2015)40
Finland	DAF/COMP/WD(2015)28
Germany	DAF/COMP/WD(2015)33
Italy	DAF/COMP/WD(2015)41
Japan	DAF/COMP/WD(2015)6
Netherlands	DAF/COMP/WD(2015)21
Norway	DAF/COMP/WD(2015)30
Portugal	DAF/COMP/WD(2015)47
Spain	DAF/COMP/WD(2015)27
Sweden	DAF/COMP/WD(2015)29
United States	DAF/COMP/WD(2015)42
EU	DAF/COMP/WD(2015)31
and	
Brazil	DAF/COMP/WD(2015)25
Bulgaria	DAF/COMP/WD(2015)26
Costa Rica	DAF/COMP/WD(2015)38
Indonesia	DAF/COMP/WD(2015)53
Latvia	DAF/COMP/WD(2015)7
Lithuania	DAF/COMP/WD(2015)20
Peru	DAF/COMP/WD(2015)23
Russian Federation	DAF/COMP/WD(2015)32
Chinese Taipei	DAF/COMP/WD(2015)10
Ukraine	DAF/COMP/WD(2015)22

Documentation also available at
www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm

X. ANNUAL REPORTS ON COMPETITION POLICY

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

Estonia	DAF/COMP/AR(2015)2
Greece	DAF/COMP/AR(2015)3
Ireland	DAF/COMP/AR(2015)5
Luxembourg	DAF/COMP/AR(2015)6
Mexico	DAF/COMP/AR(2015)7
Poland	DAF/COMP/AR(2015)8
Spain	DAF/COMP/AR(2015)25
United States	DAF/COMP/AR(2015)10

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

Belgium	DAF/COMP/AR(2015)11
Czech Republic	DAF/COMP/AR(2015)12
Denmark	DAF/COMP/AR(2015)26
Finland	DAF/COMP/AR(2015)14
Israel	DAF/COMP/AR(2015)15
Slovak Republic	DAF/COMP/AR(2015)16
Sweden	DAF/COMP/AR(2015)17
Turkey	DAF/COMP/AR(2015)18
Brazil	DAF/COMP/AR(2015)19
Colombia	DAF/COMP/AR(2015)20
Latvia	DAF/COMP/AR(2015)21
Lithuania	DAF/COMP/AR(2015)22
Romania	DAF/COMP/AR(2015)23
Russian Federation	DAF/COMP/AR(2015)24

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

XI. FOLLOW-UP DISCUSSION ON CHANGES IN INSTITUTIONAL DESIGN

For discussion:

-- Note by the Secretariat DAF/COMP/WD(2015)2

For reference:

-- Summary of the Dec. 2014 Discussion DAF/COMP/M(2014)3/ANN4/FINAL

All documents from the December 2014 discussion are available at:
www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm

XII. ACCESSION REVIEW OF COLOMBIA CONFIDENTIAL

For information:

Draft formal opinion of the Comp. Committee	DAF/COMP/ACS(2015)2
Accession Review of Colombia: Updated report	DAF/COMP/ACS(2015)3
Additional Memorandum of Colombia	DAF/COMP/ACS(2015)4

XIII. IN-DEPTH REVIEW OF DENMARK

For discussion

Draft Report by the Secretariat DAF/COMP(2015)1

X. OTHER BUSINESS

a) Trust and Business project
b) Inclusive Growth Initiative
c) Presentation by Unescwa
d) Update on the Romanian Competition Assessment project
e) Future topics and dates

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

Schedule

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

Tuesday 16 June

10:00 – 10:30	**Item I-II**
10:30 – 12:30	**Item III** (Hearing on Disruptive Innovation)
12:30 – 13:00	**Item IV**
15:00 – 18:00	**Item V** (Hearing on Oligopoly Markets)

Wednesday 17 June

10:00 – 10:30	**Item VI** (Relation with non-members)
10:30 – 11:00	**Item VII** (Experiences w/ Market Studies)
11:00 – 13:00	**Item VIII** (Hearing on Competitive Neutrality)
15:00 – 17:30	**Item IX** (RT on Competitive Neutrality)
17:30 – 18:00	**Item X** (Annual Reports)

Thursday 18 June

10:00 – 11:30	**Item XI** (Follow-up disc. on Institutional Design)
12:00 – 12:30	**Item XII** (Accession Review of Colombia - CONFIDENTIAL)
15:00 – 17:30	**Item XIII** (In-depth review of Denmark)
17:30 – 18:00	**Item X** (Other Business)

18:00 – 20:00	**Cocktail hosted by the Danish delegation**

* * *

ANNOTATIONS

Item III.

The Competition Committee decided in December 2014 to hold a Hearing on Disruptive Innovation to discuss competition policy responses to new technologies or business models that profoundly disrupt existing industries. The hearing will benefit from participation of three speakers from the academic and business communities: John Fingleton (Fingleton Associates, UK), Prof. Daniel Crane (University of Michigan, US) and Ms Salle Yoo (General Counsel, Uber) as well as a few presentations from participating jurisdictions with a particularly strong interest or expertise in the topic. An Issues Paper by the Secretariat will be circulated before the meeting to support the Committee discussion. The Secretariat will also prepare a short note on possible future topics in this area for the Committee consideration.

Item IV.

The Chairman of Working Party No. 2 will report on the workshop on ex post evaluation (22 April) and present the meeting of the Working Party that will take place on 19 June 2015.

The Chairman of Working Party No. 3 will report on the meeting of the Working Party held on 15 June 2015.

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

A report by the ICN co-ordinator on recent developments will be presented.

Item V.

The Competition Committee will hold a Hearing discussion on Oligopoly Markets. Delegates will discuss the relative strengths and weaknesses of various enforcement and non-enforcement tools, including those related to: cartels, abuse of (collective/joint) dominance, merger control, market investigations and competition advocacy. A Secretariat Issues Paper, papers by experts and country contributions (see Chairman Jenny's letter requesting country contributions – COMP/2015.21) will provide the background to the discussion. This Hearing will also benefit from the participation as panellists of Louis Kaplow (Professor of Law and Economics, Harvard University, US), Jorge Padilla (Senior Managing Director, Lexecon Europe) and Nicolas Petit (Professor of Law, University of Liege, Belgium).

Item VI.

To inform delegates on activities related to non-members developed in the framework of the Committee Global Relations Strategy, the Secretariat will report on recent activities and developments during the period July 2014 – May 2015. The discussion will benefit from a Secretariat note.

Item VII.

The Secretariat will present the main findings from a project by the OECD and the UK Foreign and Commonwealth Office launched in 2014 that aims to provide support to Chile, Colombia, Costa Rica, Mexico, Panama and Peru in their use of market studies as an important competition tool.

Item VIII.

Competition delegates agreed in June 2014 to hold two separate discussions on the challenges arising from State interventions in the marketplace and what competition authorities can do to address the distortions of competition that such interventions may create. The discussions will include a Hearing on "Competitive Neutrality" (Item 8) and a Roundtable on "Competitive Neutrality in Competition Enforcement" (Item 9).

The aim of the Hearing will be to engage in a dialogue with other policy communities including, investment, trade, tax and corporate governance, to understand what competitive neutrality distortions they are concerned with and how they address them. Experts from these policy areas will present the challenges with competitive neutrality in their policy areas and measures adopted to meet these challenges. They will also present the ongoing work on competitive neutrality in their respective OECD Committees

Item IX.

The Roundtable on "Competitive Neutrality in Competition Enforcement" will help identify possible concerns on competitive neutrality that were not addressed in previous Committee work and may deserve further consideration. The Roundtable will explore why competitive neutrality matters to competition enforcers, what types of State measures can affect the competitive environment, and what rules and tools competition authorities have, or lack, to address State-induced competition distortions. The discussion will also address specific questions and concrete challenges in applying competition law to State-induced distortions of competition. A Secretariat scoping paper, papers by experts and country contributions (see Chairman Jenny's letter requesting country contributions – COMP/2015.22) will provide the background to the discussion. This roundtable will also benefit from the participation of expert panellists: Nicolas Petit (Professor of Law, University of Liege, Belgium), Thomas Cheng (Associate Professor of Law at the University of Hong Kong, China) and Prof. Pierre Buigues (Université de Toulouse, Toulouse Business School).

Item X.

Delegates are invited to submit their country report as usual while taking note that only half of them will be presented to the June 2015 Competition Committee meeting. Countries listed in the Agenda will be invited to make an oral presentation at this session. Moreover, 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 XI.

Delegates will recall that the Committee decided to continue its December 2014 discussion on Changes in Institutional Design addressing the remaining issues which were not discussed by lack of time. The discussion will also include comments on a Secretariat Paper summarising the main findings from the December discussion and country contributions.

Item XII.

Competition delegates will meet in a confidential session to review the updates on the Colombia Accession review. Only members and the European Union will be present for this discussion.

Item XIII.

An In-Depth review of Denmark's Competition Law and Policy will take place on Thursday 18 June afternoon (15.00-17.30). This review, open to members and the European Union, will be performed based on a Secretariat report to be circulated in advance. It will be organised as follows:

- (5') Chairman and Secretariat's opening remarks;
- (10') Opening remarks by Denmark;
- (90') Question and answer session with the Competition Committee. This session will be broken down by main themes. The country examiners will open the questions on each theme, followed immediately by additional questions from other delegates on that theme;
- (30') General discussion on the overall merits of the draft report and its recommendations;
- (10') Denmark response to the assessment;
- (5') Chairman closing remarks.

The Danish delegation will host a cocktail for Competition delegates on **Thursday 18 June** (from 6pm to 8pm) at the OECD Conference centre atrium, immediately after the Competition Committee.

Item XIV.

The timing of each sub-item may be subject to last minute changes depending on the other items' flow of discussion.

a) *Trust and Business project (TnB):* The project aims to help companies bridge the implementation gap in the application of international standards for business conduct by promoting the integration of business integrity considerations into solid corporate governance frameworks. The Secretariat will make a short oral presentation of this new OECD multidisciplinary Initiative (tentative timing: **Thursday 18 June at 11:30**).

b) *Inclusive growth initiative:* The Inclusive Growth (IG) initiative was launched in 2012 in the midst of the crisis, in a context of persistently high joblessness and growing inequalities. The initial two-year effort produced a multidimensional approach to IG and provided a Policy Framework to assess, promote and monitor inclusive growth. This presentation is currently scheduled on **Tuesday 16 June at 15:00.**

c) *Presentation by Unescwa*: UNESCWA will make a presentation on their work on competition and regulation in the MENA region and on possible use of the OECD CLP Indicator. The presentation is currently scheduled on **Thursday 18 June at 12:00**.

d) ***Presentation** on the development in the Romanian competition assessment project:* The Secretariat and the Romanian Competition Council will report on the developments in the Romanian competition assessment project. The presentation is currently scheduled on **Thursdays 18 June at 12:15**.

e) *Future topics and dates*. Competition delegates will decide on future topics for substantive discussions to be held in October 2015 and June 2016. For October 2015, the Committee already agreed to hold a Hearing on vertical agreements that specify a relative price relationship between competing products

or competing retailers. Delegates should feel free to send to the Secretariat as soon as possible any suggestion for the Committee's consideration.

Competition delegates are invited to agree on the following proposed dates for the 2017-2018 meetings:

- 5-9 June 2017: WPs and Competition Committee (from Monday to Friday inclusive).
- 4-8 December 2017: Monday to Friday inclusive with the GFC on 7 and 8.
- 4-8 June 2018: WPs and Competition Committee (from Monday to Friday inclusive).
- 26-30 November 2018: Monday to Friday inclusive with the GFC on 29 and 30.

Reminder

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

2015

- 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

08-Jun-2015

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP2/A(2015)1/REV2
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Working Party No. 2 on Competition and Regulation

DRAFT AGENDA OF THE 59th MEETING OF WORKING PARTY No. 2

19 June 2015

-- Starting at 10.00 a.m. --

To be held on Friday 19 June 2015 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].

JT03378099

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DRAFT AGENDA OF THE 59TH MEETING OF WORKING PARTY NO. 2

19 June 2015, 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(2015)1/REV2

II. ADOPTION OF DRAFT SUMMARY RECORD FROM LAST MEETING

Draft Summary Record from the last meeting — DAF/COMP/WP2/M(2014)3

For information:

List of Participants in the meeting of December 2014 — DAF/COMP/WP2/M(2014)3/ANN1

Summary of Discussion of the Hearing on the the use of Auctions and Tenders — DAF/COMP/WP2/M(2014)3/ANN2/FINAL

Summary of Discussion of the Workshop on the ex-post evaluation of competition authorities' enforcement decisions — DAF/COMP/WP2/M(2015)1/ANN4/FINAL

III. STRUCTURAL SEPARATION: REVIEW OF THE RECOMMENDATION

For discussion:

-- Draft Report on the Implementation of the Structural Separation Recommendation — DAF/COMP/WP2(2015)4

IV. ROUNDTABLE ON COMPETITION ISSUES IN LINERSHIPPING

For discussion:

-- Country contributions

-- Australia	DAF/COMP/WP2/WD(2015)7
-- Chile	DAF/COMP/WP2/WD(2015)10
-- Japan	DAF/COMP/WP2/WD(2015)5
-- New Zealand	DAF/COMP/WP2/WD(2015)6
-- Spain	DAF/COMP/WP2/WD(2015)14
-- United States	DAF/COMP/WP2/WD(2015)13
-- European Union	DAF/COMP/WP2/WD(2015)1

and

-- Costa Rica	DAF/COMP/WP2/WD(2015)9
-- Indonesia	DAF/COMP/WP2/WD(2015)11
-- Peru	DAF/COMP/WP2/WD(2015)12
-- Russian Federation	DAF/COMP/WP2/WD(2015)3
-- South Africa	DAF/COMP/WP2/WD(2015)4
-- Chinese Taipei	DAF/COMP/WP2/WD(2015)2
-- BIAC	DAF/COMP/WP2/WD(2015)8

-- Background paper by the Secretariat	DAF/COMP/WP2(2015)3
-- Paper by H. Meersman, C. Sys, E. Van de Voorde and T. Vanelslander	DAF/COMP/WP2(2015)5

V. HEARING ON AUCTIONS AND TENDERS: FURTHER ISSUES

For discussion:

-- Note by the Secretariat	DAF/COMP/WP2(2015)1
-- Paper by Gian Luigi Albano	DAF/COMP/WP2(2015)2

VI. FUTURE TOPICS AND OTHER BUSINESS

PROPOSED TIMETABLE

10h00 – 10h15	**Items I - II**
10h15 – 10h45	**Item III (**Structural Separation)
10h45 – 13h00	**Item IV** (Roundtable on Liner Shipping)
13h00 - 15h00	**LUNCH**
15h00 – 16h00	**Item IV** (Liner Shipping continued)
16h00 – 17h30	**Item V** (Hearing on Auctions and Tenders)
17h30 – 18h00	**Item VI** (Future Topics and Other Business)

Item III

In 2011, the experience of countries with structural separation was reviewed, and the Structural Separation Recommendation amended. A new report on the implementation of the recommendation is now expected by the Council.

The Secretariat began working on this report after the December 2014 discussion on the sectors it should cover. A first draft, describing recent countries' experiences in implementing the recommendation, will be circulated in advance of this meeting. This report will consider traditional sectors, in which separation has been extensively adopted, such as gas, electricity, telecoms and railways, as well as other sectors where separation is being discussed and sometimes introduced, such as water, postal services, buses and ports. This draft will be presented and discussed during the meeting and, in light of the delegates' comments, will be revised for finalisation at the Working Party meeting to be held in October 2015.

Item IV

Liner shipping has a unique regulatory history. Since its inception in the late 19th century, this sector has been characterised by cooperative agreements, namely conferences whereby liner shipping companies fix prices and regulate capacity on a given route. For a long time, these agreements were exempted from antitrust laws, but over the past few decades, many jurisdictions have undergone regulatory reforms and the sector has experienced important changes.

The Roundtable will explore these changes, examining how the industry has evolved in terms of market structure and what have been the most important developments in the application of competition law to the sector.

The discussion will benefit from the participation of Christa Sys (University of Antwerp, Belgium), Claudio Ferrari (University of Genova, Italy) and Luis Ortiz Blanco (Garrigues, Law Firm, Spain). A paper from the Secretariat and written submissions from delegations will provide some background for the discussion.

Item V

In December 2014, the Working Party held a hearing on how to design auctions and tenders to achieve efficient outcomes and provide winners with the appropriate incentives to deliver quality and invest. This time the discussion will explore in depth some other challenges posed by auctions and tenders, especially how to deal with the so-called "abnormally low offers", and how and when to partition contracts into lots.

Governments have become increasingly concerned that contracts and concessions are awarded to abnormally low bids with an ensuing increase in the risks of ex-post renegotiation, cost-overruns and contract defaults. This Hearing will address these concerns and the different approaches that have been used to address them (e.g. average bid methods), as well as their impact on the efficiency of the outcomes. The discussion will also address the division of contracts into lots, which can play an important role in promoting competition and ensuring participation by smaller bidders, and will examine the trade-offs involved in terms of efficiency and competition.

The discussion will benefit from the participation of Gianluigi Albano (Head of Research, CONSIP, Italy) and Graeme Clark (Senior Advisor, EBRD). Other interventions from the WTO (Robert Anderson) and Janos Bertok (Head, OECD Public Sector Integrity Division) will also contribute to the discussion. A paper by Gianluigi Albano and a short note prepared by the Secretariat, drawing on delegates' experiences, will be circulated in advance.

Item VI

The Working Party will discuss possible topics for future meetings, in particular those to be held in June 2016 and in October 2016, as well as one last topic for the one in October 2015. In October 2015, there will be the presentation of the final version of the *Reference Guide on the ex-post evaluation of competition authorities' enforcement decisions* and a discussion on the outcome of the capacity building workshop on the same topic that will be held by the Secretariat in April 2015, a discussion of the final report on the Review of the Structural Separation Recommendation, and Hearing on a topic still to be agreed.

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

29-May-2015

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WD(2015)18
Unclassified

HEARING ON OLIGOPOLY MARKETS

-- Note by Chinese Taipei --

16-18 June 2015

This document reproduces a written contribution from Chinese Taipei submitted for Item 5 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.

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

JT03377405

Complete document available on OLIS in its original format

English - Or. English

CHINESE TAIPEI

1. This report will illustrate Chinese Taipei's law enforcement experiences in oligopoly markets with some case examples.

1. Provisions Regarding Oligopoly in the Fair Trade Act

2. There are no specific rules with regard to oligopoly in Chinese Taipei's competition law, the Fair Trade Act (FTA). The regulation of oligopolistic businesses in the FTA is based on whether they have significant market power and whether they are able to exert such market power to exclude or restrict competition.

3. Article 7 of the FTC states that, the term "monopolistic enterprise" as used in this Act means any enterprise that faces no competition or has a dominant position to enable it to exclude competition in the relevant market. Two or more enterprises shall be deemed monopolistic enterprises if they do not in fact engage in price competition with each other and they as a whole have the same status as the enterprise defined in the preceding paragraph. The definition of monopoly, according to this article, in the FTA is more comprehensive than the concept of a monopoly in conventional economics: a single firm with ability to exclude competition in the market. Two or more enterprises can be monopolistic enterprises if they do not compete on price and meet the definition under Article 7.

4. Article 8 of the FTA further specifies the market share standards for determining whether the enterprise fits in with the criterion of a dominating position: 1) the market share of the enterprise in the relevant market reaches one half of the market, 2) the combined market share of two enterprises in the relevant market reaches two thirds of the market, and 3) the combined market share of three enterprises in the relevant market reaches three fourths of the market. Intrinsically, the concept of oligopoly is incorporated in these standards.

5. For monopolistic (including oligopolistic) enterprises, the following conducts may be prohibited in Article 9 of the FTA: 1) directly or indirectly preventing by unfair means any other enterprises from competing, 2) improperly setting, maintaining or changing the prices of products or services, 3) making a trading counterpart give preferential treatment without justification, or 4) other abusive conducts by its market power.

6. Even when oligopolistic enterprises do not meet the definition of monopoly in Article 7 of the FTA, Article 20[1] may still apply if there are only a few enterprises in the relevant market and each one of

[1] Article 20: "No enterprise shall engage in any of the following acts that is likely to restrain competition: (a) causing another enterprise to discontinue supply, purchase or other business transactions with a particular enterprise for the purpose of injuring such particular enterprise; (b) treating another enterprise discriminatively without justification; (c) preventing competitors from participating or engaging in competition by inducement with low price, or other improper means; (d) causing another enterprise to refrain from competing in price, or to take part in a merger, concerted action, or vertical restriction by coercion, inducement with interest, or other improper means; (e) imposing improper restrictions on its trading counterparts' business activity as part of the requirements for trade engagement."

them has a certain influence on the prices and production in the relevant market. In other words, any anti-competitive conduct by oligopolistic enterprise, including a boycott, discriminatory treatment without justification or vertical restraints as described in Article 20 of the FTA, the Fair Trade Commission (FTC) may consider such practices as violations of the FTA. For example, in 2012, on the basis of the FTC's investigation, it found that the two leading bicycle manufacturers in the market respectively took advantage of their market power to unjustifiably impose a ban on online retail sales. The FTC concluded that the vertical restraints with an impact on competition constituted a violation of Subparagraph 6 of Article 19 of the FTA (Subparagraph 5 of Article 20 in 2015 amendment). The FTC imposed administrative fines of NT$2 million and NT$3.5 million on the two enterprises.

7. The cases involving oligopoly markets in the FTC's investigations include the telecommunications, petroleum, motorcycle, milk, cable TV service, distribution industry and air transport. To improve businesses' awareness of what practices are likely to constitute violations of the FTA in these markets, the FTC has issued policy statements and disposal directions for these markets, including the Disposal Directions (Policy Statements) on the Telecommunications Industry, the Disposal Directions (Policy Statements) on the Motorcycle Industry, the Disposal Directions (Policy Statements) on Cable TV and Related Industry, the Disposal Directions (Policy Statements) on the Distribution Industry, and the Disposal Directions (Guidelines) on Mergers and Concerted Actions of Civil Air Transport Enterprises, etc.

2. The FTC's Enforcement against Concerted Actions in Oligopolistic Markets and Case Examples

8. Consistent pricing policy or price leadership is a common phenomenon in oligopolistic markets. The FTC may launch investigations *ex officio* when it notices such a phenomenon or received complaints on price fixing from the public. Oligopolistic businesses under investigation in these cases would usually argue that such parallel behavior results from a normal phenomenon with economic rationalities in an oligopolistic market.

9. The FTC believes that, due to the small number of businesses in an oligopolistic market and the nature of interdependence, it may lead to price rigidity. When oligopolistic enterprises engage in parallel behavior as a result of their own independent decisions rather than a consequence of a mutual understanding, it is difficult for the FTC to consider such behavior a concerted action in violation of Article 14[2] of the FTA. If the parallel conduct is a consequence of a mutual understanding, that may be proved by circumstantial evidence (such as incentives, financial gains, similar time points or rates of price increase, frequency, duration, concentration of conduct, consistency, etc.), the FTC may consider the practice in question a concerted action. The following are important judgments from administrative courts on the FTC's decisions on concerted actions in oligopoly markets.

[2] Paragraphs 1 and 2 of Article 14 of the FTA stipulates that, "the term "concerted action" as used in this Act means that competing enterprises at the same production and/or marketing stage, by means of contract, agreement or any other form of mutual understanding, jointly determine the price, technology, products, facilities, trading counterparts, or trading territory with respect to goods or services, or any other behavior that restricts each other's business activities, resulting in an impact on the market function with respect to production, trade in goods or supply and demand of services. The term 'any other form of mutual understanding' as used in the preceding Paragraph means other than contract or agreement, a meeting of minds whether legally binding or not which would in effect lead to joint actions."

2.1 Decisions Upheld by Administrative Courts

2.1.1 The gasoline price increase case

10. The FTC's investigation found that between 2002 and 2004 Chinese Petroleum Corporation and Formosa Petrochemical Corporation made each price adjustment of gasoline at the same time and same rate by public exchange of price information in advance to achieve a mutual understanding. Hence, the FTC believed that the conduct could affect the prices and supply-demand function in the domestic gasoline market and it was in violation of the prohibition against cartel actions in Paragraph 1 of Article 14 of the FTA and therefore sanctioned the two companies in 2004. The case was appealed but the Supreme Administrative Court upheld the FTC's decision that the simultaneous move of price adjustment had been a result of the two enterprises' mutual understanding through the price advance announcement against economic sense. It was concluded that the appearance of consistent conduct in price adjustment between Chinese Petroleum Corporation and Formosa Petrochemical Corporation constituted a concerted action prohibited under the FTA.

2.1.2 The fresh milk price increase case

11. In 2011, the FTC initiated an ex officio investigation to look into the joint price increase by three fresh milk producers. The FTC's investigation indicated that the consistency of price adjustment by the three companies could be a concerted action conducted through a mutual understanding. The investigation revealed that, though operating costs of the three companies were different, the rate of adjustment was identical and the lists of suggested retail prices these companies gave to retailers were also highly similar. Based on evidences collected by the FTC, it was concluded the conduct of the three companies violated Paragraph 1 of Article 14 of the FTA and administrative fines totaling NT$30 million were imposed on the companies. The three companies appealed the decision to the Supreme Administrative Court, but the Courts upheld the FTC's decision on the grounds that the conduct in question was not a merely conscious parallel behavior and the only explanation for the concerted action was a mutual understanding in existence among the oligopolistic enterprises.

2.2 Decisions Revoked by Administrative Courts

12. Administrative courts have supported most of the FTC's decisions on concerted actions. However, a small number of cases were challenged by the court owing to the reason that the courts required higher standard of proof with circumstantial evidence.

2.2.1 The industrial paper price increase case

13. In 2010, the FTC made a decision to fine the three major industrial paper manufactures for a cartel practice of joint price increase between Aug. 2009 and Mar. 2010. However, the Taipei High Administrative Court concluded that the FTC had not obtained the sufficient evidence to prove that information had been exchanged among the aforesaid paper manufactures. In addition, the dates and rates of the price increases by the said businesses had been different and the offenders had all indeed been affected by rising costs, whereas the circumstantial evidence provided by the FTC could not rule out the possibility that the price increase by the three companies was a result of price leadership in an oligopolistic market. The decision of the FTC was revoked in 2011. The FTC appealed and the Supreme Administrative Court remanded the case to the Taipei Administrative Court. The Taipei Administrative Court revoked the FTC's decision again in 2013 and the FTC appealed once more. The Supreme Administrative Court remanded the case a second time and the case is currently being reviewed by the Taipei Administrative Court for the third time.

2.3 Summary

14. As cartels are becoming more clandestine, it is getting harder to acquire direct evidence of "mutual understandings" among enterprises, especially in oligopoly markets. In recent years, the number of enterprises sanctioned by the FTC on the basis of circumstantial evidences has been increasing. Although administrative courts have gradually accepted such evidences, the standard of proof is getting higher. To fight against concerted actions effectively, Article 14 of the FTA was amended on February 4, 2015 to add Paragraph 3 which stipulates: "The mutual understanding of the concerted action may be presumed by considerable factors, such as market condition, characteristics of the good or service, cost and profit considerations, and economic rationalization of the business conducts". The 2015 amendment can solve the problem of the FTC in obtaining direct evidence of mutual understandings and recognize expressly the circumstantial evidence in proof of concerted actions.

3. Merger Cases in Oligopoly Markets

15. The FTC determines to object to mergers or not on the basis of net effect between the overall economic benefit and the disadvantages from competition restraint[3]. Regarding mergers in oligopolistic markets, the FTC will be more cautious when assessing the possible disadvantages from competition restraints resulting from the merger, particularly the likelihood of unilateral effect after the merger. For mergers with the effect of competition restriction disadvantages being greater than the overall economic benefit, the FTC will either prohibit them or approve them with remedial measures to ensure market competition.

3.1 Mergers prohibited by the FTC in oligopolistic markets

3.1.1 The karaoke market

16. Cashbox Partyworld Co., Ltd. and Holiday Co., Ltd. filed a merger notification with the FTC in December 2006. In this case, the FTC defined the relevant market as the "audiovisual and singing services (karaoke) market", and its investigation revealed that the two companies accounted for almost half of the market share. Moreover, in Taipei County (now New Taipei City) and Taipei City, the most important geographic markets, they had over 90% of the market share. Obviously, they would create a dominant position after the merger as well as become a monopsony in the upstream karaoke tape market, and the development of the businesses in the upstream market would be affected. The FTC considered that the disadvantages of competition restraint would outweigh the overall economic benefit so prohibited the merger in March 2007. The merger applicants appealed and the Appeals and Petitions Committee of the Executive Yuan revoked the FTC's decision two times. However, when the FTC made its decision for the third time in April 2009, the merger prohibition was upheld by the Supreme Administrative Court in 2011.

3.1.2 The instant noodle market

17. In 2010, the FTC reviewed a merger notification filed by Uni-President Enterprises Corporation and Wei Lih Food Industrial Co., Ltd. that the Uni-President would control more than half of the Wei Lih's shares. The merging parties were the two largest instant noodle producers in the oligopoly market and the market share after merger would reach nearly 70%. The FTC's analysis indicated that, after the merger, the

[3] Article 13 of the FTA stipulates: "The competent authority may not prohibit any of the mergers filed if the overall economic benefits of the merger outweighs the disadvantages resulted from competition restraint. The competent authority may impose conditions or undertakings in any of the decisions it makes on the filing cases referred to in Article 11, Paragraph 8 herein in order to ensure that the overall economic benefits of the merger outweighs the disadvantages resulted from competition restraint."

two companies would have the ability to raise prices in the market. If they chose to do so jointly, other instant noodle producers could also follow suit. Furthermore, Uni-President, President Chain Store Corp. with 5,000 convenient stores in Chinese Taipei, and Carrefour Hypermarkets belonged to the same business group. Once the merger was completed, they would gain even more bargaining power when negotiating with retailers and, consequently, the cost to competitors to access such sales channels would increase. The FTC concluded that the proposed merger significantly restrict competition in the domestic instant noodle market while the overall economic benefit to the relevant market and consumers was insignificant. Therefore, the FTC prohibited the merger and the Supreme Administrative Court also supported the FTC in this case.

3.2 Conditional Merger Clearance

18. The FTC reviewed a merger notification in 2012 filed by five major telecommunications enterprises and EasyCard Investment Holdings Corporation for setting up a joint venture to operate a trusted service management (TSM) platform. The FTC found the undertaking could facilitate innovation in R&D as well as reduce costs and inefficiency. It would benefit the overall economy. On the other hand, the mobile payment market may be affected by the proposed joint venture as a result of economies of scale and network effect after the merger, and it is likely to abuse its market power in such monopolistic or oligopolistic market in the long run. In the meantime, the merger may also result in foreclosure in other markets (such as the micro-payment tool market, the market of e-payment on transport). To ensure that the overall economic benefit could outweigh the disadvantages from competition restraint, the FTC therefore approved the merger with eleven conditions (including four structural remedies, four behavioral remedies, two obligations of information disclosure and one supervisory measure).

3.3 Summary

19. The FTC also found that oligopolistic enterprises sometimes failed to notify the FTC before consummating the merger. For example, despite the FTC's prohibition decision on the merger between Cashbox and Holiday in March 2007, the two companies still set up a regular, jointly-managed customer service center and started to run computer multimedia services. Through interlocking directorates, the two companies achieved a *de facto* merger. After investigation, the FTC concluded in March, 2010 that the two companies should have filed the merger notification under the FTA but failed to do so; therefore, they had violated the FTA. In 2012, the FTC initiated an *ex-officio* investigation on these two companies and found that they jointly operated business by sharing offices and resources. And moreover, the intranet and telephone systems were connected and the employees could act on behalf of one another. The conduct was in violation of the FTA and the FTC therefore in 2014 imposed the administrative fines of NT$5 million and NT$4 million on the two companies respectively.

20. The other case was the illegal merger between Uni-President Enterprises Corporation and Wei Lih Food Industrial Co., Ltd. After an *ex officio* investigation in 2009, the FTC discovered the Uni-President had obtained half of the seats on the boards of directors and supervisors of Wei Lih. It met the type of merger stated in the FTA. The two companies should file a merger notification but failed to do so; hence, the FTC sanctioned both companies. However, during the administrative litigation, the Supreme Administrative Court determined that Uni-President's possession of half of the seats of the boards of directors and supervisors and chairpersonship of Wei Lih was not sufficiently to prove that Uni-President acquired control of Wei Lih. Therefore, the FTC's decision was revoked.

4. Conclusion

21. As stated above, the FTC's law enforcement experiences on concerted actions in oligopoly market show the difficulties of obtaining direct evidence and the challenges of identifying legal parallel behavior and illegal concerted actions. The FTC developed the concerted action theory and also amended the FTA to give circumstantial evidence its lawful status as an attempt to solve the problems in law enforcement against concerted actions in oligopoly markets. As for mergers in oligopoly markets, the factors to be considered in the analysis of anti-competitive effect may be similar to those for mergers in non-oligopoly markets. However, as stated in Point 10 of the FTC's Guidelines on Handling Merger Filings[4], mergers in oligopoly markets are more likely to raise competition concerns and further examination of the overall economic benefits is required. Compared to mergers in non-oligopoly markets, such cases therefore need more time to review, and they are more likely to be blocked or approved with remedies. In the future, the FTC will strengthen its economic analysis tools to cope with competition law issues that occur as a result of the characteristics of oligopoly markets.

[4] Point 10 of the Guidelines on Handling Merger Filings stipulates: In principle, a horizontal merger reviewed through the regular procedure and found to involve one of the following conditions requires further examination of the overall economic benefits by the FTC: 1) The aggregate market share of the merging parties achieves half of the total market. 2) The top two competitors in the relevant market account for two thirds of the total market share. 3) The top three competitors in the relevant market account for three quarters of the total market share.

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

29-May-2015

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WD(2015)10
Unclassified

ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT

-- Note by Chinese Taipei --

16-18 June 2015

This document reproduces a written contribution from Chinese Taipei submitted for Item 9 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.

More documents related to this discussion can be found at www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm.

JT03377415

English - Or. English

CHINESE TAIPEI

1. This paper addresses Chinese Taipei's government intervention in economic activities as well as the Fair Trade Act (FTA) and its enforcement respecting government intervention in these activities. In preparing this submission, the Fair Trade Commission (FTC) consulted with other government agencies, including the Ministry of Economic Affairs (MOEA), the Ministry of Finance (MOF), the Ministry of Transportation and Communications (MOTC), the National Communications Commission (NCC) and the Financial Supervisory Commission (FSC). All these competent authorities reported currently no legal or administrative measures applied to distort market competition under their respective jurisdictions.

1. The Role of Government in Markets

2. Public enterprises have been one of the most important measures for the government to intervene in markets in Chinese Taipei. As set forth in Article 144 of the Constitution, public utilities and other nature monopoly shall, in principle, be under public operation. In cases permitted by law, they may be operated by private. For the sake of looking after the needed, the government operates various public utilities to provide universal and steady services at reasonable prices. Hence, public utilities such as water, power supply, post, and railroads are placed under the management of public enterprises. Public enterprises, especially state-owned enterprises (SOEs) once played a very significant role in economic development. Before the 1980s, the government largely relied on public capital and government intervention in markets to promote economic growth and development. SOEs were the major players or leaders in markets such as public utilities, sugar, salt, alcohol and tobacco, fertilizer, steel, etc.

3. The government began to implement economic reforms and started to promote market liberalization and internationalization since the 1980s. One of the major reforms was to reduce the role of government in economic activities and to build a sound market competition mechanism. In July 1987, an inter-agency "Task Force for Facilitating Privatization of Public Enterprises" was created to promote the privatization of public enterprises. In 1996, the objectives of such privatization were publicly announced to "adjust the role of government, exert market functions, stimulate industrial competition, and increase effective use of resources." Furthermore, in November 2000, the Legislative Yuan amended the Statute of Privatization of Government-Owned Enterprises and its Article 1 provides explicitly that the primary objective of privatization is to maximize market functions and to enhance the operational efficiency of enterprises.

4. The term "public enterprise" is in principle defined as a business entity in which the government owns more than 50% of its capital[1]. After the aforementioned privatization process, there are still ten SOEs left today in Chinese Taipei. They continue to take the responsibility of achieving different policy goals and providing requisite resources or services to the people. According to the definition mentioned above, the number of public enterprises has dropped drastically. However, the

[1] Definitions of "public enterprises" can be seen in the Administrative Law of State-Owned Enterprise, the Audit Act and the Statute of Privatization of Government-Owned Enterprises. The ranges covered are not entirely the same but they all include (1) businesses solely owned and operated by the government and (2) public-private joint ventures in which the government owns over 50% of the capital.

government remains as the biggest shareholder in some privatized companies and still has a certain influence on the management of these companies.

5. To reduce undue advantages taken by public enterprises in the market, Article 6 of the Administrative Law of State-Owned Enterprise states that, "Unless otherwise specified in applicable regulations, the rights and responsibilities of state-owned enterprises shall be the same as those of private enterprises of similar categories." In other words, SOEs as well as private companies have to abide by general commercial regulations, such as the Company Act. In addition, there are also industry regulatory laws such as the Electricity Act, the Petroleum Administration Act and the Natural Gas Enterprise Act, to regulate the operations of different SOEs. In terms of finance and taxation, SOEs and private companies all have to pay income tax, business tax and customs duty according to tax regulations. There are no tax preferences or favorable regulatory treatment for SOEs.

6. Furthermore, the Executive Yuan (Cabinet) announced in 2003 the "Policy Framework and Action Plan for the Strengthening of *Corporate Governance*" and set up a cross-ministerial task force to strengthen the system of cooperate governance. It set forth therein that the competent authorities of public enterprises, such as the MOEA, would follow these six rules for strengthening corporate governance of SOEs and ensuring transparency and accountability: "enhancing internal control and auditing systems," "enhancing accounting systems and ensuring the independence of CPAs," "strengthening the board of directors' function and the efficacy of shareholders meeting" "strengthening the public information disclosure system," "protecting shareholders' rights and interests" and "considering stakeholders' rights and interests." This policy is also conducive for SOEs to comply with the principle of competitive neutrality to underpin fundamental business operations and prevent unfair competition in relevant markets.

7. However, some scholars[2] believe that public enterprises may enjoy undue competitive edges as a result of government support in their operations. The sources of these may be related to:

- Direct government aid: This can be direct funding from the government budget, tax exemptions or preferential access to land.

- Advantages of debt financing: With the government serving as the guarantor or sponsor, public enterprises may obtain financing at interest rates lower than market rates or even acquire preferential financing directly from government-owned financial institutions.

- Advantages of monopolistic and incumbent enterprises: Take Chunghwa Post Co., Ltd. for example. According to the Postal Act, it has the exclusive right to operate postal services of some specific mail items, yet this company also provides express courier services to compete with private enterprises in the same market. Thus, the concern of the cross subsidization practice may give rise to certain competition issues. In addition, in recently liberalized markets, such as telecommunications, the incumbent enterprise that has existed before market liberalization may have more competitive advantages than private enterprises that are new entrants to the market.

8. Except public enterprises, the government can attract private capital to public infrastructure projects. The "Statute for Encouragement of Private Participation in Transportation Infrastructure Projects" and the "Act for Promotion of Private Participation in Infrastructure Projects" were enacted respectively in January 1994 and January 2000 to provide legal grounds for public-private partnerships to conduct public projects under private management, including incinerators, waste collection, sewer construction, and so forth. To some extent these private enterprises may enjoy some

[2] E.g., Li Chun, "The Competitive Neutrality of Public Enterprises and Its Connotation of National Economic and Trade Policies," Chung-Hua Institution for Economic Research (CIER) WTO e-Paper, Issue 341, November 30, 2012.

competitive advantages because they are commissioned or delegated by the government to provide public service.

9. The FTC also pays attention to the regulatory measures of industrial regulators to prevent such regulatory measures from affecting market competition. Examples of such measures include restriction on geographic area of cable TV services and the number of services operating in each area (before 2013), and some public policies encouraging financial institutions mergers to pursue operational efficiency.

2. The FTA Respecting on Government Commercial Activities

2.1 The FTA may apply to government agencies under certain circumstances

10. When the FTA took effect on February 4, 1992, Article 46 at the time stipulated that, "The provisions of this Law shall not apply to any act performed by an enterprise in accordance with other laws. The acts of a governmental enterprise, public utility or communications and transportation enterprise approved by the Executive Yuan shall not be subject to the application of this Law until the elapse of five years after the promulgation of this Law." The main reason was that at the onset of the legislation process, legislators considered that any business practice governed by other law was permitted by such special laws and supervised by other competent authorities; hence, there was no need to place them under scrutiny of the FTC. Meanwhile, as public enterprises, public utilities and transportation and communications businesses had taken responsibility for implementing economic policies for years, it would be difficult for them to adjust in the short time. In this regard, a five-year transition period was granted to the practices that the aforementioned enterprises carried out with the approval of the Executive Yuan in line with national policies.

11. In the early stage of enforcing the FTA, many government agencies questioned about whether the FTA applied to their commercial activities, especially whether they were the "enterprises" referred to in Article 2 of the FTA. The Environmental Protection Administration (EPA), for instance, once raised a question of whether it would violate the FTA when a government agency, the Water Corporation or a private enterprise produced bottled water and sold it at a price close to the cost with funding from the government in order to improve the quality of drinking water for the public. The FTC's response was that, regardless of different types of organizations the recipient who obtained the initial startup funds from the government was an enterprise under the FTA as long as its purpose was to produce and sell drinking water. Moreover, since the drinking water plant was set up with government funding, costs would be relatively lower and the source of the water would be more plentiful. Under these favorable conditions, the drinking water plant would have certain advantages when competing with rivals in the relevant market. This would affect producers of bottled water, manufacturers and distributors of water purification equipment and the water companies, and might result in market distortions. Consequently, the FTC requested the Environmental Protection Administration to consider the matter carefully.

12. The FTC also issued the "Criteria for Applying the Fair Trade Act to Commercial Activities by the Government Agencies" in 1993. It specifies therein that the government agencies supply products or services that have market value, such conducts should be subject to the FTA.

2.2 In principle, the FTA applies to all competition-related conducts of enterprises (public or private)

13. On February 3, 1999, the amended Article 46 of the FTA stated that: "Where there is any other law governing the conduct of enterprises in respect of competition, such other law shall govern, provided that it does not conflict with the legislative purposes of this Act." The main reason for the amendment was to remove the exemption under the FTA to public enterprises, public utilities and transportation and communications enterprises. Furthermore, it gave the FTA the status of a

fundamental economic law and changed the priorities in the application of other laws and the FTA on the same matter.

14. When comparing Article 46 in 1992 and 1999, the former stated that the FTA was inapplicable to enterprises that were governed by other laws, whereas the latter specified that the legislative purposes[3] of the FTA were to be adopted as criteria to assess whether other laws had precedence to be applied first. The FTC needed to evaluate whether "the other applicable laws consisted with the legislative purposes of the FTA" in accordance with the conditions of each case. The factors to be taken into account included the methods of competition, relevant market, the number of competitors and market performance, the level of market concentration, market entry barriers, economic efficiency (productive efficiency, allocative efficiency and dynamic efficiency), consumer interests, transaction costs and other elements related to the legislative purpose of the FTA.

15. On February 4, 2015, Article 46 of the FTA was again amended to further strengthen the legal status of the FTA that serves as the fundamental rules for all competition-related conducts. Article 46 provides that, "The Act has precedence over other laws with regard to the governance of any enterprise's conduct in respect of competition. However, this stipulation shall not be applied where other laws provide relevant provisions that do not conflict with the legislative purposes of this Act."

16. Although Article 46 of the FTA confers a strong priority to the FTA, the FTC is still cautious about enforcement when competition factors are already incorporated in other laws that specify exemptions from application of the FTA. For instance, the Financial Institutions Merger Act and the Financial Holding Company Act provide that if the financial authority determines that immediate measures are necessary and that such measures will not have any material adverse effect on competition in the financial market, merger notification of financial institutions to the FTC is not required. However, the FTC may provide its opinions about likely impacts on market competition when the regulatory agencies seek such opinions.

3. The FTC's Enforcement Standpoint and Challenges

3.1 Intervention in market activities by government agencies through administrative measures

17. The FTC mostly relied on consultation and advocacy to resolve competition conflicts resulting from government intervention in market activities through regulations or other administrative measures. The FTC set up the "461 Special Task Force" (in accordance with Paragraph 1 of Article 46 of the FTA) shortly after its establishment to review administrative regulations that might be in conflict with the legislative purposes of the FTA and consulted with related agencies over such issues. The task force convened 13 meetings, examined over 200 regulations and held 19 coordination meetings with related agencies. Consensus was reached to revise 122 articles in 74 regulations. Under the Paragraph 2 of Article 46 in FTA (1992), the FTC only submitted applications of five exemptions[4] to the Executive Yuan for its approval in order to reduce

[3] Article 1 of the FTA (2015), "This Act is enacted for the purposes of maintaining trading order, protecting consumers' interests, ensuring free and fair competition, and promoting economic stability and prosperity."

[4] The five practices approved by the Executive Yuan were: 1) Chinese Petroleum Corporation providing diesel to the Taiwan Railways Administration at preferential prices, 2) Chinese Petroleum Corporation selling fuel to the military at lower prices, 3) Taiwan Sugar Corporation selling sugar to food export product processing businesses and sugar syrup to apiary businesses at preferential prices, 4) Taiwan Sugar Corporation selling sugar to the military at preferential prices, and 5) Taiwan Cereals Co., the Taiwan Sugar Corporation, the Sugar Farmers' Association, the Fruit Marketing Cooperative and the Tobacco and Wine Monopoly Bureau selling fertilizers they produced at the same prices throughout the country.

the impact on market competition of the five-year exemptions for public enterprises. The transition period ended on February 3, 1996. Before then, the FTC organized a special task force to consult with related ministries so that these agencies made the commitments to stop three types of conducts and modify two types of conducts to comply with the regulations in the FTA.

18. The FTC subsequently set up other special task forces, including the "Task Force for Deregulation and Market Competition Promotion" and the "Task Force for Development of the Green Silicon Island Vision and Promotion Strategy Regulations," to review the regulations of different government agencies as well as to consult with these agencies on regulations with likely impact on competition. One of the concrete results was the amendment of the National Property Act. The Act stipulated different treatments on the acquisition of government-owned land by public enterprises and by private enterprises. The discrimination had a negative effect on a fair competitive environment. The MOF, in consultation with the FTC agreed to treat public and private enterprises equally when both applied to purchase the same piece of land for business opened to private operation. The MOF also notified the FTC of its decision.

3.2 Case Example: Abuse of market power by the government agency

19. In 2012, the FTC received a complaint that Taiwan International Ports Corporation Ltd. (TIPC) imposed discriminatory treatment without justification on downstream stevedoring companies when they used essential facilities at Taichung Port. The FTC concluded that the conduct was an abuse of market power in violation of Subparagraph 4, Article 10 of the FTA and ordered the TIPC to rectify the conduct within a given period.

20. The FTC's investigation found that the Keelung Port Authority, Taichung Port Authority, Kaohsiung Port Authority and Hualien Port Authority merged on March 1, 2012 to become TIPC, a state-owned company. The alleged conduct in question had occurred before the restructuring. Although the Port of Taichung, governed by the Taichung Port Authority (TPA) at the time, was a public entity with the duty of supervising port operations, the facility rental business was deemed as a commercial practice in private sector which was subject to the FTA. Meanwhile, the FTC announced in June 1993 that according to Article 5 of the FTA, the TPA was a monopolistic enterprise since it possessed the essential facilities of an international port. Under such circumstances, the unjustifiably differential treatment by TPA in the collection of building rents from stevedoring companies caused new entrants to shoulder higher operating costs from paying more building rents than existing stevedoring companies. It restricted competition or impeded fair competition in the port stevedore market. The conduct was in violation of Subparagraph 4 of Article 10 of the FTA.

3.3 Anticompetitive practices of public enterprises

21. In terms of law enforcement, the FTC applies the same standards to SOEs and private enterprises. Take Chunghwa Telecom for example. It was the result of reorganization of the original Directorate-General of Telecommunications under the MOTC on July 1, 1996 in accordance with Article 30 of the Telecommunications Act. Chunghwa Telecom was sanctioned by the FTC a number of times for violating the FTA when it was still a state-owned enterprise that the MOTC had most of the shares of Chunghwa Telecom at the time. And moreover, the calculation method of the total sales is the same for public and private enterprises (to decide whether they meet the merger filing threshold or the amount of the administrative fine to be imposed).

22. Take Chinese Petroleum Corporation (CPC) as another example. It is a state-owned enterprise under the MOEA. The FTC fined the CPC several times for its unjustified discrimination and abusing its market power. In recent years, the FTC has been more concerned about the concerted actions between CPC and privately-run Formosa Petrochemical Corporation. These two companies tried to maintain same petroleum product prices and make the same price adjustments. In 2004, the FTC concluded that these two companies violated cartel prohibition in the FTA and the fines were imposed on both companies. The fines were challenged by the Petitions and Appeals Committee of

the Executive Yuan but the FTC's decision about the competition law infringement of these two companies was upheld by the Petitions and Appeals Committee of the Executive Yuan and the Supreme Administrative Court.

23. As mentioned earlier, some scholars doubted that, in a newly liberalized market, a former public enterprise that has been privatized may have certain competitive edges over private enterprises that are new in the market. Take Chunghwa Telecom (CHT) for example. Following privatization, the company maintains a dominant position in the telecommunications market not only on the basis of its longstanding experience and technologies, but also its control of telecommunication network that makes the CHT a natural monopoly. In particular, "last mile" owned by the CHT has been considered essential facility for the telecommunications industry. This is the reason why the competent authority of the industry, the NCC, includes provisions to prohibit Type 1 telecommunications enterprises from anti-competitive practices under Article 26-1 of the Telecommunications Act, based on the concept of "asymmetric regulation" and prohibition of existing telecommunications enterprises abusing market power. The FTC noted that such regulation is consistent with the legislative purposes of the FTA which are to prevent existing businesses or leading enterprises in the telecommunications market from abusing their market power to impede or eliminate competition. Accordingly, the FTC decided, after consulting with the NCC, that Article 26-1 of the Telecommunications Act will be applied to cases involving abuse of market power by Type 1 telecommunications enterprises. Nevertheless, the FTC still has authority to take enforcement action under the FTA if a Type 1 telecommunications enterprise meets the criteria of monopolistic enterprises set forth in Articles 7 and 8 of the FTA and its conduct also constitutes abuse of market power specified in Article 9[5].

4. Conclusion

24. Public enterprises and private enterprises are both subject to the FTA. When government agencies provide products or services for profit, they will be seen as the enterprises described in Subparagraph 3 of Paragraph 1 of Article 2 of the FTA and are therefore subject to the regulation. However, if such practices of government agencies or public enterprises have their legal grounds, according to Article 46 of the FTA, the FTC has to review whether these regulatory rules comply with the legislative purposes of the FTA. If competition issue is not included in such rules, the FTC may investigate and sanction unlawful acts in order to maintain fair competition in the market. As for regulatory rules or the administrative measures of government agencies, which are likely to intervene in market competition, the FTC will resort to non-compulsory means such as consultation and advocacy to resolve the issue.

[5] See Point 3 (Relations between the FTA and the Telecommunications Act) in the "FTC Disposal Directions (Policy Statements) on the Telecommunications Industry."

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

28-May-2015

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP2/WD(2015)2
Unclassified

Working Party No. 2 on Competition and Regulation

COMPETITION ISSUES IN LINER SHIPPING

-- Chinese Tapei --

19 June 2015

This document reproduces a written contribution from Chinese Taipei submitted for Item IV of the 59th meeting of the Working Party No. 2 on Competition and Regulation on 19 June 2015.

More documents related to this discussion can be found at: http://www.oecd.org/daf/competition/competition-issues-in-liner-shipping.htm

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JT03377283

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-- Chinese Taipei --

This report is a description of the current status of the liner shipping market and regulatory measures in Chinese Taipei. The competition issues and precedents that the Fair Trade Commission (FTC) has investigated are also presented. To prepare the report, the FTC requested the Ministry of Transportation and Communications (MOTC), the competent authority, to provide necessary information.

1. Liner Shipping Industry and its Regulatory Framework in Chinese Taipei

1. Chinese Taipei is surrounded by ocean and over 90% of its import/export trade is carried out through marine transport. Shipping companies in Chinese Taipei provide both liner and tramp services. Liner services mainly ship containers and tramp services ship bulk cargo. The international lines that these services operate cover Asia, the Americas, Europe, Australia and Africa. According to the Review of Maritime Transport 2014 from UNCTAD, the top three liner shipping companies in Chinese Taipei are Evergreen Marine Corp., Yang Ming Marine Transport Corp. and Wan Hai Lines Ltd. They respectively rank No. 4 (1,102,245TEU, accounting for 5.53% of global capacity), No. 12 (561,172TEU, 2.82% of global capacity) and No. 22 (172,572TEU, 0.87% of global capacity). The characteristics of Chinese Taipei liner shipping operators include 1) large scale organizations; 2) cooperation through slot exchange, slot charter and strategic alliances; and 3) conglomerate management, such as Evergreen Marine Corp. and Yang Ming Marine Transport Corp. also engaging in dock management and reinvesting in logistics business.

2. In Chinese Taipei, the FTC is the competition authority while the MOTC oversees the establishment and operations of joint service organizations set up by shipping companies. Currently, the Association of Shipping Services (AOSS) is the only joint service organization formed by local shipping companies in Chinese Taipei. The AOSS was founded in 1984 and currently has 14 member companies. It has been a designated agency[1] according to the Regulations for Materials and Instruments Imported by Maritime Transportation for Governmental Agencies and State-owned Enterprises. It will recommend what materials and equipment the government needs may be shipped by domestic shipping companies at reasonable rates to reduce the cost of such importation. The AOSS also encourages to expand domestic fleets to improve the overall economic development[2].

3. According to Subparagraph 10 of Article 3 of the Shipping Act, enacted in 1981, an international joint service organization refers to an organization set up permanently or with specific purposes under an agreement achieved on matters related to the operations on the international routes, negotiations of sea freight rates, passenger ticket fees, cargo volume of carriage and charter space and others as to the operation of routes. Meanwhile, that the term “an international shipping agreement” used in Subparagraph 11 of Article 3 means the convention entered into by the international joint associations to regulate such matters as the relationship between the operators, transport operations, costs, intermodal and picking. As the shipping authority, the MOTC imposes the following regulations on joint operations by shipping companies:

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1 The MOTC gave its consent on February 14, 2005 to recognize the AOSS as a designated agency specified in Article 7 of the Regulations for Materials and Instruments Imported by Maritime Transportation for Governmental Agencies and State-owned Enterprises.

2 The AOSS was established in 1984 before the FTA was not yet implemented and Article 34 of the Shipping Act was amended. As a result, the AOSS did not have to apply to the FTC for approval of exemption for concerted actions at the time. However, the association did apply on behalf of Yang Ming Marine Transport Corp. and 14 other businesses in 2005, 2008, 2011 and 2014 to the FTC for permission for joint shipment of materials and instruments for government agencies and public enterprises into the country (2005) and subsequently for approval to extend the permission.

1. Application for permission: As set forth in Paragraph 1 of Article 34 of the Shipping Act[3], any vessel carrier operating in Chinese Taipei, joining or setting up an international joint service organization shall file the Articles of Association, proposal for joint operations and relevant documents with the shipping administration authority (the Maritime and Port Bureau) for ratification through submission to the MOTC for approval on discussion with other authorities (the FTC).And moreover, Paragraph 1 of Article 35 also stipulates that any vessel carrier operating in Chinese Taipei and entering an international shipping agreement shall file name, content and membership list of such international shipping agreement with the shipping administration authority for submission to the MOTC for approval. The filing requirements stated as above also apply to the alteration of such international shipping agreement.

2. Filing of documents for reference: As stated in Paragraph 2 of Article 34 of the Shipping Act, any international organization is organized for discussing freight charges and ticket fares, the fares of the member carriers may be filed by those member carriers authorized by the said organization to the shipping administration authority. Paragraph 2 of Article 35 also prescribes that any international shipping agreement on freight charges and ticket fares, the fare list shall be filed by one of signatory parties to the shipping administration authority. The fare list stated above shall permit the vessel carrier to make decisions on the freight charges and ticket fares at his own discretion.

3. Operational restrictions: According to Article 22 and Paragraph 3 of Article 34 of the Shipping Act, if the fares, rates or charges aforementioned are found improper or disadvantageous to import and export or the development of the shipping industry, the shipping administration authority may order such carriers to make corrections and revisions. The authority may also suspend the effect of the whole or part of such implementations if it deems it necessary.

4. Reference to international conventions: According to Article 60 of the Shipping Act, in case provisions involving international matters are not provided in the present Act, the MOTC may, by reference, undertake to adopt, promulgate and enact the relevant international conventions or agreements and the regulations, directives, standards, recommendations or programs prescribed in the annexes thereto as provisions.

4. In practice, the shipping administration authority is required to consult with the FTC for issues directly involving freight rates or ticket fares set by a standing international organization or non-standing alliance. Regarding the agreement fairs, the application only needs to be filed with the shipping administration authority to be forwarded to the MOTC for approval when the parties can make decisions on their sales, marketing, pricing and paperwork independently. If the content of cooperation is limited to slot charter and exchange without involving concerted action, Article 15 of the Regulations for Administrating Vessel Carriers shall apply. Such shipping companies shall register with the shipping administration authority before they can begin freight solicitation and issue bills of loading with the names of collaborating vessels indicated.

[3] Article 34 of the current Shipping Act was amended on Jan. 30, 2013 and promulgated. Before the amendment, the provisions were set forth in Article 39: "Domestically registered and foreign shipping companies that have joined international joint service organizations and are operating in the country are required to present the names of such international joint service organizations, the contents of the joint service agreements and the lists of members to the maritime administration agency to be forwarded to the MOTC for reference…" Therefore, the regulatory measures are stricter after the amendment while the recognition of the FTC is also required.

2. Applicability of Competition Law to International Joint Service Organizations in the Liner Shipping Industry

5. The FTC once assessed whether the General Rate Increase (GRI) and Peak Season Surcharge (PSS) adjustment resolutions achieved on May 1, 2003 by the members of the Transpacific Stabilization Agreement and Canada Transpacific Stabilization Agreement in accordance with their organizational charters were subject to the regulation of the Shipping Act since these organizations had filed with the MOTC for reference according to the Shipping Act. After considering the legislative purposes of the Shipping Act, the characteristics of the marine transport trade, the influence of international joint service organizations on economic efficiency, past policies toward international joint service organizations, and international comity similar to antitrust immunity generally given to shipping conferences, the FTC decided under Article 46 of the Fair Trade Act (FTA), that application of related regulations set forth in the Shipping Act had the precedence. In other words, the FTA may not apply to international joint service agreements and practices exercised in accordance with such agreements if such agreements have been approved by the shipping administration authority according to the Shipping Act.

6. In principle, concerted actions are prohibited by the FTA but they may be permitted under exceptional circumstances. After the amended Shipping Act was promulgated on January 30, 2013, shipping companies operating in Chinese Taipei intend to join or set up international joint service organizations, according to Paragraph 1 of Article 34 of the Shipping Act, they are required to submit the charters of such organizations, the joint operation plans and related documents to the Maritime and Port Bureau to be forwarded to the MOTC for approval after consultation with the FTC. Competition measures often adopted by shipping alliances or joint shipping services include the rate agreement[4], pooling agreement[5], deferred rebate system[6], contract rate system[7], fighting ship[8], capacity control[9], slot charter[10],

4 Freight rate agreement: When the members of a shipping alliance establish or consult to establish unified charging standards or freight rates and create a freight rate table accordingly, it is an act of price agreement.

5 Pooling agreement: Two or more shipping companies establish the agreement to operate on the same route and assign vessels to run joint operations at unified freight rates. They share the gains, losses and expenses according to specific formulas. It can be divided into cargo sharing, profit sharing, cargo and profit sharing, and tonnage sharing.

6 Deferred rebate system: A shipper signs an agreement to give all cargo to a shipping conference for shipment for a certain period (usually 4 to 6 months). When the shipper gives cargo to the same conference for shipment again some time later (within 4 to 6 months), the conference will return a certain percentage of the freight charges to the shipper. However, if the shipper violates the agreement, the shipping conference can confiscate all the rebates accumulated. Therefore, restricted by the agreement, the shipper has no choice but to give all of its cargo to the same conference for shipment in order not to lose the huge rebates. As a result, shipping conferences can raise freight rates without losing their sources of cargo and shipping companies not belonging to any conference will find it difficult to compete.

7 Contract rate system: It is also called the dual-rate system or exclusive patronage agreement. A shipper signs a contract with a shipping company and makes the commitment to give all the cargo under its control in all the ports where the conference operates to shipping companies belonging to the conference for shipment in return for lower freight rates and the guarantee of no freight rate raises within a certain period. With shippers that have not signed such a contract, the conference will charge normal freight rates. If the shipper gives some of its cargo to a non-conference vessel for shipment when the contract is still valid, it will be required to pay a fine of a certain amount for breach of contract or dead freight as compensation. However, if all the member companies are unable to provide enough shipping space, the shipper is allowed to give cargo to non-conference vessels for shipment provided that the practice is approved by the chair or representative of the conference in advance.

slot exchange[11], etc. Except for the slot charter and slot exchange[12], the others are likely to constitute "concerted actions" under Article 14 of the FTA[13].

7. The FTC may approve the above-mentioned concerted actions according to Article 15 (application for exemptions) and Article 16 (conditional approval of concerted action) of the FTA. Otherwise the FTC may under Article 40, order the concerned parties to stop or correct the conduct or take necessary remedial measures within a given period and impose an administrative fine of no less than NT$100,000 but no more than NT$50 million. Meanwhile, if a violation described above is deemed critical, the FTC may impose an administrative fine of up to 10% of the concerned enterprise's total sales in the previous fiscal year. At the same time, as stipulated in Article 34 of the FTA, if the FTC acts according to Paragraph 1 of Article 40 of the FTA and orders the enterprise in question to stop or correct its conduct or take necessary remedial measures within a given period but the enterprise fails to stop or correct its conduct or take necessary remedial measures within the period given or engages in the same unlawful practice again after stopping the conduct, the offender may be sentenced to no more than three years of a fixed term of imprisonment, detention, detention convertible into a fine or detention with a fine of no more than NT$100 million imposed simultaneously.

8. Since the Shipping Act was amended on January 30, 2013, only the top three shipping companies in the world, namely, Maersk Line, Mediterranean Shipping Company and CMA CGM made inquiries with the Maritime and Port Bureau between June and July of 2014 about the application for setting up an international joint service organization (called the P3 Alliance). However, before filing the application, the

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8 Fighting ship: When a shipping conference encounters fierce competition from shipping companies outside the conference, the conference assigns a number of vessels of similar tonnage and performance to solicit cargo at lower freight rates on the same route, based on the same schedule and using the same ports as the competitors to force them to withdraw from the route as a result of failing to solicit enough cargo, lacking profit and being unable to cope with the loss.

9 Capacity control: When the member companies of a conference have excessive shipping space on a certain route and the sources of cargo are inadequate, they consult to adjust the supply of and demand for shipping space and define the maximum shipping space use ratio for each member to reduce the supply of shipping space, prevent price-cutting competition and raise freight rates.

10 Slot charter: Two or more companies operating similar lines or different lines assign shipping space through a charter contract to expand each other's service areas and promote service standards. However, each company is responsible for its own cargo solicitation and vessel operation.

11 Slot exchange: A shipping company exchanges its shipping space for the shipping space of another shipping company to increase the number of voyages, upgrade service quality, reduce operating costs, improve shipping space utilization rates, and create opportunities to provide shipping services in other countries. Each company solicits cargo and issues bills of lading on its own.

12 When a shipping company jointly operates with others as specified in Article 15 of the Regulations for Administrating Vessel Carriers through capacity control or slot charter, under the premise that related regulations have not been amended, the FTC will in principle adopt its opinion as stated in Kung-Yi-Tzu Letter No. 1001261501 dated January 2, 2012, of which the MOTC was given a copy. If capacity control and slot charter are practices permissible according to the Shipping Act and related regulations, the FTA shall not apply as prescribed in Article 46. However, practices that have not been approved are excluded.

13 According to Article 14 of the FTA, "The term "concerted action" means that competing enterprises at the same production and/or marketing stage, by means of contract, agreement or any other form of mutual understanding, jointly determine the price, quantity, technology, products, facilities, trading counterparts, or trading territory with respect to goods or services, or any other behavior that restricts each other's business activities, resulting in an impact on the market function with respect to production, trade in goods or supply and demand services."

plan was cancelled because China prohibited the organization of the P3 Alliance. In other words, no shipping companies have applied to the FTC for approval to join or set up international joint service organizations since then As for shipping alliances that have filed with Chinese Taipei for reference in the past according to the Shipping Act, whether operating under the title of "agreement" or "conference," they all emphasized that the intention was to enhance use of space and benefit one another; observance of the freight rate agreement was voluntary, not compulsory. Among the international shipping agreements that shipping companies in Chinese Taipei have joined, the most well-known is CKYHE to which Yang Ming Marine Transport Corp. and Evergreen Marine Corp. are signatories. As indicated in the statistics established by the international journal Alphaliner in July 2014, the shipping capacity of CKYHE in the Far East-Northern Europe routes accounted for 24% of the entire world, lower than the 33.2% of 2M (Maersk and MSC) but slightly higher than the 23.5% of G6 (Hapag-Lloyd, APL, MOL, HHM, NYK and OOCL).

3. Precedents of joint service organizations applying for exceptional permission for concerted actions: The AOSS applied on behalf of Yang Ming Marine Transport Corp. and 14 other businesses for permission to conduct joint shipment to import materials and equipment for government agencies and public enterprises (2005) and subsequent applications for extension of the permission (2008, 2011 and 2014).

9. As set forth in Article 9 of the Regulations for Materials and Instruments Imported by Maritime Transportation for Governmental Agencies and State-owned Enterprises, when concerted actions are involved in the shipping service provided, domestic shipping companies are required to apply to the FTC for permission in advance. Such application may be conducted by a designated agency. Therefore, the AOSS which represented Yang Ming Marine Transport Corp. and 14 other businesses, applied for permission to conduct the joint shipment of imported materials and instruments for government agencies and public enterprises. After reviewing the application, the FTC decided to approve the concerted action for three years with conditions attached. So far, the AOSS has applied for extension three times.

10. The concerted action of Yang Ming Marine Transport Corp. and 14 other businesses to conduct joint shipments to import materials and instruments for government agencies and public enterprises met the type described in Subparagraph 5, Paragraph 1 of Article 15 of the FTA. It is that "joint acts in regard to the importation of foreign goods, or services for the purpose of strengthening trade may be approved." However, as stated in Paragraph 1 of Article 15, exceptional permission may be granted only when a concerted action is "beneficial to the economy as a whole and in the public interest." After assessing the requirements in the overall economic development, the significance of establishing domestic fleets up to a certain scale in case transportation of military provisions would be needed during wartime, international economic and trade tendencies, and the vessels of any single domestically registered shipping business lacking the capacity to provide shipping service procured by government agencies and enterprises, the FTC decided that joint shipment was necessary. In addition, the FTC also took into consideration that joint shipment could enable the applicants to reduce their operating, transportation and port expenses as well as make more efficient use of their vessels to provide government agencies and enterprises with stable marine transport service. It would be beneficial to the overall economy. Moreover, the MOTC also concurred that joint shipments would help achieve the policy targets of increasing the sizes of domestically registered fleets and stabilizing commodity prices.

11. However, to avoid the creation of inappropriate restrictions to keep other domestically registered shipping companies that met the qualifications in the said regulations from joining the concerted action and also to prevent the applicants from abusing the advantages obtained with the concerted action permission to carry out unfair competition practices, the FTC therefore imposed three conditions: 1) the applicants may not refuse other domestically registered shipping companies that comply with related provisions in the Regulations for Materials and Instruments Imported by Maritime Transportation for Governmental

Agencies and State-owned Enterprises to join the concerted action;2)the applicants may not exploit the market status they obtain with the permission to obstruct fair competition from other enterprises or to engage in any market status-abusing conduct, and 3)the applicants are required to present the cargo weight ratios to the FTC for reference to facilitate the FTC's supervision of the concerted action.

4. Investigations and Market Research or Reports in Relation to the Liner Shipping Industry

12. In 2007, the Institute of Transportation of Chinese Taipei conducted its own study on strategic alliances in liner shipping and reached the following conclusions:

1. In order to stay in business, shipping companies continue to increase their global market share and expand their services for shippers. Liner shipping companies, on the other hand, acquire larger vessels to build up the scale of their operations to reduce their unit transportation cost. With limited demand for transport service in the market, liner shipping companies therefore choose to operate through strategic alliances to avoid vicious competition resulting from transport service supply being larger than demand.

2. Joint service agreements between shipping lines are by nature contracts established according to private law. Contracting parties have the liberty to decide the contents of the contract. However, the contents of a contract cannot be without standards and limitations. They are subject to imperative or prohibitive provisions and public order and morals as well as formality requirement. Slot charter and slot exchange practices do not violate the concerted action regulations in the FTA. Capacity control, however, is control of supply to stabilize freight rates and the result can be that shippers have to shoulder the negative costs derived from shipping companies' overexpansion and excessive production capacity. It is obviously in violation of the FTA.

3. Joint service agreements between shipping lines are defined as contracts established according to private law. Yet, they are in fact international contracts; therefore, the provisions therein are bound to involve the application of international maritime conventions yet the applicability of international maritime conventions in regions where the shipping routes are covered by joint service agreements is debatable.

4. How international maritime conventions can be adopted in domestic laws and enforced also involves coordination between international and domestic laws. This is another issue to be further discussion.

5. Conclusion

13. After the Shipping Act was amended in 2013, marine transport operators need the approval of the competition authority, the FTC, to join or set up international joint service organizations. The regulations are stricter than before the amendment. So far, no such applications have been filed with the FTC. Nevertheless, with the trend of international strategic alliances between liner shipping companies in recent years, Evergreen Marine Corp. of Chinese Taipei decided to change its policy of not joining any alliance and started to cooperate with. Following the aforesaid trend, competition between marine transport operators has been more and more intense and pressure from competition will eventually become overwhelming. Under such circumstances, strategic alliances, agreements and cooperation between shipping companies will grow more diverse and relations can only get tighter. Meanwhile, intervention from the competition authority will become more frequent to ascertain whether these new agreements or modes of cooperation are in compliance with competition law. Hence, the FTC does not rule out the possibility of conducting studies on the development of strategic alliances in the liner shipping industry, their modes of operation and the positive and negative effects on competition. The FTC will also review the shipping regulations and policies, the market structure, competition situation, as well as economic and social changes in order to promote competition policy at the right time. At the same time, the FTC will also take more active measures to look into competition practices in the market, including business mergers, concerted actions, participation in and establishment of international joint service organizations, and even competition issues with regard to whether the international shipping agreements filed with the MOTC for reference are likely to give rise to anti-competition effects.