出國報告(出國類別： 其他公務有關活動)

出席 2016 年 6 月經濟合作發展組織(OECD)「競爭委員會」相關會議報告

服務機關： 公平交易委員會

姓名職稱： 張宏浩　委員

杜幸峰　視察

王政傑　專員

林學良　科員

赴派國家： 法國巴黎

出國期間： 105 年 6 月 11 日至 19 日

報告日期： 105 年 8 月 29 日

目　　錄

附錄:

「競爭與管制第二工作小組」(WP2)會議議程

「合作與執法第三工作小組」(WP3)會議議程

「競爭委員會」(CC)會議議程

「法律服務業破壞性創新」我國書面報告

「結合管制中之公共利益因素考量」我國書面報告

「忠誠折扣」我國書面報告

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）及其下轄之第二工作小組(WP2)、第三工作小組(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」各項會議原每年固定在2月、6月及10月於法國巴黎OECD總部召開3次例會，但自2015年起，每年改成召開2次會議，會期固定為5日，但在第2次會議(10月或11月)則增加「全球競爭論壇」(Global Forum on Competition)，會期一樣維持為5日。本年6月會議於6月13日至17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35個會員國，包括澳大利亞、奧地 利、比利時、加拿大、捷克共和國 、丹麥、芬蘭、法國、德國、希臘、匈牙利、冰島、愛爾 蘭、義大利、日本、韓國、立陶宛、盧森堡、墨西哥、荷蘭、紐西蘭、挪威、波蘭、葡萄牙、斯洛伐克共和國、西班牙、瑞典、瑞士、土耳其、英國、美國、智利、斯洛維尼亞、以色列及愛沙尼亞。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）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、俄羅斯、南非、印尼、羅馬尼亞、哥倫比亞、馬爾他、祕魯、埃及、烏克蘭等國代表。另新加坡則第1次以專案受邀者身分參加本次會議。

本次會議共分為6月13日「競爭與管制第二工作小組(WP2)、6月14日「合作及執法第三工作小組」(WP3)，6月15-17日「競爭委員會」(CC)三場會議。本次我國出席會議人員為本會張宏浩委員、綜合規劃處杜幸峰視察、服務業競爭處林學良科員及法律事務處王政傑專員等4人。

參、6月13日「競爭與管制第二工作小組」(WP2)會議

6 月 13 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、「法律服務業破壞性創新」圓桌會議(Roundtable on "Disruptive Innovations in Legal Services"):本圓桌會議主要探討(1)法律服務市場之最新發展，(2)管制機構對最近創新之挑戰，及(3)最近競爭法主管機關之介入，及未來在法律服務市場競爭倡議機會。本議題計有包括我國在內共7個國家或組織提出書面報告，會中並邀請專家學者及業界人士分享觀察所得及實務經驗，討論重點略以：

(一) 美國Northwestern大學法律系教授John O. McGinnis報告「機器智慧與法律專業」（Machine Intelligence and the Legal Profession），略以：

1. 運算能力加速：電腦及手持機器智慧持續比以往更具威力，而摩爾定律（Moore's law）已經維持 40 年，軟體及彼此間連結度改進加速運算能力之成長，並呈指數型增長，而機器智慧已由平日一般系統與系統間之運用，逐漸推展至法律專業領域，例如：1997 年 Big Blue 擊敗世界棋王 Gary Kasparov、2011 年 Watson 擊敗益智問答冠軍 Ken Jennings、2013 年 IBM 建立「Watson 分析」部門、2016 年法律事務所雇用 Ross（以「Watson 分析」為基礎之服務）。
2. 預測程式：藉由律師訓練尋找簡單的相關文件，發現機器已經開始負責尋找其他文件，一份 2011 年研究指出，人力辨認文件相關度為 25%至 80%，而經科技輔助，上開數據上升為 67%至 86%。允許兩造使用預測程式於訴訟中之法院正增加中。相同方法亦運用於概念、前後文等資料搜尋上。目前法律事務所對於創造破壞性科技仍有難題，但目前已有「Lit i View」、「servient」、「RECOMMiND」、「equivio」及「Kroll Ontrack」等業者從事這方面業務，惟無律師參與。
3. 法律搜尋：以往運算功能應用於法律領域搜尋之歷史已有 40 年，惟僅關注於關鍵字搜尋，但今非昔比，目前已進化至語義搜尋，例如：2015 年多倫多大學學生團隊運用 IBM 的 Watson 發展「Ross 智慧」，並支援 Dentons 國際法律事務所；LexisNexis 專利搜尋功能亦包含語義搜尋選項。
4. 法律預測分析：資料探勘技術於商業上運用主要有以下面向，即強調預測、迅速分析、商業相關性結果之洞見、越來越強調便於商業人士使用，而法律事務所可運用預測分析於：鎖定有利可圖之客戶、以過往案件實績訂定服務

費、預測訴訟結果。

5. 長期結構變化：在低價值及簡單事務上，科技已逐漸取代律師，例如草擬標準法律文件、運用模型及以往資料預測案件結果；但科技不太可能取代律師於高價值及複雜事務上，在法律長篇文件領域中仍需要專家之處，而在快速變動法律領域如財經法規，律師仍不受影響。機器無法取代訴訟律師，但在預測分析上，將有助於縮減不必要訴訟，減少爭訟需求，以及使客戶採取合理措施。
6. 擁抱科技：與其嘗試減緩科技運算之發展，律師界應鬆綁倫理規範，允許非律師人士擁有法律事務所，如英國及澳洲即為適例，而唯有事務所具備充分資本始有可能創新。

(二) 美國North Carolina大學法律系教授，美國白宮總統特別助理及資深法律顧問Dana Remus女士就此議題分享觀察心得，略以：

1. 在企業領域，科技發展及其採用對客戶影響是直接的，尤其是訴求減少法律服務費用之客戶，對於提供新方法之供應商亦復如此。而在個人服務領域，科技發展對於預見潛在商機企業家，影響亦為直接，尤其在對中低收入消費者行銷其商品，有效減少成本，以及取得更多接近律師之機會。
2. 理解此二領域發展是重要的，但對於此二領域間關係之認識亦復重要。由於企業及個人服務領域間頻繁互動，在一領域採用科技也許對其他領域將帶來重大影響。舉例而言，倘企業客戶慣於使用對其有利之法律科技（如預測程式或司法預測軟體），但一般個人客戶卻無法使用，企業客戶將在任何法律互動或案件上取得優勢，進一步保有既存財富及權力。同樣地，倘個人客戶只能使用線上法律服務而無法聘請律師，將導致其與已具備律師及法律科技服務之企業客戶間互動時之系統性弱勢。電腦無法處理概念或學說，亦無法處理在法規上長篇法律辯論，而至少到目前為止，創造力仍是人類專屬領域。

(三) 英國法律服務委員會（Legal Services Board，LSB）策略長 Caroline Wallace 女士報告「英格蘭及威爾斯法律服務之管制及創新」（Regulation and innovation in legal services in England and Wales），略以：

1. 英國 2007 年通過實施之「法律服務法」(Legal Services Act)係由英國公平交易局(OFT)的 2001 年「專門職業服務競爭報告」(Competition in Professions)、2004 年 Clementi Review 及 2006 年「消費者優先」(Putting Consumer First)運動所

推生，在此法架構下，為避免專門職業團體同時代表其所管理之個人或單位，恐有利益衝突，故區隔管制機構之監督及代表權能，而該管制機構即此法所設立之「法律服務委員會」（LSB），並降低法律服務市場進入門檻，採用「替代性商業結構」（Alternative Business Structures，ABS），即律師及其他法律服務人士取得該會許可後，可成立公司提供多元服務，此舉使得未取得律師資格者亦可擔任管理者。

2. LSB 管制之目標在於：保護及促進公共利益及消費者利益；維護法規遵守憲法原則、改善司法可接近性；促進提供服務者間競爭；鼓勵獨立、強而有力、多元及有效率之法律專業服務；增加大眾了解公民法律權利及義務；促進及維持忠於專業原則。
3. 法律服務業目前在英國市場產值幾為 1997 年之 2 倍。據統計目前約有 10,000 家傳統法律事務所，ABS 數量則過 500 家。依 2015 年 10 月統計，ABS 雖僅佔所有法律服務業廠商 3%，但其營業額佔整體 11%以上，而支付給未管制服務項目之金額則僅為市場價值之 5%。
4. 據調查，在英國 18%的個人在遇到法律議題時會毫無作為，絕大多數原因認為無法解決，但也可能因為預期或懼於高額費用而打消念頭，46%法律紛爭為獨自或與親友共同解決。87%中小企業認為律師提供之服務與所收取服務費用顯不相當，但其中 54%中小企業認同法律在從事商業活動上之重要性，中小企業潛在未滿足法律服務之需求價值超過 90 億英鎊，約占現有法律服務市場市值 30%。
5. ABS 研究發現，維持消費者保護功能，ABS 在第一線處理投訴具較佳處理結果，且不會提供較低品質或較低標準之服務；且法律服業競爭範圍更擴大，因 ABS 更具生產力，並且具備多元商業模式。13%至 15%之 ABS 較其他類型律師事務所更有可能引進創新法律服務模式，但未受管制之事務所較其他類型事務所更具創新。立法及管制變遷是創新原動力，亦為創新最大障礙。
6. 依照 LSB 即將公布之市場評估報告，LSA 對法律服務業競爭發展有正向之影響，但其對消費者結果則正緩慢逐漸呈現。採取法律行動的消費者比例不變，但愈來愈多的消費者開始自行採取行動而非尋求法律意見；雖然法律服務業正面巨大變動及改革，但其品質普遍而言大部分都正在提升中。
7. 對於某些律師及其管制者間之獨立性尚不足問題，我們正待政府諮詢；而固定表列保留活動及依主題整體管制的規定，可能導致過度管制或管制不足，

且消費者會因錯誤預期其受管制而使用未受管制服務，並造成提供相同服務的受管制與未受管制服務提供者在競爭平台上之不均衡態勢。

(四) 「火箭律師（RocketLawyer）」公司 創辦人兼執行長 Charley Moore 先生分享該公司創新服務，略以：

1. 該公司成立於美國舊金山，而歐洲營運基地設於英國倫敦，並獲得 Google Ventures、Morgan Stanley 及 August Capital 等創投事業投資。
2. 該公司觀察到，在這世上有錢人及資力雄厚組織往往雇用所費不貲律師，但窮人通常只能尋求援助，有超過 10 億中產階級家庭成員及小型事業無法取得其所需之法律協助，而有 56%遲於尋求法律服務或嘗試自行解決，之所以如此，其中 38%囿於費用、35%覺得法律太複雜、10%不知可找何人協助。
3. 有鑑於此，該公司即致力於使法律服務費用可負擔及簡易，其具專利之線上系統已提供上百萬組織及個人法律服務。且該公司法律文件及諮詢平台有效降低大部分個人及組織尋求實現法律正義之成本。法律文件平台即由會員建立、簽署及分享如同填寫問卷般之法律文件，而由律師從旁協助解釋，並具備一定防護機制保護客戶法律文件；法律諮詢平台則由律師線上即時回答會員任何法律爭議問題並提供意見。

(五) 芬蘭：該國法律服務市場商業模式及服務保守，但無論如何，新型態法律及科技事務所已提供某些有趣服務。法律服務外包尚未普遍，但或許會成為未來趨勢。數位化亦持續於公部門推行並影響律師工作。迄今，該國規範尚未對法律服務市場創新造成阻礙，而法律服務市場可能變化有：新破壞性創新於未來推行是可預期的，立法者應考量何種立法更適於機器智慧之闡釋，而為了啟動更多創新，法律服務科技之應用應帶入教育之中。

(六) 法國：

1. 破壞性創新在通訊科技之運用，已展現在該國法律專業人士所提供服務之上，並有以下兩種類型：法律專業人士已經開始使用能促進其服務觸角更廣之新工具；同時亦面臨市場新參進者運用真正破壞性創新服務，打破其傳統運作模式，有時候因此會與所適用規範架構有所牴觸。在此情況下，對現行規範架構造成某種壓力，因而改革呼籲之聲漸起。
2. 該國管制機構 2015 年 1 月應政府要求提供建議，檢視對於法律專業人士規範之競爭影響，範圍包括服務費用、交易條件及其運作方式。上述分析完成後，

該機構提出 80 項訴求，其中包含費率管制基礎應依據成本及所謂合理報酬而訂，並建立執業自由之管制原則

3. 前揭該國管制機構之建議，有助於政府釐清爭議所在，並成為政府 2015 年 8 月因應成長、商業及機會平等法案（又稱「Macron 法」）之基礎，該法打算鬆綁數位經濟部門之商業活動，並於法律專業服務領域推行數項改革。法警及合格律師司法管轄權之擴大，有助於實現該國管制機構建立分區自由管制，此外引進執業年齡限制，及以有關個人服務之成本、勞動合理報酬及投入資本為基礎計算之費率結構，同時結合折扣靈活運用，將使得跨領域專業服務更具彈性。以上措施都可能允許適用於較為顯著競爭之受管制法律專業服務領域。

(七) 英國：

1. 英國競爭及市場管理局（Competition and Markets Authority，CMA）現正進行英格蘭及威爾斯地區法律服務市場研究，期中研究報告預計於 2016 年 7 月出版，而最終報告將於 2016 年 12 月出爐。該研究報告有助於其論述市場概況，該研究報告主要專注於個人或小型企業法律相關服務市場之領域，並詳述該國法律服務具體管制架構。
2. 證據顯示，法律行業相較其他行業而言，可能少有創新作為，又雖見該行業已有一系列正在發生的創新服務，但這些創新服務採納程度對法律服務提供者及消費者有限。創新程度似取決於性質較不複雜、更商業化或數量較大及更為競爭之法律服務。
3. 事實上，最大創新障礙因素，其認為倘消費者無法做出明智購買決策，從而推動效能競爭，法律服務提供者可能無強烈誘因進行創新。而若創新服務超越保護消費者所需，創新亦可能因管制而受影響，同時導致既有或新參進者創新市場能力受限。

(八) 美國：

1. 該國管制機構相信，在提供法律相關服務上，消費者普遍可從律師之間及律師與非律師間競爭中獲得利益。因此該機構建議消費者除非清楚明白該領域法律訓練為必須，否則應盡可能從律師與非律師間選擇，然而，該機構亦體認到證照需求及執業範圍政策對於有效保護消費者是合理的。
2. 該國管制機構一般建議法律服務規範架構，除非為了達到促進競爭及消費者

利益之必要，例如保護公眾免於重大損害，否則應允許創新競爭模式引進市場。

3. 有關法律服務新產品及服務之管制，應主要側重於防止不公平或欺騙性廣告及行銷，並加強解決其他消費者保護議題，例如隱私、資料安全或身份盜用等。該機構通常建議任何倘縮減對於法律服務之管制，將使消費者獲得法律服務市場破壞性創新所帶來好處。

(九) 保加利亞：

1. 該國法律專業服務廣泛受國家法律高密度管制其進入門檻、報酬，並禁止刊登廣告。即便如此，該國律師仍試圖尋求提供法律服務新途徑，並引進新科技以迎合其客戶之需求，而實務上已有為數眾多法律事務所提供線上服務，藉此提供實用資訊、諮詢、代擬廣泛法律文件及線上調解。
2. 該國現有線上法律服務平台，仍罕有提供該國法律事務所排名及評論，其並不提供律師經手案件及財務情形之資訊，此情形可能是因該國律師法對於刊登廣告禁令。而該國競爭保護委員會（Commission on Protection of Competition，CPC）第 353/2005 號決定已要求刪除該禁止廣告規定，以利於消費者取得相關資訊。
3. 由於該國公證程序性質上須公證人與其客戶面對面完成，因此若欲以線上完成公證程序，在該國仍相當受限。一般而言，公證人會在公證程序各階段、文件範例及公證費計算單據上附註其網址資訊。
4. 該國部分法律規定，有關法律服務管制規定須符合競爭保護委員會（CPC）競爭法規之評估。該會第 236/23.10.2006 號決定即評價該國「公證人及公證執業法」對於公證人之數量管制是否合理，該會亦採納有關於律師法修正草案中僅能由律師提供未盡臚列服務清單(non-exhaustive list of services）之要求。

(十) 主席針對我國所提報告內容提問，有關報告中所提案例「法易通案」公平會決議遭行政院訴願會駁回，本會是否曾上訴至法院?如未上訴，其因為何?本會代表答以，該案係 2015 年修法以前之決議，本會當時仍屬行政院下屬單位，所有決議仍應先由行政院訴願委員會審議，而該案為訴願委員會駁回，依法不得上訴至行政法院。

(十一) 工商諮詢委員會（BIAC）：

1. BIAC 指出，大型企業法律服務需求可與個人及中小企業之需求有所區別，蓋

大型企業往往聘有自己法律顧問，而該法律顧問具備所有有助於提供法律服務所需之資訊，但對於個人及中小企業而言，評價法律服務品質是困難的，有鑑於此，始有如最低教育程度等法律管制，以保護消費者。另一個特別關於個人及中小企業之議題，即法律服務費用成為接近法律服務之障礙，而近年來已有新型態法律服務商業模式出現，以解決前述障礙。

2. BIAC 舉例英國「lexoo.co.uk」線上平台提供由律師預先報價篩選服務，此服務滿足小型企業之需求，並使合適勝任律師提供遠距服務。該平台雖非法律事務所，本身亦未提供法律服務，但至少對小型企業而言，其確實提高法律服務可近性及可負擔性。
3. BIAC 另指出，雖然某些對於法律服務市場之管制是合理的，但亦代表對競爭不合理之限制，例如費用固定（消除或嚴重減少競爭帶來之利益）、建議費用（有助協調服務供應者間之競爭）、廣告限制、進入門檻、保留追訴權利、管制商業架構及限制跨領域實務作業（例如整合會計及法律事務所）。是以，BIAC 認為管制時應考量對於創新之阻礙效果。
4. BIAC 最後指出，儘管初期受到一些阻礙，但現在已普遍接受專門職業團體應受到競爭法規範，並指出於歐洲常使用 Wouters decision 評估限制對於競爭之影響，即：(1)審視管制專門職業服務之目標；(2)反競爭效果是否為追求公共利益所必須；(3) 反競爭效果是否逾越為確保提供合適專門服務之必要。而 BIAC 觀察到隨著時間推移，許多競爭主管機關已開始調查專門職業團體對於法律行業之監督管理措施，例如最低收費制及禁止廣告行為。

二、「強化政府採購之競爭：協助確保政府採購程序維持競爭之指導原則」(Enhancing competition in public procurement: Guidelines to help ensuring that the public procurement process remains competitive)」：

(一) 由OECD秘書處競爭組報告競爭委員會所草擬「對政府採購官員之指導原則」(Guidance for Procurement Officials)，該原則將納入「治理及領土發展總署採購處」(Procurement Division of the Directorate for Governance and Territorial Development, GOV/PSI) 所編之「政府採購工具書」(Procurement Toolbox)。競爭委員會所提之指導原則目前所涵蓋範圍為「異常低價搶標」(Abnormally low tenders, ALTs)、重新議價及得標後分割契約轉包。秘書處請會員就草案內容提出評論。

(二) 歐盟代表建議就指導原則內所提特別競爭問題應提供答案，俾利有效運用，並建議加入國家補助(state aid)。惟秘書處回以文件可能太長，且大部分問題採購官員都已瞭解，主席亦表示，不是所有國家競爭法主管機關都有規範國家補助議題，不過可針對歐盟國家補助規範內容加入指引內容。

(三) 美國代表提問此一文件是否有在OECD其他委員會討論，例如政府採購委員會或貿易委員會。因為其中把標案契約分割以避開門檻規定之問題亦涉及貿易暨關稅總協定(GATT)規定。

(四) 澳大利亞代表表示，並非所有採購官員都瞭解競爭或對競爭有興趣，因此他們需要有指導原則以確保如何維持採購過程保持競爭。挪威代表指出，指導原則中未提及如何處理不同廠商共享同一分標案(相互分包標案，mutual sub-contract bidding)行為之方法。

(五) GOV/PSI處長Janos Bertok報告「支持2015年OECD公共採購建議之施行（Supporting the implementation of the 2015 OECD Recommendation on Public Procurement）」，提出該建議所採行新方法之策略諸如效用、政策目標、競爭、效率、數位化及職業化，以及12項原則：透明性、公正性、管道流暢、衡平性、參與性、效率、電子化採購、容量、評估、風險管理、問責性及整合性。其目的是為確保在該場域中，增加潛在供應商對於政府採購契約之管道，而在整合性市場之跨境採購上，目前中小企業在政府採購契約所占比例甚寡。另指出公共採購之風險及挑戰包括：競爭性招標之例外使用，從而限制競爭並損害採購行政效率；複雜之公共採購規則以及使用非標準化之招標文件，阻礙潛在競爭者（含新參進者及中小企業）之廣泛參與；中小企業參與公共採購流程所面臨之阻礙（如法規負擔、財務拮据、缺乏技術專長及索賄）。他表示，GOV/PSI正施行「2005年OECD政府採購建議書」，新的「政府採購工具書」將會是下一步，並更新及包括更廣泛內容，而競爭指導原則配合此一工具書之修正，工具書將在2016年年底完成。

(六) 主席決議，請秘書處依會員所提意見修正後，於下次會議(11月28日)再提出供會員討論後決定。

三、競爭評估－實施之挑戰(Competition Assessment: The implementation challenge): 秘書處報告羅馬尼亞今年6月剛完成之競爭評估計畫，該計畫共提出152項對管制

改革之建議。羅馬尼亞國務卿兼首相辦公室大臣Radu Puchiu先生報告該計畫，略以:

(一) 該計畫係對食品、貨運及建築等3產業進行獨立且徹底之政策評估。此計畫是由羅馬尼亞競爭委員會(RCC)、羅國政府及OECD自2014年年中開始合作進行，如果成功，羅國將會對其他產業繼續進行評估。

(二) 對貨運產業，OECD建議在海運方面成立獨立管制機關，對食品業則建議廢除重複之法律條款及法律障礙，建築業方面OECD建議應有明確之指導原則及定義(如避免公協會在決策過程中、檢查業務中或管制機關中利益衝突之角色)。

(三) 羅馬尼亞對於OECD的152項建議已納入國家改革計畫，並分3階段施行策略，RCC及首相辦公室積極參與此施行計畫。

四、墨西哥市場檢視手冊(Mexico's Market Examinations Manual):

(一) 秘書處報告墨西哥因OECD秘書處2016年出版之「墨西哥市場檢視手冊」(Market Examination in Mexico: A Manual)所推動之競爭法環境最新改變。該手冊是為使經濟部與其他部級單位在遇到市場運作疑似有問題時可以使用。手冊中所列之方法旨在協助政府對市場能進行詳細評估以準備合理之基礎，俾利競爭法主管機關可展開調查或進行市場研究。

(二) 墨國經濟部次長Rocio Ruiz Chavez女士解釋市場檢視之價值及墨國政府現在對競爭法主管機關提出申訴之角色。C次長指出，墨國現在正對多個不同市場進行檢視，她也說明加強競爭之策略，包括確保管制機關在競爭之中立性、確認高衝擊市場、偵測市場進入障礙及造福消費者。

(三) 墨西哥聯邦經濟競爭委員會(COFECE)說明市場檢視在於競爭法主管機關分析之角色及COFECE在進行深入市場調查時之角色。

五、2016年4月19日OECD第2次事後評估研討會結果報告:WP2主席報告本次研討會共有45位代表親自參與，並有40位代表透過網路Webex參加。各國代表皆表達應繼續舉辦此一研討會。主席決議將於本年11月會議中討論是否有新的資料可供明年4月再舉辦一次研討會。

六、未來討論題目:下次會議(11月28日)將討論運輸之破壞性創新，另有代表建議明

(2017)年6月會議討論鐵路及電力產業創新。

肆、6月14日上午秘書處工作會議

一、6月14日上午9時至10時，OECD秘書處召開各國國際事務官員工作會議，會議由秘書處競爭組組長John Daives主持，各國僅限由1位表參加，我國由本會杜幸峰視察代表參加。會議主要討論競爭委員會及相關會議本次會議型態變革，如先由秘書處提出背景文件及就各國所提交書面報告先整理出摘要等及是否於2次會議間舉行電話會議或電話研討會等，各國之意見。

二、各國對於秘書處先提出背景文件供各國代表參考及會前先整理各國報告摘要皆表贊同，惟部分會員表示，因2015年後會議次數由每年3次改變成2次，會議時間雖增加為5天，但討論時間明顯被壓縮，再加上專家發言有時明顯過長，會員國發言有時僅有不到5分鐘的時間，會影響討論效率。

三、2次會議間舉辦電話會議建議雖有部分國家贊同，但秘書處認為電話會議效果可相當於舉行第三次會議，但其互動性不如現場會議，且考量時差問題，部分會員國家(如紐西蘭、澳洲或部分亞洲及中南美洲國家)參加不易，故目前仍不考慮。

四、秘書處競爭組組長John Davies先生因將於本次會議後離開OECD任職私人公司，各國會員亦於會中感謝其過去5年多帶領秘書團隊對會員所提供之服務。

伍、合作與執法第三工作小組(WP3)與國際商業交易賄賂工作小組(WGB)聯席會議

一、6 月 14 日上午舉行「合作及執法第三工作小組」(Working Party No. 3 on Co-operation and Enforcement, WP3)與「國際商業交易賄賂工作小組」(Working Group on Bribery in International Business Transactions, WGB)聯席會議，會議由 WGB 主席 Drago Kos 主持：

(一) 美國聯邦調查局國際貪腐組特別監督幹員 Denise Biehn 女士報告 FBI 對於政府採購及政府採購人員貪腐行為之偵測及調查偵辦。OECD 秘書處亦以「提供吹哨者有效之保護」(Committing to Effective Whistleblower Protection)報告各國對於政府部門貪腐檢舉者之保護政策，其中 OECD 會員國中有提供暱名檢舉政策者有澳大利亞 、澳地利、德國、希臘、匈牙利、日本、墨西哥、荷蘭、紐西蘭、葡萄牙、斯洛代克、斯洛維尼亞、瑞士、土耳其、英國及美國等 14 個國

家。

(二) 促進競爭與打擊貪腐之連結係自 2014 年全球競爭論壇開始討論，在該次會議中 WP3 主席及 WGB 主席同意競爭委員會及反貪腐工作小組應共同合作。本次會議即依該會議結論共同召開，提供兩個委員會間之成員分享經驗及討論執法方法之異同，及加強合作之方法。

(三) 本議題共有 19 個會員國提交書面報告，討論題目包括偵測(包含寬恕政策及檢舉者保護計畫)、調查及決議/反托拉斯及賄賂案之和解方法。會員代表亦討論有關交換資訊(尤其是機密資訊)之挑戰、競爭法主管機關與反貪腐機關間之證據分享、競爭法主管機關與反貪腐機關間合作之基礎(如簽定合作備忘錄，MoUs)及電子資料(如政府採購電子資料)的重要性與發掘電子資料的方法。

(四) 會員們同意競爭法主管機關及反貪腐機關間 3 階段互動: (1)倡議及提升警覺，包括合作訓練，使兩機人員間瞭解相互職權及調查使命；(2)機關間依信任承度所進行之非正式合作；(3)依法令或瞭解備忘錄(MoUs)中所定條文所進行兩機關間之正式合作。

(五) 會員也建議秘書處再草擬未來之合作範圍報告，並至少再進行一次聯席會議，討論兩機關間在執法機密資訊之交換，或在法庭用使用彼此之證據之做法。

陸、合作與執法第三工作小組(WP3)

一、「結合管制中之公共利益因素考量」圓桌會議(Roundtable on Public Interest Considerations in Merger Control)：

(一) 本議題主要討論各國競爭法主管機關應如何考量結合管制中的公共利益？由於公共利益與競爭因素在目標上並非一致，因此如何衡量兩者即成為非常困難的問題。本圓桌會議試著探討各國結合管制規則中有關公共利益的考量因素如何適用及相關的爭議，而此範圍亦包括效率與垂危事業抗辯所涉及的公共利益。本議題計有澳洲、美國、英國、歐盟、加拿大、德國、日本、韓國及我國等 18 個國家提出書面報告。

(二) 秘書處報告：由 OECD 經濟組競爭專家 Aranka Nagy 撰寫秘書處參考資料，其報告略以：

1. 在所有 OECD 成員國中，雖然效率為其競爭法及競爭政策的核心，但仍有部

分國家將其審查目標延伸考量「公共利益」因素。且由於結合管制很可能造成政治及經濟上的影響，所以如此的考量因素將更為普遍。結合審查對於公共利益之考量，在不同國家有不同的標準，各有不同的定義與內容，並以不同的形式存在，其中一種方式為直接將公共利益考量因素放入結合審查的評估標準中。另外在執行公共利益條款的制度設計上，可區分為單一權責模式與雙重權責模式。

2. OECD 成員國對於公共利益的解讀較為狹小，並僅將其適用在特殊例外的情況，然而非 OECD 成員國則經常地使用公共利益條款。由於競爭性因素與公共利益因素並不必然導致相同的影響結果，因此競爭法主管機關可能於實務上面對衡量的兩難。

(三) 由南非競爭上訴法院(Competition Appeal Court)Dennis DAVIS 法官報告，內容略以：

1. 由南非近年涉及公共利益的結合案例談起，南非競爭委員會已於 2016 年 6 月公布「在結合管制中對於公共利益因素評估之指導原則」(Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No.89 of 1998)，在此指導原則中，當處理可能影響國家的結合案件時，南非競爭委員會有權可針對非競爭因素進行評估，包括對於參與結合事業員工的影響、由弱勢者所擁有的小型企業、屬南非的工業與製造者。
2. 另外，南非競爭委員會亦制定一般審酌公共利益的 5 項步驟：(1)確認影響公共利益可能的效果；(2)確認所謂的影響效果是否具有結合特定；(3)確認可能的效果是否具實質影響；(4)考量參與結合者對於影響效果是否具有正當理由；(5)考量對於可能產生限制競爭之影響附加矯正措施。

(四) 由 Freshfields Bruckhaus Deringer 律師事務所合夥人 John Davies 以實務經驗的角度進行報告，內容略以：

1. 以澳洲、中國大陸、厄瓜多、南非及美國為例，說明公共利益標準與結合案件的關聯性及在公共利益架構下可能產生的挑戰：

(1)澳洲：依據 1975 年外國取得及併購法，澳洲財政部(Treasurer)有權以該外國投資案違反國家利益而禁止結合，相關考量因素如國家安全、政府政策（稅捐、經濟、環境等）及投資者的性質。

(2)中國大陸：2008 年反壟斷法第 1 條揭示「維護消費者利益和社會公共利益」、

「促進社會主義市場經濟健康發展」等目標，第 31 條亦使商務部可對於有關外資參與結合涉及國家安全者，進行國家安全審查。

(3)南非：1998 年 CA 要求競爭主管機關對於結合案件影響公共利益進行審查，包括國家產業在國際市場上的競爭能力。2016 年 6 月指導原則發布，對於評估公共利益有 5 項步 驟。在 Wal-Mart/Massmart 案中，儘管沒有競爭疑慮，仍使參與事業 2 年內禁止裁員，以避免產生過度裁員的隱憂，並要求設立發展基金以對於影響國內生產表達關注。另在 Afgri/AgriGroupe 案中，競爭委員會最初認為無公共利益或競爭疑慮兒同意結合案件，4 個政府機關持續認為在公共利益方面有疑慮，並直接與參與事業達成共識，嗣後競爭法庭(Tribunal)修正原結合決定，並將達成共識之條件放入結合決定中。

(4)美國：在 Exon-Florio 條款下，總統有權可因「有相當證據顯示該外國利益的控制將威脅並損害國家安全」之情況，禁止該外資併購案。如 Shuanghui International Holding/Smithfield Foods 案。

2. 因結合活動所可能產生之利益如管理創新的機會、拯救垂危事業、將衰退部門的產能移至成長部門、提升效率、生產力及技術創新；而因結合活動所相關聯之公共利益如對競爭的影響、對國家安全的衝擊、對於事業在國際策略重要性的影響、對於技術能力、就業及出口的衝擊。由於公共利益的目標太廣、適用上無法預測、容易受政治力量影響，因此，在公共利益考量下所面臨的挑戰為缺乏明確及可預測性的法律、結合案件的複雜程度及結合特定性等問題，差異性極大的法規將產生程序及重大的複雜程度，在些許的結合案中可能產生重要的差異，再者，競爭疑慮及矯正措施可能與結合特定所生的議題無關，相關矯正措施可能產生不協調或衝突的情況。

3. 在歐盟競爭法制下，當結合案件符合歐盟結合管制規則對於管轄權的規定，歐盟執委會即對於該結合案具有管 轄權限，並僅會於其審查中考量競爭因素，然而，在歐盟結合管制規則第 21 條第 4 款規定下，會員國仍可採取適當措施保護結合管制規則未考量之其他法定利益，如公共安全、媒體多元性及謹慎規則，歐盟執委會在 25 日內可評估會員國所採取的措施是否與一般法律原則及歐盟法其他條款相容。歐盟此一機制下的好處在於可產生法律確定性，並降低複雜程度，歐盟執委會的審查僅針對競爭利益進行考量，對於會員國而言，結合管制規則僅提供有限的途徑在公共利益基礎上進行干預。

(五) 美國：

1. 反托拉斯機關在法定的標準下審查結合案，多著重於競爭性的結果，並不考慮公共利益以外的因素，並確信執法決定應植基於因結合所產生之競爭性效果及消費者利益。
2. 反托拉斯機關的行動並不受制於任何其他間機關、政府機構或法院對於一般公共利益的審查標準，然而，特定的結合案件仍會由考量公共利益或國家安全立場的產業主管機關進行審查。

(六) 歐盟：

1. 根據歐盟結合規則，歐盟對於結合審查所作之評估並未考量競爭政策以外的公共利益。然而，依歐盟結合規則第 21 條規定，各會員國仍可在嚴格條件下採取適當措施保護該規則未考量到的、與歐盟法律一般原則和其他條款相容的合法利益，如公共安全、媒體多元性及謹慎規則；另外，相關會員國應向執委會說明其他公共利益，在執委會對該公共利益與歐盟法律一般原則和其他條款是否相容進行評估並予以認可前，會員國不得採取前述措施。
2. 依據歐盟運作條約第 258 條規定，歐盟執委會有權針對會員國違反歐盟結合規則第 21 條所採取的措施進行調查。實務上，歐盟執委會可發布有關會員國採取措施是否具合法性的決定，有必要時，可要求會員國撤銷所採取的措施。

(七) 德國：

1. 德國將競爭性與非競爭性方面的考量因素獨立於兩階段的結合審查程序，聯邦卡特爾署僅針對競爭性方面的因素進行結合審查，德國限制競爭防止法中規定「部長許可」制度，意即對於經聯邦卡特爾署禁止之結合案件，倘在個案中限制競爭將由結合所生之整體經濟利益所超越，或結合可透過公共利益加以正當化者，結合事業可向聯邦經濟暨能源部長提出申請許可。
2. 由於該制度的審查標準較高，自從 1973 年訂定「部長許可」制度以來，有 22 家事業申請，相對於約 45,000 件一般結合申報案件及其中約 200 件禁止案而言，部長許可的結合案件僅屬少數例外，此類結合案件除完全許可外，仍有一些案件是部分許可或附加條件許可。

(八) 日本：

1. 獨占禁止法禁止任何會實質影響競爭的結合案件，公共利益考量因素並非違法結合的構成要件，而且，結合審查的指導原則中對於市場界定及競爭分析的考量因素亦無有關公共利益的相關因素。

2. 此外，在結合審查決定的過程中，日本公正取引委員會亦無義務向其他行政機關商議，且其他行政機關亦無權撤銷日本公正取引委員會的決定。

(九) 韓國：

1. 韓國公平交易委員會審查結合案件的限制競爭時，公共利益並非考量因素。依韓國獨占管制與公平交易法第 7 條第 2 項規定，結合審查基準為結合案件是否實質限制相關市場之競爭、是否發生效率增進效果及參與結合企業是否無重整更生之可能。
2. 另外，根據韓國企業結合審查基準，在判斷對於國民全體經濟效率增進效果之基準方面，應考量下列事項判斷之：(1)是否顯然有助於增進雇用；(2)是否顯然有助於地方經濟發展；(3)是否顯然有助於上下游相關產業之發展；(4)是否顯然有助於能源之安定供給等有關國民經濟生活安定之事項；(5)是否顯然有助於改善環境污染。在判斷公司有無重整更生可能之基準方面，應考量下列事項判斷之：(1)公司資產負債表上之資本總額是否已相當期間低於實收資本；(2)公司支付之利息是否已相當期間高於營業收益，且該期間之經常損益記錄為赤字；(3)是否已開始更生程序或依申請破產；(4)持有該公司債權之金融機關，是否已開始管理該公司之不良債權。
3. 韓國公平交易委員會與其他產業（如金融、通訊）主管機關在權限上分工，產業主管機關有義務向韓國公平交易委員會交換意見，該機關除了考量韓國公平交易委員會所提出之限制競爭疑慮外，亦會考量公共利益因素。

(十) 南非：

1. 南非競爭法第 12A(3)條規定指出，當決定結合案件是否可被以公共利益審視時，競爭委員會應考量結合案件對於下列項目的影響：(1)特定產業部門或區域；(2)就業；(3)由弱勢人士控制或擁有的小型事業成為有競爭性的能力；(4)國家產業面對國際市場的競爭能力。
2. 在 2002 年至 2016 年間，結合案件共有 4,529 件，其中 247 件為附有條件的結合案件，134 件有特別考量公共利益因素。主要對於公共利益考量的關鍵案件為 Walmart/Massmart 案，Kansai/Freeworld 案，Media24/Natal Witness 案。另外，競爭委員會對於公共利益的考量因素主要規定於「在結合管制中對於公共利益因素評估之指導原則」，此指導原則於 2015 年發布初稿，並於 2016 年採用。

(十一)　BIAC：

1. 結合審查應關注競爭性定價、動態及靜態效率及創新等核心的競爭法原則。由於加強事業的財務及市場地位有助於提升長期的工作保障及生產力，因此，在前述原則下的結合審查一般來說可促進公共利益的考量。
2. 根據 BIAC 的研究，將公共利益考量放入結合審查中並不具必要性且可能造成不良的後果。以下為結合審查中考量公共利益因素的幾項不利之處：(1)不具預測性及確定性；(2)提高競爭主管機關受政治壓力的影響，而偏離結合特定的分析；(3)有助於效率的結合案因公共利益因素而被禁止。
3. 倘將公共利益因素獨立地從核心競爭分析中進行考量，BIAC 建議以明確的公共利益因素進行考量，且須作為次要的結合審查考量因素。倘結合審查中仍須考量公共利益，BIAC 認為此應由其他機關進行，並維持透明及具可預測性的原則，盡可能地不受政治干預。

(十二)　主席對我國所提交書面報告提出問題，有關 TDCC/TISSC 結合案，在考量整體經濟利益的因素上，請本會提出更詳盡的說明。本會代表以簡報說明：

1. 本會先說明公平交易法對於事業結合之審查標準，在於衡量事業結合的「整體經濟利益」與「限制競爭之不利益」，倘限制競爭之不利益大於整體經濟利益，本會將禁止該結合案件。「限制競爭之不利益」著重於事業結合所產生的潛在價格效果，包括單方效果與共同效果；「整體經濟利益」則考量經濟效率、消費者利益、參與結合事業原處於交易弱勢之一方、參與結合事業之一屬於垂危事業或其他有關整體經濟利益之具體成效等相關因素。
2. 有關臺灣集中保管結算所股份有限公司(TDCC)與臺灣總合股務資料處理股份有限公司(TISSC)結合申報案，本會簡要說明該案件所涉及之股東會電子投票平台服務市場的結構、特性與競爭情形。由於此二事業之市場占有率分別為 92%及 8%，倘本會不禁止結合，在此股東會電子投票平台服務市場中將產生一家獨大的廠商，因此是會產生限制競爭疑慮的。本案審議過程中考量該產業具有規模經濟特性，且因市場需求取決於金融監督管理委員會所訂定適用電子投票之範圍，市場規模有限，由一家業者提供服務係最符合經濟效率。再者，本結合亦可提供發行公司、投資人更具安全性及便利性的電子投票平台服務，對於產業發展具有正面效益。另金融監督管理委員會認為本結合有助於金融監理政策目標之實現，同時並對此設有適當的價格監督機制，可避免超額定價等反競爭疑慮。因此，綜合評估本結合之整體經濟利益大於限制

競爭之不利益，故本會決議不禁止其結合。

二、由美國律師協會(American Bar Association)反托拉斯小組(Antitrust Section)主席 Roxann E. Henry 女士進行「對於外商投資審查之專家小組報告」 (Report of the Antitrust Section Task Force on Foreign Investment Review) 簡報：

(一) 全球許多國家有明確的外商投資制度，有些具有產業特定性，有些則屬一般適用性，必然依賴在公共利益因素上，遠超過考量提升競爭的因素。此報告所關注的議題為近期跨境的企業併購案件，在外資審查的基礎上遭到延遲或禁止，並描述許多國家對於結合審查及准駁程序，指出不同管轄領域的競爭法主管機關在執法上的相似與相異處，並提供若干建議。

(二) 有關驅動外資審查的考量因素中所增加的國家安全考量因素，如美國外商投資委員會(CFIUS)審查中國大陸企業收購美國豬肉加工業者 Smithfield Foods 公司及收購位於美國海軍基地附近的風力發電廠案例。事實上，外資已成為優先考量的議題，並成為吸引政治活動的目光。

(三) 因此，即使在同一個管轄領域，針對同一件結合案件，不同的審查機關會有不同的審查期間及程序，包括申報義務、等待期間、交易暫停義務、保密規定及救濟權利。實質上，不同審查機關因適用不同的法規測試，可能使同一件結合案件有不同的審查結果，尤其是競爭評估與外資審查的案例。倘結合案件涉及敏感的經濟產業，在反托拉斯基礎審查上通過的案件則可能遭到禁止，產生疑慮相關產業如航空、核能、國防、土地所有權等涉及安全或文化因素。

(四) 此報告提出幾點建議如下：

1. 審查機關應給予明確的審查時間表：審查機關對於審查時間應更為透明，如果缺乏透明性，參與結合事業將難以預測審查機關完成審查程序的所需時間，並難以達成其他管轄領域審查機關的一致性。
2. 各審查機關之間應有溝通管道：不同管轄領域的審查機關應在保密義務下，對於外資審查方面建立溝通管道。
3. 審查機關應制定實質的審查標準：審查機關應對於案件所適用的審查標準更為透明，並應制定審查指導原則，並確保案件適用上有遵循指導原則。無論評估是由同一管轄領域內的同一機關或不同機關進行，該結合案件對競爭的影響與對國家利益的影響應分別進行。

三、6 月 15 日上午舉行「結合管制架構下之管轄權關聯性」圓桌會議(Roundtable on Jurisdictional Nexus In Merger Control Regimes)，討論要點如下：

(一) 主席說明，近年來由於跨國結合案件頻繁增加及競爭法主管機關資源有限的情況下，使得 競爭法主管機關僅針對其管轄領域內具有重大影響的結合案件挹注心力。2005 年 OECD 理事會所頒布的「結合審查建議書」(2005 OECD Council Recommendation on Merger Review)訂定結合審查實務的準則，2013 年 OECD 根據各國實務經驗的報告發現，許多國家已遵從該建議書修正相關結合申報門檻的規定，因此，本圓桌會議再特別針對近期各國在結合管制門檻及在地關聯性的標準進行探討。本議題計有巴西、歐盟、德國、日本、韓國、美國等 14 個國家提出書面報告。

(二) 秘書處報告：由 OECD 經濟組 Pedro Caro de Sousa 撰寫秘書處參考資料，其報告略以：

1. 結合管制在於須具有適當的「在地關聯性」(local nexus)，即結合可能增加該領域的競爭疑慮，主管機關可以適度介入管轄範圍內重要的結合案件。而對於決定在地關聯性的指導準則如下：(1)根據該領域內參與結合事業的營業活動；(2)以被取得或被併購之一事業或至少交易之二事業進行衡量。
2. 各國在制定結合申報門檻時，常考量客觀、確定或彈性、指定的指標等，並在結合審查的利益大於社會成本中衡量。許多考量因素如強制或自願性質的申報、根據歷史經驗訂定、國家經濟規模、市場結構等。
3. OECD 在 2005 年作出對結合審查的建議書，此報告的目標在於評估各國結合實務是否遵從該建議書，共計檢視 53 個國家的結合申報門檻並進行比較。檢視的結果如下：(1)結合申報門檻各國有不同的型態，有兩者擇一型、累計型或前述二者並用型；(2)申報門檻的類型有銷售金額（全球或國內）、資產（全球或國內）、交易價值、市場占有率等；(3)其他檢視工具如豁免、剩餘裁量管轄或國內效果等；(4)自 2005 年後，各國均對結合管制門檻進行檢討修正，大多數國家已遵從結合審查建議書。

(三) 美國聯邦交易委員會 Randolph W. Tritell 針對 ICN 2016 年自我評估結果的調查(Self-Assessment Results ICN Survey 2016)提出報告，略以：

1. ICN 的指導準則有主權性、透明度、無差別待遇、程序公平性、效率、及時及有效的審查、協調性、一致性與資料的保密。ICN 的結合實務建議書有結

合案件所生效果與審查領域的關聯性、清楚及客觀的申報門檻、結合申報及審查的時程、程序公平性、透明度、保密性、跨機關的協調與矯正措施等。

2. ICN 於 2016 年針對 100 個國家進行調查，主要在於評估各國對於 ICN 結合實務建議書的實施情況，其結果如下：(1)有 91%的國家要求結合案須具有實質在地關聯性(substantial local nexus)；(2)有 62%的國家規定單一取得者或併購者的結合活動即須進行申報；(3)有 71%的國家規定僅計算被取得者或被併購者的銷售金額或資產，而非所有銷售金額或資產；(4)有 70%的國家使用客觀可量化的標準如銷售金額或資產，而非市場占有率或市場力量等；(5)有 65%的國家使用 ICN 結合實務建議書檢視結合申報與審查制度；(6)有 91%的國家認為 ICN 在結合實務建議上應可採取更積極的角色。

(四) 由 BIAC 的 John M. Taladay 進行報告，其報告略以：

1. 設計良好的結合申報門檻有助於降低較無限制競爭疑慮的結合申報案件，使結合審查程序更有效率，並讓競爭法主管機關能將資源投注於其他更可能影響消費者及競爭市場的結合案件。
2. 各主管機關漸漸採行結合最佳實務的建議時，仍有些許國家有不同的結合審查程序與標準，這將使事業進行全球性的結合時面對不確定性並增加成本。這些國家較慢於更新結合申報制度之主因為其擔心喪失可以審查有競爭疑慮結合案件的能力，為此，BIAC 建議採行過渡型的「安全網」(safety net)手段，即提高結合申報門檻的同時附帶規定，主管機關仍於一定期間內能針對符合提高前申報門檻的事業進行審查。如果主管機關發現提高結合申報門檻後，許多有限制競爭疑慮的結合案件不再進行申報時，主管機關則可再選擇回復原先的申報門檻。
3. 目前仍有將近 3 成的國家使用非客觀量化的結合申報門檻如市場占有率或市場力量，然而，評估這些標準時較為困難、耗費時間、成本，事業於結合審查期間難以評估前述問題。事業在面對此種申報門檻時可能有三種選擇，一為擴大資源研究相對市場占有率；二為謹慎地向主管機關申報結合；由於大多數結合申報案件均具有促進競爭或競爭中立的情況，前述二項選擇將產生較高的交易成本。因為根據雙方所提供的資料仍無法作出合理的決定時，最後一種選擇即為不提出結合申報。

(五) 由 Ms. Ulla Schwager 報告歐盟的經驗，其報告略以：

1. 歐盟對於事業結合申報門檻係規定於結合管制規則(EUMR)第 1 條第 2 項及第 3 項規定，第 1 條第 2 項規定如下：(1)所有相關事業合併之全球營業總額超過 50 億歐元，及(2)至少有二事業於歐盟境內之營業額超過 2.5 億歐元，但如相關事業於歐盟境內之營業額有三分之二均在單一會員國境內者，非屬歐盟管制範圍；不符合第 1 條第 2 項則適用第 3 項規定：(1)各事業合併計算之全球營業總額超過 25 億歐元，(2)各事業於三個以上會員國境內個別之營業額均已超過 1 億歐元，(3)二個以上相關事業個別於三個以上會員國境內之營業額均已超過 2500 萬歐元，(4)二個以上相關事業其共同體境內營業額均超過 1 億歐元，但如相關事業於歐盟境內之營業額有三分之二數額均在單一會員國境內者，則不適用歐盟結合管制規則。
2. 在結合管制上對於跨國境合資事業的鬆綁：目前以執委會結合簡化程序通告第 5 條作為解決方案，如縮短事前申報的協商程序、簡易的申請表格、無須經市場調查等。歐盟於 2014 年公布一項「邁向更有效率的結合管制」(Towards more effective EU merger control)白皮書，針對於歐洲經濟區域(EEA)之外活動的合資事業，倘在歐盟結合管制規則下對歐洲市場無影響者，即使達到結合申報門檻，亦不需進行結合申報。
3. 結合管制的在地關聯性與輔助原則：由於歐盟為超國家組織，在結合管制上須有比例與輔助原則，結合管制規則應適用於將使市場結構顯著變化的結合案件，且此影響將超越任何單一成員國的國界；並針對任何結合交易，提供一次申報即可的機制(one-stop system)，結合管制不應超過為了防止內部市場競爭扭曲的範圍。因此，為了達到前述原則，歐盟結合管制規則係以三分之二法則（事業於歐盟境內之營業額三分之二數額）及歐盟與成員國相互移轉管轄制度作為規範。

(六) 美國：

1. 為了在辨別潛在限制競爭的交易與避免不必要的申報負擔之間取得適當平衡，美國競爭法主管機關（包括聯邦交易委員會與司法部）訂有廣泛的結合申報門檻，並對於無競爭疑慮的交易設有豁免規定。
2. 結合申報門檻的配套措施有簡易的申報文件格式、簡短的初步審查期間、對於可快速確認無競爭疑慮的審查方式，並對於未達結合申報門檻的交易有能力再進行審查。實務上在美國的事前結合申報制度下每年可處理超過一千件結合案件。

(七) 日本：

1. 根據日本獨占禁止法第 9 條規定，任何事業進行結合前，倘有達到結合申報門檻須事先向日本公正取引委員會申報。現行的事業結合規則為 2009 年獨占禁止法的修正案，修正內容包括結合申報門檻僅適用於事業取得及發行股份超過一定國內銷售額門檻。
2. 自 2009 年獨占禁止法關於結合部分之修正以來，事業結合申報案件數已降低，適度減少事業對於結合申報的負擔，並使日本公正取引委員會能將資源有效地移至其他可能違反獨占禁止法的結合案件，因此，該次修正應適度地反應的 OECD 於 2005 年所做的結合最佳實務建議。

(八) 德國：

1. 在德國限制競爭防止法下，事業結合申報有全球與國內雙門檻規定，即所有結合事業在全球總營業額超過 5 億歐元，且至少其中一家結合事業在國內總營業額超過 2500 萬歐元，另一家結合事業在國內總營業額超過 500 萬歐元，設立國內營業額的門檻規定在於確保該結合案件與德國具有足夠的關聯性。另限制競爭防止法第 185 條第 2 項規定（原為第 130 條第 2 項），該法適用於一切效果於該法適用領域以內之所有的限制競爭行為，亦包括結合。
2. 前述有關國內效果的結合條款對於合資事業的結合案件特別重要，在許多情況下，由於新設的合資事業初始並未達到營業額門檻，但其母公司為兩家大型事業時，則併計後將達到申報門檻。德國聯邦卡特爾署於 2014 年發布「有關結合管制上國內效果之須知」，幫助事業評估在德國的結合活動是否已合致國內效果條款的要件。

(九) 主席感謝所有提交報告國家，他表示，本議題並沒有一個正確的答案，每一個標準都會在法律可預測性、彈性及適當目標性上有其不同的平衡觀點。本次討論表現了小國可能有非常小的市場，絕對值式的申報門檻值可能並非理想的理念，而以其他的經濟學觀念、統計或歷史嚐試所提出的門檻或許可能會較合適。ICN 及 OECD 要求會員深化結合建議書，問題是否可加入某些事項以定義門檻的重要性及相關性，及是否可提供設定門檻的共同方法。主席請秘書處在下次會議提供範圍文件，以供更進一步討論。

柒、「競爭委員會」會議:

6 月 15 日下午至 6 月 17 日舉行「競爭委員會」（Competition Committee, CC）會議，由 CC 主席 Dr. Frédéric Jenny 主持。會議首先由主席宣布歡迎立陶宛成為 OECD 第 35 個正式會員，另新加坡由本次起以專案受邀者參加會議。主席並歡迎美國司法部反托拉斯署代理署長 Renata Hesse 女士首次參加 OECD 會議。

柒之一、CC第一日（6月15日）下午會議

一、特別國家報告:俄羅斯反壟斷服務局(Federal Antimonopoly Service of Russian Federation, FAS)局長 Igor Artemiev先生報告2015年俄羅斯聯邦的競爭法與政策發展及FAS職權變動。

二、各工作小組報告：

(一) WP2主席Alberto Hemler報告本次WP2會議討論經過及決議。

(二) WP3主席Dr. Frédéric Jenny報告本次WP3會議結果。

(三) UNTAD聯絡人Souty博士報告本年10月19-22日UNCTAD將舉辦之專家會議議程及討論議題。

(四) ICN協調人加拿大競爭局局長John Pecman報告本年ICN新加坡年會會議成果，及各工作小組最近之會議與活動。

三、競爭委員會長期討論主題:CC同意在2016年至2018年間討論2項長期主題: (1)競爭、數位經濟與創新(Competition, Digital Economy and Innovation)及(2)市場研究(Market Studies)。本次會議主要依據秘書處所提出之書面報告決定工作計畫。秘書處所提之報告:

(一) 競爭、數位經濟與創新:秘書處建議未來工作可分成4大區塊: (1) 數位經濟、競爭法及創新間之關聯；(2) 以現行競爭法領域及工具處理因數位經濟所引發之競爭法執法挑戰之適當性；(3)競爭法在該產業執法之實務挑戰；及(4)對特定產業或案例可能闡明上開問題或提供指引之工作。

(二) 對於市場研究，秘書處建議CC可依去年所做之會員問卷結果，進行下列方面之工作: (1)檢視各國市場研究特性及法律架構；(2)設定市場研究產業或部門之優先順序；(3)依照市場研究結果找尋是否進行矯正或進一步調查；(4)實施市場研究之方法；(5)利害相關人及其他政府機關間之關係；及(6)事後評估。

(三) 主席宣布，本年度11月將於全球競爭論壇中討論市場研究，並考量是否在2017年舉辦研討會之可能性。本次11月CC會議中亦將對數位經濟舉行討論大數據與競爭之關係圓桌會議，並於未來會議中討論多方市場(multisided market)、市場、市場力、獨占等之定義及市場進入障礙。

柒之二、CC第二日（6月16日）會議

一、「忠誠折扣」圓桌會議(Roundtable on “Fidelity Rebates”)

(一) 主席表示，忠誠折扣為買家在展現其對銷售者產品之忠誠度時所得到之較低價格回報。忠誠折扣方式之使用對沒有市場力廠商尤其重要，這也顯示了競爭法主管機關所提倡的某種程度的競爭，但忠誠折扣也可能帶來限制競爭效果，尤其是限制及防止其競爭對手有效競爭甚而強迫其退出市場。本議題主要討論:(1)忠誠折扣之各式方案；(2)評估忠誠折扣方案之法律架構為何?(3)如何分析忠誠折扣方案可能之限制競爭效果；(4)這些方案的可能潛在經濟效益為何?(5)競爭法主管機關是否應對這些單方行為設定其執法優先順序?本議題共有23個國家提出書面報告。

(二) 秘書處首先提出背景報告，該報告專注於所謂部分排他性折扣(partial exclusivity rebates)，報告中強調，這些忠誠折扣之態樣有時是對消費者有利的，如獨家代理，甚至授予該獨家代理的廠商具有市場支配力。這些廠商可能齊一誘因並促進投資。因此，採取嚴格的當然違法可能即有傷害消費者之風險。背景文件中提出評估忠誠折扣排他效果之分析架構，該架構主要在釐清何時是調查價格成本的不同態樣的時機，及何時才是使用抬高對手成本的較佳時機。秘書處之結論為，這些折扣方案的分析十分複雜，且依個案而有所不同，無法預先推定其價格超過成本應是具市場力廠商當然違反法律禁制規定亦或是寬鬆的避風港。

(三) 英國倫敦國王學院(Kings College London)教授Alison Jones女士報告，對忠誠折扣方案提出定義，略以：

1. 大部分競爭法體制接受某些法令或差別取價行為在某些情形下可能會損害競爭過程及消費者福利。例如，掠奪性定價、選擇性減價、利潤擠壓、價格歧視及折扣。
2. 就折扣部分，可區分為(1)忠誠(排他)折扣：銷售者對於僅就購買有條件或設

定一定比例折扣，(2)數量折扣：依購買總數量給予折扣，僅對大量購買者之優惠。但是數量折扣也可能具忠誠折扣效果。

3. 歐盟最近在案例中用之名詞定義，尤其是歐盟法院在INTEL一案中所用之名詞可分為：
   (1) 數量折扣系統：純依購買數量標準設定折扣。
   (2) 忠誠(排他)折扣：從具市場力廠商有條件的購買所有(或大部分)所需之數量。這是歐盟法律所歸類為當然違法，故意濫用市場力行為，除非該具市場力廠商可以證明其行為具正當理由。
   (3) 其他(具目標性)折扣：所有不包含排他性之其他折扣，但如果有個人化或相對性，則可能有忠誠誘導效果。
4. 在分析低價行為時，競爭法主管機關可能很難區分到底是積極的價格競爭或是違法的掠奪性定價行為，所以大部分的體制都會利用特定檢測方法來釐清廠商是否有違法濫用市場地位行為。這些檢測應與競爭法之目標一致，而且應是基於可預測性、清楚及透明原則的，以使決策者可以運用並可提供廠商明白遵循規定，而各種檢測模型的選擇則依各國競爭法規定有所不同。
5. 在美國及歐盟，下列4種折扣之主要分析方式曾被提出運用，分別為：
   (1)第一種較為極端：除非其價格低於成本，折扣不應被視為違法。但因為此一觀點太消極且其忽略了與掠奪性定價不同之損害理論，故較少人支持。在歐盟，惟一合法的折扣是單純的標準數量折扣。
   (2)第二種方式需要應用價格/成本規定，這涉及市場可歸因於折扣的可競爭性部分，以確定折扣是否可能造成排除有效率之競爭者。但這種檢測可能在運用上有困難(例如，如何釐清何者為非可競爭性需求)及可能會太過狹猛(例如，較無效率廠商如果不是有策略的被迫離開市場，對消費者可能是有益的)。在美國此種方式從未應用在單一個產品的忠誠折扣案件上。歐盟執委會宣稱對於大案件會使用此種方式，但法院案例清楚顯示沒有必要進行檢測。
   (3)第三種觀點主張以更詳盡的合理原則分析此一類型案件，以詳細瞭解具市場力廠商為何運用這些折扣的全貌。
   (4)第四種方式是，除非廠商可以提供客觀的效率理由，否則應為違法。此一方式有相當高的錯誤風險。

(四) 布魯塞爾Skadden, Arps, Slate, Meagher & Flom律師事務所合夥人Jim Venit先

生報告目前歐盟對於忠誠折扣案件之處理方式，略以：

1. 目前歐盟執委會與法院之間對於此類案件處理方式有重大之歧見。執委會在其指導原則文件中係採取以效果為主之立場，此一原則部分涉及「競爭者同等效率」(as-efficient competitor, AEC)檢測方式。但此一方式在INTEL案中被一般法院及在Post Dammark II案中被歐洲法院明白拒絕，法院似較偏好當然違法立場。
2. 法院的當然違法方式主要有2個要項：分析要項及觀念要項。分析要項是來自傳統歐洲對於市場支配力之概念是絕對而非相對而來。一旦市場力存在，不管支配力有多大，廠商必須接受特別的義務。觀念要項是與歐盟條約之基本目標一致：在此一觀點下，當然違法方式可被視為以效果為主，因為其所考量的是排他性折扣對於所要維護的不扭曲競爭目標(相對於加強消費者福利之理念)之影響。相對而言，AEC檢測方式與歐盟條約的目標不一致，因為它將容忍排除較無效率的競爭者，但可能傷害競爭過程。就政策含義而言，法院的方法是在於提供非常清楚可預測的結果，而AEC則是強調資源之配置，但較難以應用。

(五) 美國加州大學柏克來分校(University of California Berkley)教授Joe Farrell先生認為：價格成本檢測會被提出是因為政策決定者希望能夠清楚拒絕較不具效率廠商因無法競爭而提出檢舉之案件。但是，他認為針對此一問題正確的說法應該是：我們關切甚至在具市場力廠商訂定較高的價格時，競爭者仍被排除競爭。這使我們排除無效率廠商為避免競爭而檢舉之案件，並可專注於不論檢舉人有多高的效率，具市場力廠商在高價仍可排除競爭之案件。

(六) 巴西:

1. 巴西報告該國處理Ambev啤酒公司違法案。Ambev公司為巴西最大之釀酒商，約占有70%市場。依其所提出之忠誠計畫規定，該公司回饋銷售其產品之銷售點數給酒吧，累積一定點數後可兌換商品，相當於給予折扣。巴西競爭法主管機關CADE處以該公司2%之年銷售額罰鍰，為該年度對單一公司最高罰鍰額度之案件。
2. 該案考量要點有5大項：(1)該公司在市場之力量；(2)該忠誠計畫雖未明示有排他性，但實際上僅針對一部分特定名單；(3)該計畫遞增之折扣帶給競爭者額外之負擔；(4)該公司無法證明該計畫是對效率之補償；(5)內部文件顯示其

目的在於限制爭，並企圖對競爭法主管機關隱瞞其企圖。

(七) 日本:

1. 日本認為忠誠折扣方案如對市場產生限制競爭效果則會被視為違反反壟斷法規定。 相對的，如果忠誠折扣方案未產生限制競爭效果，但讓新進入廠商或競爭者難以進入行銷管道，可能會產生不公平競爭禁制行為。
2. 主席追問，是否所有忠誠折扣都有違法可能?日本代表答以：是，因為廠商即使沒有市場力量，只要使其交易相對人較難與其他競爭者交易即有可能違反不公平競爭規定。

(八) 德國:德國並沒有很多忠誠折扣之案例，但去年處理德國郵局(前為國營事業)合併使用利潤擠壓及忠誠折扣方案阻礙競爭案。德國郵局提供了以每週計算之可回溯折扣給幾乎完全使用德國郵局為郵寄服務之顧客，而此一折扣方案對於吸收顧客及封銷效果太為顯著，聯邦卡特爾署根本不需使用AEC檢測。

(九) 美國：

1. 美國對忠誠折扣視為是供給者不以降低平均價格方式激勵顧客增加消費之一種誘因。不像掠奪性定價，忠誠折扣的排他效果並不依期初損失或稍後之補償而定。
2. 從美國的觀點，忠誠折扣類似於獨家代理，因此可能為有益競爭亦可能有限制競爭。美國法院已應用價格成本檢測於捆綁折扣案件，該類折扣是把所有折扣全部用來分配於封鎖其他產品，而有部分學者建議應該把此一檢測也用來分析單一產品市場的忠誠折扣上。
3. 就競爭法主管機關而言，可能有其他理由不會如此使用:競爭法主管機關很難確認可競爭的銷售量及適用整體折扣。美國競爭法主管機關的觀點是，對於試圖評估忠誠折扣最重要的一件事就是，每一個案件本身的事實都是一件非常深澳的知識，所以執法人員能有效的評估實際的競爭效果(或可能潛在的效爭效果)為何。

(十) 西班牙：

1. 西班牙競爭法主管機關「市場與競爭委員會」(CNMC)最近發現西班牙主要手機營運商Telefonica的忠誠折扣方案有違反限制競爭之規定。該忠誠折扣方案提供中小企業顧客簽署12，18，24個月的特定契約。顧客如未通知中止，則

契約自動延長，而且顧客如未完成簽署契約，他們會被要求支付其過去所享受之折扣總金額。因為該公司在市場上未具市場力，該案被以違反第101條垂直限制論處。

2. CNMC發現，該公司對於顧客在契約中止前之違約罰金本質上即為一種限制競爭之行為，因為該條款之目標是防止顧客轉移至其競爭對手，並提高競爭對手之成本，因而對其競爭對手有封鎖之效果。

(十一) 美國加州大學柏克來分校(University of California Berkley)教授Joe Farrell就忠誠折扣可能之限制競爭效果提出新的分析架構並強調：

1. 忠誠折扣限制競爭的基本關切問題不在於低價，甚至有時候低價可能只是限制競爭方案的一部分。競爭法主管機關最應關切的問題應該是當高價格可以隔絕競爭的攻擊。
2. 競爭法執法人員最應該擔心的是一個高價具市場力廠商可以打消消費者購買對手的產品(這也說明價格成本檢測無效)。執法人員應該調查消費者是否在購買其競爭對手的產品時必須面對顯著的稅額，及價格要多高。而且，我們要看經銷商的反應。如果有些經銷商拒絕折扣但其他人繼續，這僅能證明參與該方案可以獲利而已。

(十二) 本議題本會雖有提出書面報告，惟因提交報告會員眾多，且討論十分踴躍，爰主席僅邀請會員國說明，未邀請參與者(包括我國)就報告提出說明。

(十三) 主席結論略以：

1. 在忠誠折扣案件中，執法者應著眼於高價格之能阻卻競爭行為，而且，正如Farrell教授所提出的分析架構，有時候問題可能不是單方封鎖行為，而是可能導致共同行為之方案措施。
2. 在調查排他性效果案件時，應注意分辨排他性折扣與單純數量折扣的關係，並考量執法者應分析之目標。
3. 「競爭者同等效率」(as-efficient-competitor)檢測方法雖然有部分超出今天之討論範圍，但是否可做為經濟檢測方法之一仍是個問題。
4. 在某些國家，忠誠折扣並不必然是當然違法，而且今天的討論也提供了一些論點，解釋忠誠折扣應該不為當然違法。

柒之三、CC第三日（6月17日）會議

一、「反托拉斯案件中之承諾決定」(Roundtable on Commitment Decisions in Antitrust Cases)：

(一) 主席表示，近 10 年來，許多國家的競爭法主管機關已逐漸於反托拉斯案件中採用承諾決定制度，但不同國家對此制度有不同的名稱與內容，縱使使用承諾決定仍有爭議存在，但此制度非常吸引競爭法主管機關、事業與第三人，本圓桌會議主要探討近期各國採用承諾決定的趨勢及實務案例，並針對支持或反對採用承諾決定的論點進行討論。本議題計有澳洲、美國、歐盟、英國、法國、韓國、新加坡等 26 個國家提出書面報告。

(二) 秘書處報告：由 OECD 經濟組 Satoshi Ogawa 撰寫秘書處參考資料，其報告略以：

1. 在反托拉斯領域中採用承諾決定的擴散，自 1999 年美國開始，各國已陸續相繼採用，到目前為止，已有將近九成 OECD 成員國的競爭法中有承諾決定的機制，定義上各國略有不同，如承諾(commitment)、同意裁決(consent decree)、同意命令(consent order)或許諾(undertaking)及共同特性、近期發展等。而競爭法主管機關使用承諾決定常涉及的產業與行為，在能源、天然氣或電信產業。
2. 矯正措施的類型包括行為面與結構面，實務上較多為行為面的承諾。在承諾決定制度下不同的程序與步驟，如指導原則、承諾決定的涵蓋範圍、時間限制、程序權利或監督方法。
3. 對於承諾決定制度有支持與反對的意見，支持的論點不外乎程序經濟性、快速的解決機制、提高矯正措施的品質、避免裁處罰鍰等；反對的論點為缺乏威嚇效果、較無受司法審查、法律不確定性、正當程序及透明度的疑慮等。

(三) 美國 George Mason University School 的 Joshua D. Wright 教授進行報告，其報告略以：

1. 該報告主要分析反托拉斯執法機關官僚方式的轉變，相較於訴訟程序，同意命令的制度可使執法機關從調查中的當事人獲取更多資料，然而，同意命令制度可能不僅沒有促進競爭，反而傷害競爭及消費者。
2. 管制模式是聚焦於矯正措施而非事業的違法行為，因此，主管機關須進行監督與管理事業是否有遵守矯正措施。
3. 同意命令這個制度已使其他外國競爭法主管機關認為此種與事業達成承諾的方式是合適的。

(四) 由東京大學 Tadashi Shiraishi 教授報告承諾決定在日本的情況，其報告略以：

1. 適用承諾決定制度的行為包括垂直限制、排他性行為及榨取濫用。由於日本為跨太平洋夥伴協定(TPP)之簽署國，該協定內容要求簽署國須制定有關承諾決定的法制架構，因此，日本已規劃競爭法中的承諾決定制度，並著手進行獨占禁止法的修法。根據修法內容，所有的行為均適用承諾程序，但日本公平會實際上想將惡性水平卡特爾案件排除在外。
2. 當日本公平會認為事業違法，且有需要促進公平及自由的競爭環境，日本公平會可發出承諾通知告知事業可於 60 日內提交建議的承諾內容。日本公平會認為事業符合下列兩項條件時，即會作出承諾決定：(1)承諾內容足以消除一致性行為。(2)承諾內容確實具可行性。

(五) 美國：

1. 和解制度為重要的程序工具，可使競爭法主管機關與當事人以效率、快速及完整地解決爭議。因此，對於一項主管機關可接受的和解內容的測試，須是能消除或防止反競爭行為所帶來的損害。
2. 協商後的和解可使主管機關與當事人針對矯正措施的細節進行討論，較雙方立於敵對立場而言，微調過的矯正措施可提供當事人正當的商業需求並同時緩和主管機關的限制競爭疑慮。
3. 實務上，美國競爭法主管機關所使用的和解措施已有效地終止不合法的行為，並避免該行為再次發生。

(六) 歐盟：

1. 歐盟理事會第 1/2003 號法規第 9 條規定可使歐盟以「承諾決定」的方式做出決定。此制度與歐盟做出事業違法之決定相較，承諾決定並不須事先證明事業有違法行為存在。承諾決定制度適用所有的限制競爭案件，但卡特爾案件除外；當執委會決定對案件裁處罰鍰時，通常屬於嚴重違反競爭法的情事，該案件即不適合進行承諾決定。當執委會接受承諾後，可作出約束事業的決定，可為行為性或結構性承諾，該承諾應充分地指出確認過的競爭疑慮，且須清楚與自我執行。
2. 自 2004 年起，排除卡特爾案件外，共有 57 件反托拉斯決定，其中 35 件與承諾決定有關，有 16 件與違反限制競爭協議的歐盟運作條約第 101 條規定相關，18 件與違反濫用優勢地位的歐盟運作條約第 102 條規定相關，其中 1 件涉及

前述兩條規定。所有承諾決定的案件中，有 74%屬於行為性承諾，26%則屬於結構性承諾。承諾決定對於能源產業及須自由化的產業特別重要。

3. 採用承諾決定可提高執委會執法活動的效率與有效性，承諾決定與禁止決定均各有特色與優點，端視案件事實的情況決定採取何項措施，威嚇效果、先例價值及利於民事追訴等為禁止決定的特色，此外，事業違法的嚴重性及持續期間，作成承諾的時間點及涉案事業數目等均會影響前述措施的選擇。

(七) 韓國：

1. 韓國競爭法於 2011 年制定「同意命令」(consent order)制度，使韓國公平會有一更彈性的決定方式。同意命令制度適用於違反獨占管制及公平交易法的行為，但卡特爾案件及其他更嚴重的違法行為則除外。
2. 在同意命令制度下，韓國公平會並不須先確認事業行為違法，當韓國公平會核發同意命令，事業即須受到約束。韓國公平會必須監督事業是否確實履行同意命令的內容，當事業未履行時，在無正當理由的情況下，該同意命令將被撤銷或裁處罰鍰。同意命令制度中大部分程序與其他國家相同，但有一不同處在於韓國公平會有義務於核發同意命令前向檢察長(Prosecutor General)交換意見。
3. 同意命令制度有助於減輕消費者的損害，並使市場上的競爭狀態快速且有效地回復。對事業而言，可減少面對此類案件的時間成本，並降低對事業商譽的影響；對韓國公平會而言，可減少行政程序及司法審查的成本。自 2011 年起，已有 5 件案件適用同意命令，包括濫用市場優勢地位、結合及不公平廣告案件。

(八) 新加坡：

1. 新加坡競爭法所採取的協商矯正措施有許多形式，如法律上有約束力的承諾、無約束力的承諾及附修正範圍的申報，並適用於所有的案件類型，包括水平協議、濫用優勢地位及結合案。根據競爭法第 60A 條規定，新加坡競爭局(CCS)僅針對結合案件接受有法律約束力的承諾。
2. 自 2006 年迄今，新加坡競爭局於 28 件調查執行的案件中，有 11 件採取協商矯正措施（6 件與濫用優勢地位相關，2 件結合案件，3 件水平協議行為），行為面的矯正措施占大多數。在 2013 年，新加坡競爭局於組織內部設立承諾及矯正措施單位(CRU)，負責執行相關工作。

(九) BIAC：

1. 競爭法主管機關提高承諾決定措施的使用率亦引起許多令人擔心的疑慮，這些疑慮可分為兩方面，一為競爭法的合理性及執行性，一為競爭法主管機關對於承諾決定的使用可能逐漸超越權限範圍，再加上調查過程中缺乏透明性、程序保障不足等，另外亦無司法審查的監督。
2. 對於各國使用承諾決定的建議，第一，須確認承諾決定的範圍是否過當而產生無用的域外效果；第二，建立承諾的事後評估是為了對實行矯正措施及其比例性的影響有所瞭解，但並沒有提供主管機關能重行檢視矯正措施的權力；第三，如何延伸當事人正當程序的權利，特別是閱覽卷宗權及提供指控當事人違法的資料；第四，BIAC 將支持協助減少主管機關之間對承諾決定的分歧範圍，以確保承諾與矯正措施的可行性；最後，各主管機關之間須提高協商機制，以避免不一致結果所生的無效率並確保有效的執法。

二、全球關係與參與計畫(Global Relations and Participation Plan)：本項目為閉門，本會無法參加，惟依與我國友好會員透露，本會議由 OECD 秘書處報告競爭委員會 2015-2016 全球關係之發展，包括:

(一) 韓國及匈牙利 2 處政策中心競爭計畫 2015 年所舉辦之研討會及活動，及 2016 年預定辦理活動項目。

(二) 2015 年「全球競爭論壇」(Global Competition Forum, GFC)舉行情形及本(2016)年 12 月 GFC 將討論議題，包括「競爭與人權」、「反托拉斯案件之處分」、「競爭法主管機關獨立性」等。

(三) 討論未來 2 年參與會議「參與者」(participants)國家。我國獲全體會員同意繼續成為競爭委員會參與者之一。

三、其他事項及未來題目: CC 在下次會議將討論大數據與競爭(big data and competition)之關係， 以及價格歧視(price discrimination)議題。

捌、心得與建議

一、OECD 自每年 3 次會議改為每年 2 次會議後，每一次會議均為期 5 日，會議期間對各議題之討論既深入又具參考性，OECD 所邀請之專家提出之報告專業又深入，在會中報告時間可能排擠會員發言機會，各國(包括會員國)常有提出書面報告

但卻因發言人數眾多而無法邀請發言報告之情況。秘書處因此特別在本次會議開會說明，請會員及參與者諒解。建議本會對未能報告之各新興議題，亦能由相關處室預先研擬本會意見供出席代表參考，俾於會中爭取更多發言機會。

二、WP2 本次討論「法律服務業破壞性創新」議題，我國提出之「法易通案」案例獲得各國重視，且認為本會對於法律服務業創新之處理觀點及對法律服務業競爭之倡議皆先於各國，值得各國參考。此為本會執法方向為世界各國肯定又一案例，該案雖為行政院訴願委員會駁回，但本會就法律服務業競爭倡議部分仍應持續關注。

三、WP3 與反貪腐工作小組(WGB)聯席會議所討論之卡特爾偵測、與反貪腐機關間證據共享等皆為本會在對卡特爾案件執法時參考之方向。

四、WP3本次會議對於結合管轄權關聯性討論內容豐富，值得本會在處理結合案件，尤其是在涉及域外結合時參考。

五、CC本次討論反托拉斯案件中之承諾決定，各國所提出之制度與運用對於本會目前正在研究之案件中止調查要件、程序及處理方式機制之制定非常有價值，值得本會參考運用。

六、 本次CC討論全球關係與參與計畫，本會積極參與及對OECD貢獻度備受各國肯定而予以延長本會參與者資格。本會當把握此一機會，繼續積極參與貢獻，以爭取我國在OECD競爭委員會各活動參與之機會。

七、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

13 June 2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 7 June 2016

Working Party No. 2 on Competition and Regulation

Draft Agenda: 61st meeting of Working Party No. 2

13 June 2016
Paris, France

To be held on 13 June 2016 in Room CC12 of the Conference Centre, 2 rue André Pascal, 75116 Paris, France. The meeting starts at 10.00 a.m.

Contact(s):
Ania Thiemann, Global Relations Manager: Ania.THIEMANN@oecd.org; +33145249887

JT03398050

DAF/COMP/WP2/A(2016)1/REV1
For Official Use
English - Or. English

Draft Agenda: 61st meeting of Working Party No. 2

13 June 2016

Paris, France

The 61st Meeting of Working Party No. 2 will be held on 13 June 2016 in Room 12 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris, France (starting at 10.00 am.)

Monday 13 June 2016	
10:00-10:05	**1. Adoption of the draft agenda** DAF/COMP/WP2/A(2016)1/REV1
10:05-10:10	**2. Approval of the Summary Record of the last meeting (26 October 2015)** For approval: • Summary record of the meeting of 26 October 2015 (60th meeting) DAF/COMP/WP2/M(2015)2 • Summary of Discussion – Reference Guide on ex-post evaluation of competition authorities' enforcement decisions/October 15 DAF/COMP/WP2/M(2015)2/ANN2/REV1 • Summary of Discussion – Hearing on disruptive innovations in the financial sector – October 2015 DAF/COMP/WP2/M(2015)2/ANN3 For information: • List of Participants at the meeting of 26 October 2015 DAF/COMP/WP2/M(2015)2/ANN1
10:10-12:30	**3. Roundtable on Disruptive innovations in legal services** Note by Delegations: Summary of contributions: DAF/COMP/WP2/WD(2016)8 Country contributions: • Finland – DAF/COMP/WP2/WD(2016)1 • France – DAF/COMP/WP2/WD(2016)2 • United Kingdom – DAF/COMP/WP2/WD(2016)3 • United States – DAF/COMP/WP2/WD(2016)4 • and • Bulgaria – DAF/COMP/WP2/WD(2016)5 • Chinese Taipei – DAF/COMP/WP2/WD(2016)7 • BIAC – DAF/COMP/WP2/WD(2016)6 For reference:

	Background paper by the Secretariat DAF/COMP/WP2(2016)1 Documentation is also available at: http://www.oecd.org/daf/competition/disruptive-innovations-in-legal-services.htm
12:30-13:00	**4. Enhancing competition in public procurement: Guidelines to help ensuring that the public procurement process remains competitive** For discussion: Note by the Secretariat DAF/COMP/WP2(2016)3 • Presentation of the draft guidelines by the Secretariat • Presentation by Mr Janos Bertok, Head of Policy Sector Integrity Division, OECD
13:00-15:00	**Lunch**
15:00-16:30	**5. Competition Assessment: The implementation challenge** For discussion: Competition Assessment Review: Romania. Report by the Secretariat DAF/COMP/WP2(2016)2 • Presentation by Mr Radu Puchiu, Secretary of State, Deputy Head of the Prime Minister's Chancellery, Romania Interventions by Greece, Iceland, Mexico and Portugal
16:30-17:30	**6. Mexico's Market Examinations: A Manual** For discussion: Manual by the Secretariat DAF/COMP/WP2(2016)4 • Presentation by the Secretariat • Presentation by Ms Rocio Ruiz, Under Minister for Competitiveness and Regulation, Ministry of Economy, Mexico • Presentation by Mr José Eduardo Mendoza, Head of the Productivity and Competitiveness Unit, Ministry of Economy, Mexico • Presentation by COFECE • Presentation by IFETEL
17:30-17:50	**7. Report from the Ex-post evaluation workshop on 19 April 2016** For discussion: Paper by Prof. John Kwoka, North-eastern University DAF/COMP/WP2(2016)5 Documentation is also available at: www .oecd .org /daf /competition / evaluationofcompetitioninterventions.htm
17:50-18:00	**8. Future topics and Other business**

Annex 1: Annotations

Item 3.

Legal services markets in many jurisdictions are beginning to experience fundamental change as a result of new innovations and business models. These changes are driven by increased online service delivery, the availability of ranking and review information, the unbundling of services and the automation of service delivery.

Regulations in legal services markets were designed to address potential causes of market failures, such as information asymmetries, moral hazard and externalities, as well as other policy objectives (such as accessibility of services for low-income individuals and legal principles like attorney-client privilege). However, the foundations of these regulations – i.e. exclusivity and restrictions on who can provide legal services – are being challenged by automation and online platforms, typically operated by people outside of legal professions.

This roundtable will discuss the implications of these challenges for regulatory frameworks, and the role competition authorities can play in responding to, and encouraging the development of, innovation in legal services markets.

Several panellists will share their views and experiences with WP2 delegates:

- Two innovators in this field: **Charley Moore** (Founder and CEO, Rocketlawyer) and **Pierre Aïdan** (Co-founder, Legalstart.fr);
- **Caroline Wallace** (Legal Services Board, UK) and **Louis Dégos** (Conseil national des barreaux, France), who will discuss the regulatory implications of recent innovations;

- **Dana Remus** (Professor of Law at the University of North Carolina, currently serving as Senior Counsel and Special Assistant to the President in the Office of the White House Counsel) and **John McGinnis** (George C. Dix Professor in Constitutional Law at Northwestern University), who will discuss the likely impact of recent innovations on legal service markets and legal professionals.

Item 4.

Delegates will be asked to comment on a first draft of the Committee's future contribution to the new OECD Procurement Toolbox of the Governance and Territorial Development Directorate. The proposed guidelines focus on keeping the procurement process competitive, especially with regard to abnormally low tenders (ALTs) and the portioning into lots. This work follows up from the two discussions in WP2 in December 2014 and June 2015. Janos Bertok (Head, OECD Public Sector Integrity Division) will present the new Procurement Toolbox and how these proposed guidelines will fit into the new OECD work tool.

Item 5.

This session discusses the implementation challenges faced by jurisdictions that have completed Competition Assessment. In particular, Romania will be examined with respect of implementation strategies it intends to adopt. The examination will be lead by Iceland, Greece, Mexico and Portugal.

Item 6.

This session will see a presentation and discussion on the Mexican Manual of Market Examinations. The Manual was developed by the OECD Secretariat at the request of the Mexican Ministry of the Economy, under the framework of the agreement signed by the Ministry and the OECD in December 2014. The objective of the Manual is to help the Ministry implement its new competition powers.

The Manual provides methodological and theoretical guidance for examining a market, a sector of the economy, or a particular cross-cutting issue present in various markets, when there is a suspicion or indication of distortions that cannot be assigned to a particular market participant. It is a flexible instrument that has the purpose of identifying structures, regulation and conduct that affect market performance, harm consumers and that shall be eliminated. It draws on the experience of international best practices and relies on economic theory to provide a framework that allows understanding a market.

The Manual also provides the Ministry with guidance about the content of a formal request, the procedure for its submission to the competition authorities and the process it will go through within the corresponding authority.

Item 7.

The Secretariat will report back from the Ex-post Evaluation Workshop which took place on 19 April.

Item 8.

Delegates will propose and discuss future topics for WP2.

The next meeting of Working Party No. 2 is scheduled for Monday 28 November 2016.

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

10 June 2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 9 June 2016

DAF/COMP/WP3/A(2016)1/REV2
For Official Use

Working Party No. 3 on Co-operation and Enforcement

Draft Agenda: 123rd meeting of the Working Party No. 3

14-15 June 2016
Paris, France

To be held on 14-15 June 2016 in Room CC12 of the Conference Centre, 2 rue André Pascal, 75116 Paris, France. The morning of 14 June 2016 (10:00-13:00) will be dedicated to a joint meeting between WP3 and the Working Group on Bribery in International Business Transactions (WGB).

Contact(s):
Despina PACHNOU, Policy Analyst, +(33-1) 45 24 95 25

JT03397896

English - Or. English

Draft Agenda: 123rd meeting of the Working Party No. 3

14-15 June 2016

Paris, France

The 123rd Meeting of Working Party No. 3 will be held on 14-15 June 2016 in Room 12 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris, France. The morning of 14 June 2016 (10:00-13:00) will be dedicated to a joint meeting between WP3 and the Working Group on Bribery in International Business Transactions (WGB)

Tuesday 14 June 2016	
10:00-13:00	**1. Joint Meeting of the Competition Committee's Working Party No. 3 on Co-Operation and Enforcement (WP3) & the Working Group on Bribery in International Business Transactions (WGB)** See separate agenda DAF/COMP/WP3/A(2016)1/ANN
14:30-14:35	**2. Adoption of the Draft Agenda and the Summary Record of the Last Meeting**
14:35 – 16:00	**3. Roundtable on Public Interest Considerations in Merger Control**
16:00-16:20	**Coffee break**
16:20-17:30	**3. Roundtable on Public Interest Considerations in Merger Control (Con't)**
17:30-18:00	**4. Presentation by the American Bar Association (Section of Antitrust Law) of the Report of the Task Force on Foreign Investment Review**
Wednesday 15 June 2016	
09:30-11:00	**5. Roundtable on Jurisdictional Nexus In Merger Control Regimes**
11:00-11:20	**Coffee break**
11:20-12:20	**5. Roundtable on Jurisdictional Nexus In Merger Control Regimes (Con't)**
12:20-13:00	**6. Other items** **A.** Update on the Inventory of Inter-Agency MoUs **B.** Future Topics

ANNOTATIONS

Tuesday 14 June 2016

Item 1. Joint Meeting of the Competition Committee's Working Party No. 3 on Co-Operation and Enforcement (WP3) & the Working Group on Bribery in International Business Transactions (WGB)

For information:

- Compilation of responses - DAF/COMP/WP3/WD(2016)35 and DAF/COMP/WP3/WD(2016)35/ADD

Item 2. Adoption of the Draft Agenda and the Summary Record of the Last Meeting

For approval:

- Draft Agenda for the 123rd meeting DAF/COMP/WP3/A(2016)1/REV2
- Summary record of the last meeting (27 Oct. 2015) DAF/COMP/WP3/M(2015)2

- Summary of Discussion: RT on the Relationship between Public and Private Antitrust Enforcement (15 June 2015) DAF/COMP/WP3/M(2015)1/ANN2

For information:

- Executive Summary: RT on the Relationship between Public and Private Antitrust Enforcement (15 June 2015) DAF/COMP/WP3/M(2015)1/ANN3
- List of participants at the meeting of 27 Oct. 2015 DAF/COMP/WP3/M(2015)1/ANN1

Item 3. Roundtable on Public Interest Considerations in Merger Control

For discussion:

- Background paper by the Secretariat DAF/COMP/WP3(2016)3

Note by Delegations:

- Summary of contributions - DAF/COMP/WP3/WD(2016)30
- Australia - DAF/COMP/WP3/WD(2016)1
- Canada - DAF/COMP/WP3/WD(2016)2
- Germany - DAF/COMP/WP3/WD(2016)3
- Japan - DAF/COMP/WP3/WD(2016)4
- Korea - DAF/COMP/WP3/WD(2016)5
- Mexico - DAF/COMP/WP3/WD(2016)36
- Netherlands - DAF/COMP/WP3/WD(2016)6
- New Zealand - DAF/COMP/WP3/WD(2016)7
- Norway - DAF/COMP/WP3/WD(2016)8
- Portugal - DAF/COMP/WP3/WD(2016)29
- United Kingdom - DAF/COMP/WP3/WD(2016)9
- United States - DAF/COMP/WP3/WD(2016)10
- European Union - DAF/COMP/WP3/WD(2016)11
- Latvia - DAF/COMP/WP3/WD(2016)12

- Indonesia - DAF/COMP/WP3/WD(2016)34
- Singapore - DAF/COMP/WP3/WD(2016)27
- South Africa - DAF/COMP/WP3/WD(2016)13
- Chinese Taipei - DAF/COMP/WP3/WD(2016)14
- BIAC - DAF/COMP/WP3/WD(2016)33

Documentation is also available at: www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm

Item 4. Presentation by the American Bar Association (Section of Antitrust Law) of the Report of the Task Force on Foreign Investment Review

For information:

ABA, Section of Antitrust Law: Report of the Task Force on Foreign Investment Review (2015) available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/20150928_foreign_investment.authcheckdam.pdf

Wednesday 15 June 2016

Item 5. Roundtable on Jurisdictional Nexus In Merger Control Regimes

For discussion:

- Background paper by the Secretariat DAF/COMP/WP3(2016)4 and DAF/COMP/WP3(2016)4/ANN

Notes by delegations:

- Summary of contributions - DAF/COMP/WP3/WD(2016)31
- Estonia - DAF/COMP/WP3/WD(2016)15
- Germany - DAF/COMP/WP3/WD(2016)16
- Hungary - DAF/COMP/WP3/WD(2016)17
- Italy - DAF/COMP/WP3/WD(2016)18
- Japan - DAF/COMP/WP3/WD(2016)19
- Korea - DAF/COMP/WP3/WD(2016)20
- Portugal - DAF/COMP/WP3/WD(2016)28
- Slovak Republic - DAF/COMP/WP3/WD(2016)21
- United States - DAF/COMP/WP3/WD(2016)22
- Brazil - DAF/COMP/WP3/WD(2016)23
- Indonesia - DAF/COMP/WP3/WD(2016)32
- Russia - DAF/COMP/WP3/WD(2016)25
- Ukraine - DAF/COMP/WP3/WD(2016)24
- BIAC - DAF/COMP/WP3/WD(2016)26

Documentation is also available at: www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm

Item 6. Other items

For information:

A. Note by the Secretariat and inventory of provisions - DAF/COMP/WP3(2016)1/REV1

Annex: Annotations

Item 1

The joint meeting between WP3 and WGB aims to share experiences between competition and anti-corruption authorities, both domestic and foreign, explore common enforcement challenges and propose ways to improve co-operation and co-ordination between them. See separate agenda DAF /COMP /WP3 /A(2016)1 /ANN and the compilation of country responses to the questionnaire circulated by the Secretariat by email under DAF/COMP/WP3/WD(2016)35 and DAF/COMP/WP3/WD(2016)35/ADD.

Item 3

Under this agenda item, WP3 will hold a **Roundtable on Public Interest Considerations in Merger Control**. The Roundtable aims to provide an overview of how public interest considerations are dealt with in merger control. The discussion will cover public interest considerations included in merger control rules ('public interest clauses'), how they are applied and by whom, and the relevant challenges for competition authorities. The discussion will also explore exceptional circumstances under which public interest might be taken into consideration in the regular merger assessment, such as broad efficiency claims or the failing firm defence.

The discussion will benefit from a Background Paper by the Secretariat, country submissions as well as the participation of John Davies (Partner, Freshfields Bruckhaus Deringer, Belgium) and Judge Dennis Davis (President, Competition Appeal Court, South Africa).

The delegates will discuss their national experiences based on the call for contributions sent by the Chair (see letter of the Chair COMP/2016.01, dated 14 January 2016).

Item 4

The Task Force on Foreign Investment Review of the ABA Section of Antitrust Law has developed an analytical Report on the interface between (i) competition and antitrust reviews and (ii) national security, national interest and industry-specific regulatory reviews. This Report describes the merger review and approval process within a number of major jurisdictions. It points out similarities and differences among these jurisdictions, as well as issues arising between agencies within a single jurisdiction. It focuses in particular on outlining the procedural and substantive issues both within and between jurisdictions in relation to concurrent antitrust and foreign investment reviews. It also addresses concerns raised by parties, governments, and other interested observers, and offers some recommendations for the future. The report will be presented by the Chair of the ABA Section of Antitrust Law, Roxann Henry, and Calvin Goldman, co-chair of ABA's Task Force on Foreign Investment Review.

Item 5

Under this agenda item, WP3 will hold a discussion on **Jurisdiction Nexus in Merger Control Regimes**. Given the increasing number of merger control regimes around the world and the limited resources that competition authorities have to enforce competition law, it is important that authorities only review those mergers that have an impact in their jurisdiction. In order to ensure this, the OECD and the ICN have issued guidelines on notification thresholds and local nexus. This discussion will provide an overview of the merger control thresholds and local nexus criteria currently in place in various countries.

The discussion will benefit from a Background Paper by the Secretariat, country submissions as well as the participation of Jean-Yves Art (Assistant General Counsel, Microsoft) and Kaarli Eichhorn (Global Executive Counsel - Competition Law & Policy, General Electric Company). Randolph Tritell (FTC) will present the results of ICN's survey on the implementation of the ICN recommended practices on merger review. The delegates will discuss their national experiences based on the call for contributions sent by the Chair to frame the dialogue (see letter of the Chair COMP/2016.01, dated 14 January 2016).

Item 6

The Secretariat will report on progress in developing an inventory of provisions in inter-agency memoranda of understanding (MoUs), as part of the ongoing work on international co-operation. A note by the Secretariat and the inventory are available under DAF/COMP/WP3(2016)1/REV1

The next meeting of WP3 will be on 29 November 2016. There will be a roundtable on geographic market definition and a session on merger remedies versus prohibiting transactions. Delegates will also start discussing developments relating to the implementation of the 1998 Hard Core Cartel Recommendation.

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

13 June 2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 8 June 2016

Draft Agenda: 125th meeting of the Competition Committee

15-17 June 2016
OECD Conference Centre, Room CC12

The 125th Meeting of the Competition Committee will be held on 15-17 June 2016 in Room 12 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris (starting on 15 June at 3.00 pm.)

Contact(s):
Antonio CAPOBIANCO, Senior Competition Expert, +(33-1) 45 24 98 08

JT03398026

Complete document available on OLIS in its original format.

DAF/COMP/A(2016)1/REV1
For Official Use
English - Or. English

Draft Agenda: 125th meeting of the Competition Committee

15-17 June 2016

OECD Conference Centre, Room CC12

	Wednesday 15 June (3:00pm – 6:00pm)
15:00 - 15:05	**1. Adoption of the Draft Agenda** DAF/COMP/A(2016)1/REV1
15:05 - 15:10	**2. Approval Of The Draft Summary Record Of The Last Meeting** For approval: • Summary Record of 124th Competition Committee meeting – DAF/COMP/M(2015)2 For information: • List of Participants – DAF/COMP/M(2015)2/ANN1 • Summary of Discussion of the Roundtable on Competitive Neutrality in Competition Policy – DAF/COMP/M(2015)1/ANN2/FINAL • Summary of Discussion of the Roundtable on Changes in Institutional Design – DAF/COMP/M(2015)1/ANN6/FINAL • Summary of Discussion of the Hearing on Competition Enforcement In Oligopolistic Markets – DAF/COMP/M(2015)1/ANN4/FINAL • Summary of Discussion of the Hearing on Across-Platforms Parity Agreements – DAF/COMP/M(2015)2/ANN2/FINAL • Executive Summary of the Discussion of the Roundtable on Competitive Neutrality in Competition Policy – DAF/COMP/M(2015)1/ANN7/FINAL • Executive Summary of the Hearing on Competition Enforcement in Oligopolistic Markets – DAF/COMP/M(2015)1/ANN10/FINAL • Executive Summary of the Hearing on Across-Platforms Parity Agreements – DAF/COMP/M(2015)2/ANN3/FINAL • Key points of the Roundtables on Changes in Institutional Design – DAF/COMP/M(2015)1/ANN9/FINAL • Evaluation of Competition Division's Work in 2015 – DAF/COMP/WD(2016)40 • Use of the Competition Committee's Work Product 2015 – DAF/COMP/WD(2016)55
15:10 - 16:00	**3. Special Country Presentations** **3.a. Presentation on the competition assessment project in Romania by Mr. Bogdan Chiritoiu** **3.b. Presentation on competition developments in the Russian Federation by Mr. Igor Artemiev**
16:00 - 16:30	**4. Reports By Working Parties Chairmen And Co-Ordinators**

16:30 - 18:00	**5.**	**Long-term Themes for the Committee: Market Studies and Digital Economy**

For discussion:

- Scoping note by the Secretariat on Market Studies – DAF/COMP(2016)1
- Scoping note by the Secretariat on Digital Economy – DAF/COMP(2016)3

18:00 - 20:00	**Cocktail co-hosted by the Office for the protection of Competition of the Czech Republic**
	OECD Château, Rooms Ockrent and Marshall

Thursday 16 June 2016 (9:30am – 5:30pm)

9:30 - 12:30	**6.**	**Roundtable on Fidelity Rebates**

For discussion:

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

Note by delegations:

- Summary of contributions - DAF/COMP/WD(2016)59

- Canada – DAF/COMP/WD(2016)6
- Chile – DAF/COMP/WD(2016)21
- France – DAF/COMP/WD(2016)32
- Greece – DAF/COMP/WD(2016)45
- Ireland – DAF/COMP/WD(2016)38
- Israel – DAF/COMP/WD(2016)44
- Japan – DAF/COMP/WD(2016)3
- Korea – DAF/COMP/WD(2016)25
- Norway – DAF/COMP/WD(2016)52
- Romania – DAF/COMP/WD(2016)12
- Spain – DAF/COMP/WD(2016)7
- Sweden – DAF/COMP/WD(2016)14
- Turkey – DAF/COMP/WD(2016)56
- United States – DAF/COMP/WD(2016)20
- Latvia – DAF/COMP/WD(2016)11

- Brazil – DAF/COMP/WD(2016)2
- Egypt – DAF/COMP/WD(2016)5
- India – DAF/COMP/WD(2016)10
- Indonesia – DAF/COMP/WD(2016)50
- Russian Federation – DAF/COMP/WD(2016)13
- Chinese Taipei – DAF/COMP/WD(2016)9

- Ukraine – DAF/COMP/WD(2016)8
- BIAC – DAF/COMP/WD(2016)51

Also available at: http://www.oecd.org/daf/competition/fidelity-rebates.htm

12:30 - 14:30	**Lunch**
14:30 - 15:00	**7. Presentation By UN-ESCWA on the Application of the OECD CLP Indicator to the Arab Region**
15:00 - 17:30	**8. Accession Review of Costa Rica (CONFIDENTIAL)**

- Draft Agenda – Accession review of Costa Rica – DAF/COMP/ACS(2016)4
- Note by the Secretariat – Accession review of Costa Rica – DAF/COMP/ACS(2016)3

Friday 17 June (9:30am – 6:00pm)

9:30 - 12:30 **9. Roundtable on Commitment Decisions in Antitrust Cases**

For discussion:

- Background note by the Secretariat – DAF/COMP(2016)7

Notes by experts:

- Note by Mr. Jean-François Bellis – DAF/COMP/WD(2016)53
- Note by Professor Tadashi Shiraishi – DAF/COMP/WD(2016)54
- Note by Professor Joshua D. Wright – DAF/COMP/WD(2016)58

Note by delegations:

- Summary of contributions – DAF/COMP/WD(2016)60

- Australia – DAF/COMP/WD(2016)4
- Chile – DAF/COMP/WD(2016)37
- Estonia – DAF/COMP/WD(2016)35
- Finland – DAF/COMP/WD(2016)17
- France – DAF/COMP/WD(2016)33
- Greece – DAF/COMP/WD(2016)28
- Israel – DAF/COMP/WD(2016)49
- Italy – DAF/COMP/WD(2016)18
- Korea – DAF/COMP/WD(2016)26
- Netherlands – DAF/COMP/WD(2016)29
- Mexico – DAF/COMP/WD(2016)43
- Poland – DAF/COMP/WD(2016)34
- Portugal – DAF/COMP/WD(2016)48
- Romania – DAF/COMP/WD(2016)19

- Spain – DAF/COMP/WD(2016)15
- Switzerland – DAF/COMP/WD(2016)36
- Sweden – DAF/COMP/WD(2016)39
- Turkey – DAF/COMP/WD(2016)57
- United Kingdom – DAF/COMP/WD(2016)27
- United States – DAF/COMP/WD(2016)23
- European Union – DAF/COMP/WD(2016)22

- Colombia – DAF/COMP/WD(2016)16
- Indonesia – DAF/COMP/WD(2016)42
- Lithuania – DAF/COMP/WD(2016)30
- Russian Federation – DAF/COMP/WD(2016)41
- Singapore – DAF/COMP/WD(2016)46
- South Africa – DAF/COMP/WD(2016)47
- BIAC – DAF/COMP/WD(2016)31

Also available at: http://www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm

12:30 - 14:00	**Lunch**
14:00 - 15:00	**10. Global Relations and Participation Plan**

10.a. Participation Plan (CONFIDENTIAL)

For discussion:

- Global Relations Strategy and Participation Plan of the Competition Committee– DAF/COMP(2016)9

10.b. Global Relations

For discussion:

- Note by the Secretariat on Global Relations – DAF/COMP(2016)8

15:00 - 17:00	**11. Annual Reports on Competition Policy**

Reports to be presented by the Delegates at this meeting:

- Belgium – DAF/COMP/AR(2016)1
- Czech Republic – DAF/COMP/AR(2016)2
- Denmark – DAF/COMP/AR(2016)3
- Finland – DAF/COMP/AR(2016)4
- Israel – DAF/COMP/AR(2016)5
- Portugal – DAF/COMP/AR(2016)6
- Romania – DAF/COMP/AR(2016)13

- Slovak Republic – DAF/COMP/AR(2016)7
- Sweden – DAF/COMP/AR(2016)8
- Turkey – DAF/COMP/AR(2016)9

- Brazil – DAF/COMP/AR(2016)10
- Colombia – DAF/COMP/AR(2016)11
- Lithuania – DAF/COMP/AR(2016)12
- Russian Federation – DAF/COMP/AR(2016)14

Additional Reports for information:

- Greece – DAF/COMP/AR(2016)16
- Ireland – DAF/COMP/AR(2016)17
- Luxembourg – DAF/COMP/AR(2016)18
- Mexico – DAF/COMP/AR(2016)19
- Poland – DAF/COMP/AR(2016)20
- Spain – DAF/COMP/AR(2016)21
- United States – DAF/COMP/AR(2016)22

- Estonia – DAF/COMP/AR(2016)15

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

17:00 - 18:00 **12. Other Business And Future Topics**

For reference:

- Note by the Secretariat on Future topics – DAF/COMP/WD(2016)1/REV2

Annex: Annotations

Item 3

The Committee will hear country presentations on recent developments, including a presentation by the President of the Federal Antimonopoly Service of the Russian Federation (FAS) on recent development in competition law and policy in the Russian Federation and a presentation by the President of the Romanian Competition Council on the OECD competition assessment project of three sectors in Romania (transport, construction and procurement and food processing).

Item 4

The Chairmen of Working Party No. 2 and of Working Party No. 3 will report on the meetings of the Working Parties held on 13 June 2016 (WP2) and 14-15 June 2016 (WP3).

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

The ICN co-ordinator will report on recent work and projects by the ICN.

Item 5

The Competition Committee agreed in October 2015 to work on two long term themes for the period of 2016/2018: (i) Competition, Digital Economy and Innovation; and (ii) Market Studies. In June 2016, delegates will decide on the Committee work-plans regarding these themes, based on separate Secretariat proposals.

Item 6

Fidelity rebates or loyalty discounts allow sellers to offer buyers a better price conditional on the buyer demonstrating loyalty in the purchases they make. They are often introduced as discounts on an existing price (rather than a way to introduce a higher penalty price for disloyal buyers), and can therefore stimulate demand for a seller's product in addition to achieving other goals. However, in some circumstances they can prevent rivals to a firm with market power from competing effectively. For example, they may increase the rivals' costs, increase the effective price that buyers pay for rival products, or reduce the firm's prices to a level at which equally efficient rivals cannot remain within market.

There have long been important differences in the way in which different agencies have assessed fidelity rebates and this Roundtable offers a timely opportunity to examine these different approaches and to look at the practice of agencies and courts. The discussion will benefit from the participation of three experts: Prof. Joseph Farrell (University of California, Berkley), Prof. Alison Jones (Kings College London) and James Venit (Skadden, Arps, Slate, Meagher & Flom LLP, Brussels). A Background Paper from the Secretariat and written submissions from delegations provides background for the discussion.

Item 7

A representative of the UN ESCWA (United Nations Economic and Social Commission for Western Asia) will address the Committee and present a report on competition and regulation in the Arab region. The Report is based on information collected by UN ESCWA using the structure and methodology of the OECD Competition, Law and Policy Indicator.

Item 8 [CONFIDENTIAL]

An accession review of Costa Rica will take place in a confidential session on Thursday 16 June, 2016 from 15.00 to 18:00. A separate agenda for this confidential item will be distributed on OLIS under DAF/COMP/ACS(2016)4.

Item 9

The Committee will take stock of experiences with the use of commitments in antitrust cases, which is a relatively new power for many competition authorities. In the last decade, the number of agencies which have obtained such powers has increased significantly in parallel with the number of commitment decisions adopted by such agencies.

These are legally binding commitments that parties offer to a competition authority during an antitrust investigation to eliminate the grounds for the enforcement action to continue. By addressing the concerns that the agency has, commitment decisions allow investigations to be brought to a close more swiftly.

Experiences in this area are still relatively recent and there are still a number of OECD countries which do not have such powers. The Roundtable will offer an opportunity to take stock of agencies' experiences, to identify the different powers that agencies have and look at the different conditions that agencies must meet before they can rely on these powers. The discussion will benefit from the participation of three experts: Prof. Tadashi Shiraishi (University of Tokyo, Japan), Prof. Joshua Wright (George Mason University, US) and Jean-François Bellis (Van Bael & Bellis, Brussels). A Background Paper from Secretariat and written submissions from delegations will provide the background for the discussion.

Item 10

i) The Committee will discuss in a **confidential** session its Participation Plan.

ii) For information: a Secretariat note will present to the Committee the outreach activities. It will include: (i) the activities in the two Regional Competition Centres (Hungary and Korea) (2014-2015); (ii) a Secretariat update on OECD Global relations (June 2015 – June 2016); and (iii) the results of the evaluation by participants of the 2015 Global Forum on Competition (GFC) and the 2016 OECD/IDB Latin American and Caribbean Forum (LACCF) as well as the topics for the 2016 GFC.

Item 11

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

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

19-May-2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP2/WD(2016)7
Unclassified

Working Party No. 2 on Competition and Regulation

DISRUPTIVE INNOVATIONS IN LEGAL SERVICES

-- Chinese Taipei --

13 June 2016

This document reproduces a written contribution from Chinese Taipei submitted for Item 3 of the 61st meeting of the Working Party No. 2 on Competition and Regulation on 13 June 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/disruptive-innovations-in-legal-services.htm

Please contact Ms.Ania Thiemann if you have any questions regarding this document
Ania.THIEMANN@oecd.org

JT03396257

Complete document available on OLIS in its original format

English - Or. English

-- CHINESE TAIPEI --

1. This report mainly introduces the overall situation of the legal services market and regulatory measures in Chinese Taipei, and presents the position and cases of the Fair Trade Commission (FTC) and other regulatory authorities that oversee the legal services industry.

1. Legal Services Market and its Regulatory Framework in Chinese Taipei

2. Broadly speaking, legal services refer to "providing legal advice" or "taking legal action on behalf of clients" based on the analysis of facts in a specific case, as well as applicable provisions of the law. The latter has to do with what legal services refer to in the narrow sense, i.e., handling civil, criminal, and administrative cases that are currently under investigation by a prosecutor or being tried in court. This also includes the preparation of legal documents before the court. Pursuant to Article 48 of the Attorney Regulation Act of Chinese Taipei, one who practices as an attorney for profit without being licensed as an attorney shall, unless permitted by law, be subject to imprisonment of up to a maximum of one year and, in addition thereto, a fine of not less than NT$30,000 but not more than NT$150,000. In other words, only those who are licensed as an attorney may provide the "narrow definition of legal services" for profit. Generally speaking, the law does not limit the provision of legal counseling services to only those who are licensed as an attorney. Hence, various organizations (e.g., local government, social welfare institutions, public welfare organizations, and legal service clubs of universities) all provide free legal advice, but only attorneys are allowed to provide legal services in court. The overall situation and regulatory framework of attorneys in Chinese Taipei are summarized below.

3. According to statistics of the Ministry of Justice (MOJ), a total of 15,284 people had acquired an attorney's license as of April 14th, 2016, but only 9,198 were registered with a court, accounting for 60% of people with an attorney's license. At present, local bar associations have been established in 16 counties/cities, and together they have formed the Taiwan Bar Association (TBA).

4. According to the Attorney Regulation Act, the regulatory authority over bar associations is the MOJ. The legal system generally stipulates that professionals, such as attorneys, may not practice without joining a professional association. This is equivalent to making it mandatory to join a professional association. The provisions of the law are set forth to guide the establishment and operation of professional associations, and provide the associations with autonomy, a penalty system, and authority over professional ethics. In Chinese Taipei, the conduct of attorneys is mainly regulated by the "Attorney Regulation Act, Attorney Code of Ethics, and Attorney Disciplinary Rules." The Attorney Regulation Act not only includes provisions on attorney licensing and bar associations, but also regulates the practices of attorneys, including:

- Protecting the reputation of attorneys: An attorney shall not engage in acts that may harm the attorney's reputation or credibility. An attorney shall not engage in businesses that damage the dignity and reputation of the attorney profession.

- Prohibiting soliciting suits by improper means: An attorney shall not instigate or solicit suits by improper means or barratry. An attorney shall not, in his name or the name of another, post or

publish notices amounting to deception or threats. An attorney shall not engage in court procedures, appeals or defenses on behalf of his client based on obviously groundless reasons.

- Prohibiting conflicts of interest and relationships: An attorney is prohibited from accepting representation for a respondent party to his/her client, or if the case was handled by the attorney when acting as a judge or arbitrator. An attorney shall not engage in suits in any court where they are related as husband and wife, or blood relations within the judge or prosecutor.

- Prohibiting inappropriate compensation: An attorney shall not have improper social activity with any judicial officers, and shall not demand in advance or receive fees beyond those specified in relevant regulations. In addition, an attorney shall not take by assignment rights at issue, to which his client is a party.

- Requirements on organization and membership: Attorneys are required to establish a law firm, join the law firm, and join the local bar association in that jurisdiction.

5. Contents of the Attorney Code of Ethics can be divided as follows:

- Professional conduct of attorneys: Includes the moral character of individual attorneys, how to operate their practice (e.g., the selection and supervision of employees and partners of their law firm), expanding business and advertisements (e.g., prohibiting attorneys from soliciting suits by improper means or marketing methods that damage the reputation and credibility of attorneys), public service, and on-the-job training.

- Interpersonal interactions of attorneys: Principles for handling conflicts of interest between attorneys and their clients, other attorneys, and judicial agencies or personnel.

6. If an attorney commits a severe violation of the Attorney Regulation Act or Attorney Code of Ethics, the High Court, the prosecutor's office or local bar association will send the attorney to the Attorney Disciplinary Committee; penalties include a warning, reprimand, suspension of the right to practice law for a period of no more than 2 years, or disbarment. Attorneys may apply for a second review if they refuse to accept the penalty.

2. Application of Competition Law to Disruptive Innovation in Legal Services – The Case of Lifelaw Company

7. Innovation can roughly be divided into "*continuous* innovation" and "disruptive innovation." Scholars clearly describe the difference between the two types of innovation. "*Continuous* innovation" refers to modifications made to a certain product, and does not affect the market shares of the product, but "disruptive innovation" is entirely different as it creates a new product, process or business model, and redefines the market while replacing existing products or companies.

8. In Chinese Taipei, legal services provided by Lifelaw Company have never been seen before, and can be considered to a certain extent to be a form of disruptive innovation. The company was founded in 2000 and established an online legal consultation platform, recruiting common members (the public) and specialist members (attorneys-at-law). When clients face legal problems, they can find suitable attorneys on Lifelaw Company's website or through its cellphone service. Attorneys and Lifelaw Company share fees paid by clients on a percentage basis. The service process, business model, and transparency of prices offered by the platform is a breakthrough from the legal counseling services provided face-to-face by traditional law firms, as well as the process of negotiating fees. Even though the platform will not entirely

replace traditional law firms, Lifelaw Company has set a precedent for using an online platform to reduce the cost of providing legal services.

9. However, at the time the TBA believed that attorneys allowing Lifelaw Company to share legal counseling fees was a violation of Article 12 of the Attorney Code of Ethics, which states: "Attorneys shall not solicit cases by paying brokers." Therefore, the TBA sent letters to local bar associations to notify their members that they should immediately withdraw from the platform, so as to avoid being penalized. Lifelaw Company was dissatisfied with the action of the TBA and reported the case to the FTC.

10. After examining the evidence, the FTC determined that the TBA's conduct restrained business activities and was sufficient to impact the market function with respect to the supply of and demand for services. The conduct violated the provision of the Fair Trade Act that prohibits concerted actions, and the FTC imposed a fine of NT$500,000. The grounds for the disposition were as follows:

- The Attorney Regulation Act does not restrict the channels through which attorneys may provide legal counseling. The conduct of the TBA has restrained the freedom of attorneys to provide services through an online platform.

- The conduct of the TBA, which was in accordance with the Attorney Code of Ethics, is still within the purview of the Fair Trade Act if it involves any enterprise's conduct in respect of competition.

- The Attorney Code of Ethics is not a law or legal order, and the TBA cannot claim that "an act performed in accordance with law or order is not punishable" as stipulated in Article 11 of the Administrative Penalty Act.

- Self-discipline and the autonomy of organizations must still comply with laws and regulations.

- The conduct of the TBA restricts the channels through which attorney members may provide legal counseling services. Adding restrictions not stipulated by the law has exceeded the scope of self-discipline in the Attorney Code of Ethics.

- Diverse channels for providing legal services are necessary to ensure competition, and the regulatory authority, the MOJ, has not set forth any clear and definite rules to replace or eliminate competition. Hence, it is hard to justify exemption from stipulations of the Fair Trade Act.

11. The TBA refused to accept the disposition of the FTC and appealed to the Executive Yuan. The Executive Yuan Administrative Appeal Review Committee revoked the FTC's disposition on the following grounds:

- The TBA is authorized by the Attorney Regulation Act to establish and interpret the Attorney Code of Ethics. The TBA, using its right to interpret, determined that the fee-sharing agreement between attorneys and Lifelaw Company for providing legal counseling services was a violation of Article 12 of the Attorney Code of Ethics.

- According to the Attorney Regulation Act, bar associations have the right to refer an attorney for disciplinary proceedings to the Attorney Disciplinary Committee. Based on the position to prevent members from being punished, the TBA sent warning letters to local bar associations using the authority provided by the Attorney Regulation Act and in compliance with the Attorney Code of Ethics. Hence, an act performed in accordance with law or order is not punishable in accordance with Article 11 of the Administrative Penalty Act.

- The disposition of the FTC did not consider that the conduct of the TBA to regulate the behavior of its members is in accordance with the law and legal order, and is justified as it prevents members from violating the law. Hence, the conduct does not exceed the scope of the Attorney Code of Ethics.

4. The Course of the FTC's Competition Advocacy Regarding Attorney Regulations

4.1 Restrictions of fees standard

12. According to Article 16 of the Attorney Regulation Act, the articles of incorporation of bar associations shall include standards for attorney service fees. This provision indirectly restricts the amount of attorney service fees, and may possibly restrict price competition. Therefore, the FTC consulted several times with the MOJ, the competent authority of the Attorney Regulation Act, in the hope of amending or even deleting the provision. The MOJ's attitude was vague at first, but recently came to support the idea, and it was learned that the "Amendment to the Attorney Regulation Act" drafted by the MOJ has deleted the provision. After the Executive Yuan reviews the amendment, it will be sent to the Legislative Yuan for deliberation.

13. The FTC's position on this issue: Letting bar associations set fee standards obviously eliminates competition, and there is not enough evidence to prove that this is necessary for ensuring quality. The effective enforcement of a mandatory fee standard, regardless of whether it may be in accordance with the law or for self-discipline, is gradually being questioned and considered anti-competitive behavior or contrary to the public interest. Even if they only serve as "recommendations," fee standards remain an important means for maintaining the profitability of professionals like attorneys while sacrificing consumer interests. Hence, the FTC contends that professional associations like bar associations should not be allowed to set fee standards, regardless of whether they are mandatory or recommendations, to avoid restricting price competition and harming consumer rights.

4.2 Restrictions of practice areas

14. Article 7 of the Attorney Regulation Act originally stated that an attorney may apply for registration with 4 local courts. In other words, attorneys at the time could only register with 4 local courts, and could only practice in the 4 areas. After the FTC's competition advocacy and consultations with the MOJ, Article 7 of the Attorney Regulation Act was deregulated so that it stated: "an attorney may apply for registration with a court." According to related provisions of the Attorney Regulation Act, however, attorneys still need to join the local bar association in order to practice in that area, which is different from accountants being able to practice anywhere once they join any accountants' association. Because of this, the Taipei Bar Association in April 2016 requested an amendment that would read "attorneys to practice anywhere in the State only need to join one bar association." The MOJ is currently conducting a public opinion survey regarding this issue.

15. The FTC's position on this issue: From the perspective of market competition, restricting the areas of practice for attorneys to protect attorneys in non-urban areas is completely unjustifiable. The geographic scope of Chinese Taipei is limited while the number of attorneys continuously increases. It is hard to say that this restriction is materially in the public interest, as it already infringes on the attorneys' freedom to work that is protected by the Constitution. Therefore, the restriction goes against the purpose of the Fair Trade Act to ensure free and fair competition.

4.3 Restrictions on expanding business through advertisements

16. Article 12 of the Attorney Code of Ethics established by the TBA stipulates that attorneys shall not use false or misleading advertisements, pay fees to brokers, use judicial officers or hire salespersons, or use other improper means to expand their business. The position of the TBA on this provision is to "protect the autonomy of consumers" and "maintain the independence of attorneys":

- The work of attorneys involves a high level of professional knowledge, and information asymmetry exists between attorneys and clients. If attorneys use false advertisements to solicit cases, consumers might not be able to distinguish between what is true and what is false in the content of their advertisements, or might be misled into believing that filing a lawsuit is the best way to settle a dispute, and further make a relatively disadvantageous decision.

- If attorneys pay brokers or hire salespersons to solicit cases, since the fees or other forms of compensation of brokers and salespersons are mainly calculated based on the number of clients they bring in, there is a strong incentive for the broker or salesperson to make the attorney and client sign an appointment agreement. Brokers and salespersons may make false claims to the client or even defraud or threaten them to sign the agreement. The autonomy of consumers is severely impacted as they are unable to make a fully-informed decision.

- Brokers or salespersons may also do whatever they can to persuade attorneys to take a case, and even though attorneys are able to make an independent judgment, they still have to a certain extent the pressure of maintaining personal relationships. Therefore, any possible influence from non-attorneys should be eliminated to maintain the independence of attorneys.

17. The FTC's position on this issue: Advertisements play an important role in most economic activities. Advertisements can be used to notify consumers of the latest information, ensuring that new products, services and the provider can attract the attention of users, and can also encourage innovation and new market participants. If advertisements of professionals are strictly restricted, consumers will not know where to access their professional services, and will not be able to determine the amount of the fees they will need to pay. Therefore, abolishing restrictions on advertisements will benefit consumers. Professionals such as attorneys must still abide by the code of conduct prohibiting false, misleading or deceptive advertisements, so as to protect the public interest.

5. Conclusion

18. In the legal services market, if law firms are no longer the sole provider of "legal services in a narrow sense," and platforms, e.g., websites and APPs, established by new businesses are allowed to provide legal services, foreseeable business models include:

- Collaborating with attorneys and periodically collecting a platform service fee from attorneys or a brokerage fee when a match is successfully made.

- Users join the website set up by an enterprise and pay a fee based on the type and number of legal questions asked online, as well as responses from the attorney. The enterprise then shares profits with the attorneys it works with.

- Providing an online platform or space for legal discussions free of charge. Attorneys, individuals with legal knowledge, and general users or enterprises can engage in discussions on the platform. The main source of profit for the platform is the advertisements put up by attorneys, government agencies, or other enterprises.

19. The business models listed above all require the participation of attorneys to operate. Therefore, discussions on competition issues of disruptive innovation in the legal services market cannot be separated from discussions on attorney regulations and the role of bar associations. In summarizing the above introductions to attorney regulations, competition advocacy, coordination with administrative agencies, and dispositions of the FTC, the difficulties encountered in enforcing the competition law arise due to the following two reasons:

- Bar associations and the MOJ still lack consideration for competition law.

- The Executive Yuan Administrative Appeal Review Committee and administrative court do not fully support the FTC's deregulation policy for attorneys, and still reject competition law when it comes to regulations for professionals such as attorneys.

20. The key to making a breakthrough in the FTC's law enforcement is the concurrence between the Attorney Regulation Act and competition law, while pursuing a balance between the self-discipline, professionalism, and independence of professionals, such as attorneys, and effective competition. In other words, neither can be neglected. After actively coordinating with the legislature and the MOJ, which is the regulatory authority, over the years, the FTC has seen the rights and responsibilities of both parties become clearly defined, and has also seen signs of gradual deregulation. In the future, the FTC will continue to examine legal service-related laws and policies, the market structure, the situation regarding competition, and other social and economic changes in Chinese Taipei, and will suitably advocate a competition policy with the MOJ and the bar associations. The FTC will also suggest that the regulatory authority or bar associations establish an information disclosure platform for professionals such as attorneys to eliminate the information asymmetry between attorneys and the general public. This will increase the accessibility of legal services to the general public and facilitate effective competition between attorneys with respect to service quality.

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

20-May-2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3/WD(2016)14
Unclassified

Working Party No. 3 on Co-operation and Enforcement

PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by Chinese Taipei --

14-15 June 2016

This document reproduces a written contribution from Chinese Taipei submitted for Item 3 of the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm

JT03396357

English - Or. English

CHINESE TAIPEI

1. This report will illustrate Chinese Taipei's law enforcement experiences in its review of merger notifications with some case examples.

1. The merger control system under the Fair Trade Act

1.1 An overview of the merger control system

2. The regulations regarding enterprise mergers in the Fair Trade Act (FTA) are based on the principle of a "notification system." The focus is set on market structure control in advance to prevent over-concentration as a result of enterprise mergers from leading to restrictions on market competition. As defined in Paragraph 1 of Article 10 of the FTA, "merger" refers to one of the following conditions: 1) where an enterprise and another enterprise are merged into one; 2) where an enterprise holds or acquires the shares or capital contributions of another enterprise to an extent of more than one third of the total number of voting shares or total capital of such other enterprise; 3) where an enterprise is assigned by or leases from another enterprise the whole or the major part of the business or assets of such other enterprise; 4) where an enterprise operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter's business; or 5) where an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise.

3. Meanwhile, it is also specified in Paragraph 1 of Article 11 of the FTA that any merger involving any of the following situations shall be filed with the Fair Trade Commission (FTC) in advance: 1) as a result of the merger the enterprise(s) will have one third of the market share; 2) one of the enterprises in the merger has one fourth of the market share; or 3) sales for the preceding fiscal year of one of the enterprises in the merger exceeds the threshold amount publicly announced by the FTC. In other words, enterprises engaging in business activities that comply with any of the merger types described and also achieving any of the notification thresholds where the proviso regulations in Article 12 of the FTA do not apply are required to file merger notifications with the FTC.

4. In the amendment to the FTA announced on February 4, 2015, the revision of the merger control system was focused on the specification of merger types and notification thresholds to bring affiliate enterprises (including brother/sister companies under common control) and natural persons who have controlling shareholdings under regulation as well as to increase the extension of the review period to sixty days. No changes were made to the review standards.

1.2 Regulations regarding merger review standards

5. As set forth in Paragraph 1 of Article 13 of the FTA: "The competent authority may not prohibit any of the mergers filed if the overall economic benefit of the merger outweighs the disadvantages resulted from competition restraint." To make the merger notification review standards more exact to make it easier for businesses to follow related regulations, the FTC has established the "Fair Trade Commission Disposal Directions (Guidelines) on Handling Merger Filings" in which considerations in the assessment of various effects of competition restrictions likely to result from horizontal, vertical and conglomerate mergers are specified. At the same time, the factors to be considered in determining the overall economic benefits are also defined in Point 13 of the said disposal directions as "if a merger is considered likely to entail competition restrictions, the

applicant(s) may submit proof of the following factors of the overall economic benefits to be assessed by the FTC: 1) efficiency; 2) consumers' interests; 3) one of the merging parties is originally a weaker competitor; 4) one of the merging parties is a failing firm; and 5) other concrete evidence of overall economic benefits to be expected." This means that the FTC's review of any enterprise merger is conducted according to the "overall economic benefits" and "disadvantages resulting from competition restraint" as a consequence of the merger in order to evaluate whether there will be significant competition restrictions so that over-concentration in the relevant market can be prevented.

6. In addition, for mergers in special industries, such as finance, air transportation, cable TV, telecommunications and digital convergence, the FTC has also established corresponding administrative rules for such businesses to follow as well as to serve as reference when the FTC reviews related cases. It is specified in the aforementioned administrative rules that the FTC may adopt the "overall economic benefits" as a consideration, such as the influence of innovation in financial services, the policy of the competent authority of the financial industry, whether a merger is able to promote Cable TV digitization, whether a merger can lead to more diverse choices for consumers, whether a merger can help increase competitiveness in international markets, whether a merger can improve research and development and innovation, etc.

2. Consideration of the "public interest" in the review of mergers according to the Fair Trade Act

2.1 Consideration of the role of the "public interest" in the review of mergers

7. The standards the FTC applies in its review of merger notifications are different from the "substantial lessening of competition test" or "significant impediment to effective competition test" applied by the competitive authorities in the US and the EU. They are closer to the "public interest test." For this reason, besides assessing likely disadvantages from competition restraint, the FTC also takes into account the overall economic benefits when reviewing merger cases. In practice, the scope of the overall economic benefits to be assessed not only includes economic efficiency directly resulting from competition, consumer interests, one of the merging parties originally being a weaker competitor and one of the merging parties being a failing firm, but also encompasses economic benefits not related to competition, such as industrial development, employment and national competitiveness that are associated with the overall economic benefits.

8. During commissioners' meetings, the FTC has discussed issues related to the consideration of the public interest in its review of mergers and has concluded that the focus of the FTA is set on maintaining effective competition and fair competition in the market. Merger review standards should only be related to the overall economic benefits and disadvantages resulting from competition restraint. The public interest that is not related to the overall economic benefits should not be taken into account in the review of mergers. In practice, the public interest has been taken into consideration in the review of merger cases since it is associated with the overall economic benefits. In other words, the FTC has not randomly expanded its considerations to include other legal interest or policy targets beyond economic benefits.

2.2 The relationship between the "public interest" consideration and competition analysis in the review of merger cases

9. The range of overall economic benefits is rather extensive and some considerations may even contradict the benefits directly brought about by competition (such as the consolidation of departments with similar functions after enterprise mergers which may reduce operating costs and boost efficiency but which can also create unemployment). In addition, it is also difficult to choose between various considerations. Therefore, the FTC will only go further to evaluate whether a merger is able to facilitate the realization of other economic benefits outside competition if it concludes that the net effect of the merger will be negative after analyzing the positive and negative effects of the impact on competition from the merger.

10. When assessments are made at different stages as mentioned above, consideration of the public interest in the review of mergers can only be applied in defenses that are advantageous to the merging parties. In other words, if there is no evidence showing that significant competition restrictions are likely to result, the competition authority cannot prohibit a merger simply because the merger will possibly impede the realization of economic benefits that are not related to competition. Take media merger cases for example. Unless the outcome of a merger is bound to restrain market competition to a significant degree (i.e. competition factors are taken into account), it will be impossible to prohibit the merger merely because such a merger will obstruct freedom of speech (i.e. non-competition factors are taken into account).

3. Merger cases involving the jurisdiction of other competent authorities

11. As specified in Point 15 of the Fair Trade Commission Disposal Directions (Guidelines) on Handling Merger Filings, "When reviewing merger cases, the FTC may consider the opinions of the competent authority of the industry in concern to assess the overall economic benefits and disadvantages from the competition restrictions thereof incurred." Therefore, with merger cases that involve overseas Chinese or foreign investors or special industries, for example, the FTC will work with related competent authorities to review such merger filings in accordance with the jurisdiction of each agency.

3.1 The competent authority responsible for investment review

12. When merger cases involve overseas Chinese or foreign nationals investing in the country, the applicants are required to act according to the "Statute for Investment by Overseas Chinese" or the "Statute for Investment by Foreign Nationals" and apply to the Investment Commission of the Ministry of Economic Affairs for approval. It is set forth in Article 7 of the Statute for Investment by Overseas Chinese and Article 7 of the Statute for Investment by Foreign Nationals that overseas Chinese and foreign nationals are not allowed to invest in businesses that are concerned with national security, public order, good customs and practices or national health.

3.2 The competent authority of the financial industry

13. According to the authorization given by Paragraph 2 of Article 9 of the Financial Holding Company Act, the FTC has worked with the Financial Supervisory Commission (FSC) and established the "Regulations for the Examination of Financial Holding Company Mergers Cases" in which it is stipulated that when the FSC receives applications for approval to set up financial holding companies, the FSC is required to advise the applicants to file merger notifications with the FTC if there is anything that meets any of the situations described in Article 11 of the FTA. When reviewing such merger filings, the FTC may solicit the opinions of the FSC.

14. Meanwhile, as stated in Article 5 of the Regulations for the Examination of Financial Holding Company Mergers Cases, besides reviewing such merger notifications in accordance with the considerations listed in the Fair Trade Commission Disposal Directions (Guidelines) on Handling Merger Filings, the FTC may also take the following factors into account: 1) the impact on the stability and the integrity of the financial markets, 2) the impact on the availability and convenience of financial services, 3) the impact on the innovation of financial services, and 4) policy made by the competent authority relevant to the financial industry.

3.3 The competent authority of the broadcasting and TV industry

15. The FTC has conducted administrative consultations with the National Communications Commission (NCC) over broadcasting and TV business mergers. If there is anything in a merger between broadcasting and TV companies that meets any of the situations described in Article 11 of the FTA, such companies are required to file a merger notification with the FTC. The FTC will review the merger notification after acquiring the opinions of the NCC.

4. Merger cases the FTC has reviewed in recent years with the public interest being taken into consideration

4.1 The merger between PXMart and Sung Ching Supermarket

16. Chuan Lian Enterprise Co., Ltd. (PXMart) intended to lease from Sung Ching Commercial Co., Ltd. (Sung Ching Supermarket) all of its 65 supermarkets as well as acquire the trademark, inventories and certain fixed assets of Sung Ching Supermarket. The condition complied with the merger type described in Subparagraph 3 of Paragraph 1 of Article 10 of the FTA; therefore, PXMart filed a merger notification with the FTC.

17. The merger would have no significant impact on the structure of the relevant market and competition. The number of competitors would decrease but there would still be many similar businesses in the market and competition would remain fierce. Furthermore, these businesses sold plenty of product types and items which were highly substitutable whereas the prices were highly transparent. There were many businesses and products in the relevant market for consumers to choose from. It would be difficult for any of these businesses to engage in concerted actions. There was no significant market entry barrier and countervailing power was existent. The interests of consumers would not be jeopardized as a result of the merger while existing shopping convenience would be maintained. Through the merger, the merging parties could make the deployment of their marketing channels and resources more efficient to achieve economies of scale. On top of it all, the marketing strategy of PXMart to offer cheap prices would be advantageous to consumers. If the merger were prohibited, the aforesaid overall economic benefits could not be achieved. There were also other considerations. PXMart would continue to hire Sung Ching Supermarket's employees if they wished to stay. It meant that the hundreds of workers of Sung Ching Supermarket would not become unemployed so that the unemployment rate would not go up. Hence, after concluding that the overall economic benefits would outweigh the disadvantages from the competition restraint thereof incurred, the FTC did not prohibit the merger.

4.2 The merger between Taiwan Depository and Clearing Corporation and Taiwan Integrated Shareholder Service Company

18. Taiwan Depository and Clearing Corporation (TDCC) intended to merge with Taiwan Integrated Shareholder Service Company (TISSC). The condition complied with the merger type described in Subparagraph 1 of Paragraph 1 of Article 6 (Subparagraph 1 of Paragraph 1 of Article 10 today) and TDCC therefore filed a merger notification with the FTC.

19. The industry (shareholders' meeting electronic voting platform service) involved in this case had the characteristic of economies of scale. Market demand was subject to the range of electronic voting applicable defined by the FSC and the scale of the market was limited. Even in countries with mature capital markets, there was usually only one electronic voting platform being operated because it was considered the most economically efficient. Moreover, this merger could provide public companies and investors with a safer and more convenient electronic voting platform service. The result would be a positive effect on industrial development. In addition, as the competent authority, the FSC also believed that the merger would be beneficial in the achievement of financial supervision policy targets and there existed proper price supervision mechanisms to prevent excessive pricing and other anti-competition practices. Therefore, the FTC concluded that the overall economic benefits would be greater than the disadvantages from the competition restraint thereof incurred and decided not to prohibit the merger.

5. Conclusions

20. The competition policy in Chinese Taipei is intended to maintain trading order and protect consumer interests, ensure free and fair competition, and promote economic stability and prosperity. The FTC reviews merger notifications in advance to prevent market structure deterioration, over-

concentration of economic power and competition restriction as a result of enterprise mergers. In addition to the adoption of whether the overall economic benefits outweigh the disadvantages resulting from competition restraint as specified in Paragraph 1 of Article 13 of the FTA as a standard in the review of mergers, the FTC has also established administrative rules for special industries. It is clearly specified in such rules that the FTC may apply the "overall economic benefits" which include the policies of the competent authorities of various industries, the promotion of competitiveness in international markets, the improvement of research and development and innovation, and the diversification of choices for consumers. Other factors such as freedom of speech, environmental protection, etc. are not associated with the overall economic benefits or core issues in effective competition; therefore, they are not to be considered in the review of mergers.

21. When merger cases involve the jurisdiction of other competent authorities, the FTC will act according to the FTA and only decide by taking into consideration the overall economic benefits and disadvantages resulting from competition restraint according to the market structure, market concentration, entry barriers, countervailing power in the upstream, midstream and downstream sectors, and other competition factors in order to avoid confusion over jurisdictions between the FTC and other competent authorities.

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

24-May-2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

ROUNDTABLE ON FIDELITY REBATES

Note by Chinese Taipei

15 – 17 June

This document reproduces a written contribution from Chinese Taipei submitted for item 6 of the 125th OECD Competition committee on 15-17 June 2016.
More documents related to this discussion can be found at www.oecd.org/daf/competition/fidelity-rebates.htm

Please contact Mr. Chris Pike if you have any questions regarding this document [Email: Chris.Pike@oecd.org]

JT03396489

This report illustrates the application of the Fair Trade Act (FTA) to fidelity rebates (loyal discount) in Chinese Taipei, and the Fair Trade Commission's (FTC) approach to handling such cases with a case example.

1. Chinese Taipei's Investigation on "Fidelity Rebates" or "Loyalty Discounts"

1. The Fair Trade Act (FTA) of Chinese Taipei does not have specific provision to define or regulate the term "fidelity rebates" or "loyalty discounts." When handling cases in practice, the FTC usually uses the term "loyalty discounts" or "fidelity discounts" to describe the practices of offering lower prices or other preferential treatment by enterprises to trading counterparts (including intermediate traders and end users) for continuing transactions with the enterprise and not switching to other competitors.

2. When handling cases related to loyalty discounts that may lead to restricted competition, the FTC generally applies Paragraph 3 of Article 20 of the FTA: "No enterprise shall engage in any of the following acts that is likely to restrain competition:…3. preventing competitors from participating or engaging in competition by inducement with low price, or other improper means." According to Article 27 of the Enforcement Rules of Fair Trade Act (Enforcement Rules): "The 'low price inducement' described in Subparagraph 3 of Article 20 of the Act refers to the offering of prices below costs or obviously inappropriate so as to hinder competition or prevent competitors from participating in the market. In determining whether the low price inducement mentioned in the preceding paragraph is likely to restrain competition, the totality of such factors as the intent, purposes, and market position of the parties, the structure of the market to which they belong, the characteristics of the goods or services, and the impact that carrying out such restrictions would have on market competition shall be considered." Moreover, if the loyalty discount is offered by a monopolistic enterprise, Subparagraph 1 of Article 9 of the FTL: "directly or indirectly prevent any other enterprises from competing by unfair means;" may be applied.

3. That is, when handling "loyalty discount" cases, the FTA first considers whether the discount hinders competition by offering prices below cost or obviously inappropriate. Hence, the approach to handling loyalty discount cases essentially includes using "low price inducement" to cause "predatory pricing" effects, and thereby prevent competitors from participating in the market. If the loyalty discount does not result in predatory pricing but may restrict competition by "market foreclosure," the conditions listed in Article 27 of the Enforcement Rules must be considered, i.e., the overall effects of intent, purposes, and market position of the parties, the structure of the market to which they belong, the characteristics of the goods or services, and the impact that carrying out such restrictions would have on market competition shall be considered to determine the case.

4. In fact, the FTC recognizes the competitive effects caused by price discounts in the market and their benefits to consumers. The effects of "low price inducement" that the FTC is concerned about are the actions taken by enterprises to prevent competitors from participating in the market, which includes the intent to foreclose the market so that existing competitors cannot continue to compete with the enterprise, or to prevent potential competitors from entering the market. The FTC believes that the conduct is not only harmful to the interests of competitors and consumers, but may also hinder market function in the mid- to long term. Furthermore, enterprises capable of using low price inducements must have considerable financial resources, and usually have a certain level of market power to engage in improper conduct to restrict market competition. When low price inducement by enterprises with considerable market power does not result in predatory pricing, it will still restrict market competition to a certain extent, and must therefore be appropriately regulated.

5. Assessing the Effects of Loyalty Discounts

6. Most "loyalty discounts" cases in Chinese Taipei are in the telecommunications and cable TV industries. The FTC explains the conduct of "anti-competition discount offers" in Item 8 of the Fair Trade Commission Disposal Directions (Policy Statements) on the Telecommunications Industry (the Policy

statement): "It is a common practice in competitive markets for enterprises to generate trading opportunities with discount offers and this type of practice usually calls for no particular regulation. However, certain discount offers, such as selective discounts, loyalty discounts and deferred discounts, may create a negative impact on market competition and become anti-competition practices. Such conduct may be considered as being in violation of 'causing the trading counterpart(s) of its competitors to do business with itself by inducement with interest,' in Subparagraph 3 of Article 19 of the Fair Trade Act."

7. The term "loyalty discounts" then is defined in the Policy Statements as follows: "This refers to discount offers to subscribers under the condition that the subscribers do not switch to different providers or large discounts given to subscribers with the potential to switch to other providers to prevent loss of customers. Such discounts may result in subscribers being 'locked out' by specific enterprises and thus obstruct their competitors from gaining trading opportunities."

8. That is, to attract consumers to use their services on a long-term basis, telecommunications enterprises often adopt offers of volume discounts or fixed-term subscription contracts to obtain trading opportunities. Telecommunications enterprises usually offer discounts to subscribers who agree to use a certain amount of services or to a certain call charge amount or use the services for a certain period of time. If the subscribers fail to fulfill the promised level of call amount or charges or decide on early contract termination, they will be held liable for an "exit payment" as compensation to the telecommunications enterprise. Since the exit payment mechanism can increase subscribers' switching costs and obstruct competitors from gaining trading opportunities, it may constitute offering anti-competition discounts. When assessing the justifiability of the aforesaid loyalty discounts, the FTC will evaluate the following:

1. Whether subscribers have been given enough options before signing the contract;

2. The duration of the contract period;

3. The costs to telecommunications enterprises of providing the services;

4. The recoverable percentage of the aforesaid costs within the contract period;

5. Whether the amount of the exit payment exceeds the total discounts subscribers have received before withdrawal;

6. Whether such discount offers will lead to a market blockade;

7. In addition to the aforementioned considerations, the concrete content of each case, the intention, purpose, market status of the subject of conduct, the structure of the relevant market, the characteristics of the product, and the impact of the discount offers on market competition are also considered in accordance with the "rule of reason."

9. In addition, loyalty discounts refer to discounts offered to subscribers under the condition that the subscribers do not switch to different providers or large discounts given to subscribers with the potential to switch to other providers to prevent the loss of customers. Hence, such discounts are usually under the condition that subscribers do not switch to different providers and there is a form of switching cost to prevent them from deviating from the agreement. Loyalty discounts are basically viewed as a form of competition using discounts, and generally pro-competitive to benefit consumers. From an economic perspective, the main issue with loyalty discounts with respect to the restriction of competition is that they "lock out" customers, especially when the enterprise offering the discount has substantial market power. It is possible to lock out large numbers of customers with the strategy and foreclose the market from other competitors.

2. Case Example: Company A uses loyalty discounts to restrict subscribers from trading with its competitors

10. Background: Company A held the "Cargo Clearance Automation Network Service Promotion," which includes two plans, Plan X and Plan Y. "Plan X" offers a 20% discount to those that use Company A's cargo clearance automation network service during the promotion period (NT$6.0 per thousand Chinese characters during peak hours and NT$3.72 during off-peak hours); "Plan Y" offers a 40% discount to customers that commit themselves 100% to using Company A's cargo clearance automation network service during the promotion period (NT$4.5 per thousand Chinese characters during peak hours and NT$2.79 during off-peak hours). If trading counterparts (users of the service) do not abide by their commitment, Company A has the right to terminate the discount and collect the difference from the original price for the amount of the discounts that had already been given to the customer.

11. Case analysis: The relevant market in this case is the "cargo clearance automation network service" market, the entire nation is the geographic market, and there are two market participants in the market, Company A and Company B with 91% and 9% of the market share based on revenue, respectively. Cargo clearance automation networks have the characteristics of the so-called "network effects" and "two-sided market." Users are inclined to join the network with the most users under "network effects" (such networks have the most users they can communicate with). Under the influence of a two-sided market, cargo clearance automation network users are inclined to choose the network with the most users. Company A has a clear competitive advantage over Company B due to its first-mover advantages, user scale, and market share, as well as the network effects and characteristics of a two-sided market, and can utilize its dominant position to exclude competition. Company A has the ability to impact market function and exclude competition and is therefore a "monopolistic enterprise" as defined by the FTL.

12. Company A offered the "Cargo Clearance Automation Network Service Promotion" when Company B entered the market and began gaining customers of Company A using lower prices. There was also a discount offered by Company A in response to the competition, which is a normal process of market competition. However, besides the 20% discount offered under "Plan X," Company A also offered a 40% discount under "Plan Y." Under general market rules, customers will choose the plan that benefits them the most to reduce expenses, but Company A requires that customers use their services 100%, thereby showing a clear intention to restrict customers from switching to a different provider and hence locking out its existing users, thus creating the anticompetitive effect of foreclosure.

13. According to the statement given by Company A, 78 of its users chose "Plan X" and 1,215 users chose "Plan Y," while the remaining 215 users did not participate in the "Cargo Clearance Automation Network Service Promotion." Hence, the ratio of users that chose "Plan Y" exceeded 80% of Company A's total number of users. The issue in this case is that if a user wishes to switch to the cargo clearance automation network service provided by Company B within 1 year of joining a plan offered by Company A, the user must pay the difference between the original price and the discounted price for the term of the services used as a penalty, thereby increasing the switching cost of users and reducing the incentive to choose services provided by Company B. Hence, "Plan Y" of Company A's "Cargo Clearance Automation Network Service Promotion" clearly aims to restrict or exclude other competitors, and has prevented over 80% of Company A's existing users from being able to switch to a different service provider, forming an artificial barrier to entry. The conduct was in violation of Subparagraph 1 of Article 10 of the FTA: "directly or indirectly prevent any other enterprises from competing by unfair means."[1]

[1] The case occurred before the amendment to the FTA on February 4, 2015, and the conduct was in violation of Subparagraph 1 of Article 10, which became Subparagraph 1 of Article 9 of the amended FTA after February 4, 2015.

3. Conclusion

14. The FTC has not set a specific priority for loyalty discounts, predatory pricing, or exclusive dealing cases, and handles cases when a complaint is received, but will carefully consider market structure, product or service characteristics, and the effects on competition in the market. This is to prevent enterprises from using complaints as a means to undermine the competition.

15. In the future, when handling loyalty discount cases, the FTC will carefully consider the following factors to determine whether loyalty discounts have the effect of restricting competition:

1. The severity and probability of competition restriction caused by loyalty discounts are both uncertain. Therefore, the application of the FTA must be analyzed on a case-by-case basis, by carefully examining different types of discounts and related market characteristics.

2. The basic consideration when determining whether loyalty discounts could potentially restrict competition is to examine whether prices increase in the long term. If prices increase, then the loyalty discounts may cause enterprises to gain market power and weaken market competition, further giving the enterprise the ability to raise prices. Whether or not the aforementioned situation has occurred can be determined by observing if the transparency of market prices has decreased, and observing the foreclosure of existing or potential competitors. The following market aspects can also be used to help the determination:

    1. Existing or potential competitors are not capable of offering the same loyalty discounts for consumers to switch away from.

    2. Existing competitors are forced to reduce production.

    3. Consumers do not have buying power to maintain or lower market prices to levels before loyalty discounts were offered.

    4. The long-term rise in market prices surpasses levels before loyalty discounts were offered, making existing competitors unable to increase their market share, and preventing potential competitors from entering or reentering the market.

    5. The benefits consumers gain from loyalty discounts are less than the losses they sustain from market prices increasing to levels higher than before loyalty discounts were offered.