出國報告(出國類別：其他公務有關活動)

出席 2017 年 12 月經濟合作發展組織(OECD)競爭委員會相關會議暨第 16 屆全球競爭論壇(GFC)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

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赴派國家：法國巴黎

出國期間：106 年 12 月 2 日至 12 月 10 日

報告日期：107 年 2 月 5 日

目　　錄

附錄：

壹、參與各項會議之緣起、目的及各會議與會人員

一、OECD「競爭委員會」及相關工作小組

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

(二) OECD除總理事會及秘書處外，下設有各專業委員會(Committee)。「競爭委員會」(Competition Committee, CC)係源於1961年成立之「限制性商業行為專家委員會」，1991年更名為「競爭法暨政策委員會」(Competition Law and Policy Committee)，2001年再更名為「競爭委員會」，其下轄有2個工作小組「競爭與管制第二工作小組」(Working Party No. 2 on Competition and Regulation, WP2)及「合作與執法第三工作小組」(Working Party No. 3 on Co-operation and Enforcement, WP3)。競爭委員會與WP2、WP3每年定期於法國巴黎OECD總部召開2次會議，主要討論競爭政策及競爭法之制定及執法方向與技巧，以促進執法活動之國際化及促進各國各項政策及法規之透明化，並制定競爭法執行之最佳實務，促進各國之執法合作並對開發中國家進行能力建置。競爭委員會2017年例會分別於6月及12月舉行，本次12月會議於12月4日至12月6日間召開。

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

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

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

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

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

(二) 本年度全球競爭論壇為第16屆會議，係安排於本次競爭委員會例會後12月7至8日接續召開。本次出席全球競爭論壇國家計有來自會員國、參與者及61個非會員國家與10個國際組織共4百餘位代表與會。

三、會議出席人員：我國代表團由本會張宏浩委員率綜合規劃處杜幸峰視察、服務業競爭處溫哲嘉專員及法律事務處王政傑專員出席上開2項會議。另金融監督管理委員會指派駐倫敦代表辦事處耿培香主任出席12月4日上午「競爭與管制第二工作小組」(WP2)會議。

貳、OECD各工作小組及競爭委員會會議重點

一、「競爭與管制第二工作小組」(WP2)會議

12月4日上午舉行「競爭與管制第二工作小組」(Working Party No. 2 on Competition and Regulation, WP2)會議，由WP2主席Alberto Heimler先生(義大利競爭委員會研究與組織關係處前任處長)主持，討論議題包括：

(一)「金融危機10年後－金融產業中競爭法機關與管制者間之合作」圓桌會議(Roundtable on “10 years on from the Financial Crisis: Co-operation between Competition Agencies and Regulators in the Financial Sector”)：

1、本議題討論競爭法機關與金融管制機關在全球金融危機10年後是否成功地合作實施穩定的監管及競爭架構體系，使創新及有效率廠商可蓬勃發展。討論分為兩部分:第一部分是競爭法機關與金融管制機關間之關係,以及近年來競爭法機關在金融監理過程中扮演的角色以及金融管制機關在競爭法執法中的作用。第二部分是如何因應金融行業內的科技進步與創新，許多競爭法機關目前正在

進行市場研究，撰寫報告和倡導有利於競爭的管制方式。

2、本議題共有23個國家提交書面報告，大部分都集中於第一部分之討論，OECD邀請3位專家與談：(1)Compass Lexecon顧問公司副總裁Miguel De La Mano博士討論金融產品與服務創新及如何因應問題；(2)英國英格蘭銀行及Bristol大學教授Paul Grout先生報告英國金融管制審慎規範如何改變及以追求競爭做為第二目標之經驗；(3)德國Max Planck學院Martin Hellwig教授討論競爭法主管機關與金融管制機關間是否該提倡合作。

3、Paul Grout教授報告略以：

(1) 安全性(safety)與穩定性(stability)是金融管理2大首要目標。但在這些主要目標外，金融管制機關仍可以有次要目標(secondary objective)，而金融管制機關有多少空間允許競爭做為次要目標，為其政策考量及執法裁量。各國央行主要職責為貨幣政策之調節，通貨膨脹之管控為其主要目標，在此一目標下，其中間是否容許其他政策的介入而不影響首要目標，也是一大考量。金融管制機關對於審慎監理目標及加強競爭目標是否可以並容，也是首要及次要目標之選擇。

(2) 英國政府於2013年對於金融監理制度做出重大變革，以「金融穩定」為核心概念，並以英格蘭銀行(Bank of England)作為監理架構之中心，於該行理事會下設立「金融政策委員會」（Financial Policy Committee，FPC）專責總體審慎監理，負責監控英國金融體系的穩定性，以確認及評估系統風險。另新成立「審慎監理局」((Prudential Regulatory Authority，PRA）主導個體審慎監理；及「金融行為管理局」（Financial Conduct Authority，FCA）負責金融市場行為規範。由於審慎監理局為英格蘭銀行的附屬機構，該行成為英國金融監理最重要的核心機關。

(3) PRA成立的主要目標在於促進受監理機構的安全性及健全性，以及確保保險公司的保戶能受到適當程度的保護。英格蘭銀行可透過PRA對具「系統重要性」（systemic important）金融機構的個體審慎監理，以確保金融機構的健全營運，避免對英國金融體系的穩定產生負面影響。

(4) 在長期，管制者應逐漸將競爭納為第二目標，使競爭與穩定2大目標並行。

4、Compass Lexecon顧問公司副總裁Miguel De La Mano博士報告以「創新金融商品與服務，金融管制機關與競爭法主管機關的新挑戰」(Innovative Financial Products and Services (FinTech): A “New” Challenge for Finance Regulators and Competition Authorities)為題，略以：

(1) 近年來掀起一波名為「FinTech」結合金融與科技的創新浪潮，其中包括行動支付系統、加密數位貨幣等產品及服務。然而這樣的風潮也使金融體系原欲追求穩定及完整性等考量之要素受到威脅，加上相關金融監理法規應變針對此種創新科技的應變速度較慢，造成如同數位加密貨幣以創新等為理由來迴避受到金融監理機關管制，導致相關投資者面臨之投資風險提高等問題。

(2) 以人工智能大數據（Artificial Intelligence Big Data）、分散式運算（Distributed Computing）、密碼學（Cryptography）、行動網路（Mobile Access Internet）等技術作為基礎所衍生出的金融創新產品或服務已可涵蓋支付、儲蓄、借貸、風險管理等需求，技術創新更可藉由移除或減輕經濟因素之進入障礙來增加競爭，例如：減少企業營運之固定成本、降低網路外部性等。但「FinTech」除了前述相關管制法規外，仍須面對市場現有競爭事業之阻礙（如拒絕提供相關消費資訊等）及獲取特定經營執照等困難。

(3) 因此，為了維持金融體系之穩定性並鼓勵創新所造成促進競爭等良好效果，同時避免提高投資風險及金融監理死角等負面影響，並且達成有效執行競爭法、確保金融體系穩定性、以及金融市場之消費者保護等考量，相關單位應以有效之方式加以溝通合作。

5、荷蘭：

(1) 荷蘭消費者及市場管理局(The Netherlands Authority for Consumers and Markets，ACM)經常會與金融服務部門的監管機構溝通，以確保市場競爭利益與市場監管架構下之一般利益可以獲得平衡。兩者在合作和互動時有數個共同議題，首先，促進競爭通常（但並非絕對）亦可維持金融穩定，故該局多會尋求金融監理部門的支持；其次，金融監理部門相對於競爭法主管機關，具有能夠獲得較多資訊之優勢，也因此可能無意地過分強調其所代表的利益。為了解決這種不對稱的困局，自由交換資訊是其中一個選擇，而此種不對稱的困局也常發生在國際性的層級，EU各國也並非都有平台可以討論相關競爭問題。這是因為歐盟政策制定者常會嘗試一次性地同時達成多數的目標，所以一個市場的監管制度可能會存在有不只一個權責機關，因而產生雙方協商之挑戰及低透明度之風險。又因為金融市場之監管本質上其實具有高度政治性，當議題政治化後，相關機關的合作就會受到影響。

(2) 由於快速興起的數位技術要求解決問題的方法，及與利益相關者的有力合作，故相關主管機關間需要更多的資訊交流，對於新技術的認知，以及對政策形成過程的及時參與。國界（緩慢）消失的趨勢增加了歐盟成員國之間統一規

則的需要，各會員國在國際層面的合作，以及國際戰略的重要性。而不同行業和技術之間的競爭愈趨激烈，對於技術中立，比例調控和監督等有所需求。因此，該單位認為其與荷蘭金融監管機構的合作是建設性的，相關單位應使合作成為監管金融市場的內在組成部分，各權責機關更有彼此間溝通合作的必要。

6、新加坡：

(1) 新加坡競爭局(The Competition Commission of Singapore，CCS)會與市場研究機構合作進行市場研究，針對新加坡金融管理局多項金融市場相關議題對於市場競爭之衝擊通常都會提供相關建議，包括管理局措施對競爭之影響，以及某些市場行為是否會引起競爭關注等。例如對管理局之金融措施進行競爭影響評估、與管理局就汽車保險共同進行市場調查。

(2) 在CCS審理事業結合及執行個案等過程，金融管理局多會向CCS提供相關資訊，來協助CCS作成決定。又因新加坡清算所等部分財務併購活動是豁免於競爭法管轄的，金融管理局透過「監理沙盒」來鼓勵金融技術領域內的創新，並在該「監理沙盒」中，對有前景的創新進行測試。

(3) CCS與金融管理局及相關競爭監管機構和其他政府機構等在競爭和監管等事項會以定期舉行午餐、研討會、通訊和培訓課程等方式，透過相關機構間平台來分享彼此的經驗及作法。為了確保CCS決策時能獲得金融管理局提供相關資訊，CCS會借調管理局的工作人員，並確保其董事會始終包括一名管理局的成員。

7、西班牙：

(1) 西班牙過去幾年金融業的重組過程主要是受全球金融危機的驅動，也造成了該國銀行業的集中化，使得西班牙國家市場和競爭管理局(CNMC)之前身國家競爭管理局(CNC)和金融監管機構間需要具有深度而有力的協商。例如，在金融監管部門對於結合的控制與反托拉斯框架內，首先是要確保雙方在審理過程中的最後期限前，所要求及提供的資訊都能獲得有效的協商。

(2) 在2013年的修法中取消了在結合管制過程中原競爭法第17條規定的競爭法機關與金融管制機關合作協商之義務要求，但此種作法並不是表示減少了相關單位的溝通協商，反而是促使其更具有彈性。CNMC在2016年關於自動取款機費用的報告中即描述了近年來與金融監管機構的合作。又因為銀行業正在經歷技術和監管制度變革的過程，所以金融部門的控制管理和反托拉斯框架更為重要。而資訊是金融領域最重要的投入，如行動錢包、線

上支付、區塊鍊、加密貨幣等，都是金融科技創新的結果。

(3) 對CNMC而言，或許可以很快確定創新金融科技對於金融體系的影響，而就金融產業的基本面來說，亦可略窺金融科技現象的一些機遇和挑戰，故金融監管機關必須在新的商業模式和創新中平衡競爭和創新，同時維護互信和投資保護即是新的挑戰。

8、澳洲：

(1) 全球金融危機爆發後，澳洲金融體系的調控主要集中在促進和維護金融穩定與降低風險。然而，縱使澳洲強調金融穩定性，但其金融監管制度也不斷地調整轉變，以求多方面的考慮到競爭目標。

(2) 2013年澳洲政府建立了金融調查系統(Financial System Inquiry, FSI)來檢查國家的金融體系。FSI了解競爭對金融體系的重要性，並據以提出了相關建議。基於此種考量，澳洲政府和相關監管機構更加關注市場之競爭，例如近期政府即要求生產力委員會調查金融體系的競爭狀況。它還向澳大利亞競爭及消費者委員會(ACCC)提供預算，以建立專責單位定期調查金融市場的競爭問題。根據上述情況，可以發現ACCC和金融監管機構已開始有更為頻繁的互動參與，並協調其競爭目標。

(3) ACCC認為，澳洲的金融監管機構可能以兩個關鍵的方式影響其在金融服務業的反托拉斯工作，第一，它所調查的反托拉斯問題可能只是監管環境的一個症狀，而不是任何事業具體的反競爭行為之結果；第二，獲悉反托拉斯案件可能取決於是否從海外監管機構獲得資訊或與其合作。因此，ACCC認為必須制定一個全球性的監督管理架構，來促進跨部門的有效參與，其中又以競爭法主管機關和金融監管機關間更為需要。故ACCC建議改革國際安排來共同努力提升反托拉斯案件的能力，並支持邀請適當的團體來確定共同的目標，探索加強各監管機構合作的方法。

9、匈牙利

(1) 匈牙利競爭管理局(GVH)自金融危機以來即與金融監管機構之間密切合作。GVH並嘗試分析金融部門的競爭問題，在必要時提出監督管理制度之變革，更進一步利用其競爭法律等工具來加強行業競爭。

(2) 除金融服務業之調查，以及目前正在進行的部門調查，GVH也分析了零售銀行客戶流動性問題，並確定了扭曲市場競爭的幾個因素（如片面修改契約，高轉換成本等），並就這些問題提出立法建議，由國會在納入GVH的建議後，修改相關規定。另外，在對建築業市場進行的調查中，GVH也發現

該行業在特定法規的缺陷，並提出了補救措施。

(3) GVH目前也在對卡片支付工具市場進行調查，並注意到小型的收單機構在以卡片等替代支付工具來替代現金支付的市場上相較大型的收單機構面臨較不利的服務費，故決定發起行業調查來分析相關市場。

(4) GVH並舉出多個案例來說明競爭法主管機關與金融監管機構的合作情形，如銀行卡及保險市場等相關的競爭執行和監管措施，GVH與金融監管機構在銀行卡業務方面進行合作，共同交換費率等訂立監督管理機制，來加強市場競爭。

10、美國：美國司法部反托拉斯署說明在金融危機之後起訴金融業卡特爾犯罪的成果，並概述了司法部對銀行業近年來在美國之併購行為所產生的競爭效應，再提出美國司法部反托拉斯部門與金融監管機構近期的合作實例，說明在其中所獲得的經驗與教訓。

11、英國：

(1) 英國競爭與市場管理局(CMA)就金融市場之管理需要與金融服務部門的三個監管機構合作，其分別為金融行為監理局(FCA)、支付系統監管機構(PSR)和審慎監理局(PRA)。

(2) CMA和前述三個監管機構間的權責分工並不像其他司法管轄等那麼明確，實務上由於不同的監督管理機構各自有不同程度的競爭及監督管理職權，所以針對部分管轄重疊的部份，多少都會存在一些意見衝突的情形。爰英國發展出CMA與金融主管機關間共享職權制度，並明訂金融主管機關在競爭法執法案件、市場專案調查、結合審查及消費者保護等項目應與CMA合作並提供相關資訊。

12、主席結論如下：

(1) 競爭法之執法係以抽象之法律規範為基礎，且須明確告知企業何種行為不可以做。金融管制以產業為特定目標且管制者須明確告訴廠商何者可為。競爭法執法者的目標是對於整個產業法律的一致性，而管制者的目標則為對產業政策的一致性。競爭與穩定之間本質上即有差異且為互相排斥，而競爭法機關對管制者的建議可以協助管制者草擬較不損害競爭的管制政策；但競爭法機關亦應瞭解，所有管制機關並非僅會對競爭「製造」重大影響。

(2) 如同英國做法，競爭法機關如能對金融管制機關提倡競爭的次要目標可以協助消除許多現存管制限制，並使監理機關更能接受競爭理念。

(3) 對於競爭法之執法，金融管制機關除可對競爭法規或適用之解釋方式提供評

論外，亦可提供競爭法主管機關必要資料數據及通知競爭法主管機關被忽視或過度強調之問題。

(3) 競爭法主管機關對於管制方面已提出顧客過高的轉移成本問題，倡議降低存款及貸款退出成本。競爭法主管機關在這方面的意見通常都會被接受，但在另一方面，競爭法主管機關並沒有解決因為某些陷入經營困境的垂危銀行「太大不能倒閉」所產生之隱形補貼問題。有些建議此一問題可在併購中考慮，但為達到此一目標，對何謂「太大不能倒閉」需要更明確的定義。

(4) 管制者有時候對於禁止限制競爭協議規定之反應會一再發布產生相同限制競爭效果之規定，實務上競爭法機關可以透過與管制者更多的合作來解決。

(5) 競爭法機關在最近對於金融科技公司產生興趣，且一些競爭法機關已經開始進行些事項的調查。雖然調查結果僅是初步的，但事實是管制方法必須適應科技的發展。例如，私募基金不應僅是允許，管制者不應過度限制。另外，許多非銀行正進入金融市場，針對此一問題，有人建議管制應以目標為導向專業化。

(6) 在許多國家中法律賦予金融管制者反托拉斯執法權力，但這些金融管制機關並非同意拋棄權力聲明共享資訊的反托拉斯網路之一部分，此一問題可能對反托拉斯執法順利執行實務上造成障礙，此一問題也須適當討論處理。

二、「合作與執法第三工作小組」(WP3)會議

12月4日下午及12月5日上午召開「合作與執法第三工作小組」(WP3)會議，由競爭委員會主席Frédéric Jenny先生主持，討論議題包括：

(一) 對集體訴訟及私人執法之國際經驗報告(Report on International Experiences with Class Actions and Private Enforcement)：OECD秘書處就墨西哥檢視國際間私人對競爭法執法經驗之委外研究結果提出報告，並探討各領域之私人執法經驗及報告中所提出之挑戰，以做為未來修訂競爭法體制之參考。該報告主要挑戰在於各國之私法訴訟制度不同，且因無先前文獻或案例可供參考，秘書處提出報告主要在向各國代表請求協助有關私法訴訟中集體訴訟之經驗。

(二) 對於「監督打擊惡質卡特爾有效行動建議書」之執行(Monitoring the Implementation of the Recommendation concerning Effective Action against Hard Core Cartels)：OECD秘書處報告對會員執行1998年有效打擊惡質卡特爾行動建議書之問卷報告，並討論建議書未來修正方向。秘書處就2017年6 月討論修正方向提出報告，並就評估未來發展方向、釐清未來挑戰等蒐集會員國意見。秘

書處認為其中主要問題在於：會員國是否同意寬恕政策為最有效之卡特爾偵測工具、會員間對於和解(settlement)之使用及其程序是否差異太大、私人執法訴訟是否可補償政府執法之不足及各國越來越嚴苛的處分及越來越高的罰鍰是否適當等。

1、寬恕政策是否為偵測卡特爾最有效之工具？義大利表示，義國於 10 年前引入寬恕政策，但並不如預期有效。主要原因在於義國的文化與市場結構。義大利大部分為中小企業，大事業則屬家族企業，因為對彼此都很熟悉，缺乏申請誘因，寬恕政策無法有效施行，申請最成功的大多屬國際大型事業。在 70 件申請案件中僅有 7 件屬國內事業。英國半數以上的卡特爾案件與寬恕政策無關，澳洲表示，在卡特爾案件執法與其他沒有寬恕政策國家落差很大而無法進行合作。

2、各國對於處分權力是否足以嚇阻卡特爾？秘書處報告顯示，2011 年後各國對卡特爾的罰鍰處分越來越高，且越來越多國家採取刑事處分，如澳洲法院在 2017 年對日本 Nippon Yusen Kabushiki Kaisha 公司處以該國第一件刑事處分。日本指出，日本公平會可能會依其研究團隊建議，提高違反反壟斷法之罰鍰。

3、私人執法(private enforcement)在某些國家中已成為主流的執法方式，但在建議書中並未提及任何私人執法行動方式。目前已有些國家採取措施以鼓勵民眾提起損害訴訟，這些措施包括：提供原告更容易閱覽卷證、減輕違法行為之舉證責任、受到損害資格證明及採取集體訴訟求償。澳洲表示，就私人執法是否可以協助政府執法方面須要特別注意，歐盟表示鼓勵會員國提升民事訴訟的私人執法行為。美國則表示，美國的制度會因私人執法鼓勵寬恕政策的申請，而在美國集體訴訟已成為卡特爾執法重要的一部分。

4、和解：許多國家競爭法機關都有競爭法執法和解的案例，但處理方式各有不同。和解的好處在於競爭法機關可以快速結束案件處理，節省調查資源，並節省上訴之時間。比利時指出，和解平均可節省 22 到 36 個月的案件處理時間，歐盟指出，一般和解案件僅需 2.5 至 3 年，而正常案件處理程序則需 5 年左右，可節省一半時間。南非與巴西則指出，和解可得到更確實的執法效果，美國表示，和解好處包括提升被調查者之早期合作意願，並可獲得更多內部證據及調查動力。

5、有關是否更新建議書及是否在建議書中增加新元素：義大利建議寬恕政策應列入建議書，並列入利用資訊管道(information gateway)交換機密資訊。紐西蘭建議明列鼓勵各國簽署合作備忘錄以加強國際合作，美國附議並建議各國應有達

成打擊卡特爾之共識，澳洲表示，應可建立多方國際合作打擊卡特爾之空間。

6、主席結論表示：對於建議書內容之改變應非常謹慎，渠將要求秘書處在 6 月提出可能之範本供會員討論。

(三)「矯正措施之域外管轄權」圓桌會議(Roundtable on the “Extraterritorial Reach of Remedies”)：

1、本議題討論競爭法執法域外管轄權之挑戰及競爭法機關如何決定對與國內損害相關之矯正措施適用地理範圍。本議題共有14個國家或團體提出書面報告，並邀請美國Douglas Ginsburg法官、英國倫敦大學學院Florian Wagner-von Papp教授、哈佛大學Andrew Guzman教授及Jay Jurata律師等4位專家參與討論。

2、美國哥倫比亞特區聯邦巡迴上訴法院(United States Court of Appeals for the District of Columbia Circuit) Douglas H. Ginsburg法官報告略以：

(1) 由於競爭法之執行於國際間已蔚為潮流，國際禮讓原則近年來也益顯重要，國際禮讓原則又可有強弱之分，強勢的國際禮讓原則是不論對於較多或較少限制的他國管轄均予以尊重，而弱勢的國際禮讓原則僅是尊重較多限制的他國管轄權，惟近年來的發展趨勢似是朝向弱勢的國際禮讓原則為主。

(2) 實質性的競爭政策因為司法管轄權而相異，例如，歐盟及美國關於競爭法的起源、目標及壟斷標準等都有所不同。為此，各國仍盡力去避免衝突，包括透過雙邊會議、諮詢程序、分享資訊及國際禮讓原則等方式。又由於「效果原則」的產生導致競爭法主管機關或法院開始審查外國事業行為，此時更使得國際禮讓原則愈趨重要，而美國大多是在他國競爭法主管機關以不同的方式管理或是決定不對相關行為進行管制時，才適用國際禮讓原則。

(3) 以高通案在韓國及中國所面臨的矯正措施為例，KFTC在高通的案件中強制實施了一項全球性的矯正措施，甚至會影響到高通公司在韓國沒有註冊的專利，KFTC甚至禁止了高通公司在美國是被允許或鼓勵的行為，例如：KFTC認為專利組合當然違法，但美國通常認為是有效的。因此，韓國實質上開創了一個先例，亦即最嚴格的規範應該適用於全球，然而，這種作法與消極國際禮讓原則並不相同。中國國家發展改革委員會（NDRC）在高通案的決定就與韓國明顯不同，其補救措施明確限於中國，且僅涵蓋對於中國製造商之行為，應授予中國標準必要專利及其在中國的使用。

(4) 在全球競爭法的普及下，國際禮讓原則更為重要，應注意的是，是由法院或是競爭法主管機關來適用這個原則？執行上究竟應該適用強勢或是弱勢的國際禮讓原則？而弱勢的國際禮讓原則有可能導致「底線的競賽」，強勢的國際

禮讓原則產生的限制性規則則可能適用於全球。

3、Florian Wagner-von Papp教授就競爭法域外矯正措施是否須遵守地域之嚴格限制、行為是否可分割、及從管轄權觀點討論域外矯正措施之限制，報告略以：

(1) 矯正措施之可及範圍可能會受到國際法及國內法的限制。競爭法的域外管轄權可分為兩個部分，其中執法性管轄權始終都是嚴格遵守地域性，而規範性管轄權則會隨著國內法令之規定而變動,所以對於矯正措施的域外效力而言，強制執行措施大多是嚴格的領土管轄，任何在外國的執法都必須透過外國的協助才能執行，至於規範性的管轄，由於現在效果原則在競爭法已普遍性的被接受，如果事業的域外行為並不會對國內產生效果，則自然不會禁止該行為,也當然不會有訂立矯正措施之可能。又倘同一行為受到不同國家之管轄，則經過評估後則會由最嚴格者勝出。以美國為例，上述管轄權衝突情況發生時，通常會被認為是國際禮讓的問題之一。

(2) 執法性的管轄權因為必須嚴守地域原則，矯正措施幾乎無法在沒有外國配合的情況下施行，而規範性的管轄由於牽涉到各國法令的規定而有重複規範之可能，部分行為或有得否分割適用之考量，可能必須由各國相關單位依國際禮讓原則或是自我限制管轄、訂立共同合作協議等方式來解決所面臨的衝突等問題。

4、Jay Jurata律師從不同司法管轄權的實體法律、救濟方式、國際禮讓原則以及國家主權等面向來討論矯正措施的域外效力，渠認為韓國高通案之域外矯正措施將會削弱全球專利體制，抑制創新設計鼓勵貿易戰而保護國家獨大廠商，增加智慧財產權轉移成本，報告略以：

(1) 一般情況下，由法規所授予的智慧財產權等，需在有授予管轄權的情況下才能強制執行，對於管轄權外之行為並無法律效力，但近年來，有愈來愈多的國家開始面對管轄權外行為造成之競爭。以美國為例，如果是在雙方都是美國事業或由事業進口至美國境內，則涉及美國專利相關規定，反之，倘僅由美國出口則非必定與美國專利有關，如果兩事業之行為皆與美國無關，則無涉及美國專利規定之問題。

(2) 以Google及Nokia的結合案、三星案、高通案等為例，不同國家處理時可能造成重疊性矯正措施之結果，而有關智慧財產權爭議所提出的域外矯正措施，可能會造成弱化全球專利體系、不鼓勵由既有專利再進一步創新專利、鼓勵各國保護國內事業及增加智慧財產權交易之成本等負面效果。

(3) 建議各國在是否做出矯正措施決定時，可以詢問可能會受到矯正措施影響的

國家意見，並根據ICN相關規定來處理，或是將矯正措施的地理範圍限制自身的管轄範圍內。

5、BIAC：

(1) 矯正措施之域外效力對事業來說相當重要，然而，根據各國競爭法規定，如果將矯正措施擴展到國家管轄領域外可能會造成衝突和差別待遇等疑慮。事業在經營上應該能夠藉著遵守其所在地相關法令規定來保護其商業行為避免受到其他事業之侵害。倘各國之競爭法執法機構均將矯正措施延伸到外國公司的商業事務中，可能造成事業營運上不成比例的不確定性。同時，當某國試圖在其他具有較為寬鬆的競爭法規範的外國執行其限制性競爭規則時，可能會對事業造成損害，也剝奪了該公司依循其他國家較為寬鬆的競爭法規定的合理空間，更進一步剝奪了各國平衡經濟利益的主權權利。因此，毫無節制的域外執法會造成最嚴格的競爭法執法，將在全球範圍內規定商業慣例的風險。

(2) BIAC雖支持各國競爭法主管機關有能力確定事業之違反競爭法行為，是否對其國內消費者福利造成實質性損害，並採取適當措施減輕損害，甚至包括在特定情況下而制定對國外有影響的矯正措施。但也認為，全球競爭法執法環境正不斷變化，如果單一國家執法時沒有考量到對國際市場的影響，或是其他主權國家根據自身法、國籍市場狀況等來管理各國事業之商業的權利，該單一國家就不能實施矯正措施。換言之，沒有單一國家的競爭法主管機關可以在未考量到其管轄權、執行可能性、對國內產生之效果和國際禮讓原則等情況下，即逕自對其他國家事業之行為結果訂立矯正措施

(3) BIAC認為，前述負面影響大部分可以通過國家間的溝通、協調和尊重其他國家主權等的方式來解決。更重要的是，在競爭情況下，各國競爭法主管機關應該了解國際禮讓原則必須適用於超越真實衝突的情況，才能讓各國依照主權以各國經濟考量等來管理自己的國內商業行為。

6、歐盟：

(1) 「歐盟運作條約」(TFEU)和「歐盟合併條例」(EUMR)對歐盟競爭法相關規範的適用領域訂有規定，歐盟競爭法的適用範圍也可能包括在歐盟領域以外發生的事業行為。歐盟法院認為，縱使參與協議的事業位於其他國家，若該協議是在歐盟市場實施並產生影響，則並不妨礙TFEU的適用。例如，Woodpulp案件中，歐盟競爭委員會將其管轄範圍擴大到事業在歐盟之外行為的案件，可知歐盟競爭法適用與否的決定性因素是該行為的實際實施地點，而不是作

成承諾的地點。

(2) 歐盟競爭委員會多會與全球各國的競爭法主管機關合作及協調處理具有域外因素的案件，其中包括在確定是否採用適當的矯正措施，以及能否有效處理該行為對競爭所造成的損害時，其會盡量通過較少分歧結果的方案，為事業提供法律上的確定性。故歐盟競爭委員會會根據歐盟與第三國所達成的國際協議或與他國達成之備忘錄，實施國際禮讓原則和調查競爭案件之合作。

(3) 結合矯正措施：矯正措施必須是能有效地解決所確定的競爭問題，而歐盟競爭委員會也受到比例原則的約束，如果限制地域不會對矯正措施的有效性或可行性產生負面影響，矯正措施的領土範圍將限於歐盟/歐洲經濟區甚至個別歐盟/歐洲經濟區國家的領土，然而為了確保矯正措施的可行性，個案中有時仍可能有必要將其適用之地理範圍擴大到歐盟領土之外。

(4) 反托拉斯矯正措施：歐盟執委會的指導原則是矯正措施的地理範圍應能反映歐盟競爭法的適用領域，亦即是實施或產生影響的行為是在歐盟/歐洲經濟區發生，就如同2014年摩托羅拉和三星關於標準必要專利（「SEP」，涵蓋了技術標準必須遵守的技術專利）案件的決定即可獲悉該委員會的作法，在這兩個個案中，歐盟執委會都特別限制其在歐洲經濟區進行的矯正措施，並且僅限於在歐洲經濟區授予的SEP，而具體實施該矯正措施的區域也必須符合比例原則，亦即矯正措施所施加的任何負擔都不得超過能達到有效抑制侵權目的所必要的行為，所以矯正措施之制定必須根據個案的事實和情況，包括對於領土、侵權的性質等與歐盟執委會可採用的矯正措施之間必須具有相當關連性。

7、韓國：

(1) 隨著跨越國界市場主體的經濟活動越來越普遍，就如同自由貿易的擴大，跨國交易的增加以及跨國公司的出現，競爭法主管機關依據各該國競爭法的規定，有時需要據以糾正全球公司以市場為主導的不公平作法，特別是資訊通訊技術產業的發展和數位經濟的普及，對現今各國競爭法主管機關著實帶來了新的挑戰。

(2) 基於上述情況，韓國競爭法主管機關和學術界正在討論域外適用競爭法的問題。討論的議題包括競爭法主管部門可以對外國行為採取多大程度的矯正措施。同時，此項議題和域外適用的一般含義不同，涉及到競爭法的執法是過度或有所不足，以及跨國家之間救濟的衝突。

(3) 韓國金融交易中心在2002年時根據美國、德國和日本的石墨電極公司違法行

為對韓國市場產生的影響作出處分，並在MRFTA中規定了實施救濟的域外範圍。嗣後MRFTA在2004年規定了針對競爭法救濟的域外影響規定，明定即使是事業於國外進行的行為，若有影響韓國市場亦有適用空間。其後並說明國際卡特爾、併購和濫用市場優勢地位的相關案例。

8、德國：

(1) 德國聯邦卡特爾署(Bundeskartellamt)的執法活動原則上僅限於德國。德國競爭法適用在所有於德國有效的限制競爭行為，即使該限制是在德國領域外所實施的行為。

(2) 一般而言，德國聯邦政府不會施加會影響到其他司法管轄領域的矯正措施。然而，德國聯邦政府的執法活動仍可能會產生事實上的域外效力。首先，事業結合之矯正措施需要適當的解決結合所引起的競爭問題，如果採取分割計劃，就可能需要足以供一個競爭對手營運所必需的資產和資源，但上述資源或資產未必都位於德國。其次，為了解決德國聯邦政府提出的競爭問題，事業可能必須決定不僅在德國，也同時在其他國家，改變他們的作法或契約條款。

(3) 因此，德國相關主管機關立於與其他國家雙邊協議，或是在國際組織之架構內，必須與世界各地的競爭法主管機關進行合作，來避免相關矯正救措施不一致或重疊的風險。

9、美國：

(1) 美國司法部和美國聯邦交易委員會的反托拉斯司負責執行聯邦反托拉斯法適用於影響美國商業的某些外國行為。各部門之重點在於關注反競爭行為與美國之間是否存在相當關連性，以便適用聯邦反托拉斯法，並導正案關行為對美國的商業和消費者所造成之傷害或威脅。儘管美國法院在針對矯正措施之救濟方面已經給予相當大的運作空間，各主管機關仍都制定了相應的政策來調整於一國或多國領域以達成競爭目的之矯正措施。除非事業之違法行為對美國商業和消費者造成重大損害，否則各主管機關會儘量避免實施域外矯正措施。

(2) 美國相關競爭法主管機關認為向商業界提供反托拉斯法之執法政策的透明程度是很重要的，例如矯正措施即可能適用於域外。因此，二主管機關在其2017年聯合公布「對於國際執法與合作之反托拉斯法指導原則」(Antitrust Guidelines for International Enforcement and Cooperation，下稱「國際合作指導原則」)中闡明了關於域外矯正措施的政策指導意見。又國際間的合作是避免

與各國矯正措施衝突的根本方法之一，所以競爭法主管機關經常與調查相同交易行為的他國競爭法主管機關共同進行調查，前述準則也強調在執行反托拉斯法時不受歧視的重要性，而矯正措施並不應該被用來支持國內企業或推動產業的政策目標。

(3) 美國國際合作指導原則中所規定的域外救濟的標準與其他各機關在其他情況下關於矯正措施的指導意見皆以促進各機關矯正措施的透明度，並確保矯正措施得以治癒事業違法行為所造成國內的競爭傷害為主。美國並強調相關規定的透明度、程序公正性和不歧視性的重要性，其中又以涉及治外法權部分更為重要，當各主管機關與外國主管機關就矯正措施進行時合作，應謹慎使用域外矯正措施和案件合作之機會。

10、英國：

(1) 英國說明了域外矯正措施在英國針對結合案件控制管理中的作用。而英國法院已經確認，CMA能夠在某些確定的情況下擴大其對事業於英國境外的行為採取矯正措施的管轄權，因此強化了CMA在全球化經濟中保護英國消費者的能力。

(2) 然而，英國在設計矯正措施時，CMA可能會在執行域外矯正措施時考慮到相關的附加風險。在CMA的執法經驗中，設計和實施域外矯正措施最好能透過不同司法管轄區的競爭法主管機關間的密切合作來解決。

11、法國：

(1) 隨著全球市場相互依賴及相關事業競爭者全球化的風潮，競爭法執法時的地域原則也必須適應全球化經濟發展下的現實。在Adidas I.和Navx II的案例中，競爭法主管機關針對事業所提出的域外矯正措施，因為其目的是解決有關國家的競爭問題，所以公司本身可以自行決定自願延長其承諾的地理範圍。

(2) 然而，在Booking.com案例中，除了瑞典和義大利的主管機關，在歐盟競爭委員會的支持下，包括法國在內的三個司法轄區的線上酒店預訂部門及與相關單位及事業展開協商，這種前所未有的協商方式清楚地表明了競爭法主管機關未來面臨的挑戰，尤其是在處理數位平台的相關問題時。法國認為在國際上對治外法權問題進行反思和開展工作的同時，仍將繼續進行與他國進行合作。

12、主席對本會就本議題所提出之報告提出詢問：「貴國監控域外矯正措施之方式為何？」(measures for monitoring extraterritorial remedies)，本會代表答覆略以：

(1) 本會對於命事業停止、改正或採取必要更正措施部分，通常係透過函詢被處

分人、檢舉人、相關上下游交易對象等關係人、其他目的事業主管機關或實地訪查等方式來監控被處分人是否停止、改正違法行為或採取必要更正措施。

(2) 另外，本會對作成行政處分之域外監控與執行，依「公平交易委員會處理涉及外國事業案件要點」第8至10點及第17點規定，本會得以尋求國內相關廠商協助取得可公開之資訊、函請相關外國事業提供資料、函請外交部獲經濟部駐外單位協助蒐集外國之證據資料、及透過民間組織與同業公會等其他途徑蒐集相關證據資料，來進行矯正措施之監控與執行。

(四) 未來討論題目：WP3將於未來3年就「程序公平及透明化」(procedural fairness and transparency)進行討論。

三、「競爭委員會」(CC)會議

12月5日下午至12月6下午舉行「競爭委員會」(CC)會議，會議由CC主席Frédéric Jenny先生主持，討論議題如下：

(一) 「競爭法中之安全港及法律推定」圓桌會議(Roundtable on "Safe Harbours and Legal Presumptions in Competition Law")：

1、本圓桌會議主要探討各國競爭法主管機關在執行競爭法時所採用判斷是否違法的明確界線及標準、使用安全港及法律推定的原因與是否考量競爭法主管機關的執法能力而訂定相關規定等面向。本議題計有美國、英國、歐盟、德國、日本、韓國及我國等 25 個國家提出書面報告，並邀請英國 David Bailey 教授、瑞士 Damien Neven 教授及美國 Andrew Gavil 教授等 3 位專家學者參與討論。

2、秘書處報告：由 OECD 經濟組 Federica Maiorano 女士及 Pedro Caro de Sousa 先生撰寫秘書處議題之背景文件資料，其報告略以：

(1) OECD 過往並無特別針對制度設計有過詳盡的討論，僅於若干圓桌會議觸及過相關議題。而在探討制度設計的工具方面，已有相當多的分析架構，如決定理論(Decision Theory)、錯誤成本理論(Error Cost Theory)等。法規設計上則可分為實體規則（如當然違法原則、安全港或經濟分析）及證據規則（如法律規定、舉證責任）。

(2) 法院、政策制定者及專家學者對於競爭法中之安全港及法律推定一直存在爭議性的討論。一方面，競爭法禁止事業從事某些行為，無論該行為是否產生任何競爭效果，例如價格聯合行為；然而，另一方面，如事業從事之行為所產生的效果並無法確定，則僅有在該行為被證明具有限制競爭效果時才會遭

到禁止。隨著經濟理論的發展，競爭法逐漸不再依賴偏於規範形式上的禁止行為，轉而要求認定事業從事之行為具有限制競爭效果前須進行詳盡的經濟分析與評估。此趨勢源自於實務上漸漸認為過往被認定屬競爭法的核心違法行為（如垂直限制行為、搭售或排他性交易等）實際上係有利於競爭。

(3) 在競爭法執法中開始進行經濟分析與評估，可為競爭法主管機關提供更多的可信度與更高的準確性。然而，此亦會增加執行競爭法的成本，同時在法律規範上帶來更高程度的不確定性。

(4) 秘書處發現，對經濟分析依賴程度增加的同個時期，競爭法上的安全港及法律推定亦隨之興起。秘書處所提供的背景文件資料能有助於瞭解運用競爭法上之安全港及法律推定的主要原因，與所根據的理論基礎與實務經驗。

3、美國哈佛大學 Andrew Gavil 教授報告略以：

(1) 從競爭法發展的歷史趨勢，已漸漸朝向以「效果」作為分析基礎的決策過程。競爭法執法上需要運用法律推定的原因，係在於競爭法主管機關決策過程中時常須面臨資訊不完全的情況。

(2) 該報告提及何謂「更具經濟觀點」的分析方法，首先，事業如須面對不必要的舉證責任規定，將導致競爭法產生過度威嚇的規範效果，可能使實際上並無違反競爭法之事業反遭競爭法主管機關調查及裁罰。其次，可藉由競爭法主管機關的「錯誤成本（包括誤報(false positive)及誤判(false negative)成本）」與「資訊掌握度（特別是經濟證據的掌握）」進行分析，即競爭法主管機關調查時所掌握的經濟證據越多，是否足以降低執法時的誤報及誤判成本。

(3) 在使用法律推定上，制度設計時常以事業具有的「地位」及「行為」進行規範，例如限制競爭行為的法律推定通常由「市場力量」及「事業有損害競爭的行為」兩者所構成，其中在「市場力量」部分，則由「市場界定」、「市場占有率之計算」及「評估參進障礙」所組成；在「事業有損害競爭的行為」部分，則由「損害理論」及「事業從事該行為之誘因及能力」所組成。

4、英國倫敦國王學院(King’s College London)的 David Bailey 教授報告略以：

(1) 報告大綱以「何謂法律推定」、「為何歐盟競爭法運用法律推定」、「實務上的法律推定」及「法律推定的未來」等 4 項議題進行。首先，該報告提及法律推定在歐盟競爭法中所扮演的角色，法律推定係指可從案件事實證據中推定出的結果，並且規範於法規及指導原則中，其性質須易於操作、具程序性或事實性，且具有決定性（如當然違法原則，屬於較嚴格(hard)的法則，符合構成要件時該行為即屬違法）或可反駁性（如合理原則，屬於較彈性(soft)

的法則，事業可舉反證推翻）。

(2) 報告並舉出若干歐盟競爭法實務案例中所使用的法律推定，例如「較高的市場占有率可推定具有市場優勢地位」、「銷售價格低於平均變動成本可推定有掠奪性定價行為」、「廠商間訂定瓜分市場的協議時可推定彼此之間具有潛在競爭關係」等。另歐盟競爭法使用法律推定的原因在於經由實務案例操作後，依據執法經驗可判斷事業行為具有事實上的限制競爭效果，或是經濟理論足以支持確認事業違法行為的成立。

5、瑞士日內瓦研究學院(The Graduate Institute Geneva)的 Damien Neven 教授報告略以：

(1) 所謂「法律推定」係指就事前評估而言，觀察 A 事實的發生將導致 B 事實的結果，其可能性較高。「違法性推定」係指如事業之間實施具排他性的折扣措施很可能導致限制競爭的封鎖效果；而「合法性推定」則指如事業之市場占有率低於 30%，較不可能產生市場力量。前述推定通常須根據經濟理論及實證資料作成。

(2) 該報告以經濟理論的觀點試擬競爭法主管機關使用「法律推定」的工具調查，並設立目標函數進行經濟分析。其具體結論為法律推定的使用仍須取決於競爭法執法程序的本質，如職權進行主義(inquisitorial)或當事人進行主義(adversarial)；未來主要的挑戰在於競爭法主管機關之間是否發展具一致性的法律推定。

6、美國：

(1) 美國反托拉斯案件係由聯邦交易委員會及司法部反托拉斯署向法院提起訴訟，並由法院審理認定事業行為是否具有反競爭的性質。競爭法中的法律推定係規定於法院累積許多實務案例後而建立的普通法，包括實質性及程序性的法律推定。在適用任何法律推定之前，通常身為原告的競爭法主管機關必須依據訴訟過程中所強調的證據標準確認案件的事實。

(2) 在美國的競爭法中，些許類型的行為會被認為本質上具有反競爭性質，因此係當然違法的。而對於其他類型的行為，則須針對影響競爭的效果進行調查。前者的立法方式反映在當然違法的適用原則上，例如對於價格的聯合協議行為；後者的立法方式有時會採用可舉反證推翻的競爭性損害的法律推定，例如事業可舉證證明案關行為可提升經濟效率，使市場更具競爭性。

(3) 實務上，美國法院依據 3 種分析方法認定事業行為是否具有反競爭性質而違法。從原告方面（無論為競爭法主管機關或請求民事主張的個人）進行舉證

證明事業行為具反競爭性質而違法，前述分析方法有當然違法原則(per se illegal)、簡易的合理原則(an abbreviated rule of reason)及充分的合理原則(the full rule of reason)。法院選擇何種分析方法相當程度上須取決於事業的行為類型。此外，對於事業結合而言，法院已制定程序性的假設推定及舉證責任轉換的審理框架，以認定事業結合是否違反克萊登法。

7、歐盟：

(1) 在法律推定下，由於已經累積過往的經驗或知識，某項事實的成立通常是既定事實可推定的邏輯上結果，因此，如果競爭法主管機關已經確認某項事實，即可以此事實推定其他事實的存在。歐盟競爭法中的法律推定通常係具可反駁性的，即當事人可提出相關證據論述法律推定並不適用於案件的具體情況。

(2) 在資訊蒐集成本高、訴訟資源有限的法律體系中，採用法律推定的方式分階段進行分析並分配舉證責任，此方式是具有意義的。在此方式下，能使競爭法主管機關及法院加速審查程序，使複雜的爭議變得更加容易掌握，亦可確保執法政策的準確性。

(3) 歐盟書面報告探討下述議題：(1)歐盟競爭法上的法律推定與無罪推定的兼容性；(2)歐盟競爭法下不同類型的法律推定；(3)使用法律推定的理由。目前在歐盟競爭法中所使用的法律推定，例如母子公司責任推定(parental liability presumption)；無其他證據推翻相互勾結的事實下，推定事業之間有聯合行為存在；推定參與聯合行為之事業會相應地調整彼此之間的行為；聯合行為限制類型的推定；事業訂價低於平均變動成本的推定等。

(4) 最後，歐盟認為法律推定係一種廣泛、有用、可節省行政成本的手段，使競爭法執法制度更加可行，亦即可根據過去的執法經驗推定某項特定事實存在及提高執法的有效性。

8、德國：

(1) 德國競爭法制度包括豁免符合一定條件下的反競爭協議，此與歐盟運作條約第 101 條第 3 項規定一致。在事業結合及單方行為的競爭法制度中，則規定有事業可舉證反駁其並無市場優勢地位的法律推定，其目的在於促進競爭法上的有效執法。

(2) 實務上，由於德國聯邦卡特爾署在法律上有義務調查與案件相關的所有事實，法律推定主要係作為輔助工具。市場優勢地位在法律推定上的主要功能是為事業提供較強的誘因機制，以便在初期的調查階段可向聯邦卡特爾署提供所

需的評估資料。

9、瑞典：

(1) 運用安全港及法律推定執法時，須衡量因此所生的效率、過度執法及執法不力可能導致的風險。因此，安全港及法律推定須以強而有力的理論與經驗作為基礎，以降低風險。將安全港及法律推定的規範措施與調查初始階段的優先篩選措施相結合，可進一步降低過度執法的風險。

(2) 依據實務經驗及理論，在一定條件下，垂直合作關係可能會對競爭及消費者造成傷害；然而，亦有認為垂直合作關係對競爭及消費者的損害通常可能較低。因此，在面對不同行為類型的垂直協議案件進行優先篩選時，瑞典競爭管理局會特別考量調查當時的市場情況，而非僅運用法律推定作出判斷。

10、日本：

(1) 日本公平交易委員會在「有關經銷體系及商業行為之指導原則」(Guidelines Concerning Distribution Systems and Business Practices，下稱 DSBPG)及「有關事業結合審查之獨占禁止法指導原則」(Guidelines to Application of the Antimonopoly Act concerning Review of Business，下稱 MRG)中均有安全港條款的相關規定，倘符合所定要件時，事業行為將不會被認為違反獨占禁止法。

(2) 例如，在 DSBPG 規定中，倘事業之市場占有率在 20%以下或新進業者有垂直限制行為時，通常認為該行為不足以影響公平競爭，而推定並無違法之虞。另在 MRG 規定中，則有使用 HHI 及市場占有率等量化標準，認為符合某範圍標準下之事業結合並不具有限制競爭之疑慮。日本於會議中表示其競爭法對於限制轉售價格部分並無使用安全港條款。

(3) 日本公平交易委員會在制定相關的安全港標準時，均會考量過往執法案例及實務經驗，以及事業各種行為的限制競爭效果，必要時亦會考量與其他國家競爭法的一致性。同時，為確保指導原則的形成主要係基於提供事業遵法的明確性及可預見性，故制定的過程中並沒有從日本公平交易委員會的執法能力作為考量出發點。

11、韓國：

(1) 近來由於競爭法執法上需要詳細的經濟分析，法律推定及安全港的運用能減輕競爭法主管機關的舉證責任與執法成本，並降低法律的不確定性，增加事業對法規的可預測性。然而，對於依賴安全港條款所造成的執法不力及運用法律推定所產生的過度執法等疑慮仍存在著，因此，在制定安全港及法律推定標準時須特別注意所可能產生的風險及問題。

(2) 依據獨占管制及公平交易法第 4 條規定，當事業個別之市場占有率超過 50%以上，或者 3 家或 3 家以下事業之市場占有率總和達 75%以上，則推定具有市場優勢地位。另依據獨占管制及公平交易法第 7 條規定，事業結合倘符合下列情況時，將被認為係具有限制競爭之效果：(1)參與結合事業之市場占有率總和達到符合市場優勢地位之情形；(2)參與結合事業之市場占有率總和為該市場最高者；(3)參與結合事業之市場占有率總和超過市場占有率次高，且不低於市場占有率 25%之情形。此外，韓國針對事業結合、卡特爾行為及不公平的交易慣例，在相關的指導原則中均有安全港條款之規定。

12、BIAC：

(1) 反托拉斯法執法之目的在於防止限制競爭行為之發生，例如造成消費者損害之行為。然而，由於反托拉斯法的執行涉及相對普遍的規則及標準之適用，此些規則及標準通常以相對簡化的規定進行規範，並適用在各種複雜的經濟行為，因此可能存在錯誤適用法律的內在風險。

(2) 在許多情況下，BIAC 強調競爭法執法須具備透明度的必要性，並認為應具可預測性的規定須以經濟觀點作為制定的依據，以減少事業的行政成本及遵法成本，BIAC 並對於競爭法規範遭到過度執行表示憂心。BIAC 書面報告中提出使用違法推定及安全港條款的建議，特別是新興的競爭法主管機關可作為參考。主要討論面向如下：

A.對競爭法執法目標缺乏一致性的意見，可能將使制定普遍接受的法律推定更為困難。

B.在規則設計及成本錯誤分析上，是否應考量競爭法主管機關的執法成本。

C.正當法律程序的要求可支持效果分析及較狹義的違法推定。

D.對於法律推定設計上，司法審查的觀點尤為重要。

E.設計適當的安全港條款及法律推定時，應加入經濟觀點。

13、秘書處原擬就我國所提書面報告中有關「聯合行為微小不罰之認定標準」(de minimis safe harbor)解釋令提出詢問，惟因本議題各國提交報告數量多，在時間限制下，本會代表並未被詢問。

(二)「機構投資者共同所有權及其對競爭之影響」聽證會(Hearing on “Common Ownership by Institutional Investors and its Impact on Competition”)：

1、本議題在討論在寡占市場中共同持股對競爭之影響，並邀請美國 Daniel O’Brien 律師、貝萊德公司副總裁 Barbara Novick 女士、Daniel Rubinfeld 教授、Einer Elhauge 教授及 Martin Schmalz 教授等專家參與討論。

2、OECD 對「共同所有權」(common ownership)之定義為：法人投資者同時持有多家在高集中度產業相互競爭廠商之各廠商少量股權，而此一現象可能透過共同對所有廠商股權而影響市場競爭。本討論議題背景略以：

(1) 部分學術研究中，對同時擁有股權的機構投資者稱為「共同所有權」，因其對競爭性條件（特別是在獨占或寡占市場）具有潛在影響。由於 2008 年以來，被動式管理的投資基金快速增長，已經對部分行業的幾個大型公司的股權結構產生重大影響，這種被動式投資的資金對特定行業採取多元化持股的方式來分散風險，並以追踪指數等方式來降低個人及公司風險。在金融業、航空業及消費性電子業部門已經出現由大量投資公司共同擁有多數股權的例子。

(2) 雖然多元化投資可以降低事業對公司特定風險之曝險程度，但亦有影響市場競爭之可能。機構投資者持有特定產業市場之多數互相競爭之公司的投資組合時，該投資組合公司間的激烈競爭或許反而有機會造成投資公司受損。因此，機構投資者或許可以通過行使其股份之投票權或者施加其他壓力來影響被投資公司之決策。而機構投資者在其投資組合對特定被投資公司的管理中採取積極的做法可能不是其最為關心的。

(3) 最近的計量經濟學研究顯示，對機構投資者或其他大型金融公司共同擁有相同競爭市場下，不同事業股權而可能產生的影響有不同觀點。然而，衡量共同所有權的影響和使用競爭政策來解決任何相關的競爭問題是具有挑戰性的。也因為如此，共同所有權所造成對於市場競爭的影響程度，以及應該透過何種競爭政策來處理這個問題，目前的作法仍然相當分歧。

3、Schmalz 教授報告略以：

(1) 競爭需要透過激勵來促進競爭，所以必須給予企業足夠的誘因來使其參與競爭，而分散所有權才能帶來相對的競爭誘因。當機構投資者對於美國航空業的投資，聯合提高產能和降低價格時，共同所有者不會像獨立業主那樣受益，所以機構投資者不會像獨立投資者一樣給予企業獎勵來作為其參與競爭的誘因。例如，美國航空發生強迫乘客下機的流血事件時，其股價下跌，但美國航空最大機構投資者的投資組合價值卻提高了。

(2) 渠並引用其他學術論文來說明共同所有權可能會導致壟斷結果，認為企業和投資者都可以從平衡的競爭中受益，雖然機構投資者也沒有動機去花費更多的成本來促成其投資事業的聯合定價等行為，但當企業缺乏競爭的誘因時，此種共謀行為就是沒有必要的。由於共同基金收取資產價值的一定比例，所以資產價值在競爭減少時會增加，而最終投資者和資產管理者都從競爭的減

少中受益。縱使機構投資者可能同時擁有上游供應者及下游消費者的股權，垂直的投資關係也不影響水平的反競爭效果。

(3) 最後，其提出保持加計單位廉價多樣化投資的能力、增強投資者的激勵和監控能力以及保留或恢復具有競爭力的產品市場等建議，來緩和共同所有權可能會造成的負面影響，也強調競爭法執法機關的執法亦有改善市場的能力。

4、Compass Lexecon 顧問公司執行副總裁 Daniel O'Brien 律師認為經濟學者對於共同所有權影響競爭的疑慮仍是一個有待證實之議題，現階段應提升經濟學者對於少數持股投資者與公司控制如何聯結及如何影響競爭應加強研究。而在執法方面，應特別注意共同所有者試圖影響產業競爭之聯行為證據應特別小心處理，且應以個案為分析基礎，不應有通案性質。其報告略以：

(1) 當一個或多個投資者共同擁有特定產業內多家公司的股份的「共同所有權」狀況時，可能係以個人持有、機構投資者持有或是公司持有等三種情況，其主要考量經濟因素多為財務利益或公司控制之面向。若同一市場競爭對手之股權為共同所有權人所持有，可能會損害水平之市場競爭，但其目前仍為具爭議性的問題。然我們目前可以發現很多機構投資者或機構投資都為一般散戶投資人帶來了分散投資風險等利益。

(2) 未解決的問題是當企業管理者與所有權人的利益不同時所造成的矛盾，管理權與所有權分離時可能產生的代理人成本，導致企業管理階層可能會違反其信託義務，機構投資者並未給予企業管理階層足夠的誘因去競爭等原因，皆會造成經濟學上的利益並非極大化等問題。總括來說，經濟學家對於少數股權持有者轉化為企業控制者的研究還不夠完備，加上機構共同所有權人對企業經營提供的激勵並不明顯等，造成現今對於其是否會造成競爭的風險依然在理論的階段

(3) 另外，由於企業間的自願合併，可能會提高經營效率，減少交易成本，所以主管機關通常不會阻止，美國合併指南已有認知到共同所有權帶來的好處。

(4) 目前的理論和實證都並未支持直接將整體宏觀的政策方向導向少數股權的轉變，但也因為目前機構投資者共同所有權是否會對競爭造成負面的影響及其中的連結亦非明確，所以其建議主管機關在個案執法時應小心謹慎的評估及處理個案中的相關事證。

5、貝萊德公司副總裁 Barbara Novick 女士從基金公司及投資者角度討論本議題，渠認為：

(1) 資產管理者作為資產所有權人的受託人，只是客戶的代理人，需要依據投資

管理契約行事，而各個獨立資產帳戶仍是屬於資產所有權人，資產管理者仍然必須受到公司的高層以及相關單位之監督。所以並不會有透過參與主要交易的方式投資自己，或保證投資者的本金，或為資金提供流動性及直接參與被投資的經濟成果等行為。

(2) 貝萊德公司目前替養老基金、保險公司、主權基金、基金會等客戶管理資產，投資的大宗是 index equity，2016 年 7 月至 2017 年 6 月間參與公司股東會投票時，有 63%贊同公司管理者之決策，37%反對、棄權或隱藏決定，19%投票給不同意見的候選人。然其提出持有的股份的監管報告，並不代表具有資產所有權，也不意味著不同的資產所有權人有不同的投資。

(3) 該公司與 Berkshire Hathaway 公司不同，Berkshire Hathaway 擁有所投資公司的資產所有權、持有特定數量的公司，會積極選擇公司進行投資，通常需要取得董事會席次，而且其利潤會直接受到投資公司業績的影響。而貝萊德公司之資產經理人僅為客戶的受託人，代表數千家公司等客戶持有部分被投資公司的少數股權，且係根據投資股票指數的成份股持有股票，該公司在上市公司中沒有董事會席次，並且由客戶自行承擔投資組合所擁有的公司的經濟成果和業績等風險，貝萊德公司則向客戶對其管理下的資產組合收取管理費。兩者顯不相同。

(4) 貝萊德公司並指出部分文獻表示航空業因機構投資人持有共同所有權而缺少競爭造成高票價之說法有誤，因為資產管理人缺乏誘因來提高航空公司票價，一方面因為航空股佔普通股指數不到 1%，加上指數中其他公司都有使用航空服務的需求，所以指數策略沒有誘因提高機票的成本，因為這樣做會增加其他投資組合公司的成本。該等文獻的統計方法具有不能區分關聯性與因果關係的缺陷。

(5) 指數型基金有提供多元的投資選擇，成本效益透明等優點，且其係追踪指數的回報，投資人可透過投資指數基金來投資各種產業、各個地區之公司來降低風險。目前指數提供者已經創造了數百個可投資的指數。加上指數型基金由個人直接持有，部分機構甚至選擇直接購買股票的指數基金，故是種民主化的投資方式。

(6) 雖然部分專家提出以限制所有權（如限制投資單一公司股權達 1%，或限制投資集中在單一產業的公司等）的方式來避免共同所有權可能產生的競爭疑慮，但此種方法有減少指數型基金投資多樣化，增加追蹤錯誤等缺點，亦對部分公司之資金分配造成影響。事實上，指數型基金是支持長期持有公司股票並

關注長期價值創造的，其亦可提供公司穩定的資金來源，基金經理人縱使不滿特定公司亦無法出售該公司股票。

(7) 部分專家則提出以限制表決權的方式來避免共同所有權可能產生的競爭疑慮，然對於資產管理者來說，機構客戶一直以來都鼓勵基金管理者即使是在被動的投資指數型基金等投資組合的情況下，也儘量積極參與公司治理。在其他領域，政策制定者甚至建議給長期股票持有者額外的投票權，以鼓勵長期持有。

(8) 最後，貝萊德公司認為資產管理者缺乏減少其投資產業中各事業參與競爭的動力，目前討論議題所擬議的政策措施對於公司和投資者都是有害的，加上目前也沒有證據顯示針對此種集中投資特定產業的傳統反壟斷矯正措施是不夠的，所以不應該貿然推行此種不成熟而有害的政策措施。

6、美國哈佛大學 Einer Elhauge 教授提出「水平持股」(horizontal shareholding)及「共同持股」對高度集中產業廠商投資對產業競爭之影響，並建議修正美國休曼法及歐盟競爭法，以匡正此一現象。其報告略以：

(1) 「水平持股」是指同一競爭市場之競爭對手具有相同的股東，而共同持股可能包括垂直持股、集團持股及水平持股，交叉持股則是水平持股的特例，接著提出經濟上的實證來說明公司管理者會如何極大化自己的利益，並表示透過水平持股，可以增加整個產業業績來最大化股東權益，認為其與公司業績同等重要，此說法會直接提供動機去減少競爭。

(2) 1999 年到 2014 年間，兩家大型競爭公司水平持股的比率從 16％上升到 90％，同期，企業投資與利潤的差距也是自二次世界大戰以來最大程度的上升，經濟的不平等也是如此。經過迴歸分析，顯示特定產業的水平持股狀態可能是造成企業投資與利潤差距的因素之一。而航空公司的研究也證明了水平持股可能提高了航空票價 3%至 7%的幅度，講者並認為部分文獻表示水平持股對航空公司之定價沒有反競爭的影響，具有排除了個人投資者、將「共享」投票權設置為無投票權等錯誤，如共享投票實質上是代表一個實體控制另一個實體的投票。

(3) 最後，渠認為反托拉斯矯正措施仍有運用的空間，因為即使機構投資者對被投資公司沒有控制或影響，但股票的收購仍可能會有違反 Clayton Act §7 的反競爭效果。所以講者建議當 HHI> 2500 和ΔMHHI> 200，相關主管機關就應該進行調查並譴責可能的反競爭效果。

(4) 美國主管機關可適度擴展 Sherman Act 第 1 條，認為對競爭實施限制的任何契

約、信託或其他方式都是違法的等延伸。歐盟主管機關則可適度擴展歐盟併購法至可以涵蓋水平持股之股東集體決定影響的股權收購等;同時擴展 TFEU 101，禁止具有限制競爭效果的企業間有協議實施一致性行為等；擴展 TFEU 102，禁止濫用集體集體支配的市場地位，包括透過過度定價等方式。

7、德國報告略以：

(1) 德國的併購管制法包含了處理少數股權收購的規定，少數股權可能會根據有關反競爭協議的規定具體進行審查。然而，德國的法律並沒有包含機構投資者共同擁有事業所有權的具體規範，在某些情況下，如果機構投資者同時擁有相互競爭公司的股份可能會引起是否會影響市場競爭等疑慮。

(2) 因此，德國競爭法主管機關在 2016 年的報告提出了相關的論辯，其後並總結出機構投資者之行為對於競爭的重要性，同時提出了一些可能的解決方案。

8、美國報告略以：

(1) 美國的競爭法主管機關目前並沒有就一個機構投資者共同擁有特定事業所有權的案件提起訴訟。根據 Hart-Scott-Rodino Act，僅有投資發行人的 10%或以下的具有表決權的股票而進行的少數股權收購可免於提前通知，不過，某些機構投資者在獲得特定事業 15%或以下的具有表決權的股票，如果僅僅是為了投資的目的，則無需提前通知。相關法令規定為機構投資者的投資準備了更高的門檻，然據了解，這些機構投資者中的大多數並不參與或影響他們所購買股票的公司的管理。

(2) 如果一個機構投資者要協調其所投資的兩個直接競爭事業間的反競爭協議，則被投資的競爭事業和投資者（即機構投資者）可能都要為其自身違反反托拉斯法的行為負責。同樣的，通過機構投資者在競爭對手之間互相傳遞具有影響競爭的相關資訊亦可能會使公司和投資者必須承擔相關法律責任。

(3) 以目前來說，只有少數關於共同所有權效應的論文是直接考察共同所有權可能影響企業管理者行為的機制。部分研究甚至強調，機構投資者反對在他們所擁有的公司產品所在的競爭市場上作出協調或干預。目前的研究多數尚未探討到使機構所有權及其分析複雜化後，不同激勵方式和摩擦可能產生對被投資公司的影響。另外，機構投資者多數持有高達數億美元的資產，如果因為有前述的顧慮，就要求機構投資者出脫持股，可能會導致資本市場的重大衝擊，對企業和消費者產生意料外的成本，使得風險分散變得更加困難。因此，只有在調查結果顯示機構投資者的確有在集中行業中共同擁有所有權的反競爭效果的情況下，才能朝向這部分的反托拉斯行為執法而努力。

(4) 鑑於目前正在對於這個議題所進行的學術研究和辯論上處於發展的早期階段，美國競爭法主管機關目前還沒有準備對機構投資者共同擁有所有權的政策作出任何改變。美國競爭法主管機關任何強制措施都是以解決實際或預測可能造成特定市場競爭的損害為主，而非以學術論文所建議的一般關係為前提，更會設法避免不必要強制措施反而造成投資競爭力下滑的結果。

9、英國：英國在報告中探討了大型機構投資者對於下游競爭者中持有的普通股權可能產生對競爭的潛在影響，並針對一些新興文獻的研究結果提出說明，進而確定其後需要進一步研究分析的一些領域，其中包括需要測試研究中所使用的量化指標的穩健性，最重要的是，嘗試去確定是否有任何競爭機制可能會因此受到傷害。並以零售銀行業和保險業等 2 個關鍵性金融產業在英國的共同所有權的程度作為案例說明。

(三) 各國 2016 年競爭政策報告(Annual Reports on Competition Policy)：

1、本次會議計有澳洲、加拿大、智利、法國、德國、匈牙利、冰島、義大利、日本、韓國、拉脫維亞、荷蘭、紐西蘭、挪威、斯洛維亞、瑞士、英國、歐盟、保加利亞、哥斯大黎加、埃及、印度、馬爾他、秘魯、我國及烏克蘭等 27 國提交 2016 年度國家競爭政策報告，並依次由澳洲、荷蘭、日本、墨西哥、德國、英國、我國、挪威、冰島及秘魯於會中提出簡要口頭報告。

2、我國本次口頭報告提出公平會 2016 年所調查處理之 21 家貨櫃場聯合行為案及日月光與矽品結合案做為重要案例說明。

(四) 市場調查：事後評估及其矯正措施(Market studies: ex post evaluation and remedies)：秘書處將就過去 2 年「市場調查」主題討論所得資料編輯本報告；報告中兩項主題為：(1)市場調查結果及矯正措施行動，包括執法行動、立法或管制措施的改變、消費者保護措施或行為矯正措施之執行、市場架構之改變及非競爭事項之問題;（2）市場調查影響之事後評估，包括進行事後評估之理由、進行事後評估之一般方法、事後評估之案例。

(五) OECD 科學科技及創新總處(Directorate for Science Technology and Innovation)就 OECD 目前正進行之「進入數位化時代」(Going Digital Project)計畫提出目前進展報告。

(六) 未來討論題目：競爭委員會同意自 2018 年起未來 2 年的策略主題為：（1）智慧財產權與競爭(Intellectual property and competition)；（2）程序公平(procedural fairness)；（3）競爭中立(competition neutrality)。

(七) 未來開會日期：

1、2018 年會議日期為 6 月 4 日至 8 日、11 月 26 日至 30 日；2019 年為 6 月 3 日至 7 日、12 月 2 日至 6 日；2020 年為 6 月 8 日至 12 日及 11 月 30 日至 12 月 4 日。

2、目前競爭委員會正考量在 2018 年 12 月會議中與消費者委員會(Consumer Committee)舉辦聯席會議之可能性。

四、亞太地區高階官員會議：

OECD 秘書處競爭組在 12 月 6 日下午另外召開「亞太地區高階官員會議」(Meeting of High Level Representatives of Asia-Pacific Competition Authorities)，我國由代表團團長張委員宏浩率溫哲嘉專員出席，會議內容如下：

(一) 本次會議由 OECD 秘書處競爭組組長 Antonio Gomes 先生主持，討論議題主要在亞太地區建立技術援助網絡之可能性，並邀請 2 位學者參與討論，再分別由韓國、日本、印度、菲律賓、紐西蘭、澳洲及我國等國家依序報告「執法優先順序及倡議活動」。

(二) OECD 相關人員及邀請學者先從競爭法制度的設計、寬恕政策、調查程序強度及處置方式等面向來說明亞太各國對於競爭法規定之差異，並指出目前亞太地區約有接近一半之國家制定有寬恕政策或類似之規定，對於事業或個人違反競爭法後的處置，多數國家仍是以民事法及行政處分的方式為主，但亦有約 3 分之 1 的國家對違法者定有刑罰。各國在考量執法優先順序時，必須先定義目標，接著才能設定優先順序，進而制定策略及選擇標的等，而設定執法優先順序時，需要考量到立法目的、經濟衝擊、計畫發展及建構主管機關之權能等因素。然而，設定執法優先順序是很困難的，因為一個法令規定可能同時存在多個需要達成的目標，而目標間各自可能都是相衝突的，機關所扮演的角色也決定了是否會產生隱藏的成本。此外設定優先順序時，應該可以藉由外部諮詢及立法調整等方式來增加其合理性。至於計畫選擇的標準，則需要思考是否與執法優先順序配合，預期欲獲得之成效及注意可能發生的風險等問題。

(三) 韓國代表報告表示：

1、因為資源（或指國家預算）有限，所以競爭法主管機關在選擇需要達成哪些目標時，會盡量選擇最有效率的方法，又因為發展中國家常會著重於短期的經濟成長，所以通常給予競爭法主管機關的資源多屬不足。

2、以韓國 KFTC 歷史發展的優先順序來說，一開始是先對社會宣導競爭之概念，接著再較為嚴格的執行禁止卡特爾行為，其後則開始將目標轉移部份重心到事

業併購及濫用市場地位之行為。

3、現今韓國 KFTC 之執法則是優先鼓勵創新（包括知識經濟等面向）的競爭，以及替小型企業營造公平的競爭機會之環境等。

(四) 日本代表報告表示：

1、執法活動必須考量對人民生活的衝擊及回復市場功能，倡議活動則必須確保競爭的環境並宣傳競爭的重要性。

2、日本在 1947 年左右開始訂立競爭法及設立主管機關，在 1950 至 1960 年代的經濟蕭條時期，制定了反壟斷及反卡特爾行為之規定，1960 年代後競爭法進入穩定發展期，開始出現大型公司的併購風潮，1970 年代由於石油危機及價格飛漲，重行修訂反壟斷行為等規定，1980 年代則是開始加強社會對競爭政策的認知，1990 年代再度加強反壟斷行為的關注及強化執法。近年來，相關案件已經由 1980 年代的 63 件提高到 20 世紀的 92 件，罰鍰金額則由 5800 萬日元提高到 14 億日元。

3、至於倡議活動，日本會透過相關規定的修訂以及市場調查等方式來進行。

(五) 菲律賓代表報告了其近來經濟發展的成果，並表示在資源有限及不同限制的前提下，PCC 會盡力確保以適當的程序及適當的準則來設定競爭法執法的優先順序。

(六) 澳大利亞代表報告表示：

1、該國在決定執法優先順序時，必須先審視市場，蒐集事業及團體的回應，再透過競爭委員會內部討論，接著依照政策目標等修訂，最後程序才是公布。

2、ACCC 在 2017 年持續將卡特爾、反競爭的協議、濫用市場力量及透過不安全產品嚴重傷害市場等行為列為優先執法重點。該國並認為為了使執法選擇與矯正措施等能有所調和，應該先透過教育提高社會對競爭及競爭法之認識，再以行政決定等方式來執行，最後則是立法規定欲禁止的反競爭行為並加以處分。

(七)我國代表將本討論議題分為三個面向：先說明本會如何設定執法優先順序的程序，再說明哪些目標是執法時的優先考量，最後則是說明應該如何完成執法優先順序的目標。

1、我國會透過政府的施政計畫（4 年 1 次）、市場調查報告等來決定一般的關注重點，而針對部分特殊案件的起始調查則是透過立法院或媒體報導等來開展程序。其中有關政府的施政計畫，除了著重跨部會間的合作及加強國際合作外，如何有效的查察反競爭法的案件，數位經濟及多層次傳銷產業等產業之關注是目前的重點；線上交易平台等產業之關注則是經由相關報告所決定，有線電視產業

之查察則是本會近年來的查處重點（2016 年至 2017 年已有 13 件案例）。

2、本會另在立法院的關注下，主動針對農產品等一般零售食品的漲價情況、違法吸金的多層次傳銷行為以及相關重大反托拉斯案件進行調查。部分潛在性的重大反托拉斯行為案件，本會則可能會依照是否出現相當數目的受害者及輿論的關注程度來決定是否開啟調查。

3、最後，我國代表以說明本會處理急要案件的相關程序來解釋應如何達成設定之執法優先順序案件。

(八) 最後討論時，多數國家代表多表示贊同該型態之會議可以繼續舉辦，也認為常態性的舉辦該會議應可有助於與會各國競爭法之交流合作與執行，惟日本代表亦另提出該會議之參與成員國與東亞競爭政策高峰會議(EATOP)有高度重疊，或許有將兩類會議之功能加以區分的必要。

參、第 16 屆「全球競爭論壇」

一、開幕典禮及專題演講：由CC主席Frédéric Jenny先生主持，OECD日本籍副秘書長Masamichi Kono先生致開幕詞，並邀請秘魯自由民主學院主席(President of the Institute for Liberty and Democracy)Hernando de Soto先生做專題演講，題目為「財產權與競爭」(Property Right and Competition)，他主張人們必須先有財產所有權才能參與市場競爭，而財產所有權為民主表現的第一步，有了民主才能有財產私有化，才能參與市場競爭。如果我們考慮「領域」觀念，全世界2/3的人將無法參與競爭，因為他們沒有實際財產。因為競爭的本質在於:「誰擁有什麼」(who owns what)，這一本質決定了誰可以參加競爭，誰無法競爭。「財產所有權」或「擁有東西的權利」(right to hold things)是市場自由交易的基礎，沒有此一權利，就沒有交易，沒有交易即沒有市場，沒有競爭存在。

二、「競爭與民主是否為共生」(Are Competition and Democracy Symbiotic?)圓桌會議：

(一) 本議題主要討論競爭是否為民主蓬勃發展的充分條件或必要條件，特別是在民主制度轉型的國家。隨著競爭執法的演變，這是否會改變其支持民主的程度？競爭與民主間是否存在聯繫？本議題邀請德國 Walter Eucken 學院院長 Lars P. Feld 教授、歐盟法院 Ian S. Forrester 法官、美國紐約大學 Eleanor M. Fox 教授、南非前競爭法庭主席 David Lewis 先生及美國芝加哥大學 Spencer Weber Waller 教授與談。

(二) Fox 教授報告略以：

1、民主確實需要市場經濟，但市場經濟不一定要在民主體制下才能發展。因為市場經濟有兩大功能：為民主服務及為效率服務。民主的真諦在於人民享有對抗獨裁專治，市場也是一樣。

2、第二次世界大戰結束及柏林圍牆的倒下可以證明民主與市場經濟是共生的2個轉折點。歐盟在第二次世界大戰後進入民主階段，也因為開、自由市場經濟對抗特權與特許制度而產生了歐盟的競爭法。柏林圍牆的倒下更見證了從共產體制到民主體制，從計畫及控制經濟轉向自由市場經濟的發展。

3、美國的反托拉斯法的目的是為維持市場經齊，保護市場中的弱勢競爭者，最高法院早期的觀念對於市場經濟的概念是分歧的，主要觀點在讓弱勢者有更多財產或政府有更多自由。但在1950年對結合管制的修法中體現了民主與競爭，一世紀以來，反托拉斯所體現的即是民主的自由市場經濟。

4、在經歷柏林圍牆倒下及金融危機後，大多數國家瞭解問題所在及無法持續成長的原因。對於發展中國家而言，包容性及持續性發展是民主競爭的價值之一，要使市場由人民自主，享有市場經濟，必須將包容性價值納入。

5、我們要關注的民主價值包括世界主義對於民主的價值，尤其是在現今的世界因新科技出現而成為無國界但國家反而產生狹猛的國家主義。對此，各國競爭法主管機關就全世界的競爭民主應該有很大的進步空間。

(三) Forrester 法官報告略以：

1、美國的反托拉斯法是市場經濟與民主發展下的結果，因為休曼參議員(Senator Sherman)在1890年提出該法案是當時民粹運動「保護小企業不受大企業聯合行為欺凌」的結果。其最有名的一句話就是「如果我們不能忍受君王在政治上的權利，我們也不應忍受在生產、運輸、及民生物品上銷售的任何君王」。歐洲也在第二次世界大戰後積極發展民主，羅馬條約草案目標即在提供歐洲不受經濟霸凌或其他相關的保護，但其目標相當多元化。

2、美國的反托拉斯法進化為強大而且為自由經濟私人或政府執法標竿或原則的重要工具，不再是民粹運動。反觀歐洲的競爭法，最初運用在強化經濟整合，抑制邊界契約障礙，純為政治目的。1956年的競爭法草案中規範目標相當的廣泛，包括卡特爾、基於國別、種族、宗教之價格歧視。在經過整合後，歐盟競爭法正式施行，以競爭總署做為執法機關，並成功的將自由繁榮帶入各國。但是與美國不同的是，歐盟競爭法很少有私人執法，對於國家的龍頭事業執法較溫和，而且也適用於國家級的行為（國家補貼）。

3、美國及歐盟的競爭法演進至今已非當日起草者所能預見，其涵蓋之項目包括結合、濫用市場地位、罰鍰、卡特爾刑事制裁、遵法、機關間之合作等。而歐盟模式也為許多發展中國家仿效之對象。

4、有了競爭法及競爭法機關不一定可以完美的執行競爭法。各國的資源、經驗及政治不同也會造成執法的差異。典型的問題在於競爭法機關是否為獨立機關，是否受到部級單位的干擾或其他遊說而影響執法成效。司法再審視（訴願或上訴）對於確保競爭法機關執法品質的角色及可信賴度也是十分重要的。

5、競爭法與民主一樣，各國制度平行但不相同。政治意志及執法技巧可確保執法的單純與清澈。

(四) Feld 教授報告略以：

1、經濟自由是否需要政治自由為前提，目前無法得知，支持競爭與民主確實為共生之體制者認為市場競爭須以民主競爭為前提，反對者則認為兩者並無衝突，因為民主決議可能限制市場競爭，而市場競爭僅是政治多數目標下的一個目標而已。

2、民主就是政治市場中的競爭。市場競爭與民主是共生的，因為都是為了達到政治上的理性結果而限制權力。歷史上曾有市場力導致獨裁而控制整體社會而造成悲劇的案例，因此，競爭與民主是相互強化彼此的要素。

3、但是競爭與民主並不必然為互補。民主可能對競爭做出限制，政府可能對補貼管控，提倡國家龍頭企業，政治人物因為要滿足特殊利益團體之訴求而偏好對結合進行管制。另方面，競爭法主管機關的獨立性可能受到法律限制，如德國聯邦卡特爾署。而在民主與競爭產生衝突時，只有政府必須遵法或做出清楚的解釋，以社會其他目標來限制競爭通常是有害的。

(五) 南非 Lewis 先生以中國為例，中國政府給予國營事業自由競爭體制，但政治上本身並非民主，導致中國大陸腐敗貪污叢生，現任領導人必須進行改革。「市場經濟上的民主可導致政治體制上的民主」在命題上可能是有問題的。

(六) 芝加哥大學 Waller 教授報告略以：

1、從歷史觀點而言，美國反托拉斯法的施行主要目的之一是為了維護民主制度，而透過民主的施行才能強化有效的市場競爭。

2、立法單位通過施行競爭法交由執法單位執行，民眾可透過私人執法向法院提起訴訟，其結果透過社會、學術及媒體的散布，更強化了國會對於競爭法的立場，這是民主與競爭的良性循環。

三、秘書長致詞：OECD秘書長Angel Gurria先生於12月7日下午應邀致詞，略以：

(一) 很高興在全球競論壇上致詞，這是OECD最重要的論壇之一，也恭賀CC主席及競爭委員會對於競爭政策的努力推動。

(二) 競爭是經濟中主要本質之一，競爭可驅使企業追求更多產能及更多創新，更多競爭的產業會有高的產量成長，導致更高的經濟成長。

(三) 競爭也可以協助OECD所提倡推動聯結經濟與社會繁榮的包容性成長。包容性成長在生產力動能及包容性間之連結的分析的確顯示，競爭可確保創新與新科技逐漸影響整個經濟而成為經濟成長主要的關鍵。而且競爭可減少市場力，降低市場價格，這也是縮小因市場獨占而造成的貧富差距之主要因素。

(四) 競爭也可以協助我們面對數位化的快速變化，處理因數位化其所產生的挑戰，如大數據所產生之市場力及新型態市場勾結或卡特爾行為。

四、「對競爭法的司法觀點」圓桌會議(Roundtable on "Judicial Perspectives on Competition Law")：

(一) 本議題針對不同面向的競爭法司法判決進行討論，主要討論議題在於經濟證據之使用與認定、專業競爭法庭與一般法庭之效能，及競爭法主管機關與法院間之互動關係等。本議題計有美國、歐盟、義大利、韓國、土耳其、巴西及我國等26個國家提出書面報告，並邀請加拿大聯邦法庭首席大法官Paul Crampton先生、南非高等法院法官暨競爭上訴法院院長Dennis Davis先生、塞內加爾競爭委員會主委Mouhamadou Diawara先生、韓國高陽地方法院審判長Donghwan Shon先生、智利競爭法庭庭長Enrique Vergara V.先生及歐洲聯盟法院Nils Wahl先生等參與討論。

(二) 加拿大聯邦法院首席大法官Paul Crampton報告以「競爭法證據：法院面臨的挑戰」為題進行說明，略以：

1、加拿大競爭法的裁決機關，主要分由競爭法庭、高等法院及最高法院進行審理。競爭法庭(Competition Tribunal)通常處理事業結合、濫用市場優勢地位及垂直限制行為等；高等法院則處理涉及卡特爾、圍標等刑事案件。

2、針對事業結合、濫用市場優勢地位等非刑事案件，法院採用「假設法」("but for" approach)檢視，倘無事業結合行為或限制競爭行為時，案關產品的價格是否會實質地提高；非價格因素（例如品質、種類、服務、廣告或創新等）是否因不存在的事業結合行為或限制競爭行為而實質地降低。然而，對於何謂「實質」(material)之解釋，法院並沒有給予明確的標準。

3、該報告特別提及在法院進行審理前的準備階段，法院非常重視爭點整理，將案件爭議及證據逐漸限縮至適當的範圍以便作出判決，例如，事先要求當事人提

交證人證詞及專家報告、要求當事人提出之訴狀須載明案件所使用的經濟理論、要求當事人確認事實範圍、舉行會議事先釐清爭點範圍等。

(三) 南非高等法院法官暨競爭上訴法院院長Dennis Davis先生報告略以：

1、針對法庭上專家證人所產生的問題，該報告引述Lord Woolf所言，由於專家最初被聘請作為調查階段的小組成員，而後該案件進入法院階段時，該專家可能須改變其角色以作為提供法院意見的獨立專家證人，因此可能產生專家意見之間的派系問題(expert partisanship)。

2、為解決前述問題，目前法院實務上有採行“hot tub”的作法，即在確保證據透明及公平性下，專家證人應同時向法院提交相關證據，而非依序提交相關證據。此作法可降低專家派系問題，減少限縮對於實際爭點所需花費的審理時間。另外，報告亦說明競爭法不同於其他法律，須在法律規範中注入經濟概念與理論，仍有必要設立專業法庭處理競爭法的相關案件。

(四) 韓國高陽地方法院審判長Donghwan Shon先生以韓國公平交易委員會(KFTC)處分5家飲料廠商聯合行為案例進行說明，其報告略以：

1、該案中5家飲料廠商涉及交換飲料生產訊息並共同提高價格，由於5家飲料廠商生產的產品均非屬同類產品，例如汽水、礦泉水、咖啡、運動飲料及豆漿等，KFTC在沒有界定相關產品市場的前提下即認定5家飲料廠商涉及違反聯合行為禁制規定。

2、該案主要呈現的爭點在於，在價格聯合行為案件中，是否有需要界定相關市場及證明具有限制競爭效果。KFTC在該案中認為，相關市場僅為檢測事業間之行為是否具有限制競爭效果的工具，並非證明有價格聯合行為的要件，並認為價格聯合行為在競爭法的評價上屬當然違法。

3、然而，最高法院則認為案件應進行2階段評估分析，先界定相關市場後再評估可能產生的限制競爭效果，不同種類的產品並無法符合SSNIP檢測方法，故案關產品並非處於相同市場。最後，該報告提出評論，認為競爭法主管機關與法院之間的不同見解應在執法效率、法律闡釋、合法性及市場實務面（例如韓國市場結構、事業之間的競爭關係不同於歐美國家等）尋求平衡點。

(五) 智利競爭法庭庭長Enrique Vergara V.先生報告以智利的實務經驗作為說明，略以：

1、智利競爭法主管機關為二元體系(bifurcated system)，分成國家反托拉斯法執法機關(National Economic Prosecutor’s Office, FNE)及競爭法庭(Competition Tribunal, TDLC)。競爭法庭在執法機關初期調查階段的角色主要有下列事項：

對於監聽、實施搜索等強制力手段授權執法機關進行調查，授權執法機關發動調查等。

2、當案件進入後續階段後，FNE將在競爭案件中作為原告向涉及違反競爭法之事業進行起訴，TDLC則強調於此階段將保持其獨立性。TDLC為專業的競爭法庭，並不屬於一般民事法院或刑事法院管轄，其上級法院為最高法院。最高法院會對TDLC所作的判決進行法律面向的檢視。

(六) 歐盟：

1、歐盟競爭法執法體系屬行政體系，隸屬於歐盟執委會，並由歐盟法院進行司法監督。競爭法案件經歐盟競爭總署進行調查後，由委員會決定處分與否。歐盟執委會主要係依據歐盟運作條約(TFEU)第101條及第102條規定、歐盟事業結合管制規則等進行競爭法執法活動，並受到法院審查，該審查範圍極廣，不僅審查決定的合法性，亦包括受理損害賠償的請求、事業結合案的禁止決定、附加矯正措施的結合決定等。

2、歐盟法院可以執委會所作決定缺乏法定權限、濫用法定職權、違反必要的程序性規定、違反條約規定或任何所應適用之法律，而全部或部分撤銷該決定。當事人可對執委會所作之決定向普通法院提起第一審訴訟，該法院可對所有事實、證據及法律規定進行審查，然而普通法院並不能以其自身的經濟評估來取代執委會所作的經濟評估。倘對於普通法院的判決及命令不服時，則須以具有法律上爭點為由向上訴審法院提起上訴。

(七) 韓國：

1、韓國獨占管制及公平交易法的制定與競爭法執法的發展上，很大的原因在於累積相當多競爭法主管機關與事業之間的訴訟案例。韓國的競爭執法相當程度上取決於韓國公平交易委員會的行政調查。另方面，司法機關透過事後審查機制，避免競爭法主管機關產生過度武斷的決定。因此，競爭法主管機關及司法機關之間有良好的合作關係，然亦有些許緊繃的關係存在。

2、此外，法院有權可將韓國公平交易委員會所作的決定或施加事業的矯正措施予以撤銷。同時，經由法院所產生的判決案例亦可促進競爭法的發展，甚至改變現行競爭法制度的運作。

(八) 土耳其：

1、土耳其競爭局(TCA)於1997年成立，如同其他行政機關所作的行政決定，均須經司法審查，而該審查係由行政法院進行，目前土耳其則尚未有專業法庭。在土耳其競爭局執法的20年間，行政法院對競爭局的專業判斷表示最大的尊重，

競爭局並遵循法院所作決定的要求，此為兩方相互學習的過程。

2、在競爭局成立初期，行政法院以程序上有所瑕疵而撤銷競爭局所作的決定。隨時間發展下，競爭局遭行政法院撤銷的數量亦逐漸減少，但行政法院漸漸傾向調查競爭局所作決定依據的經濟評估是否正確，而非著重於程序上的爭點。

3、土耳其競爭局並於會議上報告有關對土耳其航空調查過程所作的決定，遭最高行政法院(Council of State)撤銷案，該案起因於土耳其飛馬航空(Pegasus Airlines)向競爭局檢舉土耳其航空在國內及國際航班上採取獨家交易的限制措施，而有濫用其市場優勢地位，嗣後競爭局於調查過程中並無發現土耳其航空有違法之虞，因此駁回土耳其飛馬航空的檢舉。然而，該駁回決定遭一審法院撤銷，競爭局上訴後亦遭最高行政法院駁回，行政法院認為競爭局並無取得足夠證據及對涉案事業是否違反濫用市場優勢地位進行詳盡的分析。

(九) 巴西：

1、巴西經濟防衛委員會(CADE)與巴西法院之間的互動係由Procuradoria Federal Especializada do CADE(ProCADE)運作，ProCADE有義務提供擔任CADE的出庭代表。由於CADE為負責針對事業結合案件及反壟斷調查案件作出最終決定的機關，ProCADE則處理前揭競爭案件後續在法院階段的爭論。而CADE在法院審理階段通常有2種不同情況：(1)CADE將作為訴訟事件的原告，以執行所作成的決定；(2)由於當事人不服CADE所作的決定，CADE將作為訴訟事件的被告。

2、在ProCADE的成員結構上，係由總檢察長領導的國家律師所組成，並經總統提名而參議院核准後任命。該機關主要有3個主要功能：(1)在提交給CADE的所有案件中提供法律意見；(2)準備及追蹤CADE於法院階段的訴訟案件；(3)執行CADE的決定。

3、在過去數年以來，ProCADE藉由提出訴訟（如執行罰鍰或要求事業施以改正措施）亦已逐漸變得更為積極。此外，涉及CADE訴訟案件的後續處理已成為該機關的優先重點，CADE的律師（有時亦會由委員陪同）須親自出庭向法院解釋決定的實質內容，此些措施均有助於加強法官、法律實務界與CADE之間的關係，並促進CADE在競爭法執法上的發展。

(十) BIAC：

1、BIAC表示其高度地支持應協助法院有效適用競爭法，並審查競爭法主管機關在競爭法事項的行為。BIAC認為，競爭法上的司法審查對於確保競爭法的公平、正確至關重要，能因此促進整體社會的經濟福利。此外，對於競爭法主管

機關的決定進行獨立審查亦為市場有效運作的必要因素。透過獨立的法院體系，可向事業、機關及大眾保證競爭法能依循法律規定確實地被執行。

2、有效的司法審查能讓競爭法主管機關可能做出的錯誤決定，有重新檢視的機會，以確保事業的權利及法治的適用。如果競爭法制度能將調查或起訴主體與司法審查主體有效地區隔，將能提供正當的法律程序及適當的制衡力量。因此，每個司法管轄區域均應有獨立的法庭系統，可有效地審查競爭法主管機關所作之決定及裁決民事糾紛。另外，由於競爭法時常須面對審查時間限制的問題，例如在審查事業結合案件時，司法審查程序即須提供較迅速的審理程序，以避免拖延事業之間的結合時程。

(十一)會議主席對我國所提書面報告提出問題，請本會說明書面報告中有關行政法院對於「連鎖便利商店聯合調漲現煮咖啡價格案」之判決見解，本會針對該案市場界定之意見。本會代表說明略以：

1、本會在該案中界定市場為「連鎖便利商店現煮咖啡市場」，惟行政法院審理時認為本會實際上並未進行任何「微幅但顯著的非暫時性價格調漲」(SSNIP)測試方法，僅依書面資料於短期內即逕行界定產品市場，缺乏經市場實證之情形；另本會所提出之其他質化因素（如咖啡店分類標準），並非取自深度觀察與晤談所蒐集之資料加以分析，缺乏具體事證，而予以駁回。

2、本會表示未來在個案上將強化市場界定與事證資料之緊密結合，並使相關市場實證方法所得數據與合理可替代性之論理說明相符，以獲行政法院支持。

五、「克服逆境及獲致成功：聚焦於小型及發展中經濟體競爭法機關」(Focus on Small Agencies and those in Developing Economies: Overcoming Adversity and Attaining Success)：本議題討論小型或發展中國家競爭法機關所面臨之執法障礙及如何克服這些障礙。會議共分3組討論：

(一) 倡議：討論在政府間倡議努力及在公共「預算內」創造競爭文化，由香港競爭委員會主任委員 Anna Wu Hung Yuk 女士擔任主席，邀請巴布亞新幾內亞獨立消費者及競爭委員會委員 Paulus Ain 先生、菲律賓競爭委員會主任委員 Arsenio M. Balisacan 先生、薩爾瓦多競爭委員會官員 Evelyn Olmedo 女士、奧地利競爭局專家 Daniela Trampert-Paparella 女士、馬來西亞競爭委員會委員 Dato'Jagjit Singh A/L Bant Singh 先生及美洲開發銀行（IDB）專家 Mario A. Umaña 與談。

(二) 執法：討論競爭法機關與公訴檢察官合作及與產業管制機關間之工作關係，由波札那競爭局代理執行長 Tebelelo Pule 女士擔任主席，邀請拉脫維亞競爭委員會主任委員 Skaidrite Abrama 女士、巴西經濟防衛行政委員會（CADE）主任委

員 Alexandre Barreto de Souza 先生、智利國家經濟檢察官（FNE）Felipe Irarrá zabal 先生、喬治亞競爭局偵測及預防限制競爭協議處處長 Nika Sergia 女士及印度消費者團結及信任社會（CUTS）秘書長 Pradeep S Mehta 先生與談。

(三) 競爭法機關如何克服敵視或漠不關心環境。由立陶宛競爭委員會主任委員 Sarunas Keserauskas 先生擔任主席，邀請南非競爭委員會副委員 Hardin Ratshisusu 先生、聯合國貿易及發展會議(UNCTAD)競爭與消費者政策處處長 Teresa Moreira 女士及世界銀行市場與競爭政策處處長 Martha Martinez Licetti 女士與談。

六、越南競爭法與政策同儕檢視(Peer Review on Competition Law and Policy in Vietnam)：由澳洲 Nicholas Taylor 律師擔任引言介紹，澳洲、法國、日本及羅馬尼亞擔任主要檢視國、檢視國所提出檢視問題包括：

(一) 越南企業大多為國營事業，資源也多數為國有化，越南是否有任何機制監督國營事業或平衡因特殊待遇而造成之不公平競爭？競爭法機關(VCCA)是否可介入處理國營事業的獨占行為？

(二) 越南解除管制（如報告中之稻米輸出特許）將如何改變？競爭法主管機關是否有擔任任何角色？由誰決定此一角色分配？

(三) 越南為何幾乎沒有卡特爾之檢視或處分案例（至今僅有 1 件卡特爾案件及 1 件濫用市場地位案件）？目前越南競爭法中並沒有寬恕政策，未來修法是否將納入寬恕政策？

(四) 越南競爭法機關（VCCA）目前缺乏獨立性，在未來修法後是否為獨立機關？其預算資源如何取得？在越南是否可有真正獨立之機關？

七、「公共市場之競爭」(Competition in Public Markets)：

(一)本議題討論醫療保健、教育、及其他公共服務之提供市場。這些市場通常屬於高度補助及管制，競爭法機關對其關注亦較低。但是，謹慎的選擇與競爭已證明可提升這些市場的品質及效率，因此競爭法機關應該有機會在這些市場中倡議更多的競爭與選擇。

(二)本議題邀請前澳洲競爭及消費者委員會(ACCC)主任委員 Allan Fels 先生專題演講，略以：

1、教育、醫療保健及其他公共市場構成 GDP 及政府支出的一大部分，但在競爭及選擇的範疇上經常是有限的或被蓄意限制。本研究主要的動機在探討是否可以利用消費者選擇及廠商競爭來改善這些產業的結果。

2、本議題主要的討論問題在於：我們在保護（或推動）這些產業公共政策目同時，

是否能以競爭給教育、醫療保健及其他公共服務的顧客及使用者帶來更高的效率及更好的結果。這個目標不是由約定或以競標而來，而是由市場中之競爭及消費者選擇來達成。對於每一產業，我們依下列三步驟研析：（1）政府採取行動介入的基本理由為何？（2）對有效選擇及競爭的障礙為何？（3）對於有效選擇及競爭的可能基本架構為何？

3、教育與醫療保健是最受政府補貼的產業，而補貼支付的態樣強力影響選擇及競爭之範疇。如果補貼以「固定價格」給付，則可與選擇及競爭相容，但也可能引起「吸脂效應」(cream-skimming)，即學校選擇高能力學習且可付出低執教成本的學生產生良好的結果，但高成本教育（或低利潤）學生（如特教或低學習能力學生）則無法受教。政府補貼教育的基本理由很多，包括產量外部性、公民權益、市場機制失靈等，但最主要的基本理由是，確保教育的基本功能可以讓公民不論家庭背景如何都能平等享有。

4、學校與學校之間還是可能產生相互競爭，尤其是在較大的郊區，而政府應允許學校間自由競爭及進出市場，但也須防止吸脂效應的產生。

5、對於醫療保健，政府的介入往往是因為競爭性的短期醫療保險無法防止長期的慢性病健康風險，而民眾不分貧富皆應享有取得醫療健保機會之權利。

6、對於大多數的一般醫療程序，競爭是可及的，病人只要能有充分的資訊協助即可做出選擇決定，醫院也應該可以競爭並自由進出市場。

7、對於其他類似以政府補助為主之公共市場，競爭議題應予重視。解決方法之一為：直接將補助支付予消費者，使其有機會選擇如何使用補助以符合其需求。

肆、心得與建議

一、OECD 本次 WP2 會議所討論之「金融危機 10 年後－金融產業中競爭法機關與管制者間之合作」就金融管制政策與競爭政策間之衝突，及競爭法機關與金融管制監理機關間之合作進行討論。本會議由金融監督管理委員會及公平交易委員會共同出席，就本議題汲取各國之經驗，未來在因應金融市場開放競爭議題及結合議題上，兩機關可開啟更多之合作契機。

二、WP3 本次會議探討「矯正措施之域外管轄權」，主要在於競爭法域外管轄是否遵守國際禮讓原則及國際合作原則。本會在執法案件中不乏有域外矯正措施效力之爭議，本議題討論內容應可做為本會未來執法之參考。另 WP3 下次討論「競爭法調查程序公平及透明化」與本會調查程序及行政程序法相關規定有關，本會應提早因

應準備。

三、本次會議資料相當豐富，所討論議題皆與本會執法息息相關，討論內容可做為本會執法參考。為利同仁瞭解，會議相關文獻將建置於本會 BBS 網站供同仁參閱。

Organisation for Economic Co-operation and Development

DAF/COMP/WP2/A(2017)2/REV2

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21 November 2017

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 2 on Competition and Regulation

Draft Agenda of the 64th meeting of Working Party No. 2

4 December 2017
Paris, France

To be held on 4 December 2017 (10:00-13:30) in Room CC1 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris, France.

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JT03423382

Monday 4 December (10:00-13:30)

10:00-10:05

Item 1. Adoption of the Draft Agenda

DAF/COMP/WP2/A(2017)2/REV2

10:05-10:10

Item 2. Approval of the draft summary record of the last meeting (19 June 2017)

For approval:

Draft summary record of the 63rd meeting (June 2017) - DAF/COMP/WP2/M(2017)1

For information:

List of Participants - DAF/COMP/WP2/M(2017)1/ANN1

Executive Summary of the Hearing on Radical Innovation in the Electricity Sector - DAF/COMP/WP2/M(2017)1/ANN3

10:10-13:00

Item 3. Roundtable - 10 years on from the Financial Crisis: Co-operation between Competition Agencies and Regulators in the Financial Sector

For discussion:

Background note - DAF/COMP/WP2(2017)8

For discussion:

Summary of contributions – DAF/COMP/WP2/WD(2017)19

Note by experts:

Note by Professor Martin Hellwig - DAF/COMP/WP2/WD(2017)26

Country contributions:

Australia - DAF/COMP/WP2/WD(2017)3

Canada - DAF/COMP/WP2/WD(2017)4

Denmark - DAF/COMP/WP2/WD(2017)5

Finland - DAF/COMP/WP2/WD(2017)7

Hungary - DAF/COMP/WP2/WD(2017)15

Israel - DAF/COMP/WP2/WD(2017)8

Italy - DAF/COMP/WP2/WD(2017)9

Mexico - DAF/COMP/WP2/WD(2017)10

Netherlands - DAF/COMP/WP2/WD(2017)11

Norway - DAF/COMP/WP2/WD(2017)12

Portugal - DAF/COMP/WP2/WD(2017)13

Spain - DAF/COMP/WP2/WD(2017)14

Sweden - DAF/COMP/WP2/WD(2017)21

United Kingdom - DAF/COMP/WP2/WD(2017)22

Romania - DAF/COMP/WP2/WD(2017)24

EU - DAF/COMP/WP2/WD(2017)6

Argentina - DAF/COMP/WP2/WD(2017)16

India - DAF/COMP/WP2/WD(2017)17

Lithuania - DAF/COMP/WP2/WD(2017)18

Singapore - DAF/COMP/WP2/WD(2017)25

South Africa - DAF/COMP/WP2/WD(2017)23

Ukraine - DAF/COMP/WP2/WD(2017)27

This Roundtable on Co-operation between competition agencies and regulators in the Financial Sector will ask whether, 10 years after the global financial crisis began to unfold, financial regulators and competition agencies have successfully co-operated to implement a regulatory and competitive framework that delivered a stable system in which innovative and efficient firms can thrive.

The Roundtable will look at whether changes to prudential regulation have complemented competition and for example helped to incentivise traditional banks not to take on excessive risk; or whether these changes have restricted competition in the hope that banks, insurance firms or other financial institutions would use market power to build their resilience. It will analyse the regulatory framework in order to assess how it has dealt with the potential of Fintech, including mobile payments and shadow banks, to introduce innovative business models. It will also explore the way in which macro-prudential measures have effected competition.

In addition, the Roundtable will consider whether, where greater transparency on rates and other conditions has been introduced, this has helped consumers to choose and switch between providers of financial services, or whether it has backfired and provided banks with detailed knowledge about each other's policies, thereby leading to higher prices.

The discussion will benefit from 22 contributions from delegations, a background paper by Professor Elena Carletti and Agnieszka Smolenska and the views of three expert speakers: Professor Martin Hellwig (Max Planck Institute for Collective Goods); Dr Miguel de la Mano (Compass Lexecon), and Professor Paul Grout (Bank of England).

13:00 – 13:10

Item 4. Japan - Presentation on the use of the Competition Assessment Framework in Japan

The JFTC will make a short presentation on its use of the Competition Assessment Toolkit and the introduction of mandatory competition assessment within the Regulatory Impact Assessments of all ministries of state.

13:10 – 13:20

Item 5. STI - Presentation on the OECD Telecommunication and Broadcasting Review of Mexico 2017

OECD's Science and Technology and Innovation (STI) Directorate will make a short presentation on the Telecommunication and Broadcasting Review of Mexico 2017, which examined the implementation of

the regulatory reforms that have taken place since the 2012 OECD review and the results achieved to date, and makes recommendations for the future.

13:20 – 13:30

Item 6. Update on the Competition Assessment Toolkit, and Other Business

The secretariat will provide a brief update on the adoption of the Competition Assessment Toolkit by the Asia Pacific Economic Cooperation Forum (APEC), and the revision of the toolkit in light of Digitalisation (following the survey of members in September).

Organisation for Economic Co-operation and Development

DAF/COMP/WP3/A(2017)2/REV2

For Official Use **English - Or. English**

21 November 2017

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

Draft Agenda: 126th meeting of Working Party 3 on Co-operation and Enforcement

4-5 December 2017

The 126th Meeting of Working Party 3 on Co-operation and Enforcement will be held on 4-5 December 2017 in Room 1 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris (starting on 4 December at 15:00 pm).

Despina.Pachnou@oecd.org, +(33-1) 45 24 95 25

JT03423386

Monday 4 December 2017

15:00-15:05

Item 1. Adoption of the draft agenda

DAF/COMP/WP3/A(2017)2/REV2

15:05-15:10

Item 2. Approval of the draft summary record of the last meeting

For approval:

Summary record of the 125th meeting – DAF/COMP/WP3/M(2017)1

For information:

List of participants - DAF/COMP/WP3/M(2017)1/ANN1

Summary of Discussion - Roundtable on Methodologies for Conducting Market Studies - DAF/COMP/WP3/M(2017)1/ANN2

Executive Summary - Roundtable on Methodologies for Conducting Market Studies - DAF/COMP/WP3/M(2017)1/ANN3

15:10-15:30

Item 3. Report on International Experiences with Class Actions and Private Enforcement

Report by the Secretariat - DAF/COMP/WP3/WD(2017)33

Competition laws employ multiple tools for enforcement. These can include the imposition of monetary or criminal penalties on corporations, civil and criminal sanctions on individuals – such as jail time, pecuniary penalties or disqualification orders, and injunctions. Victims can also be entitled to compensation damages. Private actions for antitrust damages operate alongside public enforcement to deter anticompetitive conduct, while also seeking to compensate the victims of cartelization. More and more jurisdictions have adopted mechanisms for the private enforcement of competition law. As private enforcement has become more common, awareness of the difficulties and complexities that competition cases raise in comparison to the bulk of non-contractual liability cases has grown.

Mexico commissioned an overview of international experiences on the private enforcement of competition law (with a view to potentially reform its system in the future), as part of the Mexico-OECD in-country work. The OECD Secretariat prepared a detailed report exploring various areas of private enforcement and the specific challenges they raise.

The report will be introduced in this session, with a view to obtain comment and feedback from the delegates by **31 January 2018**.

15:30-18:00

Item 4. Monitoring the Implementation of the Hard Core Cartel Recommendation concerning Effective Action against Hard Core Cartels

Report by the Secretariat - DAF/COMP/WP3(2017)2

In November 2016, Working Party 3 on Enforcement and International Co-operation started a discussion on the implementation of the 1998 Recommendation concerning Effective Action against Hard Core Cartels.

In June 2017, the Secretariat presented the preliminary findings of a Secretariat survey shared with the delegates in March 2017, showing how countries and competition agencies have implemented the Recommendation. The discussion in June focused on powers available to competition authorities to co-operate and provide investigative assistance to each other in cross-border cartel cases.

At the December meeting, the Secretariat will present the full survey findings. The discussion will cover all areas of enforcement against hard core cartels: administrative and criminal sanctions; leniency programmes; ex officio investigations; settlements and plea bargaining; and private enforcement actions. The discussion will aim to ascertain current status of enforcement against cartels, identify challenges and gather views on the need for revising the Recommendation to, e.g., explicitly refer to amnesty/ leniency programmes, settlements and private enforcement.

Delegates will be requested to comment on and validate the survey's findings by **31 January 2018**.

Tuesday 5 December 2017

10:00-13:00

Item 5. Roundtable on the extraterritorial reach of remedies

For discussion:

Issues Paper by the Secretariat - DAF/COMP/WP3(2017)4

Notes by delegations:

Summary of contributions - DAF/COMP/WP3/WD(2017)34

Country contributions:

France - DAF/COMP/WP3/WD(2017)48

Germany - DAF/COMP/WP3/WD(2017)36

Korea - DAF/COMP/WP3/WD(2017)37

Mexico - DAF/COMP/WP3/WD(2017)38

New Zealand - DAF/COMP/WP3/WD(2017)39

United Kingdom - DAF/COMP/WP3/WD(2017)40

United States - DAF/COMP/WP3/WD(2017)41

European Union - DAF/COMP/WP3/WD(2017)35

Brazil - DAF/COMP/WP3/WD(2017)42

Russian Federation - DAF/COMP/WP3/WD(2017)43

South Africa - DAF/COMP/WP3/WD(2017)44

Chinese Taipei - DAF/COMP/WP3/WD(2017)45

Singapore - DAF/COMP/WP3/WD(2017)47

BIAC - DAF/COMP/WP3/WD(2017)46

The increasing interdependence of markets and economies means that the behaviour of market participants and its effects are often not limited to the territory of the country where the behaviour takes

place. Thus, conduct by foreign parties occurring abroad may have negative impacts on domestic markets.

Over the years, jurisdictions have developed different approaches to assess whether they can extend jurisdiction to cover foreign conduct. While there is broad consensus that foreign conduct sufficiently affecting domestic markets merits extending a country's jurisdiction to cover it, countries remain aware of the need to balance this extended jurisdiction with the principles of international comity, evaluate another state's interests and at times defer to them, and avoid imposing inconsistent demands on private parties who may need to comply with several and occasionally conflicting competition regimes.

In particular the design and implementation of remedies against parties and conduct outside an authority's territory can prove challenging. How can the geographical scope of these remedies be defined, in light of international comity principles, other jurisdictions' possibly different competition law and policy priorities, and other competition authorities' enforcement activities? What about the risk of inconsistent requests to private parties, when parallel remedies are imposed by different jurisdictions for the same conduct? On a practical level, how can the remedies be effectively enforced in a different country, and how would the imposing authority monitor that?

This Roundtable will seek to debate the challenges of extraterritorial competition law enforcement in the light of recent cases, and discuss how agencies decide the geographic scope of remedies and relevance to redressing domestic harm. It will include a panel of experts with Judge Douglas Ginsburg, Professor Florian Wagner-von Papp, Dean Andrew Guzman and Orrick partner Jay Jurata. It will also benefit from an issues paper and 14 country contributions.

Organisation for Economic Co-operation and Development

DAF/COMP/A(2017)2/REV2

For Official Use **English - Or. English**

21 November 2017

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Draft Agenda: 128th meeting of the Competition Committee

5-6 December 2017, CC1

The 128th Meeting of the Competition Committee will be held on 5-6 December 2017 in Room 1 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris (starting on 5 December June at 2.30 pm).

Antonio CAPOBIANCO, Senior Competition Expert
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03423380

Tuesday 5 December 2017

14:30-14:40

Item 1. Adoption of the draft agenda

DAF/COMP/A(2017)2/REV2

14:40-14:45

Item 2. Approval of the draft summary record of the last meeting

For approval:

Summary record of the 127th Competition Committee meeting - DAF/COMP/M(2017)1

Summary Record of the Accession Review of Lithuania [CONFIDENTIAL] – DAF/COMP/ACS/M(2017)1

For information:

List of participants - DAF/COMP/M(2017)1/ANN1

14:45-15:00

Item 3. Report by Working Party Chairmen and Co-ordinators

The Chairmen of Working Party No. 2 and of Working Party No. 3 will report on the meetings of the Working Parties held on 4 December (WP2) and 5 December (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.

15:00-18:00

Item 4. Roundtable on Safe Harbours and Legal Presumptions in Competition Law

For discussion:

Background Note by the Secretariat - DAF/COMP(2017)9

Notes by delegations:

Summary of contributions - DAF/COMP/WD(2017)82

Country contributions:

Belgium - DAF/COMP/WD(2017)46

Chile - DAF/COMP/WD(2017)60

Germany - DAF/COMP/WD(2017)88

Israel - DAF/COMP/WD(2017)59

Japan - DAF/COMP/WD(2017)61

Korea - DAF/COMP/WD(2017)84

Latvia - DAF/COMP/WD(2017)65

Mexico - DAF/COMP/WD(2017)66

Portugal - DAF/COMP/WD(2017)67

Sweden - DAF/COMP/WD(2017)57

Turkey - DAF/COMP/WD(2017)96

United Kingdom - DAF/COMP/WD(2017)91

United States - DAF/COMP/WD(2017)85

Romania - DAF/COMP/WD(2017)89

European Union - DAF/COMP/WD(2017)64

Argentina - DAF/COMP/WD(2017)68

Brazil - DAF/COMP/WD(2017)69

Colombia - DAF/COMP/WD(2017)70

Croatia - DAF/COMP/WD(2017)71

India - DAF/COMP/WD(2017)58

Lithuania - DAF/COMP/WD(2017)62

Russian Federation - DAF/COMP/WD(2017)72

Chinese Taipei - DAF/COMP/WD(2017)73

Ukraine - DAF/COMP/WD(2017)74

BIAC - DAF/COMP/WD(2017)90

Safe harbours are rules that preclude a finding of a competition infringement and/or make it unnecessary to assess market circumstances in order to find a conduct lawful. Presumptions of illegality usually refer to *per se* rules or object prohibitions and with safe harbours they delineate the borders of conduct that must be subject to detailed market analysis. They can be absolute or rebuttable, depending on whether evidence against it can be brought by either the parties or the enforcing agency. Safe harbour and presumptions, in the form of market shares, HHI indices, or other market structure variables, are widely used. Commonly, they are applied in the area of horizontal mergers, unilateral conduct, market dominance, and/or monopolisation, vertical relations including vertical mergers and vertical restraints. The Committee will invite experts to discuss if there is a good theoretical or practical justification for their use and for the determination of the threshold levels. The roundtable will offer an opportunity to discuss the rationale for adopting bright-line rules or flexible standards in competition enforcement; the reasons behind the adoption of safe harbours and/or presumptions of illegality for certain conducts and not others; whether rule-design is influenced by institutional considerations regarding the enforcement bodies' capacity to conduct in-depth analyses. Confirmed experts: David Bailey (King's college London, UK), Damien Neven (Graduate Institute of International and Development Studies, Switzerland), Andrew Gavil (Howard University, USA).

Wednesday 6 December 2017

10:00-10:10

Item 5. Election of Chairman and Vice Chairmen for 2018

The Competition Committee will be called to elect the Chairman of the Competition Committee and the Bureau members who will serve as Vice-Chairmen for 2018.

10:10-13:15

Item 6. Hearing on Common ownership by institutional investors and its impact on competition

For discussion:

Background Note by the Secretariat - DAF/COMP(2017)10

Notes by delegations:

Summary of contributions - DAF/COMP/WD(2017)83

Notes by experts:

Note by Professor Einer Elhauge - DAF/COMP/WD(2017)95

Note by Professor Daniel Rubinfeld - DAF/COMP/WD(2017)94

Note by Professor Martin Schmalz - DAF/COMP/WD(2017)93

Country contributions:

Chile - DAF/COMP/WD(2017)21

Germany - DAF/COMP/WD(2017)87

Mexico - DAF/COMP/WD(2017)75

Portugal - DAF/COMP/WD(2017)76

Slovenia - DAF/COMP/WD(2017)77

United Kingdom - DAF/COMP/WD(2017)92

United States - DAF/COMP/WD(2017)86

Argentina - DAF/COMP/WD(2017)78

Brazil - DAF/COMP/WD(2017)79

Russian Federation - DAF/COMP/WD(2017)80

Ukraine - DAF/COMP/WD(2017)81

This Hearing will discuss the recent literature on common ownership and their impact on competition, especially in concentrated markets, and their effects on firms' incentives to compete fiercely. Recent empirical studies conclude that horizontal shareholdings are widespread in our economies especially in sectors (such as airline or banking) where institutional investors are active and that they can lead to strong concentration in such sectors. The discussion will address questions such as: How does competition law deal with cross or partial ownership? When considering the competition effects of a merger, even if the ownership is less than a controlling interest in the target, how does this affect competition? Similarly, what are the impacts of this common ownership on cartel conduct? The discussion will benefit from the views of external experts: Daniel O'Brien (Partner, Bates White, United States), Barbara Novick (Vice Chairman, BlackRock), Professor Daniel Rubinfeld (NYU School of Law,

United States), Professor Einer Elhauge (Harvard Law School, United States) and Professor Martin Schmalz (University of Michigan, United States).

Lunch break (13:00-15:00)

15:00-15:15

Item 7. Update on the Accession Review of Costa Rica [CONFIDENTIAL]

Following the first discussion on the Accession Review of Costa Rica which took place in June 2016, the delegation of Costa Rica will report on recent developments in the legislative process for the reform of the competition law of Costa Rica.

15:15-16:30

Item 8. Annual Reports

Annual Reports due at this meeting:

Australia - DAF/COMP/AR(2017)26
Canada- DAF/COMP/AR(2017)27
Chile- DAF/COMP/AR(2017)28
France- DAF/COMP/AR(2017)29
Germany- DAF/COMP/AR(2017)30
Hungary- DAF/COMP/AR(2017)31
Iceland- DAF/COMP/AR(2017)32
Italy- DAF/COMP/AR(2017)33
Japan- DAF/COMP/AR(2017)34
Korea- DAF/COMP/AR(2017)35
Latvia- DAF/COMP/AR(2017)36
Netherlands- DAF/COMP/AR(2017)37
New Zealand- DAF/COMP/AR(2017)38
Norway- DAF/COMP/AR(2017)39
Slovenia- DAF/COMP/AR(2017)40
Switzerland- DAF/COMP/AR(2017)41
United Kingdom- DAF/COMP/AR(2017)42
EU- DAF/COMP/AR(2017)43
Bulgaria- DAF/COMP/AR(2017)44
Costa Rica- DAF/COMP/AR(2017)45
Egypt- DAF/COMP/AR(2017)46
India- DAF/COMP/AR(2017)47
Indonesia- DAF/COMP/AR(2017)48
Malta- DAF/COMP/AR(2017)49

Peru- DAF/COMP/AR(2017)50

South Africa- DAF/COMP/AR(2017)51

Chinese Taipei- DAF/COMP/AR(2017)52

Ukraine- DAF/COMP/AR(2017)53

Delegations listed above are invited to submit their annual report for 2016. As agreed last December 2016 following a recommendation by the Bureau, only some Delegations will be allocated time to make presentations on a key development that has taken place in their jurisdiction (e.g. a legal reform, a new policy approach, an important decision, etc.).

At the moment, the following delegations have expressed an interest to make short: 1) Japan will make short remarks on the 70th anniversary of the Antimonopoly Act of Japan; 2) Mexico will present the key findings from the Mexican competition assessment reviews of the meat and the pharmaceutical sectors; 3) the Netherlands will present the main findings from the ACM market study on Online Video Streaming; 4) the United Kingdom will present the main findings from the CMA market study on Digital Price Comparison Websites; 5) Germany will present the changes introduced by the 9th Amendment to the German Competition Act entered into force in June 2017; and 6) Australia will discuss some recent major law reforms and the finding of recent market studies in Australia. The delegations of Switzerland and Chinese Taipei will present recent important cases in their jurisdiction.

Other delegations are welcome to contact the Secretariat to suggest a topic for an oral presentation at this session if they wish to do so. The Secretariat will collect these expressions of interest and coordinate with the Chair of the Competition Committee.

16:30-17:00

Item 9. Market Studies: ex post evaluation and remedies

Note by the Secretariat – DAF/COMP/WD(2017)56

The Competition Committee will discuss a note of the Secretariat compiling the information already available to the Committee based on past work undertaken in the course of the strategic theme on Market Studies. The note will focus on two specific sub-topics: i) outcomes and remedial actions from market studies; and ii) ex post evaluation of the impact of market studies. The purpose of the session is to decide if further analytical work is required in both areas or if the information already available to the Committee will sufficient to prepare a publication summarising the OECD work on Market Studies as agreed at the June 2016 meeting of the Competition Committee.

17:00-17:30

Item 10. Other business and future work

For information:

Note by the Secretariat on Going Digital Project: State of Play - DSTI/CDEP/GD(2017)8

Note by the Secretariat on Future Topics – DAF/COMP/WD(2017)48

Note by the Secretariat on Going Digital Project: State of Play is circulated for information. A presentation by the DSTI Secretariat will highlight the main developments in this OECD-wide project.

Competition Delegates will be called to decide topics for substantive discussions to be held in June 2018. Delegates should feel free to send to the Secretariat as soon as possible any other suggestion that they would like to submit to the Committee's consideration.

Delegates will also be called to decide on the dates for the Competition meetings for the years 2019 and 2020.

Proposed dates:

For 2019: 3-7 June and 2-6 December

For 2020: 8-12 June and 30 November - 4 December

Global Forum on Competition

7-8 December 2017

OECD Conference Centre, Paris

PROGRAMME

OECD

About the OECD Global Forum on Competition

Established in 2001, the OECD Global Forum on Competition brings together each year high-level officials from more than 100 competition authorities and international organisations worldwide, from both OECD and non-OECD economies. Joining with representatives of international organisations and invited experts, participants debate and discuss key topics on the global competition agenda. With a broad focus on development, the Forum promotes a wider dialogue that encompasses the linkages between competition policy and other cornerstones of economic development.

The programme includes OECD-style roundtable discussions, presentations from notable experts as well as peer reviews. Discussion topics benefit from the input of the Competition Committee whose work is at the forefront of debate on competition policy and enforcement. The Committee promotes the regular exchange of views, analysis and best practices on key competition policy issues and is supported by the Competition Division within the OECD Directorate for Financial and Enterprise Affairs.

www.oecd.org/competition/globalforum
www.oecd.org/daf/competition

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www.oecd.org/competition/globalforum

#OECDcomp @OECD_BizFin

/// FORUM TIMETABLE ///

DAY 1
07 DEC 2017

09:15 - 10:15 — CC1

Opening remarks

10:15 - 12:30 — CC1

Session 1
Are competition and democracy symbiotic?

oe.cd/283

12:30 - 12:45 — Atrium

Group picture

12:45 - 14:45 — Expresso café

Buffet lunch offered by the OECD

14:45 - 15:30 — CC1

Special remarks by Angel Gurría
OECD Secretary-General

15:30 - 18:45 — CC1

Session 2
Judicial perspectives on competition law

oe.cd/jpcl

18:45 - 20:45 — Buffet du Parc

Cocktail

DAY 2
08 DEC 2017

09:00 - 09:30 — CC1

Session 3
Focus on small agencies and those in developing economies

PLENARY SESSION

oe.cd/sda

09:30 - 11:30

Break-out sessions

CC1	CC2	CC10
1. Advocacy	2. Enforcement	3. Creating legitimacy

11:30 - 13:00 — CC1

Wrap-up plenary

13:00 - 14:30

Lunch break

14:30 - 16:30 — CC1

Session 4
Peer Review of Viet Nam

oe.cd/vtn

16:30 - 17:30 — CC1

Session 5
Competition in public markets

oe.cd/28n

17:30 - 18:00 — CC1

Final Session
Other business and future work

General information

Documentation & Presentations

All Forum **documentation** is available on the Forum website **oe.cd/gfc** under each discussion page [see also the short URLS given throughout the agenda].

Powerpoint presentations will be uploaded progressively on the site after they are presented.

Sharingbox & Social Media

Please note that a Sharingbox is available during the two days of the Forum so that you may take a picture as a souvenir and share it thorugh social media.

When tweeting about the Forum, please use the hashtag **#OECDcomp.**

Interpretation

Discussions will be held in the two OECD official languages (English and French), with simultaneous interpretation. Headphones are available for you under the main tables or in the side pockets of the chairs at the back of the room. Please choose one of the two channels to listen to English or French interpretation.

Hot drinks available

Please note coffee and tea will be available continuously to Forum participants outside the entry of the room.

Conference centre facilities

Internet & WiFi

There is a free WiFi service in the room and in the Conference Centre. Please connect to the network "HotspotOECD", open a browser page and accept the OECD terms of use.

Restaurants

There is a coffee bar (*red chairs*) and a self-service restaurant in the OECD Conference Centre.

Please note they do not accept credit card payment. If you need to withdraw cash, an ATM is available near the Bookshop at level -1 (Société Générale).

Printing

The *Copycentre* can handle any printing jobs you may have. It is located at the bottom of the escalators.

Bookshop

You are invited to visit the OECD Bookshop to discover our latest publications and a range of OECD souvenirs.

The bookshop is adjacent to the coffee bar *(red chairs)* area at level -1 and open Monday to Friday.

KEY TIMES & EVENTS

DAY 1

12:30 **Official Photo & Buffet Lunch**
The group photo will be taken on the stairs next to the escalators. A **buffet lunch** is offered to you at the Expresso Café in the Conference Centre (*red chairs*) directly after the official photo is taken.

14:45 **Speech by OECD Secretary-General**

18:45 **Cocktail**
Buffet du Parc (restaurant on the entrance level of the Conference centre).

DAY 2

09:30 – 11:30 **Break-out sessions in Rooms 1, 2 and 10**
The break-out sessions for session 3 will allow for an informal and lively dialogue among participants. The allocation of participants per session will be displayed in room CC1.

Participants are kindly invited to return to room CC1 immediately after the break-out sessions where they will hear reports from the session moderators and continue the discussions.

17:30 **Evaluation questionnaire**
We hope you enjoy your Forum experience.
Please give us your views and choices for next year's topics by filling in the evaluation questionnaire before you leave.

DAY 1 – 7 DECEMBER 2017

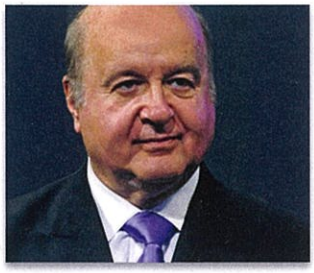
Opening session

7 December 2017 | 09:15 - 10:15 | Room CC1

Opening remarks

Masamichi Kono
Deputy Secretary General,
OECD

Keynote speaker



Hernando de Soto
President of the Institute for
Liberty and Democracy (IDL)

Introductory remarks

Frédéric Jenny
Chairman,
OECD Competition Committee

Session 1. Are competition and democracy symbiotic?

7 December 2017 | 10:15 - 12:30 | Room CC1 | URL oe.cd/283

Democracy and competition law and policy are often considered as interwoven, and mutually beneficial. The argument being that competition supports democracy by dispersing economic power through by ensuring against concentrations and cartelisation. Economic power is thus shared across a wide range of economic actors rather than in the hands of a select few who could potentially exert undue influence over government and political decision-making processes. Democracies grow and thrive based on a multitude of factors such as strong rule of law, respect for institutions and a sufficiently large voting population.

This session will consider if competition can be included amongst the success factors for democratic government particularly when considering countries transitioning to democratic systems of government. Are there linkages between democracy, the degree to which a country is democratic, and the prevalence of competition across an economy? As competition enforcement evolves, does this change the nature to which it can or does support democracy? How can competition enforcement be a vector for democracy ?Is it possible for market liberalisation and competition to thrive in the absence of democracy? This session will be held on the first day and led by a panel of experts from different policy areas who will debate the topic and discuss with participants in an interactive Q&A format.

Panellists

Lars P. Feld
Member of the German Council of Economic Experts

Ian S. Forrester
Judge, General Court of the European Union

Eleanor M. Fox
Professor of Trade Regulation, NY University School of Law

David Lewis
Executive Director Corruption Watch

Spencer Weber Waller
Associate Dean and Professor, Loyola University Chicago School of Law

All related documentation is available at **oe.cd/283.**

Official group picture

7 December 2017 | 12:30 - 12:45 | Stairs at the Atrium

Buffet lunch

7 December 2017 | 12:45 - 14:45 | Expresso Café

Special remarks

7 December 2017 | 14.45 - 15.30 | Room CC1

Angel Gurría
Secretary-General, OECD

Session 2. Judicial perspectives on competition law

7 December 2017 | 15:30 - 18:45 | Room CC1 | URL oe.cd/jpcl

Competition cases are often characterised by complex litigation and differing sets of economic evidence. This roundtable will be led by a panel of world senior members of the judiciary so as to address various dimensions of the judicial adjudication of competition law. While recognising the differences that exist across jurisdictions, the session will try to elicit the main common challenges that judges face when applying competition law, and find ways to address those challenges. Since the audience comprises not only other judges, but also representatives of competition agencies from around the world, the roundtable will provide a venue for an exchange of views regarding the interaction between competition agencies and courts.

Topics explored: **Standard of proof** and the evidence in judicial proceedings related to competition, **Interactions** between judges and competition authorities, and **Experiences** and lessons regarding the use of generalist and specialised competition courts.

Panellists

Paul Crampton
Chief Justice, Federal Court, Canada

Dennis Davis
President of the Competition Appeal Court, South Africa

Mouhamadou Diawara
President, Competition Commission, Senegal

Donghwan Shon
Presiding Judge, Goyang district court, Korea

Enrique Vergara
President, Competition Tribunal, Chile

Nils Wahl
Advocate General, Court of Justice of the European Union

All documentation is available at **oe.cd/jpcl.**

Cocktail

7 December 2017 | 18:45 - 20:45 | Buffet du Parc

DAY 2 – 8 DECEMBER 2017

Session 3. Overcoming adversity and attaining success: Focus on small agencies and those in developing economies

8 December 2017 | 09:00 - 13:00 | URL oe.cd/sda

Plenary session

09:00 - 09:30 | Room CC1

Every competition agency has to overcome obstacles to enforce its competition law. But for small and developing jurisdictions these obstacles are often more acute, numerous and reinforced by challenges specific to these jurisdictions.

Last June, the OECD circulated a survey among the Global Forum members, to discover what are the hardest challenges competition agencies are facing, and how they managed to overcome them.

The three most ranked challenges (Advocacy, Enforcement, and how can competition authorities overcome hostility or indifference?) will be discussed during three parallel break-out sessions during which speakers from different agencies will present case studies for their challenges and success stories.

Break-out sessions

09:30-11:30

1. Advocacy	2. Enforcement	3. Creating legitimacy
Advocacy efforts within the government and creating a competition culture in the public "within the budget".	Co-operating with public prosecutors and work relations between the competition authority and the sectoral regulators.	Different techniques to develop authorities' credibility and legitimacy in particular through fighting bid-rigging in public procurement.
Room CC1	Room CC2	Room CC10

Moderators

Anna Wu Hung-yuk
Chair, Competition Commission, Hong Kong, China

Tebelelo Pule
Chief Executive Officer, Competition Authority, Botswana

Sarunas Keserauskas
Chairman, Competition Council of Lithuania

Break-out sessions Con't.

09:30-11:30

1. Advocacy

Room CC1

- **Paulus Ain**, Commissioner & Chief Executive Officer, Independent Consumer & Competition Commission, Papua New Guinea
- **Arsenio M. Balisacan**, Chairman, Philippine Competition Commission
- **Evelyn Olmedo**, Inter-agency Affairs and Cooperation Analyst, Superintendencia de Competencia, El Salvador
- **Daniela Trampert-Paparella**, Expert, Federal Competition Authority, Austria
- **Dato' Jagjit Singh A/L Bant Singh**, Commission Member, Malaysia Competition Commission
- **Mario A. Umaña**, Lead Trade and Competition Specialist, Integration and Trade Sector, IDB

2. Enforcement

Room CC2

- **Skaidrīte Ābrama**, Chairwoman, Competition Council of Latvia
- **Alexandre Barreto de Souza**, President, CADE, Brazil
- **Felipe Irarrázabal**, Public Economic Prosecutor, FNE, Chile
- **Nika Sergia**, Head of the Division for the detection and prevention of competition restrictive agreements, Competition Agency, Georgia
- **Pradeep S Mehta**, Secretary General, CUTS International

3. Creating legitimacy

Room CC10

- **Hardin Ratshisusu**, Deputy Commissioner, Competition Commission, South Africa
- **Teresa Moreira**, Head, Competition and Consumer Policies Branch, UNCTAD
- **Martha Martinez Licetti**, Global Lead, Head, Markets and Competition Policy, World Bank

Session 3. Wrap-up plenary

11:30 - 13:00

Room CC1

1. Report by Moderators
2. General Discussion
3. Summary and final remarks by session Chair

All documentation is available at **oe.cd/sda.**

Lunch Break

8 December 2017

13:00 - 14:30

N/a

Session 4. Peer Review of Viet Nam

8 December 2017 | 14:30 -16:30 | Room CC1 | URL oe.cd/vtn

Open to country representatives and intergovernmental organisations only
Report under restricted circulation on O.N.E

"Peer review" is a core element of OECD work. The mechanisms of peer review vary, but it is founded upon the willingness of a country to submit its laws and policies to substantive questioning by other peers. The process provides valuable insights into the country under study, getting to the heart of ways in which each country deals with competition and regulatory issues, from the soundness of its competition laws to the structure and effectiveness of its competition institutions.

In 2017, Viet Nam will be subject to such a review.

Lead Examiners

Australia

France

Japan

Romania

Introductory presentation

Nicolas Taylor
Partner,
Jones Day Australia

Session 5. Competition in public markets

8 December 2017 | 16:30 - 17:30 | Room CC1 | URL oe.cd/28n

Public markets, such as those in health, education and the provision of various public services, make up a large part of the economy, and the quality and efficiency of the services that they provide are fundamental to a countries ability to achieve inclusive growth. Yet these markets attract relatively little attention from competition authorities in many countries. It is well established that important market failures can arise in these services if markets are left entirely to themselves. These markets therefore tend to be heavily subsidised by governments, and highly regulated. Nevertheless, careful use of choice and competition in these markets has been shown to help improve quality and efficiency. As a result, competition agencies would appear to have opportunities to advocate for a broader role for competition in these markets, to provide expert advice on the design and regulation of those markets that do exist, and to enforce within these markets.

The aim of this session is to open up for discussion issues concerning the role of: choice and competition in public markets, and the enforcement of competition law in those markets.

Keynote speaker

Allan Fels AO

Professor, University of Melbourne, Monash & Oxford

All documentation is available at **oe.cd/28n.**

Final session. Other business and future work

8 December 2017 | 17:30 - 18:00 | Room CC1

Organisation for Economic Co-operation and Development

DAF/COMP/WP3/WD(2017)45

Unclassified **English - Or. English**

22 November 2017

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

Roundtable on the Extraterritorial Reach of Competition Remedies - Note by Chinese Taipei

5 December 2017

This document reproduces a written contribution from Chinese Taipei submitted for Item 5 at the 126th Meeting of the Working Party No 3 on Co-operation and Enforcement on 4-5 December 2017.

More documentation related to this discussion can be found at

www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm

Please contact Ms. Despina Pachnou if you have any questions regarding this document
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JT03423413

Chinese Taipei

Summary

1. The Fair Trade Act (hereinafter referred to as the "Act") is a domestic law and its contents are mainly administrative regulations for control. The Act serves as the basis for the Fair Trade Commission (hereinafter referred to as the "FTC") and the court for imposing administrative dispositions, convicting and sentencing.

2. Besides conducting investigations and imposing administrative dispositions in accordance with the Act, the FTC's administrative actions in principle must comply with the Administrative Procedure Act and Administrative Penalty Act. Since the Administrative Penalty Act already sets forth the principle for the jurisdiction of administrative penalties imposed by administrative agencies, the Act does not separately specify whether or not extraterritorial acts of enterprises are under the jurisdiction of the FTC. In practice, the FTC takes into consideration the consequences of the applicable law and feasibility of executing competition remedies for each case, and then decides on an administrative disposition for the case.

3. An extraterritorial merger of enterprises does not necessarily result in a breach of duty in accordance with the Act. When faced with an extraterritorial merger case, the FTC first considers its jurisdiction in accordance with Point 3 of the Fair Trade Commission Disposal Directions (Guidelines) on Extraterritorial Mergers. As for the extraterritorial monitoring and execution of administrative penalties under the Act, according to Articles 8, 10 and 17 of the Fair Trade Commission Guidelines for Cases that Involve Foreign Enterprises, the FTC may seek assistance from domestic enterprises to obtain information that may be disclosed, send letters to foreign enterprises to request data, send letters to overseas locations of the Ministry of Foreign Affairs or Ministry of Economic Affairs to assist in the collection of evidence and data overseas, and collect evidence and data through non-government organizations or industry associations for the extraterritorial monitoring and execution of competition remedies.

4. The FTC of Chinese Taipei has actively participated in activities related to issues of international competition law since it was established, and has also established reliable exchange and communication channels with the competent authorities of competition law in other countries. Competition law cooperation agreements signed with various countries in recent years are the result. The FTC has also worked with the competent authorities of competition law in other countries in the case of concerted actions by capacitor companies. The FTC will maintain its position as it continues to engage in exchanges with various countries to jointly maintain free and fair competition in the market.

5. This report introduces the provisions of the Fair Trade Act (hereinafter referred to as the "Act") of Chinese Taipei concerning the extraterritorial reach of competition remedies, and also shares law enforcement experiences in specific industries.

1. Provisions of the Fair Trade Act for Extraterritorial Cases

6. The Act is a domestic law and its contents are mainly administrative regulations for control. The Act serves as the basis for the Fair Trade Commission (hereinafter

referred to as the "FTC") and the court for imposing administrative dispositions, convicting and sentencing. Its effectiveness, in principle, applies to facts that occur to citizens and within the territory, which are known in legal terminology as *jus sanguinis* and *jus soli*, respectively. Applicable to facts within the territory is the inter-territorial effect of the Act.

7. The FTC is a level-two independent administrative agency subordinate to the Executive Yuan. Besides conducting investigations and imposing administrative dispositions in accordance with the Act, the FTC's administrative actions in principle must comply with the Administrative Procedure Act and Administrative Penalty Act. Paragraph 1 of Article 6 of the Administrative Penalty Act stipulates that the act shall be applicable to any act in breach of duty under administrative law that is committed within the territory of Chinese Taipei and is punishable. Paragraph 3 of the same article stipulates that where either the commission of an act in breach of duty under administrative law or the consequence resulting therefrom takes place within the territory of Chinese Taipei, it shall constitute a breach of duty under administrative law committed within the territory of Chinese Taipei. Therefore, the FTC has jurisdiction over any act or consequence within the territory of Chinese Taipei that is in breach of duty as set forth by the Act. Hence, even if the act of an enterprise that violates the Act is outside the territory of Chinese Taipei, the FTC may intervene in accordance with the Act as long as the consequence of the act affects the competition order in the domestic market.

8. Based on the above, since the Administrative Penalty Act already sets forth the principle for the jurisdiction of administrative penalties imposed by administrative agencies, the Act does not separately specify whether or not extraterritorial acts of enterprises are under the jurisdiction of the FTC. In practice, the FTC takes into consideration the consequences of the applicable law and feasibility of executing competition remedies for each case, and then decides on an administrative disposition for the case.

9. The Act adopts the pre-merger notification system for merging enterprises, and emphasizes pre-control of the market structure. The purpose of pre-notification is to prevent those mergers that may result in an anti-competitive effect by means of ex-ante regulation of the market structure. Hence, an extraterritorial merger of enterprises does not necessarily result in a breach of duty in accordance with the Act, and the FTC has thus established the Fair Trade Commission Disposal Directions (Guidelines) on Extraterritorial Mergers (hereinafter referred to as the "Disposal Directions") to handle the issue of whether the Act is applicable to specific extraterritorial merger cases.

10. According to Point 2 of the Disposal Directions, an "extraterritorial merger case" as referred to in the Guidelines means a merger of two or more foreign enterprises outside of the territory of Chinese Taipei under any of the circumstances enumerated in Paragraph 1, Article 10 of the Act. Point 3 stipulates that: "The following factors shall be taken into account while determining the Fair Trade Commission's jurisdiction over extraterritorial merger cases: (1) whether the merger will have a direct, substantial, and reasonably foreseeable effect on the domestic market; (2) the relative importance of the merger's effects on the relevant domestic and foreign markets; (3) the residence and main business places of the combining enterprises; (4) the degree of explicitness and the possibility of a foreseeable consequence on the impact of the market competition in the Republic of China; (5) the likelihood of creating conflicts with the laws or policies of the home countries of the combining enterprises; (6) the feasibility of enforcing administrative dispositions; (7) the impact of enforcement on the foreign enterprises; (8)

what the rules of international conventions and treaties, or the regulations of international organizations say; (9) whether any of the combining enterprises has production or service facilities, distributors, agents, or other substantive sales channels within the territory of the Republic of China; (10) other factors deemed important by the Fair Trade Commission." This shows that the FTC uses the principle of effect as the basis for its law enforcement in extraterritorial merger cases (subparagraphs 1 and 2), and then limits the applicability of the principle of effect while giving consideration to the comity of nations, principle of interest balancing, and principle of reasonable jurisdiction (subparagraphs 2-10). It is clear from Subparagraphs 5, 7 and 8 of the Disposal Directions that the FTC gives consideration to potential conflicts with foreign laws or policies when determining jurisdiction over extraterritorial merger cases.

11. Summarizing the above, when faced with an extraterritorial merger case, the FTC first considers its jurisdiction in accordance with Point 3 of the Disposal Directions. If the FTC decides that it does not have jurisdiction, then there naturally will not be any competition remedies for the merger, and it is not possible to discuss the monitoring or execution of competition remedies under extraterritorial jurisdiction. According to statistics, the FTC did not exercise its jurisdiction in over 100 extraterritorial merger cases between January 2012 and September 2017, and decided to not prohibit 5 merger cases; only 1 merger case that was not prohibited had imposed conditions or undertakings. The undertakings of that merger case were behavioral measures of remedial actions that require the merging enterprises not to engage in the restraint of competition, such as by means of a boycott, treating another enterprise discriminatively without justification, and so on.

2. Monitoring and Execution of the Act's Competition Remedies

12. According to the Act, the FTC may order any enterprise that violates the provisions on monopoly, concerted actions, the imposition of restrictions on resale prices, and other restrictive and unfair competition practices to cease therefrom, rectify its conduct, and take necessary corrective action within the time prescribed in the order. In addition, it may assess upon such an enterprise an administrative penalty. In practice, the main disposition of the FTC for enterprises that violate the Act is to order the enterprise to cease the illegal practice and impose a fine. Regardless of whether they are domestic or foreign, enterprises that do not pay the fine within the specified period are subjected to compulsory enforcement by the Administrative Enforcement Agency in accordance with Article 11 of the Administrative Execution Act. With regard to ceasing, rectifying or taking necessary corrective action, the FTC usually sends letters of inquiry to the sanctioned parties, complainant, upstream and downstream trading counterparts, and the competent authorities of other industries or conducts on-site visits to monitor the sanctioned parties to determine whether they ceased engaging in the unfair practices, rectified their wrongdoings, or took necessary corrective action. As for the extraterritorial monitoring and execution of administrative penalties under the Act, according to Articles 8, 10 and 17 of the Fair Trade Commission Guidelines for Cases that Involve Foreign Enterprises, the FTC may seek assistance from domestic enterprises to obtain information that may be disclosed, send letters to foreign enterprises to request data, send letters to overseas locations of the Ministry of Foreign Affairs or Ministry of Economic Affairs to assist in the collection of evidence and data overseas, and collect evidence and data through non-government organizations or industry associations for the extraterritorial monitoring and execution of competition remedies.

2.1. Extraterritorial Merger between Microsoft Corporation and Yahoo! Inc.

13. Microsoft Corporation and Yahoo! Inc. planned to merge outside the territory of Chinese Taipei. Their agreement to cooperate in the search and keyword advertisement business matched the merger pattern specified in the Act as "where an enterprise operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter's business," and the subsidiaries of the merging enterprises, Microsoft Taiwan Corporation and Yahoo! Taiwan, thus filed a pre-merger notification in accordance with the law in December 2009. After receiving the notification, the FTC made the decision to not prohibit the merger but imposed undertakings. The merging enterprises were prohibited from using their market position after the merger to engage in actions that would restrict competition, and were required to provide the scale of operations of their keyword advertisements, the number of employees and researchers, and changes in market share in Chinese Taipei to the FTC at the end of December each year for 3 years after the merger actually took place.

14. Microsoft Corporation and Yahoo! Inc. completed merger procedures for their search and keyword advertisement businesses in December 2013, and the FTC monitored the execution of competition remedies by Microsoft Corporation and Yahoo! Inc. by requiring the two subsidiaries in Taiwan to provide the above-mentioned industry data for 3 years starting in 2014. After examining the industry data provided by the Taiwan subsidiaries of Microsoft Corporation and Yahoo! Inc., the FTC did not find evidence of an increase in the market share of the two enterprises in the search and keyword advertisement market, and also did not receive any complaints regarding the two enterprises violating imposed conditions and undertakings. Hence, after the period of attached conditions and required undertakings expired, the FTC used the other approach of continuing to monitor changes in industry structure from a market perspective.

3. Collaboration with Competent Authorities of Competition Law of Other Countries

3.1. Signing Bilateral or Multilateral Competition Law Agreements

15. Chinese Taipei and Australia signed the Cooperation and Coordination Arrangement of the Competition and Fair Trading Laws in 1996. It was the first formal cooperation agreement signed between Chinese Taipei and other countries for law enforcement and exchanges concerning competition law. Chinese Taipei and New Zealand signed the Cooperation and Coordination Arrangement of the Competition and Fair Trading Laws in 1997; Chinese Taipei, Australia and New Zealand signed a trilateral agreement of the Cooperation and Coordination Arrangement of the Competition and Fair Trading Laws in 2002; Chinese Taipei and France signed the Cooperation Arrangement of Regarding the Application of their Competition Rules in 2004; Chinese Taipei and Mongolia signed the Memorandum of Understanding Regarding the Cooperation of Competition Law Implementation and Memorandum of Understanding on Cooperation in 2007 and 2012; Chinese Taipei and Canada signed the Memorandum of Understanding Regarding the Application of Competition Laws in 2009; Chinese Taipei and Hungary signed the Co-operation Agreement Regarding the Application of Competition and Fair Trading Laws in 2010; Chinese Taipei and Panama signed the Agreement Regarding the Application of Competition Laws in 2013; Chinese Taipei and France signed the Memorandum of Understanding Regarding the Application of Competition Laws in 2014; Chinese Taipei and Japan signed the Memorandum of Understanding Regarding the

Application of Competition Laws in 2015. Based on the above-mentioned cooperation agreements signed with different countries, the FTC engages in exchanges regarding mutual notification, the coordination of law enforcement activities, information request, consulting, and information confidentiality. The cooperative relationship between the competent authorities of competition law promotes the effective enforcement of competition law within their respective fields.

3.2. Case of Capacitor Companies

16. The FTC imposed penalties on capacitor companies that participated in concerted actions at the end of 2015. The sanctioned parties exchanged sensitive information, such as that related to prices, quantity, production capacity, and response to customers, through meetings or bilateral communications, and a mutual understanding to restrict competition was reached. The enterprises' conduct resulted in an impact on the function of the capacitor market, and the FTC therefore determined that it constituted a concerted action and imposed an administrative penalty of NT$5,796,600,000. Due to the small number of domestic capacitor manufacturers, which have far lower output value and production capacity than foreign companies, the demand for aluminum capacitors is mainly satisfied by imports; there are no domestic manufacturers of tantalum capacitors. Downstream companies are free to select their supplier, and there are no regulatory restrictions on the import of such products, so the geographic market is the global market. In terms of the competition law jurisdiction, however, the result of the concerted action by the sanctioned enterprises had already affected competition and trading order in the domestic market. According to the Administrative Penalty Act and the Act, the FTC has jurisdiction over the actions of these enterprises.

17. With regard to the collection of evidence and data in the case of capacitor companies, one of the companies taking part in the concerted action applied to the FTC for exemption from the fine in accordance with the leniency program set forth in Article 35 of the Act, and then the FTC thus conducted an investigation. From the beginning of the investigation, the FTC worked with the competent authority of competition law in numerous countries. Besides agreeing to deliver the letter of investigation to the enterprises involved on the same day (delivered to the subsidiary of the enterprises being investigated or transferred by the Ministry of Foreign Affairs) and beginning the investigation, telephone conferences or e-mails between the competent authorities during the investigation process kept the competent authorities up-to-date on the investigation. Opinions on market definition and the applicability of laws were clarified, and they exchanged experiences with evidence gathering and case investigation. After completing the investigation, the FTC imposed penalties at the end of 2015. The entire process of the case from the beginning of the investigation to when penalties were imposed shows the results of the FTC's long-term efforts in international cooperation.

4. Conclusion

18. The purpose of Chinese Taipei's competition policy is to maintain trading order and protect consumer interests, ensuring free and fair competition, and promoting economic stability and prosperity. The Administrative Penalty Act sets forth the jurisdiction of administrative agencies of Chinese Taipei in the event of breach of duty by enterprises. According to Paragraphs 1 and 3 of Article 6 of the Administrative Penalty Act, the FTC deems a breach of duty to occur under the Act if an act or consequence of a

breach of duty takes place within the territory of Chinese Taipei and thus exercises its jurisdiction over the act. However, since the Act is a domestic law, there is no need for the FTC to intervene and exercise its jurisdiction if both the illegal act and consequence did not occur within the territory of Chinese Taipei. This can be confirmed by the contents of the Disposal Directions. If the FTC decides not to exercise its jurisdiction after all things are taken into consideration in accordance with Article 3 of the Disposal Directions, there naturally will not be competition remedies for the merger, and it will not be necessary to monitor or execute extraterritorial competition remedies. Conversely, if the illegal act or consequence occurs within the territory of Chinese Taipei, the scope of the competition remedy decided by the FTC is mainly the territory of Chinese Taipei and rarely includes extraterritorial reach. The FTC also established the Fair Trade Commission Guidelines for Cases that Involve Foreign Enterprises to handle the procedure for cases involving foreign enterprises.

19. The FTC of Chinese Taipei has actively participated in activities related to issues of international competition law since it was established, and has also established reliable exchange and communication channels with the competent authorities of competition law in other countries. Competition law cooperation agreements signed with various countries in recent years are the result. The FTC has also worked with the competent authorities of competition law in other countries in the case of concerted actions by capacitor companies. The FTC will maintain its position as it continues to engage in exchanges with various countries to jointly maintain free and fair competition in the market.

Organisation for Economic Co-operation and Development

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English - Or. English

16 November 2017

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note by Chinese Taipei

5 December 2017

This document reproduces a written contribution by Chinese Taipei submitted for Item 5 of the 128th OECD Competition committee meeting on 5-6 December 2017.

More documents related to this discussion can be found at www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
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JT03423093

Chinese Taipei

1. This report explains the provisions in the Fair Trade Act of Chinese Taipei on safe harbours and legal presumptions, and also describes the Fair Trade Commission's law enforcement experiences and cases.

1. Safe Harbours and Legal Presumptions in the Fair Trade Act

2. Conduct regulated by the Fair Trade Act (FTA) includes restrictive competition and unfair competition. Monopolies, mergers, concerted actions, and vertical restrictions are all categorized under restrictive competition. The purpose of regulation is to eliminate conduct that impedes competition and to promote free competition in the market. The Fair Trade Commission (FTC) applies the safe harbours and legal presumptions in relation to the above-mentioned actions that restrict competition, in order to determine whether or not the competitive practices of the enterprises involved have violated the FTA. Monopolistic enterprises, merger controls, concerted actions, and vertical restrictions are further explained below.

1.1. Safe Harbours for Monopolistic Enterprises

3. Whether or not an enterprise is a monopolistic enterprise is a prerequisite and key element in determining whether or not it has abused its market power. According to Article 8 of the FTA, an enterprise shall not be deemed a monopolistic enterprise if none of the following circumstances exists: (1) the market share of the enterprise in the relevant market reaches one half of the market; (2) the combined market share of two enterprises in the relevant market reaches two thirds of the market; and (3) the combined market share of three enterprises in the relevant market reaches three fourths of the market. Furthermore, in considering the overall scale of individual enterprises, where the market share of any individual enterprise does not reach one tenth of the relevant market or where its total sales in the preceding fiscal year are less than the threshold amount as publicly announced by the FTC (the current threshold amount is NT$2 billion), such enterprise shall not be deemed to be a monopolistic enterprise.

4. However, if the establishment of an enterprise or any of the goods or services supplied by an enterprise to the relevant market is subject to legal or technological restraints, or there exists any other circumstance under which the supply and demand of the market are affected and the ability of others to compete is impeded, the FTC may still determine an enterprise to be a monopolistic enterprise based on the facts of the case, even if the enterprise's market share or sales amount does not reach the above-mentioned threshold.

1.2. Safe Harbours for Merger Control

5. The FTA adopts the pre-merger notification system for merger control, and only regulates the merger of enterprises that reach a certain scale. The safe harbours for merger control use the "market share" and "sales amount" of the merging enterprises as the threshold for filing a pre-merger notification. According to Paragraph 1 of Article 11 of

the FTA, any merger that falls within any of the following circumstances shall be filed with the 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; (3) sales for the preceding fiscal year of one of the enterprises in the merger exceeds the threshold amount publicly announced by the FTC.

6. According to the "Thresholds and Calculation of the Sales Amount which Enterprises of a Merger Shall File with the FTC", there are 3 thresholds for the sales amount of enterprises in the merger: (1) The combined worldwide sales in the preceding fiscal year of the enterprises in the merger exceed NT$40 billion and the domestic total sales of each of at least two of the enterprises in the merger in the preceding fiscal year also surpass NT$2 billion. (2) The enterprises in the merger are not financial institutions and the domestic total sales of one of the merging parties in the preceding fiscal year exceed NT$15 billion while the domestic total sales of one of the other merging parties in the preceding fiscal year also surpass NT$2 billion. (3) The enterprises in the merger are financial institutions and the domestic total sales of one of the merging parties in the preceding fiscal year exceed NT$30 billion while the domestic total sales of one of the other merging parties in the preceding fiscal year also surpass NT$2 billion.

7. The FTC also established the "FTC Disposal Directions (Guidelines) on Handling Merger Filings" to control mergers. Paragraph 1 of Point 10 of the Disposal Directions stipulates that the FTC shall further assess the overall economic benefits when reviewing horizontal mergers that involve one of the following situations: (1) The aggregate market share of the merging parties accounts for half of the total market. (2) The top two competitors in the relevant market account for two thirds of the total market share. (3) The top three competitors in the relevant market account for three quarters of the total market share. However, in order to prevent small enterprises participating in the merger from being mistakenly regarded as restricting competition due to competitors not participating in the merger reaching the above-mentioned thresholds, Paragraph 2 of Point 10 of the Disposal Directions provides the safe harbour that excludes merging parties whose aggregate market share does not amount to 20% of the total market.

1.3. Safe Harbours and Legal Presumptions of Concerted Actions

8. In principle, the FTA prohibits concerted actions. According to Paragraph 1 of Article 14 of the FTA, a "concerted action" means that competing enterprises at the same production and/or marketing stage, by means of a contract, agreement or any other form of mutual understanding, jointly determine the price, technology, products, facilities, trading counterparts, or trading territory with respect to goods or services, or any other behavior that restricts each other's business activities, resulting in an impact on the market function with respect to production, trade in goods or the supply and demand for services.

9. A "mutual understanding" between enterprises to restrict business activities is the element needed to establish a concerted action. However, direct evidence of a "mutual understanding" is extremely hard to obtain in practice, and Paragraph 3 of Article 14 of the FTA was thus added on February 4th, 2015 to effectively regulate concerted actions, by stipulating that: "The mutual understanding of the concerted action may be presumed by considerable factors, such as market condition, characteristics of the good or service, cost and profit considerations, and economic rationalization of the business conducts." On this basis, if a mutual understanding between enterprises can be reasonably suspected after considering the facts of a case based on the above-mentioned factors, the FTC may

presume the existence of a mutual understanding based on relevant evidence and considerable factors. Enterprises are responsible for producing strong evidence to overturn this legal presumption.

10. In light of the significant effect that concerted actions have on market trading order, the FTA has always taken the position of viewing a concerted action as a violation of the law. However, if the enterprises participating in a concerted action have minimal market power, there is little concern that they will restrict competition and legal control is unnecessary. Investigation of a concerted action is difficult, so it would be more appropriate to concentrate law enforcement resources in the investigation of concerted action cases that have a severe effect on competition order in the market. The FTC thus referred to foreign legislation and practical law enforcement experiences and issued an interpretation of the "Standard for Determining Concerted Actions of Minor Importance" on March 1st, 2016. Besides defining the content of concerted actions between enterprises as restricting the price, quantity, trading counterparts or trading territory of goods or services, whether or not the total market share of enterprises participating in the concerted action reaches 10% is used as the standard for determining "sufficient to impact the market function with respect to production, trade in goods or the supply and demand for services" in Paragraph 1 of Article 14 of the FTA. Hence, if the concerted action limits price, quantity, trading counterparts, or trading territory, the concerted action is the "hardcore cartel" and is highly hazardous to market competition. Therefore, regardless of the market share of the involved enterprises, the concerted action is deemed sufficient to affect the function of market supply and demand.

1.4. Safe Harbours and Legal Presumptions of Vertical Restrictions

11. The FTA divides vertical restrictions into price restrictions and non-price restrictions. For vertical price restrictions, according to Paragraph 1 of Article 19 of the FTA: "An enterprise shall not impose restrictions on resale prices of the goods supplied to its trading counterpart for resale to a third party or to such third party for making further resale. However, those with justifiable reasons are not subject to this limitation." In principle, the FTA prohibits any restriction on resale prices, and enterprises are responsible for proving the legitimacy of their restrictions on resale prices. The FTC will then review the reasonable evidence produced by the enterprise.

12. For vertical non-price restrictions, Article 20 of the FTA covers boycotting, discriminative treatment, improperly preventing competitors from participation in competition, improperly causing other enterprises to refrain from competition, and improperly imposing restrictions on the business activities of trading counterparts. When determining whether or not the above-mentioned actions are in violation of the FTA, the elements are actions that may restrict competition. In this regard, the FTC first examines whether the enterprises have the market power in the relevant markets. If the enterprises' market share in the relevant market does not reach 15%, then the enterprises are deemed not to have market power and, in principle, there are no concerns that competition is being restricted. However, with consideration to practices of market operations, even when the market share of the enterprises involved does not reach 15%, if trading counterparts cannot be realistically expected to deviate from the enterprises, then dependence between the enterprises can be determined and the enterprise has a relatively dominant position. Hence, their conduct that restricts competition may still be regulated by Article 20 of the FTA.

2. Cases in Which the FTC Has Applied the Safe Harbours and Legal Presumptions in Recent Years

2.1. Six companies including Baoren Quarry Development Co., Ltd. engaged in a concerted action to raise the price of gravel[1]

13. Facts of the case: The Ready-Mixed Concrete Industry Association notified the FTC that it received a written notice from gravel companies in Taichung in April 2013 to raise the prices of gravel. Taking into consideration that gravel is an important construction material, the FTC opened an investigation to maintain market order. The products in this case are sand and stone, and are processed from river grade or construction surplus sand and gravel. The product is a basic material required for construction, and serves different purposes than other construction materials, such as cement, ceramic bricks, and glass; the materials cannot serve as substitutes. Hence, "gravel" is the product market. Since gravel is a heavy object, supply should be as close as possible, but adjacent counties and cities will trade gravel in practice. If there is a shortage of gravel in central district, then relatively cheap gravel in adjacent counties and cities will be sold to the area. Hence, the central district gravel market is the geographic market.

14. After investigation, the FTC found that six companies including Baoren Quarry Development Co., Ltd. (hereinafter referred to as "Baoren") all admitted to exchanging information on market prices during gatherings between March and May 2013. The companies separately notified downstream customers of the rise in gravel prices between April and June 2013. Gravel output in central district was roughly 12,992,257 tons between January and June 2013, and the 6 companies including Baoren produced roughly 223,092 tons. Even though the companies only had a combined market share of roughly 1.71%, the concerted action restricted prices and was classified as a "hardcore cartel", which may potentially impede market competition and is sufficient to affect the function of market supply and demand. Hence, the FTC determined that the concerted action of the 6 companies to raise gravel prices between April and June 2013 was sufficient to affect the market function of the gravel market in central district. The concerted action was in violation of Paragraph 1 of Article 14 of the FTA and the FTC therefore imposed fines that totaled NT$1.6 million.

15. Administrative litigation process of the case: Baoren refused to accept the disposition of the FTC and filed an administrative litigation, and the disposition was revoked by the administrative court of the Taipei District Court[2]. The reason for the ruling was that the 6 companies including Baoren did indeed reach a mutual understanding to jointly raise gravel prices, but their market share was too low and could be easily broken down or replaced by other competitors, and the concerted action was insufficient to affect the supply and demand function of the gravel market in central district. The FTC appealed, the original ruling was then revoked by the Taipei High

[1] Disposition Kung Chu Tzu No.105019 of the Fair Trade Commission on March 4th, 2016.

[2] Administrative Litigation Judgment 2016 Jian Zi No.127 of the Taipei District Court on December 2nd, 2016.

Administrative Court, and the appeal by Baoren was dismissed[3]. The FTC won the lawsuit.

16. The Taipei High Administrative Court (the court of final appeal) believed that the mutual understanding between several enterprises to restrict each other's business activities may affect the market in several respects, and therefore determined that the concerted action was sufficient to affect the market's function. Hence, all conditions must be taken into consideration, including the market structure, product or service characteristics, industry culture, trading habits of upstream and downstream enterprises, contents of the concerted action, the number of participating enterprises, and their market position, to evaluate whether the concerted action is sufficient to affect the market supply and demand function. All of the factors must be considered to determine if the concerted action has damaged trading order in the market, and market share alone is no longer sufficient to evaluate the effect of a concerted action on the market supply and demand function. Therefore, even if the total market share of the enterprises participating in the concerted action does not reach 10%, when it involves the core factor of "restricting prices", the FTC may still determine that the concerted action is sufficient to affect the market function after considering other factors, such as product characteristics and market structure; market share is not the sole determinant.

3. Conclusion

17. The FTC has been in operation for over 25 years, and has accumulated a considerable amount of law enforcement experience through practical cases. The FTC has used the safe harbours and legal presumptions for enterprises involved in monopolies, mergers, concerted actions, and other actions that restrict competition, in determining whether the enterprises are in violation of the law. On the one hand, this has made enterprises aware of the FTC's standards and boundaries. On the other hand, it has reduced the costs incurred by the FTC with respect to law enforcement. The safe harbours enable cases that are relatively less severe to be screened, and also allow law enforcement resources to be concentrated in cases with a severe impact on market competition order, whereas legal presumptions are used to determine whether an enterprise's competitive practices are per se illegal, and no law enforcement resources need to be wasted proving the enterprise has broken the law.

18. The FTC has studied foreign legislation and practical law enforcement cases in recent years, specifically the application of the safe harbours and legal presumptions for determining whether a concerted action is sufficient to affect the market supply and demand function. Unless the concerted action involves prices, quantity, trading counterparts, or trading territory, and if the total market share of enterprises participating in the concerted action does not reach 10%, then it is presumed that the concerted action is insufficient to affect the market function with respect to production, and product and service supply and demand. The safe harbours and legal presumptions are already recognized by the administrative court, and they will benefit the FTC in determining whether or not enterprises are in violation of the FTA and when utilizing its law enforcement resources.

[3] Administrative Litigation Judgment 2017 Jian Shang Zi No.21 of the Taipei High Administrative Court on April 27th, 2017.

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Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

Annual Report on Competition Policy Developments in Chinese Taipei

-- 2016 --

5-6 December 2017

This report is submitted by Chinese Taipei to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 5-6 December 2017.

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Tables

1. Executive Summary

1. This report covers the activities of the Fair Trade Commission (FTC) of Chinese Taipei from 1 January to 31 December 2016.

2. There have no new amendments to Chinese Taipei's competition law, the Fair Trade Act (FTA) during the year 2016, but the FTC stipulated and amended 3 regulations and 29 guidelines, including some significant amendments related to merger control and concerted actions.

3. Regarding competition enforcement, the FTC processed 2,101 cases, including 1961 cases received in 2016 and 140 cases carried over from 2015. By the end of 2016, 1,909 cases had been closed and 192 cases were pending. The FTC handed down 11 decisions related to anti-competitive practices: 4 on concerted actions, 3 on resale price maintenance, 4 on vertical restraints, and 1 failed to file merger notification to the FTC.

4. Of the above-mentioned cases, the FTC imposed an administrative fine totalling NT$72.6 million on 21 container terminal operators for concerted actions and fined 3 cable channel agents NT$126 million in total for discriminative practices.

5. The FTC reviewed 78 merger cases in 2016, 7 carried over from 2015 and 71 received in 2016. By the end of 2016, the FTC completed the review of 69 cases, none of them were prohibited, and 9 were pending.

6. In 2016, the FTC participated in various consultation meetings with other government agencies related to competition issues and organised 75 seminars for public sectors, students, and local governments for advocacy. The FTC also held 7 seminars for the various business sectors to introduce the leniency program, administrative fines, and the new amendments to the FTA.

2. Introduction

7. This report describes key competition law and policy developments in Chinese Taipei during 2016.

2.1. Competition law of Chinese Taipei

8. The Fair Trade Act (the Act) is the competition law of Chinese Taipei. The purpose of the Act is to maintain trading order, protect consumers' interests, ensure free and fair competition, and promote economic stability and prosperity[1]. The Act covers regulations on restrictive business practices, including monopolies, mergers, concerted actions, vertical restraints (RPM, boycotting, tie-ins and other restrictive business practices) and unfair trade practices, including false, untrue or misleading advertisements, counterfeiting commodities or trademarks, improper offering of gifts or prizes, damage to business reputation and other deceptive or obviously unfair conduct capable of affecting trading order. We will not discuss regulations on unfair trade practices in this report.

[1] Article 1 of the Fair Trade Act: "This Act is enacted for the purposes of maintaining trading order, protecting consumers' interests, ensuring free and fair competition, and promoting economic stability and prosperity."

9. The Act has been amended 8 times since it became law in 1991. The 6th amendment enacted on 4 February, 2015 was considered the widest in range, the largest in scale and the most influential in terms of legal reforms[2].

2.2. Institutional design

10. The Fair Trade Commission (FTC)[3] is Chinese Taipei's primary competition enforcement authority. The FTC was established in 1992 and reformed in 2011 under the newly enacted "The Organic Act of the Fair Trade Commission." The FTC is an independent government entity at ministerial level and is responsible for the enforcement of the Fair Trade Act and the Multi-Level Marketing Supervision Act.

11. The FTC consists of 7 full-time commissioners who are appointed by nomination by the premier and approved of the Legislative Yuan (the Congress) for a 4-year term and may be reappointed. When making the appointment, the premier shall designate one of the commissioners as the chairperson and another as the vice chairperson. The commissioner appointees must have knowledge and experience with regard to law, economics, finance, taxation, accounting, or management. All commissioners must be politically impartial, are not allowed to participate in political party activities during their terms of service, and must also perform their duties independently according to related laws.

12. The Commissioners' Meeting is the highest policy making organ of the FTC and is charged with drafting fair trading policy, laws and regulations, and with investigating and handling various activities impeding competition, such as monopolies, mergers, concerted actions, and other restraints on competition or unfair trade practices by enterprises. Moreover, it is also responsible for developing policy, completing regulations as well as investigating cases concerning multilevel marketing.

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

3.1. Summary of new legal provisions of competition law and related legislation

13. There have been no new amendments to the FTA during the year 2016.

3.2. Other relevant measures including amended guidelines

14. The FTC stipulated and amended 3 regulations and 29 guidelines as well as abolished 8 guidelines in 2016 (including guidelines on unfair competition conduct), in accordance with the FTA amendments in 2015. Some of the significant stipulations and amendments related to anti-competition are as follows:

[2] See "Annual Report on Competition Policy Developments in Chinese Taipei," DAF/COMP/AR(2016)50.

[3] The FTC's website address is: http://www.ftc.gov.tw/internet/english/index.aspx.

- Issued the Announcement of the "Merger Types to which Paragraph 1 of Article 11[4] of the Fair Trade Act Does Not Apply" to exclude the mandatory filing of notification to the FTC before a merger under the following circumstances in addition to Subparagraphs 1 to 5 of Article 12[5]:
  - An enterprise merges with other enterprises that are controlled by, controlling or affiliated with the former.
  - An enterprise merges with other enterprises, and the merging parties are controlled by the same enterprise.
  - An enterprise assigns a part of or the entire voting shares or capital contributions of a third-party enterprise that are in its possession to other enterprises that are controlled by, controlling or affiliated with the former.
  - An enterprise assigns a part of or the entire voting shares or capital contributions of a third-party enterprise that are in its possession to other enterprises, and the merging parties are controlled by the same enterprise.
- Amended the "Thresholds and Calculation of Sales Amount which Enterprises of a Merger Shall File with the Fair Trade Commission," which stipulates the thresholds merging parties shall file with the FTC for review before a merger:
  - Under one of the following circumstances, the enterprises in the merger shall file with the FTC in advance:
    - The combined worldwide sales in the preceding fiscal year of the enterprises in the merger exceed NT$40 billion and the domestic total sales of each of at least two of the enterprises in the merger in the preceding fiscal year also surpass NT$2 billion.
    - The enterprises in the merger are not financial institutions and the domestic total sales of one of the merging parties in the preceding fiscal year exceed NT$15 billion while the domestic total sales of one of the

[4] Paragraph 1 of Article 11 of the FTA: "Any merger that falls within any of the following circumstances shall be filed with the competent authority 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 competent authority."

[5] Article 12 of the FTA: "The provisions of Paragraph 1 of the preceding Article shall not apply to any of the following circumstances:

1. where any of the enterprises participating in a merger, or its 100% held subsidiary, already holds no less than 50% of the voting shares or capital contribution of another enterprise in the merger and merges such other enterprise;
2. where enterprises of which 50% or more of the voting shares or capital contribution are held by the same enterprise merge;
3. where an enterprise assigns all or a principal part of its business or assets, or all or part of any part of its business that could be separately operated, to another enterprise newly established by the former enterprise solely;
4. where an enterprise, pursuant to the proviso of Article 167, Paragraph 1 of the Company Act or Article 28-2 of the Securities and Exchange Act, redeems its shares held by shareholders so that its original shareholders' shareholding falls within the circumstances provided for in Article 10, Paragraph 1, Subparagraph 2 herein;
5. where a single enterprise reinvests to establish a subsidiary and holds 100% shares or capital contribution of such a subsidiary;
6. any other designated type of merger promulgated by the competent authority."

other merging parties in the preceding fiscal year also surpass NT$2 billion.
  - The enterprises in the merger are financial institutions and the domestic total sales of one of the merging parties in the preceding fiscal year exceed NT$30 billion while the domestic total sales of one of the other merging parties in the preceding fiscal year also surpass NT$2 billion.
- The threshold amount of the sales for non-financial institutions shall apply to mergers composed of both financial institutions and non-financial institutions.
- The term "financial institutions" used in this notice refers to the financial institutions specified in Article 4 of the Financial Institutions Merger Act, as well as financial holding companies as described in Article 4 of the Financial Holding Company Act.
- The sales of banks are determined in accordance with the net income indicated in the consolidated income statement established pursuant to the Regulations Governing the Preparation of Financial Reports by Public Banks. The sales of financial holding companies are determined in accordance with the net income indicated in the consolidated income statement established pursuant to the Regulations Governing the Preparation of Financial Reports by Financial Holding Companies. The sales of securities firms are determined in accordance with the income indicated in the consolidated income statement established pursuant to the Regulations Governing the Preparation of Financial Reports by Securities Firms. The sales of insurance companies are determined in accordance with the operating revenue indicated in the consolidated income statement established pursuant to the Regulations Governing the Preparation of Financial Reports by Insurance Companies.
- The "sales for the preceding fiscal year" as set forth in Subparagraph 3 of Paragraph 1 of Article 11 of the Fair Trade Act are calculated in accordance with the following:
  - In the case where merging enterprises have operated for a whole year in the preceding fiscal year, the sales for the fiscal year shall be adopted to calculate the amount.
  - In the case where merging enterprises have operated for less than a year in the preceding fiscal year, the sales accumulated in the months of actual operation shall be calculated proportionately to determine the amount. The sales for the preceding fiscal year = (sales throughout the actual period of operation ÷ the number of months of actual operation) × 12.

- Issued the Announcement of the Legal Interpretation for the "Standard for Determination of Concerted Actions Being Too Insignificant for Fine Imposition," which states that: "an insignificant concerted action is defined as that where the enterprises participating in a concerted action together account for less than 10% of the market and are assessed as being unable to affect the production, transactions or supply of and demand for service in the said market, but concerted actions that are intended mainly to restrict the price, quantity, trading counterparts or trading areas of goods or services are excluded in order to retain flexibility in law enforcement."

15. Other stipulated and amended guidelines related to anti-competitive conduct are as follows:

- "Directions for the Application of Article 46[6] of the Fair Trade Act";
- Announcement of Legal Interpretation on the "Examples of Conduct not involving Concerted Actions for Business Associations";
- Announcement of Legal Interpretation on the "Application of the Fair Trade Act to Government Entities' Conduct in Setting Prices and Other Anti-Competitive Administrative Behaviours";
- "Disposal Directions for Holding of Hearings";
- "Disposal Directions (Guidelines) for Concerted Petroleum Purchasing by Individual Petrol Stations";
- "Disposal Directions (Policy Statements) for Cable Television Related Enterprises";
- "Disposal Directions (Guidelines) for Approval of Concerted Pricing among Small or Medium-sized Enterprises";
- "Disposal Directions (Policy Statements) for Trade Associations and Other Business Groups";
- "Disposal Directions (Guidelines) on Handling Merger Filings";
- "Disposal Directions (Guidelines) on Technology Licensing Arrangements";
- "Disposal Directions (Guidelines) on Cases Handled by Administrative Guidance";
- "Public Notice on Filings for Approval or Extension of Concerted Actions";
- "Disposal Directions (Guidelines) on Extraterritorial Mergers";
- "Directions for Enterprises Filing for Merger";
- "Regulations on Payment of Rewards for Reporting of Illegal Concerted Actions";
- "Disposal Directions (Guidelines) on Trade Practices between Department Stores and Counters".

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

4. Enforcement of competition laws and policies

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

4.1.1. Summary of Activities

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

17. In 2016, the FTC processed 2,101 cases, including 1,961 cases received in 2016 and 140 cases carried over from the preceding year. By the end of 2016, 1,909 cases had been closed, and 192 cases were pending. A total of 173 complaint cases applicable to the Act were concluded in 2016 and, of these, 36 concerned anti-competitive practices.

18. Decision rulings on complaints and FTC self-initiated investigations were undertaken in relation to 140 cases in 2016, and only 11 of these fell into the category of anti-competitive practices. The FTC also initiated investigations into 7 anti-competitive cases.

Table 1. Decision Rulings by the FTC in 2016

Unit: Number of cases

Year	Anti-competitive Practices	Abuse of Monopoly	Mergers	Concerted Actions	Resale Price Maintenance	Vertical Restraints
2016	11	-	1	4	3	4

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

4.1.2. Description of significant anti-competitive cases

Case 1: Concerted actions of 21 container terminal operators' joint decision on collective charge of Equipment Usage Fee

19. The FTC received several written complaints from informants between June 2014 and January 2015 about container terminal operators jointly restoring the collection of an Equipment Usage Fee for container freight station (CFS) export goods under 3 tons in weight from July 2014 onwards. The FTC initiated the investigation based on these complaints.

20. The FTC's investigation found that the said Equipment Usage Fee (the Fee) was a charge arising from using forklifts to unload export goods into warehouses, and that such a process was within the business scope of export warehouses run by container terminal operators. In 1994, the container terminal operators had applied for and obtained approval from the competent authority to charge the Fee. However, due to the fact that the government had given container terminal operators subsidies in accordance with the policy of encouraging exports and the promotion of industrial upgrading, the Fee was never collected. However, as export quantities declined in recent years, the container

terminal operators on several occasions began to discuss restoring the collection of the Fee to boost their business income in the Container Terminal Transport Association meetings (CTTA). Nonetheless, not a single operator was willing to take the risk of losing customers as the first to collect the Fee at that time. However, at the end of 2013 and January 2014, three of the 21 container terminal operators in the Taichung area started to collect the Fee and other operators would follow suit; the container terminal operators thus decided to discuss the issue again.

21. On 10 December 2013 and 26 February 2014, the 21 container terminal operators gathered to discuss restoring the collection of the Equipment Usage Fee for CFS export goods at the dinners following the regular CTTA meetings. In order to smoothly restore the collection of the Fee, these operators on several occasions proactively contacted the Keelung Custom Broker Association through the CTTA to negotiate the methods of fee collection. They also provided notices or announcements for restoring the collection of the Fee to the CTTA at the end of April or the beginning of May 2014, and then the CTTA notified relevant trade associations of carriers, shipping agencies, and forwarders, etc., stating that its members would restore collection of the Fee. 21 Container terminal operators started to collect the Fee from 1 July or from early July 2014 onwards.

22. The FTC's investigation also revealed that the turnover and CFS export volume of these 21 enterprises was more than 80% of that of all domestic Container terminal operators. Their joint decision on resorting to implement the Fee was considered a "concerted action" and in violation of Paragraph 1, Article 15 of the FTA, which prescribed that "No enterprise shall engage in any concerted action." The FTC decided on 2 March 2016 to order the said 21 companies to stop the joint decision to collect the charges for the use of the Fee and imposed administrative fines totalling NT$72.6 million (about US$2.38 million) that ranged from NT$100,000 to 17.25 million (from about US$3,278 to 565,573), respectively.

23. Another significance of this case was that this was the first case to issue a reward for reporting illegal concerted actions since the setting up of the "antitrust fund" according to Article 47-1[7] of the FTA in the Amendment on 24 June 2015. The FTC then

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

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

1. 30% of the fines imposed according to the Act;
2. interests accrued on the fund;
3. budgetary allocations;
4. other relevant incomes.

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

1. rewards for the reporting of illegal concerted actions;
2. promotion of co-operation, investigation and communication matters with international competition law enforcement agencies;
3. subsidies to the related expenses incurred from litigations associated with the Act and rewards reporting of illegal actions;
4. deployment and maintenance of databases in relation to the competition law;
5. research and development on the systems in association with the competition law;
6. education and advocacy of the competition law;
7. other necessary expenditures to maintain the market order.

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

enacted and promulgated the "Regulations on the Payment of Rewards for the Reporting of Illegal Concerted Actions" according to the amendment. The informant who received a reward in this case was the first to provide evidence and useful information for the FTC to initiate an investigation process.

Case 2: 3 cable TV channel agents violated the Fair Trade Act by engaging in discriminative treatment against new market entrants without justification

24. The FTC launched an *ex officio* investigation into cable TV channel agents Kbro Co., Ltd. (hereinafter referred to as Kbro); Global Digital Media Co. Ltd. (hereinafter referred to as Global Digital), and Jia Xun Multimedia Co., Ltd. (hereinafter referred to as Jia Xun) to see if they had violated the Fair Trade Act by impeding new and cross-district cable TV system operators seeking to compete in the market when providing licenses to them to broadcast channels that the three companies were agents for in 2016.

25. The FTC found in its investigation that the contract between the 3 channel agents and those new system operators starting in 2015 for licensing channels in 2016 involved a provision of a minimum guarantee (MG) of 15% of all households in the service area. That is, the minimum fee paid by new system operators was the unit price times 15% of all households in the service area. This MG number was actually several times the number of actual subscribers that each new system operator had. However, the MG in contracts between Kbro, Global Media, and Chia-Hsun and existing system operators was only a certain percentage of the actual number of subscribers. This discrepancy in MG ratios resulted in a significant difference in fees paid by new entrants compared with existing system operators in each service area, and this made it more difficult for those new entrants to compete with existing operators.

26. Cable TV channels are mainly licensed by agents to system operators, which then broadcast the channels to cable subscribers. The 3 channel agents, Kbro, Global Media, and Chia-Hsun all have significant market power in the market and they represent many mainstream and popular channels. It is thus difficult for new and cross-district system operators without licensing from the channel agents to gain subscribers. The FTC believed that such discriminative conduct by the 3 channel agents had increased the operating cost of new and cross-district system operators, and constrained the ability of these system operators to compete with more advantageous prices, quality, and services. This created a competition barrier to new and cross-district system operators and may drive the system operators out of the market. Since the conduct severely restricted competition in the cable TV service market in violation of Subparagraph 2, Article 20 of the Fair Trade Act, in addition to ordering the 3 channel agents to rectify the unlawful conduct within one month after receiving the disposition, the FTC also imposed administrative fines of NT$41 million, 40 million and 45 million, respectively, on them. The fines totalled NT$126 million (about US$4.13 million).

4.2. Mergers and acquisitions

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

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

Table 2. Notifications for Mergers

Unit: Number of cases

Year	Cases under Processing		Total	Results of Processing				Cases Pending at Year-end
	Carried Over from 2015	Received in 2016		Mergers not Prohibited	Mergers Prohibited	Termination of Review	Combined into other Cases	
2016	7	71	69	33	-	35	1	9

Table 3. Statistics on Enterprise Mergers

(Unit: Number of cases)

Year	Cases not Prohibited	Type of Merger (Article 10, Paragraph 1 of the Fair Trade Act)				
		Subparagraph 1	Subparagraph 2	Subparagraph 3	Subparagraph 4	Subparagraph 5
2016	33	3	29	3	2	26

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

4.2.2. Summary of significant cases

Case 1: Merger between ASE Group and Siliconware Precision Industries Co. Ltd. not prohibited

28. The FTC decided at the 1,306th Commissioners' Meeting on November 16, 2016 that the overall benefit from the merger between the ASE Group (hereinafter referred to as ASE) and Siliconware Precision Industries Co., Ltd. (hereinafter referred to as SPIL) would outweigh the disadvantages from the competition restrictions thereof incurred. Therefore, the FTC cited Paragraph 1, Article 13 of the Fair Trade Act and did not prohibit the merger.

29. ASE filed a notification with the FTC on 29 July that it intended to acquire more than one third of the voting shares of SPIL. The two companies had agreed that ASE would set up a new holding company and, subsequently, conduct a stock-for-stock exchange between the two companies. Afterwards, ASE and SPIL would both become wholly-owned subsidiaries of the new holding company but would continue to exist under their original company names. All the members of the boards of directors and supervisors of the two merging parties would be appointed by the new holding company while the managers of each company would be decided by the board of directors. The transaction fell within the types of merger definition specified in Subparagraphs 2 and 5, Paragraph 1 of Article 10 of the Fair Trade Act and the sales of both merging parties in 2015 also exceeded the threshold prescribed in Subparagraph 3, Paragraph 1 of Article 11 of the same act; therefore, the two companies filed a merger notification with the FTC.

30. The investigation of the FTC showed that the main business operations of both ASE and SPIL were packaging and testing various types of integrated circuits. There were over 70 competitors in the global OEM packaging and testing market. Competition was fierce and finding new trading counterparts would not be hard. Most upstream and downstream enterprises surveyed by the FTC thought the fact that the two brands that would continue operating independently could reduce the likelihood of price adjustments. They also commented that if price increases occurred as a result of the merger, they

would transfer their orders to other companies. The technological levels of different packaging and testing businesses were uneven and IC packaging and testing businesses often offered customised services according to the specifications obtained from their clients and the technologies they needed. Hence, it would be difficult for such businesses to adopt concerted actions. At the same time, semiconductor makers with the right financial capacity and technologies could easily enter the IC packaging and testing market. Since the two companies would continue to operate independently after the merger, existing procurement and transaction modes would be maintained. Although raw material suppliers might face demands for price decreases and buyers transferring orders to other companies could have an effect on the scale of the industry, price decreases and suppliers fighting for orders could actually help promote competition in the relevant market. Therefore, the merger would not lead to significant competition restrictions in the global semiconductor packaging and testing market.

31. The production lines of ASE and SPIL were highly overlapping and repeated R&D costs of the two companies could be saved after the merger, while the manufacturing processes of certain medium-and low-end products could be standardised and the R&D costs saved could be invested in technological innovation and development to improve the packaging and testing standards in the country. Meanwhile, products for smartphones and wearable smart devices or the Internet of things were becoming lighter and smaller. Heterogeneous integration for system in package (SiP) would be cheaper than the cost of system on chip (SoC) and packaging and testing technologies could be introduced. Moreover, such heterogeneous integration needed cross-disciplinary technological integration, including substrate, packaging and testing, component and EMS technologies. For this reason, the merger could also help push technological advancements in the supply chains of related industries.

32. The FTC concluded that, after the merger, the two companies would be able to enhance their capacity to compete with major international manufacturers. The effect on the overall domestic economy would be positive. The transferring of orders would be unavoidable, but things changed rapidly in the electronics industry and the life cycles of electronic products were short.

33. Therefore, the order transfer effect resulting from the merger would also differ after the merging parties and their competitors increased their productivity and improved their technologies. After evaluating the opinions solicited from the Ministry of Economic Affairs, the businesses surveyed, related associations and professional organisations as well as assessing related considerations, the FTC decided not to prohibit the merger.

Case 2: Netwave and Power Full violated the Fair Trade Act for failing to file merger notification

34. The FTC decided at the 1,262nd Commissioners' meeting on Jan. 13, 2016 that Netwave Cable Television Co., Ltd. (hereinafter referred to as Netwave) and Power Full Cable Television Co., Ltd. (hereinafter referred to as Power Full) failed to file a merger notification with the FTC for their joint operations which was in violation of Paragraph 1, Article 11 of the Fair Trade Act at the time of the conduct. The FTC imposed administrative fines of NT$850,000 on Netwave and 250,000 on Power Full.

35. According to the FTC's investigation, Netwave and Power Full started to share machine rooms, make joint purchases and business promotions, and use the same employees in May 2014. The joint management practices fell within the merger defined in Subparagraph 4, Paragraph 1, Article 6 of the Fair Trade Act at the time. In addition,

Netwave also accounted for over one fourth of the cable TV service market of Wanhua District and Zhong Zheng District in the second quarter of 2014 and the condition also met the merger filing threshold specified in Subparagraph 2, Paragraph 1 of Article 11 of the Fair Trade Act at the time.

36. Meanwhile, the aggregate market share of the two companies also exceeded more than two thirds of the said market during the same period and the condition met the merger filing threshold set forth in Subparagraph 1, Paragraph 1, Article 11 of the Fair Trade Act at the time, whereas none of the proviso regulations in Paragraph 1, Article 11 of the Fair Trade Act at the time were applicable. Hence, Netwave and Power Full were required to file a merger notification with the FTC in advance but did not do so. The FTC believed that was in violation of Paragraph 1, Article 11 of the Fair Trade Act at the time of the conduct.

37. After considering the two companies' market shares, sales, numbers of subscribers, business scales and extent of co-operation throughout the investigation and that it was their first violation, the FTC cited Paragraph 1, Article 13 as well as Paragraph 1, Article 40 of the Fair Trade Act at the time of the conduct, imposed administrative fines of NT$850,000 on Netwave and 250,000 on Power Full, and also ordered the two companies to file a merger notification or make necessary rectifications within three months after receiving the dispositions.

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

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

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

40. In 2016, the FTC organised and participated in various consultation meetings with other government authorities related to competition issues, as summarised in the following:

- Participated in the meetings held by the Legal Affairs Committee of the Council of Agriculture, Executive Yuan, to provide competition opinions on the draft amendment of the "Veterinarian Act" for the fees charged by veterinary animal care facilities.
- Participated in the meeting on "Discussing Operation Practices on the Inspection of Vegetable Wholesalers during Times of Extraordinary Fluctuations in Vegetable Prices" held by the Taipei City Government to explain the regulations on concerted actions in the Fair Trade Act and the co-ordination agreement between the FTC and the Council of Agriculture, Executive Yuan, as well as provide revision suggestions on the inspection plan and operation procedures.

- Sent a letter to the Energy Bureau, Ministry of Economic Affairs, to advocate that natural gas firms, in the process of acceptance of natural gas pipeline construction work, should clearly define the procedures, from the user's application to design, estimates of pipeline fees, payment for the work, construction, completion, and installation of gas meters, and post them on the natural gas firms' websites for constructors to follow.
- Participated in the meetings of the "Special Task Force for Commodity Price Stabilization." The FTC reported on "Response Measures of Commodity Price Stabilization during the Chinese New Year." Furthermore, to effectively monitor market conditions, the FTC established communication channels with competent authorities and immediately responded to the media and public opinion in order to efficiently maintain trading order.
- Participated in the meetings of the "Agricultural Products Production and Marketing Control Mechanism and Vegetable Prices Stabilization Review" organised by the Executive Yuan and co-ordinated with the Ministry of Justice and Council of Agriculture on the case investigations.

6. Resources of competition authorities

6.1. Resources overall

6.1.1. 5.1.1 Annual budget

41. NT$335.503 million in 2016 (approximately equivalent to US$10.342 million in Dec. 2016).

6.1.2. Number of employees (person-years)

42. There were 213 employees at the end of the year 2016, including all staff in the operations and administrative departments and 7 full-time Commissioners. The operations departments include the Department of Service Industry Competition, Department of Manufacturing Industry Competition, Department of Fair Competition, Department of Planning and Department of Legal Affairs. Over 93% of employees have bachelor degrees with majors in different subjects at the university level.

43. In terms of the educational background percentages, 23%, 26%, 8%, 6% and 36% of the employees majored in law, economics, business administration, accounting and other related fields (including information management, statistics, and public administration), respectively.

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

Table 4. Structure of FTC Human Resources

Category	No. of employees
Lawyers	48
Economists	55
Other professionals & support staff	110
All staff combined	213

6.2. Human resources (person-years) applied to:

6.2.1. Enforcement against anti-competitive practices and merger review

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

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

6.2.2. Advocacy efforts

47. In 2016, 10 of the 25 staff members in the Department of Planning of the FTC were primarily in charge of public outreach programs. However, since most of the outreach programs for competition advocacy were case-oriented, almost every department staff member played an active role in outreach activities. The FTC organised 75 seminars in 2016 for the public, students, and local governments to introduce the regulations of the FTA.

48. Furthermore, in 2016, the FTC held 7 seminars for the various business sectors to introduce the leniency program, administrative fines, and the new amendments to the FTA in order to ensure acquaintance with the new provisions of the FTA. The FTC also held one seminar for business sectors to introduce the "Code of Conduct for the Antitrust Compliance of Enterprises."

6.3. Period covered by the above information

49. January through December 2016.

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

50. The FTC studied and published reports on competition policy issues in 2016 with the following titles. All of them are only available in Chinese:

- The Trend of Competition in the Digital Economy - New thinking on the Role of Government.

- A Study on the Copyright of Karaoke Music Products Licensing and Fair Trade Act Related Issues.
- A Study on the Controversy of the Electricity Liberalization Policy and Concerted Actions of Independent Power Producers.
- The Development of Laws and Regulations on Multi-Level Marketing and Assessing its Supervision.
- An Empirical Case Study on the Judicial Practical View on Concerted Actions under the Fair Trade Act.
- A Study on Economic Evidence in Concerted Actions.

51. The FTC also engaged in outsourced research, and published the following research reports in 2016. A short English abstract is available for both reports[8].

- Analysis on the Marketing Strategies of Distribution Enterprise and Consumer's Demands under Competition Law Perspectives.
- A Study on Patent Linkage System and its Related Issues of Competition Law.

[8] For the English abstract of the two reports, please refer to: http://www.ftc.gov.tw/internet/english/doc/docList.aspx?uid=1498

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Global Forum on Competition

JUDICIAL PERSPECTIVES ON COMPETITION LAW

Contribution from Chinese Taipei

-- Session II --

7-8 December 2017

This contribution is submitted by Chinese Taipei under Session II of the Global Forum on Competition to be held on 7-8 December 2017.

Please contact Ms. Lynn Robertson if you have any questions regarding this document [phone number: +33 1 45 24 18 77 -- E-mail address: lynn.robertson@oecd.org].

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Table of Contenets

Judicial Perspectives on Competition Law

-- Chinese Taipei --

This report explains the administrative court practice of Chinese Taipei in concerted action cases involving the Fair Trade Act, as well as the law enforcement experiences of the Fair Trade Commission.

1. The administrative court's evaluation of evidence in concerted action cases of the Fair Trade Commission

1. The Fair Trade Commission (FTC) imposes the administrative dispositions defined by the Administrative Procedure Act on enterprises that violate the Fair Trade Act (FTA). If the enterprises refuse to accept the administrative dispositions imposed by the FTC, they can file administrative lawsuits in the administrative court in accordance with the Administrative Litigation Act. The evidence used by the FTC as a basis for imposing the administrative dispositions is the focus in administrative litigation, especially in evaluations that involve "economic evidence", for which the FTC must explain the relationship between the evidence and the facts that need to be proven.

2. The FTC in 2015 summarized recent administrative lawsuits that involve concerted actions related to the FTA, and looked into whether or not the administrative court accepted the facts and legal opinions of the FTC[1]. The report pointed out that the constituent elements of concerted actions, including "the definition of the relevant market," "mutual understanding," "concerted action" and "sufficient to affect market function" are the issues concerned with administrative litigation. In recent years, the administrative court has ruled on 10 cases that involve concerted actions related to the FTA, in which the administrative court ruled in favor of the FTC in 7 cases, but there were still 3 cases regarding which the FTC was not supported by the administrative court. Hence, the following section explains court practice and the evaluation of evidence by the administrative court in regard to "the definition of the relevant market," "concerted action" and "sufficient to affect market function" in concerted action cases involving the FTA.

[1] No. 5 of the report of the 1,259th meeting of the FTC on December 23rd, 2015.

2. Court practice and evaluation of the evidence by the administrative court regarding "the definition of the relevant market," "concerted action" and "sufficient to affect market function" in concerted action cases involving the FTA in recent years

2.1. Practice of the administrative court regarding the "the definition of the relevant market"

3. In the case of convenience store chains jointly raising the price of freshly brewed coffee[2], when defining the relevant market, the FTC determined that the freshly brewed coffee of convenience store chains was convenient, highly accessible, and available 24 hours a day, the main consumers were different from those of coffee shop chains, and convenience stores had unique equipment, as well as special pricing, marketing, and business strategies. Hence, the freshly brewed coffee of convenience store chains was not highly replaceable by coffee store chains. After the sanctioned enterprises jointly raised the prices of their freshly brewed coffee, their total sales volume remained the same as before they raised their prices. After comparing profit changes before and after raising prices, the FTC determined that the sanctioned enterprises made a small but significant and non-transitory increase in price to increase their profits. According to the classification of coffee shops in the Standard Industrial Classification announced by the Directorate-General of Budget, Accounting and Statistics, the freshly brewed coffee of convenience store chains was determined to belong to a different market to that of coffee shops. Therefore, the FTC defined the market in this case as the "convenience store chains freshly brewed coffee market."

4. In its judgment, the administrative court, however, believed that the FTC did not conduct the questionnaire surveys on consumers with respect to the quality of freshly brewed coffee, the purpose of use, and the subjective perspective of consumers when defining the product market in the case. The freshly brewed coffee of coffee shop chains, fast food restaurants, coffee specialty stores, supermarkets, hypermarkets, and stores are all able to satisfy the demand of consumers for freshly brewed coffee, and are therefore highly replaceable by each other. However, the FTC did not perform the test of a "small but significant non-transitory increase in price" (SSNIP), and only used the documentary reviews to define the product market within a short amount of time, lacking empirical evidence gathered from the market. In addition, there is no standard for whether qualitative or quantitative analysis should be adopted in defining the market. The qualitative factors proposed by the FTC (such as the above-mentioned coffee shop classification) were not based on the analysis of data collected from in-depth observations and interviews, and the FTC therefore lacked concrete evidence.

5. Hence, the case shows that the administrative court still needed to conduct an empirical study on the FTC's economic evidence for defining the relevant market, and not just base the definition on the documented reviews. Regardless of whether a qualitative or quantitative approach is used to define the market, it is still necessary to have concrete evidence to describe the substitutes. In light of this, the FTC announced the "Principles of the FTC Regarding the Definition of Relevant Markets" on March 6th, 2015, specifying determination guidelines, consideration factors, and analysis methods. The FTC will thus strengthen the connection between the definition of the market and

[2] Disposition Kung-Chu-Tzu No.100220 of the FTC on November 9th, 2011, and Judgment 2014 Pan-Zi No.195 of the Supreme Administrative Court on April 18th, 2014 (the FTC lost in the final judgment).

evidence, and match data gathered through empirical studies on the market with reasonable substitutes to gain the administrative court's support.

2.2. Practice of the administrative court for determining "concerted actions"

6. In the case of industrial paper manufacturers jointly raising the price of base paper[3], with regard to a concerted action, the FTC determined that the 3 sanctioned enterprises had a 98.5% market share in the primary industrial paper market, which is an oligopoly that is favorable to forming concerted actions. The sanctioned enterprises appeared to jointly raise the invoice price of base paper between November 2009 and March 2010, and the act of jointly raising prices did not conform to past experiences of raising prices. The increase in price also did not match the trend in international prices, and there were frequent gatherings between the sanctioned enterprises that appeared strange among competitors, and for which the sanctioned enterprises did not provide reasonable explanations. In the secondary cardboard market, the FTC also determined that 2 of the sanctioned enterprises raised the prices of secondary cardboard to similar prices at a similar time between January and March 2010, and used their control over the paper supply of upstream and downstream paper factories to jointly raise the prices of secondary cardboard. Since the product specifications and codes of the two sanctioned enterprises for the cardboard were different, with complex formulas for calculating prices, it was clearly unusual for the two enterprises to set the same prices. Therefore, the above-mentioned actions of the 3 sanctioned enterprises constituted the concerted actions by means of "other forms of mutual understanding."

7. According to the practice of the administrative court, the FTA determines a "mutual understanding" regarding a concerted action based on substantial evidence. Even if there is no direct evidence of a mutual understanding between enterprises regarding a concerted action, a mutual understanding in relation to a concerted action can be inferred from the gathering and analysis of indirect evidence, which can be used in support of the view that the concerted action in the market cannot be reasonably explained unless the enterprises engage in such a concerted action. The administrative court believed that the FTC's inference regarding the concerted actions by the 3 enterprises based on the indirect facts of the case, product types, oligopoly market structure, cost and source of raw materials, import and export ratio, price adjustment experience in the past, and prices in the international market were reasonable. The Supreme Administrative Court also cited economic theories such as game theory and the prisoner's dilemma in the final judgment to explain the competition characteristics in an oligopoly market structure, and pointed out that a mutual understanding regarding a concerted action usually only exists between the competitors, making it hard for the competent authority to provide evidence without assistance from a party involved, otherwise the competent authority can only use direct or indirect evidence.

8. Therefore, the case showed that the administrative court adopts indirect evidence and additional factors when evaluating the FTC's economic evidence regarding a concerted action. Such indirect evidence includes that related to the market structure, press releases, the product's type, characteristics, costs and profits, the market share of the enterprises, and the scope and characteristics of the relevant market. The scale of

[3] Disposition Kung-Chu-Tzu No.099054 of the FTC on May 5th, 2010, and Judgment 2017 Pan-Zi No.265 of the Supreme Administrative Court on May 25th, 2017 (the FTC won in the final judgment).

business operations, business strategy, sales technique and profit goals of the enterprises are also compared, and mutual understanding between the enterprises to engage in a concerted action is thus inferred based on the rule of thumb and rule of reason. In light of this, Paragraph 3 of Article 14 of the Act was added on February 4th, 2015: "The mutual understanding of the concerted action may be presumed by considerable factors, such as market conditions, characteristics of the good or service, cost and profit considerations, and economic rationalization of the business conduct." The FTC may presume that a mutual understanding regarding the concerted action is based on relevant evidence and considerable factors. If enterprises intend to overturn this legal presumption, they must provide strong evidence to explain their actions.

2.3. Practice of the administrative court for determining "sufficient to affect market function"

9. In the case of Tainan City pet shops jointly refraining from price competition[4], when determining "sufficient to affect market function," the FTC determined that the sanctioned enterprises jointly decided to refrain from price competition during a meeting between pet shops in Tainan, so that price competition would not affect their profits. The sanctioned enterprises also asked upstream suppliers to control and cut off supply to pet shops that did not cooperate, so that the pet shops would be forced to raise prices. This pressured retailers to refrain from price competition and damaged consumer interests. The sanctioned enterprises had up to 17.34% of the pet food and products market in Tainan City. After the meeting, many pet food suppliers demanded that other retailers raise prices and some retailers had their supply cut off. Therefore, the actions of the sanctioned enterprises substantially damaged market competition, and were sufficient to affect the market function of the Tainan City pet food and products market.

10. In the judgment the administrative court believed that market share was not the only standard for determining whether or not a concerted action is sufficient to affect the market function. When determining whether or not the concerted action of the enterprises impacted market competition and distorted the market function in the circumstances at the time, it should have been a violation of the FTA regardless of the market share if the nature of the concerted action might have restrained market competition. The administrative court also agreed with the FTC in that the sanctioned enterprises were mainly national and regional chains with high revenue and were the main trading counterparts of upstream suppliers, giving them considerable influence on suppliers, which was sufficient to affect the market function of this case.

11. Hence, this case shows that when the administrative court is evaluating economic evidence deemed "sufficient to affect market function" by the FTC, the evidence only needs to be "sufficient." In other words, the concerted action does not necessarily need to cause actual damage, and the evidence is sufficient if the concerted action weakens the pressure of competition or has a negative effect on the intensity of competition. In light of this, the FTC issued an interpretation order referred to as the "Standard for Determining Concerted Actions of Minor Importance" on March 1st, 2016. Besides the concerted actions that limit the prices and quantity of products or services, trading counterparts or trading territory, regardless of whether or not the combined market share of the

[4] Disposition Kung-Chu-Tzu No.104100 of the FTC on October 14th, 2015, and Judgment 2016 Cai-Zi No.1276 of the Supreme Administrative Court on October 6th, 2016 (the FTC won in the final judgment).

enterprises engaging in the concerted actions reaches 10%, is used as the basis for determining "sufficient to impact the market function with respect to production, trade in goods or the supply and demand for services" in Paragraph 1 of Article 14 of the FTA. If the concerted action limits price, quantity, trading counterparts, or trading territory, the concerted action is viewed as a "hardcore cartel" and is highly hazardous to market competition. Therefore, regardless of the market share of the involved enterprises, the concerted action is deemed sufficient to affect the market function.

2.4. Influence of administrative court practice on law enforcement by the FTC

12. Since the administrative court's review of administrative dispositions imposed by the FTC includes the determination of facts and the application of law, the administrative court's judgment in cases related to the FTA over the years will affect the FTC's determination of constituent elements. Furthermore, according to Article 216 of the Administrative Litigation Act, if the administrative court rules to revoke the original administrative disposition, administrative agencies must decide on a different administrative disposition according to the court's judgment. If the administrative court points out that an administrative agency has misunderstood the applicable law, the administrative agency shall be constrained by the judgment and may not impose an administrative disposition that differs from the legal opinion. This shows that the administrative court's determination and interpretation of the constituent elements in the FTA will affect the FTC's decisions when examining the facts, evidence, and applicable law of a case.

3. Interaction between the FTC and the Administrative Court

3.1. The court's trial in administrative litigation of the FTA

13. Administrative litigation involves a two-tier trial system with three levels of administrative court. The three levels refer to the Supreme Administrative Court, High Administrative Court, and the administrative litigation division of the district court. The two-tier trial refers to the first instance of simple procedural cases in the administrative litigation division of the district court, and the High Administrative Court serves as the court of second instance and the court of final appeal. For normal procedures, the High Administrative Court is the court of first instance, while the Supreme Administrative Court is the court of second instance and the court of final appeal. In addition, administrative litigation cases that involve intellectual property are heard in the Intellectual Property Court.

14. According to Article 9 of the Administrative Court Organization Act, the number of divisions in the High Administrative Court is dependent on the case load; if necessary, special tribunals may be set up. In practice, the administrative court does not set up a special tribunal for cases related to the FTA. Most administrative litigation cases are heard in the Taipei High Administrative Court, while only a few administrative litigation cases with administrative penalties of under NT$400 thousand are heard by the Administrative Litigation Division of the Taipei District Court. In addition, a few cases related to the FTA that involve intellectual property are heard by the Intellectual Property Court.

3.2. The FTC's experience of exchanges with the administrative court

15. The competition activities of enterprises have become increasingly diverse and complex in recent years, and cases that violate the FTA often cross over law, economics, finance, or intellectual property rights. If the evidence used in administrative procedures involves the sales amounts and market shares of the enterprises, or industrial and economic knowledge of the relevant industry, the FTC's execution and maintenance of administrative dispositions will be affected if the judge in the administrative court does not understand the development trends and multi-disciplinary characteristics of the FTA and competition law of other countries, or if the judge does not have a good grasp of economic concepts and cannot understand the economic analysis and evidence used by the FTC in administrative litigation.

16. Hence, the FTC often arranges lectures and academic conferences. Besides inviting scholars and experts in competition law-related fields, the FTC also invites judges and lawyers to speak on topics or attend the events. This provides members of the FTC, judicial authorities, and industries with the opportunity to exchange law enforcement experiences and legal opinions. The FTC can also use the events to explain its position in law enforcement and the development trends of competition law in international society.

4. Conclusion

17. Important issues in administrative litigation related to the FTA often involve the evaluation and analysis of economic evidence, such as defining the relevant market, whether or not enterprises are competitors, and the impact of the illegal actions on market function. The administrative court must determine the facts and applicable law in relation to such issues. Hence, if the judge of the administrative court is an expert in economics, the judge will be able to better understand the economic evidence and analysis used by the FTC in administrative litigation. Yet, the key to persuading the administrative court to support the administrative dispositions imposed by the FTC is whether or not the facts and evidence are sufficient to prove the illegal action.

18. Based on administrative litigation cases involving the concerted actions of the FTA in recent years, when the administrative court is evaluating the economic evidence for "defining the relevant market," the FTC should explain reasonable substitutability based on the evidence, in which an empirical study of the market is especially important. When evaluating the economic evidence for a "concerted action," the administrative court supports the use of indirect evidence and additional factors by the FTC in presuming that a mutual understanding exists between enterprises in regard to the concerted actions. The administrative court's practice concerning a "concerted action" has also affected the addition of Paragraph 3 of Article 14 of the FTA for presuming that a concerted action exists. Furthermore, when evaluating the economic evidence that a concerted action is "sufficient to affect market function," the administrative court believes that market share is not the only indicator for measuring market power. If the concerted action can reduce the pressure of competition or negatively affect the intensity of competition, then it is "sufficient" to affect the market function, which is consistent with the FTC's opinion.

19. In addition to administrative litigation cases related to the FTA, the FTC often arranges lectures and academic conferences for interaction with the administrative court. The FTC invites judges of administrative courts, judges of the Intellectual Property Court, and personages in the field of competition law to speak or give comments on topics related to the FTA. Besides allowing the judicial authorities to understand the enforcement of the FTA and development trends in international competition law, these exchanges and discussions will also drive developments of the FTA and competition policy.