出國報告(出國類別：開會)

出席 2019 年 12 月經濟合作發展組織(OECD)競爭委員會相關會議暨第 18 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：洪財隆委員

杜幸峰視察

楊哲豪專員

賴建勝專員

赴派國家：法國

出國期間：108 年 11 月 30 日至 12 月 8 日

報告日期：109 年 2 月 17 日

摘　要

本報告詳述出席 OECD 競爭委員會 108 年 12 月 2 日至 5 日第二工作小組（WP2）、第三工作小組（WP3）、競爭委員會（CC）及 12 月 6 日至 7 日第 18 次 OECD 全球競爭論壇（GFC）各項會議討論情形：

一、12 月 2 日上午 WP2 舉行「獨立產業管制機關」圓桌會議；討論獨立產業管制機關與競爭法主管機關之關係。

二、12 月 2 日下午至 12 月 3 日上午 WP3 會議舉行「案件閱覽及機密資料保護」圓桌會議，討論各國在競爭法案件調查時，對於當事人案件調查資料閱覽權利及機密資料之保護。

三、12 月 3 日下午至 12 月 4 日下午 CC 會議舉行（1）「軸輻式協議」圓桌會議，討論有關軸輻式協議行為案例與主要國家對其所訂立之舉證標準，特別是在數位市場中所產生之軸輻式協議風險。（2）「市場退出障礙」圓桌會議，競爭法主管機關如何在其執法及倡議工作中考量市場退出障礙。

四、12 月 5 日至 6 日全球競爭論壇，討論下列議題：（1）受攻擊的競爭法；（2）貿易協定中之競爭條款；（3）動態市場之結合管制；（4）獲取市場競爭。

五、另 OECD 亦在會議期間同時舉行「亞太競爭法主管機關高階代表會議」及「數位案例實驗室」，討論有關數位市場問題。

目　　錄

附錄：

1. 競爭與管制第二工作小組(WP2)會議議程
2. 合作與執法第三工作小組(WP3)會議議程
3. 競爭委員會(CC)會議議程
4. 亞太地區高階官員會議議程
5. 第 18 屆全球競爭論壇(GFC)議程
6. WP2「獨立產業管制機關」我國書面報告
7. WP3「案件閱覽及機密資料保護」我國書面報告
8. GFC「動態市場中之結合管制」我國書面報告

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36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、愛沙尼亞、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，另哥倫比亞及哥斯大黎加正申請加入中。

(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每年於2月、6月及10月定期於法國巴黎OECD總部召開3次會議，2015年後改為每年於6月及12月舉行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，本次12月會議於12月2日至12月4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。

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18屆會議，係安排於本次競爭委員會例會後，於12月5至6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、非會員國家等100個國家及10個國際組織代表與會。

三、本次會議出席人員：我國代表團由本會洪財隆委員率綜合規劃處杜幸峰視察、服務業競爭處楊哲豪專員及法律事務處賴建勝專員出席上開2項會議。另駐法國代表處經濟組劉禹伶秘書亦全程與會。

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2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)第68次會議，由WP2主席Alberto Heimler先生主持，討論議題包括：

(一) 「獨立產業管制機關」圓桌會議(Roundtable on “Independent Sector Regulators”)：

1、本議題主要討論各國產業管制機關之角色與職掌，其所推行之政策與任務及與競爭法主管機關間之關係。除秘書處報告背景文件外，另有21個國家提交書面報告，包括歐洲消費者聯盟(BEUC)與工商諮詢委員會(BIAC，現更名為Business at OECD)，會中並邀請英國安東格里亞大學競爭政策中心主任Sean Ennis教授、OECD經濟管制者網路主席暨法國交通管制機關副主席Anne Yvrande-Billon女士，以及澳洲競爭及消費者委員會(ACCC)行政總經理Marcus Bezzi先生與談。

2、OECD秘書處首先說明一般政府產業管制機關之獨立性，略以：

(1) 「獨立性」、「可課責性」以及「管制多樣性」通常係衡量產業管制機關執法能量的指標。OECD曾以該指標對於各國水、電、航空、電子商務與能源產業進行測量評分，發現各國間不論於何種產業，於「獨立性」項目的分數均為

差距最小，意即各國在產業管制機關之獨立性方面，均有一致程度的水平。

(2) 進一步調查後可以發現，這些產業的管制機關多半僅在長期施政方針項目會受到其他機關(如上級)的干預，在個案或工作計畫等項目則鮮少受到干擾。同時，機關的獨立性與可課責性呈現正相關，這些產業管制機關的首長大多須在卸任後經過一段等待期間，才能重新於被管制產業中任職。

(3) 以上調查結果，均顯示產業管制機關之獨立性，普遍受到各國的重視。因此，本次會議即以「獨立管制機關與競爭」為題，討論產業管制機關之獨立性，以及其與競爭法主管機關間的關係。

3、Sean Ennis先生：

(1) 產業管制機關與競爭法主管機關間可能有任務的重疊,亦有潛在上的不一致。例如，因為競爭行為通常能增進消費者福利，故一般的情況下產業管制機關對於產業內的競爭行為多會表示支持，且會藉由制定相關競爭規範以促進產業內更有效的競爭，如解決產業內資訊不對稱的問題、降低市場參進障礙，或是建立一個良好且適當的市場評估方式。但產業管制機關亦可能與競爭法主管機關的任務衝突，因產業管制機關除確保消費者福利外，有時亦肩負維持產業穩定性、確保多樣性，以及公共利益的維護(有時消費者利益並不代表公共利益)等任務，故為達成前開任務，有時產業管制機關的作為會與競爭的概念衝突。

(2) 產業管制機關對於其所管產業的管制方式，多會依循產業主管法規進行。惟產業主管法規有其僵固性，尤其當產業發生快速的變革時，法規有時難以即時跟進。因此，在部分發展快速且具有高度不確定性的產業中，先以產業相關法律做出原則性規範，再授權產業管制機關以行政命令的方式進行實質規範，清楚揭示其遊戲規則，並參照產業發展特性彈性調整，除消除產業遵法的不確定性外，相關法令與政策亦能更有效適應產業動態的快速變化。

(3) 在許多產業中均存在著產業自律機制，若以成本效益考量，於產業內部獨立建立自律機制，以取代獨立管制機關的直接管理，係屬成本較低的選擇。除傳統上被認為應具有獨立性特質之產業外，其他如港口、教育、金融及其他專業領域等,均有其適用之空間。其好處是產業自律對於政府而言成本較低，且比政府更具有高度產業知能。但因為產業自律的本質係由產業內部自行管理，故也可能會使部分事業得以維持，甚至增加其市場力量，這也是必須注意的地方。

(4) 最後，獨立管制機關與競爭法主管機關間應保持政策上的一致性，不過如同

一開始提到，產業管制機關與競爭法主管機關間，因為功能任務的不同，在政策上有時會重疊，有時會牴觸，此時，機關間的協調溝通就更顯重要。然而諷刺的是，機關的獨立性在溝通協調的過程中，有時反而會成為一個阻礙。為解決此問題，或許可藉由組織架構上的整合、共同執行，或實體上合作，設計出一套兼具獨立性、一致性及效能的管理方式。

4、Anne Yvrande-Billon女士：

(1) 在法國交通相關規範的發展歷程上，法國競爭法主管機關(Autorité de la Concurrence，ADLC)均扮演相當重要的角色。2009年法國依據歐盟交通指令(Transportation Directive)的內容，設置法國鐵路行為主管機關(Autorité de Régulation des Activités Ferroviaires，ARAF)，並在鐵路基礎設施的管理方面導入經濟面規範，要求基礎設施管理者應公平、無差別待遇提供相關基礎設施，並在2014年的鐵路改革法案中確立基礎設施提供者(IM)及其使用者(RUs)間的關係，另賦予鐵路部(鐵路之產業管制機關)特別的權力，如懲戒委員會，或對IM高層選任具有部分決定權等。

(2) 2015年，ADLC亦促成了城市客運的自由化，以及ARAFER(即ARAF與城市客運業務結合後所設立)之建立，對於城市客運站及其服務採行經濟化之監控與管理。在2018年的第2次鐵路改革法中，開放國內鐵路運輸自由化，並在2019年將巴黎戴高樂機場之營運民營化，成立法國交通管理局(Autorité de régulation des transports，即前開ARAFER改制後設立，下稱ART)等事項，均可以見到ADLC與產業管制機關合作，進行經濟面的自由化及私有化政策。

(3) 至於法國ADLC與ART的合作方面，當ART接獲任何在鐵路、客運、航空或高速公路等產業出現如濫用優勢地位等反競爭行為時，ART有將該資訊提供予ADLC之義務，且ART在管理其所屬產業時，如涉及相關市場定義等議題，亦會參酌ADLC之建議。其餘尚包含兩機關的的人員交換，定期交流會議(國內或歐盟間的討論均有)等。實務上因為違反競爭法規定者，很可能也同時涉及其他產業相關法規之違反，競爭法主管機關基於其主動、積極調查的角色，對於產業涉及違反競爭法之事項進行調查，實務上不僅能彌補產業管制機關的不足，而在其他未設立產業管制機關之產業，如車廂、票務及資訊等產業，亦能有效發揮其作用。

5、Marcus Bezzi先生

(1) 產業管制機關與競爭法主管機關間，具有互補運作的特性，因不論競爭法主管機關或是產業管制機關，其設立目的之一均是為了增進消費者之利益。在

這個出發點上，兩機關並無不同，因此對於競爭法主管機關而言，具備產業專業知識是絕對有好處的，尤其在越複雜的產業，如能源、交通、水、通訊、農業或金融服務產業中就愈顯重要。因此與產業管制機關保持密切合作，對於增進競爭法主管機關產業的專業性有極大的助益。如澳洲競爭與消費者委員會(ACCC)與澳洲能源監理局、通訊媒體局(CAMA)及準備銀行等單位均有相當程度的合作關係，其合作模式亦相當多元，如辦公室位於相同駐點、人力資源共享、定期會議，或是簽立機關間MOU等。

(2) 由於ACCC在政策、法律上被賦予消費者保護、競爭政策執行及經濟上規範等任務，具體來說，像是決定及評估某些重大基礎設施之價格、執行並監督業者遵守產業特別法規、對於特定商品或服務之價格及品質進行監督及報告、傳播資訊使利害關係人知悉法律規範架構，以及掌握基礎設施市場的運作情形等。近期隨著市場態樣的演變，ACCC亦開始肩負消費者個人資料保護的功能。在產業事業的管理上，ACCC會與產業管制機關進行分工，如CAMA是澳洲通訊產業管制機關，在通訊產業中負責相關技術標準之制定，以及特定幾類消費者保護事項；ACCC則是負責通訊產業的評估管理，含監督、促使事業遵循通訊專門法規、一般消費者保護，及通訊產業之競爭事項，不僅在通訊產業，ACCC於燃料、機場、能源、郵政、水、鐵路、小麥出口等產業均分有一席之地。

(3) 另外，ACCC對於特定幾類具自然獨占特質之基礎設施或服務，訂有近用規範(Access Regulation)，於該正面表列清單上之設施或服務，其他事業均得在適當狀況下進行合理使用。首先澳洲國家競爭議會會先提出建議納入清單之基礎設施或服務項目，ACCC會在符合：(1)列入後將實質促成其他市場之競爭提升(2)近用之服務有可預見之需求，且相較於多重建置，近用該服務可有效降低事業之成本(3)該服務具有國家重要性(4)近用後將增進公共利益之條件下，將該基礎設施或服務納入清單，納入後，澳洲競爭法院亦得應相關利害團體之要求，對於清單上的服務項目進行審查。然而，近用規範並不表示事業可以當然取得清單上所列之服務，事業倘欲取得相關服務，仍需與該服務提供者達成協議，或經由ACCC的仲裁後始能取得。

(4) 在數位經濟時代，如同前面所提到，消費者的個人資料保護係ACCC未來努力的方向之一。在通訊產業中，除既有反競爭行為調查、市場價格與競爭之監控與報告，以及與產業管制機關或相關機構合作外，ACCC亦建議應在ACCC下設立數位經濟平台之相關監控調查及報告單位、將個資法適用範圍擴及至

數位資訊，並強化對於使用客戶數位資訊之同意要求，以及澳洲個資保護機關應實行具可行性的數位資訊取得、同意、刪除及保留規範，以因應數位經濟時代下的個人資料保護。

6、會議討論共分2大部分，第一部分討論產業管制機關與競爭法主管機關實質之合作協調關係，第二部分則為討論制度設計。主席對於本會先前所提交之報告進行提問：「依據貴國報告，獨立並非保證管制品質的先決要件，是否指獨立並不重要？依據貴國所提報告，獨立的那一項特性較不相關？」本會代表答以：「我國報告並非指管制機關獨立性不重要，而是指產業專業知識以能及時反應快速變動的管制產業及發展量身訂製之管制政策與管制機關獨立同等重要。正如報告中指出，在創新產業中管制機關是否為獨立機關並非重點，例如報告所引用之案例，獨立的國家通訊傳播委員會(NCC)及隸屬行政體系之管制機關金融監督管理委員會(FSC)以專業性面對創新科技所帶來之挑戰及衝擊是同等重要的，不論其是否為獨立機關。」

二、「合作與執法第三工作小組」(WP3)會議

12月2日下午及12月3日上午召開「合作與執法第三工作小組」(WP3)第130次會議，由WP3主席美國司法部反托拉斯署署長Makan Delrahim先生主持，各項議題討論內容略以：

(一) OECD於透明化及程序公平建議書草案：日本、澳洲、美國紐西蘭等各國代表提出對於建議書草案之修正意見，主席請秘書處參酌各國意見修正後於下次會議中討論。

(二) 監督「有關競爭調查及執法行動國際合作建議書」之執行：本次會議討論OECD競爭委員會及ICN於本年9月對各國所做之問卷調查，OECD共對46個會員國及參與者發出問卷，回收42份，結果將於明年ICN洛杉磯年會中提出報告。

(三) 12月3日上午舉行「案件閱覽及機密資料保護」圓桌會議(Roundtable on “Access to the Case File and Protection of Confidential Information”)，討論各國在競爭法執法行動中對於提供閱卷之各種不同方式，及探討各國如何保護機密資訊。除邀請美國哥倫比亞特區地方法院首席法官Beryl A. Howell 先生及歐盟普通法院法官Marc Jaeger先生與談外，與會共有32個國家及BAIC提出報告。會議重點摘要如下：

1、OECD秘書處先就背景文件資料提出說明，隨後由歐盟普通法院法官(Judge, General Court of the European Union)Marc Jaeger 先生，就歐盟法院實務上授予

閱覽競爭主管機關檔案資料之權利，作簡要報告：

(1) 歐盟法院之司法管轄系統分為2個審級，「普通法院」(the General Court)為第一審，負責審理歐盟機關(如歐盟執委會)所為裁決之適法性；「歐盟法院」(the Court of Justice, ECJ)為上級審，負責審查對普通法院判決不服而提起上訴案件之法律適用疑義，故為法律審，它同時並為解釋歐盟法律以及認定歐盟機關行為是否適法之專責機關，歐盟會員國本國法院對於其國內法規與歐盟法律間存有牴觸疑義時，得向ECJ請求裁決。

(2) 機密資訊維護及閱覽競爭主管機關持有卷宗之權利間存在著緊張關係，二邊權利之衡平取捨，係一項重要課題。依據「歐盟運作條約」(TFEU)第339條規定，歐盟執委會對於機密資訊負有保密責任，特別是關於那些經揭露而會對事業造成嚴重損害之機密資訊。另「歐盟基本權利憲章」(the Charter of Fundamental Rights of the EU)第41條亦確認人民均有權閱覽其個人檔案之權利。前揭法規間之衝突，導致閱覽權之給予一直是案件關注焦點，法院藉由判例之累積，逐漸確立二項權利之平衡運作模式。例如普通法院曾對「商業秘密」做出定義，亦即列入保密義務範圍之資訊僅有少數人知悉，該資訊之揭露可能對提供者或第三人造成嚴重損害，且客觀上，該資訊確實係值得予以保護的。

(3) 在民事損害賠償訴訟中，取得競爭主管機關持有之檔案文件閱覽權對原告而言至關重要，原告除可藉此獲得訴訟所需證據資料外，更可藉此估算其所受損害。然而閱覽之資訊倘屬機密文件，特別是寬恕政策相關資訊，亦會對競爭主管機關未來寬恕政策之執行造成巨大威脅，因為它會降低日後違法事業提供關鍵定罪證據、申請寬恕政策之意願。在此，ECJ重申二項權利權衡之重要性，會員國法院在審理民事損害賠償訴訟案件時，仍必須依據個案(case-by-case)情況，審酌案件所有相關因素，以決定是否同意閱覽競爭主管機關機密資訊及其範圍，ECJ並未全然排除閱覽寬恕政策相關資訊之機會，且不認同競爭主管機關得以可能危及寬恕政策之有效執行為由，即可斷然拒絕原告閱覽所持文件之聲請。

2、美國哥倫比亞特區地方法院首席法官(Chief Judge, United States District Court for the District of Columbia)Beryl A. Howell女士就美國法院實務上，為兼顧當事人抗辯權與競爭主管機關機密資訊之保護，法官常運用之命令措施予以概述：

(1) 法院保護令(protective order)為針對機密資訊及高度機密資訊之常見定義。所謂「機密資訊」指任何商業秘密或其他機密研究、開發及商業營運資訊；「高

度機密資訊」則指任何被保護之人合理認為具有競爭敏感性而需賦予特別保護之機密資訊。被保護令指定之機密資訊除辦理本案訴訟之相關法院職員、司法部(DOJ)檢察官及職員、被告外聘律師及其事務所雇員、被告委任之鑑定或諮詢專家、於機密資訊原即具有閱覽權之作者或收件人等等外，不得向他人揭露，且該資訊僅能用於該次訴訟。

(2) 除了保護令外，法院常用以兼顧機密文件維護及當事人卷證閱覽權之措施，尚有封印(sealing)及開封(unsealing)命令、提供編輯版(redacted versions)資訊供閱覽等措施。關於封印(sealing)程序，Howell女士指出7大檢視要點：(1)倘無法令之授權，封印須取得司法人員同意；(2)封印之聲請應公開予以標記文件號；(3)必須給予媒體與公眾機會聆聽封印之聲請；(4)封印之允許應有公開紀錄；(5)封印不得逾越必要範圍；(6)封印之內容及理由必須完整以供法院審視；(7)當封印期間屆滿，應予以開封揭露。Howell女士另指出，封印限制閱覽之資訊於必要時，得以開封供閱，例如根據原告之聲請理由，法院認為係其推理案情所必需，則開封供閱乃屬適當。

3、羅馬尼亞：

(1) 基於武器對等原則及保障被調查事業之抗辯權，羅馬尼亞競爭委員會(Romanian Competition Council，RCC)在對於被調查事業發出調查報告通知後，被調查事業即有權閱覽RCC的檔案，以使其能夠有效地針對RCC的調查結果提出意見陳述，惟得閱卷的範圍原則排除機關內部文件、他事業之商業秘密，以及其他機密資訊。此外，依據RCC閱卷指導準則，被調查事業僅得閱覽自身所提出之書面意見,對於其他被調查事業所提出之書面意見不得閱覽；然而倘RCC欲於裁罰決定援引其他事業提供之書面意見及資料為依據，則此時必須提供該被調查事業閱覽。

(2) 在授予被調查事業閱覽機密資訊前，RCC必須在保障被調查事業抗辯權與保護機密資訊間，就資訊提供者之觀點、資訊與案件關聯性及敏感程度等因素予以考量，以合理評估其必要性。

4、加拿大：

(1) 加拿大競爭局(Competition Bureau)在執行其職務的過程中，依據加拿大競爭法規定，對於依權力或當事人自願提供而取得之機密資訊，均須遵循機密資訊傳遞公告之相關規定，施以嚴密保護。在民事侵權事件方面，競爭局有義務調查及揭露其所取得或保有與訴訟相關之所有文件。在刑事案件方面，刑事法庭必須對其在判決中所欲使用之文件予以揭露，尤其是被引為控訴之證

明資料。倘有必要在法庭之訴訟程序使用機密資訊，競爭局會盡力保護資訊免於洩漏，其採用之措施包括彌封、保密時間表、非公開程序審理等等。

(2) 維護機密資訊免於洩漏係加拿大競爭局依法所必須遵守之職責，然而該國競爭法仍允許與國際競爭機構夥伴進行資訊交流，惟在將機密資訊傳遞給外國當局當下，競爭局均尋求透過正式的國際文書或外國當局的保證來維護信息的機密性。

5、斯洛維尼亞：

(1) 與其他國家一樣，斯洛維尼亞法律肯認當事人應有權閱覽競爭保護局(Competition Protection Agency)取得之卷宗資料，以確保當事人之抗辯權。有關閱卷之權利，係明文規定在該國限制競爭防止法(ZPOmK-1)第18條，該項權利適用於競爭主管機關之調查程序以及法院之訴訟程序。

(2) 有關被調查事業何時可提出閱卷申請乙節，必須於競爭保護局啟動調查程序後，方會授與被調查事業申請閱卷權利，因為此時事業方具有當事人之身分。當事人須事先向競爭保護局提出申請，獲得該局書面或口頭公告後，方得於辦公時間，在競爭保護局之處所內(通常為會議室)閱覽卷宗，前開同意閱卷公告須於閱覽期日前5個工作日發布。當事人得請求閱卷次數並無限制，只要其提出之閱卷請求合法，另在調查程序終止後，當事人仍可申請閱卷，惟僅限於閱覽其參與之案件資料。

6、立陶宛：

(1) 立陶宛競爭委員會(the Competition Council of the Republic of Lithuania，LCC)執行調查程序，在發出異議聲明書後，當事人即有權申請閱覽卷宗。閱卷方式可利用電子儲存設備，或在LCC辦公場所進行閱覽，惟利害關係第三人在LCC做出最終決定前，係無權閱卷。對於在反托拉斯案件調查程序以及結合程序中所取得的商業秘密資料，LCC負有法定保密義務。為了保護LCC所取得的商業秘密資料，提供事業必須提交保密處理請求，LCC亦可能要求事業提供非機密版本文件，以及對於要保護資訊的描述。對於是否應給予保密處理之准駁決定，事業可以向LCC以及嗣後之法院提出異議。

(2) 關於機密資訊之揭露方面，倘LCC基於保密理由未提供予被調查事業閱覽，而被調查事業認有侵害其抗辯權時，該事業必須證明LCC持有何具體機密資訊，且排除該機密資訊之閱覽，足以影響其抗辯權利。而在國際合作方面，倘LCC未獲得權利拋棄聲明書(waiver)，則不得與其他國內或國外機構共享機密資訊。然而，在處理違反歐盟運作條約第101條、第102條規定案件時，LCC

則例外得與其他歐盟會員國競爭主管機關分享機密資訊。

7、匈牙利：有關第三人閱覽卷宗部分，匈牙利競爭法規定，第三人(例如檢舉人、請求民事損害賠償者)得於匈牙利競爭局(Hungarian Competition Authority, GVH)作出最終決定後，申請閱覽案件卷宗內之非機密性文件。此時，第三人無需證明與欲閱覽之卷宗有法律上之利益，惟倘提供此類非機密性文件予第三人閱覽，將有害GVH執法公益，例如妨礙執法效率或寬恕政策之處理等等，GVH則可以拒絕第三人閱覽。

8、捷克：

(1) 在一般行政程序中，針對閱覽卷宗及保護機密資訊之規範，係規定於其行政程序法(第500/2004號法案)，但是在競爭調查程序中，相關閱卷及機密資訊保護措施之特別規定，則訂定在其競爭法中(第143/2001號法案)。在捷克競爭保護辦公室(the Czech Office for the Protection of Competition)調查程序中，有關卷宗閱覽權之授予，因申請者之身分、閱卷資料之類型及來源而異，針對寬恕政策及和解程序相關資料會採較嚴密之保護，故原則會拒絕提供閱覽。

(2) 除此之外，有關事業之商業機密或其他類似之機密資訊，通常亦會排除在閱覽之列，惟在競爭保護辦公室發出異議聲明書後，當事人有權閱覽任何文件，不論該文件是否已被或將被用作證據，此種允許情形，即使於調查程序終結後亦同。

9、哥倫比亞：

(1) 哥倫比亞工商監督管理局(Superintendency for Industry and Commerce, SIC)為使申請寬恕政策事業與該局合作，以獲取有利資訊，因此對於寬恕政策申請事業及其提供之資訊施以保密措施。依據該國法律規定，申請寬恕政策事業之相關資料應視為機密檔案，且自主要調查程序卷宗中分離，單獨儲存。

(2) 實務上，被調查事業常基於行使其抗辯權之利益主張，而申請閱覽寬恕政策全部文件，惟為保護訊息提供者隱私，避免影響爾後事業申請寬恕政策之意願，致妨礙其調查與執法，此時，SIC必須就雙方權利間之保障予以權衡。通常申請閱卷之被調查事業必須證明欲閱覽之寬恕政策資料與其主張抗辯之點相關且必要的，方得就其主張相關之範圍申請閱卷。

10、歐盟：

(1) 在卡特爾和解案件中，提供閱卷時期及文件範圍均異於一般案件。在可供閱卷時期方面，和解案件可在異議聲明書發出前申請閱卷，此項程序權利之授予是必要的，因被調查事業可藉由閱覽此部分資訊而評估是否要向歐盟執委

會遞交和解意見書，此會影響執委會做成異議聲明書內容之認定。

(2) 在和解程序中，被調查當事人並不得閱覽全部卷宗資料，得閱覽範圍限於其預設將用於答辯之證據資料。此外，當事人亦可以申請閱覽案卷中其他特定資料，以確認其於實施卡特爾行為時期之立場。根據這些閱卷獲得之資訊，當事人嗣後方得以決定是否提出和解申請文件，一旦異議聲明書中回應了當事人之和解意見，則當事人不得再要求聽證或閱卷。

11、挪威：

(1) 在挪威，有關行政程序閱覽卷宗及機密資訊之一般處理措施係規定在「公共行政法」(the Public Administration Act)和「資訊自由法」(the Freedom of Information Act)。當事人閱卷權為挪威行政法一項重要原則，目的係為確保程序公正與保障當事人行使抗辯權。「資訊自由法」賦予民眾閱覽政府機關文件之權利，該法律之目的係為促進公開、透明之公共行政管理，加強資訊及言論自由，提升民主參與及對政府機關之信任，因此，限制閱覽卷宗權利必須要有法律明文依據，惟通常允許閱卷之範圍不包含機密資訊及機關內部文件。

(2) 在結合管制程序方面，根據公共行政法第18條規定，結合案件之當事人方有權閱覽挪威競爭局(Norwegian Competition Authority，NCA)之檔案文件，在該局發出結合通知後，申請結合當事人可於各階段申請閱覽卷宗，而可閱卷之文件原則上爆包含機密資訊，然而倘對透明度及程序公正性之需求大於機密資訊之保護，則例外可以准許閱覽機密文件。在反競爭行為調查程序方面，在一開始，當事人之閱卷權原則上遵循與結合管制相同之規則，惟挪威競爭法第26條規定，受調查之事業僅可在不妨害調查及損害第三人權益之範圍內，給予閱覽NCA卷宗之權利，因此，非如結合管制程序一般，當事人於任何階段皆能閱覽NCA之卷宗。對於拒絕閱覽NCA檔案申請之處分，可以向挪威競爭法庭提起救濟。

12、南非：有關閱覽行政機關檔案之權利係規定在南非競爭法及行政法，前開法律確立一項原則，亦即閱卷權之給予與隱私及機密資訊之保障間必須取得平衡。政府資訊之取得乃南非憲法第32條所賦予人民之基本權，其具體實現細節規定在「促進資訊取得法」(the Promotion of Access to Information Act，PAIA)及「競爭委員會調查程序規則」(the Rules for the Conduct of Proceedings in the Competition Commission)第15條，該等規則賦予民眾在某些情況下得以閱覽南非競爭委員會(the South African Competition Commission)檔案之權利。惟(1)第

三人秘密提供之資訊；(2)因該訊息之揭露而有妨害未來相類似資訊之取得；(3)為維護公共利益所需等情況下，則不在提供閱覽之列。

13、拉脫維亞：

(1) 拉國「資訊自由法」對於何種文件得供閱覽以及應限制閱覽有明文規範，該法律規定除了國家(或官方)機密文件以外應予以限制閱覽之資訊(諸如個人資料、商業秘密、機關內部資料等)，為保障閱卷權及保護機密文件，主管機關必須仔細評估何種資訊應限制提供閱覽。此外，商業法、個人資料處理法等特別法，亦分別對於商業秘密、個人資料之定義，以及應予保密之範圍有明文規定。

(2) 在反競爭調查程序中，與案件相關之直接證據資料，例如聯合行為事業間之往來電子郵件，通常不會被列為機密資訊，但為顧及第三人之隱私，此類資訊將施以部分保護，不會在決策的公開版本中予以揭露。

14、土耳其：

(1) 有關機密資訊之保護係規定在競爭保護法第4054號之第44條條文，其執行原則及程序則規定在「處理閱卷及機密資訊保護事宜第2010/3號公報」(Communiqué Related to the Arrangement of Access to File and Protection of Confidential Information No. 2010/3)。在不違背競爭法之精神下，當事人被賦予充分、適當之閱卷權利以確保其行使抗辯權。依據競爭保護法第44條規定，當事人得要求競爭主管機關給予與其有關之任何文件副本，第2010/3號公報第6條並規定當事人得在競爭主管機關內部閱覽其所有文件以及與其相關之證據，惟機關內部通訊、其他事業之商業秘密，以及其他機密資訊則不可供閱。

(2) 所謂「商業秘密」，包含事業之know-how、成本評估、生產秘密及過程、供貨來源、產量、經營計畫、客戶名單、與銷售策略相關之技術或財務資訊等等；所謂「其他機密資訊」，包含商業機密以外，只要經揭露將會嚴重損害個人或事業之一切資訊。在競爭保護法適用範圍內，競爭主管機關可以從事業、事業團體及個人取得資訊及文件，該法第25條及第53條並明定商業秘密、機密資訊應加以保護之義務，倘檔案含有商業秘密或其他機密資訊，會視情況全部拒絕供閱，或將敏感部分予以刪除供閱。

15、西班牙：

(1) 依據競爭法規定，競爭主管機關不論基於職權或當事人要求，均可隨時以命令將任何文件或訊息視為機密而予以列，該法並規定，當事人申請將其提供文件視為密件之同時，尚應提供該文件之非機密版本。主管機關在考慮將文

件列為密件時，在形式上首應應評估當事人要求保密之動機及文件之性質。

(2) 另外，在實質方面應進一步考量：訊息內容是否確屬商業秘密，事業應證明其資訊有因揭露而造成嚴重損害之虞，方能被視為商業秘密；倘該商業秘密業向第三人揭露，或在事業外部已是公知狀態，因而失去機密性，則不會被視為密件對待。此外，倘商業秘密屬當事人在訴訟中待確認之事實而為行使抗辯權所必須者，則不會被列為密件而限制閱覽。

16、以色列：

(1) 以色列競爭局(the Israel Competition Authority，ICA)認為，閱覽案件檔案權與保護機密資訊同等重要，多年來，該局一直為求二者之平衡發展而努力。有關限制閱覽機密資訊情形之歸類上，該國行政法庭法(the Administrative Tribunals Law)第30(b)條規定了得排除供閱之資訊，包括與訴訟無關之資料(含職業或交易秘密、法律明定應予保密之知識)、國家安全機密、外交或重要公益文件、法律明定之機密證據、機關內部文件(如內部討論紀錄、向上級報告文件、內部提案草稿)、揭露致有侵害他人權利或個人利益(如個人隱私)之文件等等。

(2) ICA在進行調查程序之初期，在蒐集資料時，即會要求提供者同意揭露相關文件，倘提供者拒絕揭露，其必須援引法律規定之支持其主張。為兼顧當事人之閱卷權，ICA通常會衡平地提供因應措施，以減少對涉案當事人之潛在傷害。這些措施可能包括，僅提供簽署保密協議之當事人律師或經濟專家閱覽機密文件，或是提供刪除機密資訊或重新彙整之文件供閱覽。如果案件檔案包含高度敏感資訊，或有其他正當理由需要提供比上述措施更高程度之保護，則ICA可能會建議利用資訊室(information room)之機制，讓簽署保密協議之當事人律師或經濟專家，在ICA之資訊室閱覽卷宗。

(3) ICA認為尋求適當之方法來保護各方提供之機密資訊至關重要，因此，在涉及高度敏感資訊之情況下，ICA運用諸如資訊室是類之解決方案，使揭露機密資訊之潛在危害將至最小，以保護向ICA提供文件和資訊之第三人利益，並確保未來合作之延續和有效地蒐集資訊，同時保障涉案當事人正當程序權利。

17、英國：

(1) 為確保閱卷程序有效率地進行，英國競爭局(CMA)通常會向當事人寄送(1)酌情修正、於異議聲明書中直接提及之文件(關鍵文件)副本；(2)載有關鍵及非關鍵文件(異議聲明書中未直接提及之其他文件)清單。當事人接獲文件清單後，得以有機會檢視清單，並要求檢視表中所列之其他文件。如當事人要求閱

覽清單中所列之其他文件，CMA會考慮使用保密圈(confidentiality rings)或資料室(data rooms)方式以利閱卷程序之進行。前開閱覽方式通常在相關當事人同意，且在異議聲明書發出前已事先與受調查事業經過討論下，方可運用。

(2) CMA通常透過保密圈提供案件相關特定數據或資訊之電子檔閱覽，而資料室則提供對CMA場所中之機密資訊或文件檔案閱覽，因此具有提供當事人額外保障之優點。閱覽保密圈或資料室中文件之人須受保密承諾約束，其中包括限制使用及如何運用向其揭露之機密資訊等事項。進入保密圈或資料室之條件為，有權閱覽之受任法律顧問所檢閱之資訊不會與其客戶共享。法律顧問遵守他們根據任何相關專業行為規則所必須採取之步驟，以確保他們能夠在此基礎上執行其職務。使用保密圈和資料室之請求將視情況而定，CMA有權決定是否允許此類要求，通常只有在必須、明顯有益，且可以在與相關當事人達成協議後迅速解決潛在法律及實際困難等情況下，CMA將綜合權衡案件之進展、執行保密圈及資料室對資源、人為錯誤及資訊洩漏風險等影響，考量是否同意使用保密圈及資料室方式提供機密資訊閱覽。

18、BIAC(Business and Industry Advisory Committee)：為求被調查當事人可閱覽完整卷宗以行使抗辯權，以及保護高度敏感商業資訊，競爭主管機關可藉由重新編輯檔案文件、設置保密圈或資料室等機制，以平衡二項權利間之衝突。考量到案件資料對於被調查事業權利保護具重要性，主管機關必須在適當地運用保密圈或資料室等機制，在對資訊提供者損害最小化之前提下，允許被調查事業閱覽完整卷宗，以保障其抗辯權。如執行有困難，則至少應以重新編輯或彙整資料內容之形式提供閱覽。

19、比利時：為保護比利時競爭局(BCA)所取得之機密文件，比利時經濟法(the Code of Economic Law, CEL)明文禁止BCA所屬職員，向無權閱覽卷證資料之人或單位揭露機密資訊，違者將被科處刑罰。同樣地，法院於接獲此類文件時，亦必須採取有效之保密措施。然而，在例外情形下，如與BCA簽訂有合作協議之監管機關(regulator)，BCA可與該機關交換除了自其他歐盟競爭主管機關或寬恕政策申請人所取得資料以外之機密資訊。目前與BCA簽訂合作協議者，有能源(CREG)、電信及郵政(BIPT)等監管機關。此外，依據歐盟法律，BCA可以不受限制地，與歐盟執委會或其他歐盟成員國之競爭主管機關共享所有資訊。

20、俄羅斯：根據俄羅斯法律，商業秘密乃屬機密資訊之一，不允許供第三人自由閱覽。俄羅斯聯邦反壟斷局(the Federal Antimonopoly Service of the Russian

Federation，FAS Russia)在審理案件時，必須在商業秘密資訊提供者利益與涉案當事人合法抗辯權之間取具平衡。為確保涉案當事人充分、正確地行使其抗辯權，在無正當合理事由下，不得不當限制其閱覽商業秘密資訊，倘該秘密係當事人行使抗辯權所必需。折衷而平衡的作法為，讓商業秘密資料提供者以書面同意主管機關揭露予其他涉案人，此項措施之採行，除可獲得法律上之保證，並可使反壟斷案件調查程序之進行更有效率。

21、愛爾蘭：

(1) 有關提起競爭法案件民事損害賠償請求之第三人，申請閱覽愛爾蘭競爭及消費者保護委員會(the Irish Competition and Consumer Protection Commission，CCPC)所持有檔案資料之權利，係依據歐盟「違反競爭法損害賠償訴訟法」(Actions for Damages for Infringements of Competition Law，SI 43/2017)。該法第6條規定，第三人因他事業違反競爭法而提起民事損害賠償訴訟，得在不違反禁止未經授權許可揭露機密資訊之情形下，閱覽CCPC之檔案。該條條文亦規範法院應均衡地評估揭露CCPC檔案所含證據資料之妥適性。在競爭法案件訴訟程序中，CCPC檔案可以是自發性供閱，或是由法院依「高等法院規則」(the Rules of the Superior Court)第31號命令第29條(Order 31 rule 29)規定，強制命令供閱。至於民事損害賠償訴訟程序，法院係依據SI 43/2017規定，命CCPC揭露檔案所含之證據資料。

(2) 倘CCPC並非民事損害賠償訴訟之當事人，提起訴訟之第三人在請求閱覽CCPC檔案文件時，必需舉證CCPC可能擁有其所需文件，且該文件與其訴訟主張權利相關，而法院對於該第三人之聲請，應予審慎評估而仍有保有准駁之權。又第三人係按SI 43/2017請求並獲得准許閱覽CCPC之檔案文件時，得閱覽之範圍不包含依SI 43/2017第6條第4款所取得之寬恕政策或和解聲明相關資訊。此外，在CCPC調查程序終結前，依據SI 43/2017第6條第3款所取得非關寬恕政策或和解聲明之資訊，亦不允許提供閱覽。

22、瑞士：

(1) 對於公共採購圍標案件受害之第三人而言，為評估其潛在受損情形並主張其權利，可能會有需要申請閱覽瑞士競爭委員會(the Swiss Competition Commission，COMCO)所持有之檔案文件，而政府採購機關亦可能因此向COMCO請求調閱檔案。然而，與違反競爭法涉案當事人不同的是，政府採購機關可請求閱覽資料之範圍與時間係有所限制。近年來，COMCO發現並起訴了若干件圍標卡特爾案件，為此，政府採購機關，特別是州或市政府當局，

乃提出調閱COMCO卷證資料之要求。由於政府採購機關所得調閱卷證範圍非如涉案當事人廣，僅在其執行法定業務必要範圍，且因圍標而受有損害之情形下，方享有閱覽COMCO資料之權利。一項具指標性之考量原則為，保護採購機關招標利益必須大於被調查當事人之保密利益，方可允許採購機關調閱COMCO相關資料。然而，COMCO不會同意提供寬恕政策申請相關文件供閱覽，因為此關係到寬恕政策是否能有效運作，此項利益乃大於採購機關因圍標所受損害而提出民事損害賠償之利益。

(2) 由於部分採購機關並不認同COMCO之前述觀點，就某件圍標案件之民事求償訴訟，向聯邦行政法院(the Federal Administrative Court)提出救濟，要求COMCO提供寬恕政策相關文件供該機關閱覽。目前法院仍在審理當中，此問題尚未解決。值得一提的是，在以往，聯邦行政法院基於普遍之公共利益考量，曾同意有限制地提供寬恕政策相關資料供閱覽。

23、美國：

(1) 有效保護機密資訊對於競爭主管機關獲取評估所需之敏感資訊，並在必要時提出於法院作為證據資料至關重要。如果競爭主管機關決定向聯邦法院起訴涉法案件，則被訴當事人有權根據憲法規定以及由獨立聯邦法官執掌之聯邦民事訴訟規則，檢視控訴其行為之具體證據。聯邦法官擁有廣泛之工具可資運用，包括下達保護令，以保護機密性之商業資訊。此類保護性命令之條款可能會有所不同，但是在審判前之程序中，此類命令通常要求將敏感資訊予以彌封，僅供當事人之委任律師閱覽。

(2) 同樣地，聯邦交易委員會(FTC)在其第3部分規則(Part 3 Rules)中亦制定了保護令範本，除一般性地禁止機密資訊供公眾閱覽外，例如將機密資料彌封並要求對任何敏感資訊進行非公開檢視(in camera review)，此範本還考慮了被控訴人之需求以及防止第三人提供之敏感資訊洩露予競爭同業。為保護機密資訊，保護令範本允許被控訴人之外聘律師有權閱覽機密資訊，並且不允許第三人提供之機密資訊揭露予被控訴人之內部法律顧問或職員。

(3) 如果FTC根據第3部分規則向聯邦法院提起行政控訴或民事求償訴訟，則FTC之機密保護令將繼續適用。FTC之規則固然規定，透過強制程序所取得之資料、標記為機密之資訊、機密性之商業或金融資訊，得以在行政調查或法院訴訟程序中揭露，但資訊提交人將事先給予機會，尋求適當保護命令或從裁決者處發出非公開檢閱(審理)之命令，以維護其權益。

24、主席就我國所提書面報告提問我國與外國競爭主管機關分享機密資訊乙節，

我國代表回答略以：

(1) 我國公平會因案件調查所獲資料，部分會涵蓋檢舉人、寬恕政策申請人提供之機敏資訊，以及事業之營業秘密資料，故而對其負有保密之必要。因此，在閱卷權利保障、與他機關合作分享以及機密資訊維護之間，必須取具平衡。當我國國內其他機關請求提供機密資訊時，如該資訊僅涉及個人資料或營業秘密者，則將該資料另為彌封或妥當處理後提供，其餘機密資訊原則不予提供。

(2) 儘管在競爭法相關議題之國際合作方面，我國公平會得依與外國簽署之雙邊貿易協定或備忘錄約定，基於互惠原則，以及視對方國是否有採相同保護措施等情，而與外國交換資訊，惟所得交換之資訊內容範圍囿於國內相關法令規定(諸如國家機密保護法、營業秘密法、個人資料保護法等等)，對於交換機密資訊一事仍存有限制。

(3) 然而我國深知與國際交流合作對於結合案件評估以及遏止國際性卡特爾之重要性，仍積極藉由一些非正式管道(如電子郵件或電話會議)與國際競爭主管機關合作，針對非機密資訊(如相關市場範圍界定、相關產品或市場定義、違法案件之法律程序、案件調查技巧與經濟分析方法之應用等)，分享辦案經驗與心得。

(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3日下午至12月4下午舉行「競爭委員會」(CC)第132次會議，由CC主席Frédéric Jenny先生主持，討論議題如下：

(一) 墨西哥同儕檢視：由巴西、美國及挪威擔任檢視人，對墨西哥之寬恕政策、結合與處分及倡議與國際合作等面向提出檢視質詢。秘書處提出檢視報告及建議。

(二) 競爭委員會 2020 年主席及委員選舉結果：

1、由現任法國 Frédéric Jenny 先生續任 CC 主席，委員分別為：比利時競爭局局長 Jacques Steenbergen 先生，加拿大競爭局局長 Matthew Boswell 先生，挪威競爭局局長 Las Sørgard 先生，德國聯邦卡特爾署署長 Andrea Mundt 先生，日本公平交易委員會委員 Reiko Aoki 女士，韓國公平交易委員會卡特爾調查處處長 Kim Hyung-Bae 先生，拉脫維亞競爭委員會主任委員 Skaidrite Abrama 女士，

墨西哥聯邦經濟競爭委員會主任委員 Alejandra Palacios Prieto 女士，紐西蘭商業委員會委員 Jill Walker 女士，西班牙國家市場及競爭局局長 Jose Marín-Quemada 先生，瑞士競爭委員會主任委員 Andreas Heinemann 先生，英國競爭及市場局局長 Andrew Tyrie 先生。

2、另外，義大利 Alberto Heimler 先生及美國司法部反托拉斯署署長 Makan Delrahim 先生因分別擔任 WP2 及 WP3 主席，葡萄牙競爭局局長 Margarida Matos Rosa 及奧地利競爭局法務處處長 Natalie Harsdorf 女士因分別擔任 ICN 及 UNCTAD 協調人，為委員會當然成員。又歐盟競爭總署代理署長 Cecilio Madero Villarejo 先生請求被選入委員會成員一事，將於 2020 年初由各國代表透過過書面程序決定。

(三)「軸輻式協議」圓桌會議(Roundtable on “Hub and Spoke Arrangements”)：

1、本議題討論有關軸輻式協議行為案例與主要國家對其所訂立之舉證標準，特別是在數位市場中所產生之軸輻式協議風險。會中邀請英國倫敦 Charles River 顧問公司 Mattew Bennett 先生、美國舊金山 Gibbson Dunn 法律事務所 Rachel Brass 律師及英國劍橋大學 Okeoghene Odudu 教授與談，另有 21 個國家提出報告。會議首先由 OECD 秘書處進行背景說明，略以：

(1) 軸幅式協議係指同一水平競爭事業間，藉由垂直關聯(通常是中間商或供應商)形成合意，進而組成卡特爾。基本上零售商跟供應商之間的資訊交換，在法律上來說並沒有問題，然而零售商如果將自身資訊，藉由共同供應商(即「軸」，Hub)，傳遞給其他水平競爭事業(即「幅」，Spoke)，或供應商藉由共同零售商，傳遞給其他具水平競爭關係之供應商時，即可能出現競爭法上的疑慮。軸幅式協議基於組成特性，有眾多議題值得討論，以下將初步就經濟、法律等層面可能出現的問題進行說明。

(2) 在經濟面上，擔任資訊傳遞者的經濟誘因為何？因為上游或下游之市場競爭，與「軸」本身所處之市場並不相同，因此願意協助其上游或下游業者進行資訊傳遞，甚至協助組織、維持卡特爾的經濟誘因為何？上游或下游市場存在具市場力量之事業是否為必要條件？

(3) 在法律面上，如何區分事業之行為係屬軸幅式協議，或僅只是上下游廠商間的資訊交流或約定？如果上游廠商藉由限制轉售價格作為維持軸幅式協議的手段時，我們應將其視為單向垂直交易限制，或是上下游之間的雙向協議？

(4) 競爭法主管機關在面對軸幅式協議時，通常會遇到許多挑戰，這些挑戰包括如何去證明水平競爭事業間，存在以上、下游之其他事業作為資訊傳遞管道，

進而達成合意之意圖，且證明這些資訊確有在水平事業間傳遞亦屬關鍵。另外在調查中，基於產業特性的不同，有時會涉及龐大的調查規模，因此調查單位如何設定調查的先後順序，也是軸幅式協議調查的挑戰之一。

2、Matthew Bennett 先生：

(1) 軸幅式協議一般可以分為 2 種類型：第 1 種是供貨商之間藉由共同零售商(即下游)進行資訊交換，第 2 類則是零售商之間藉由共同供貨商進行資訊交換。相較於直接資訊交換，進行間接資訊交換的難度較高，原因是廠商間必須先建立間接資訊交換的信賴模式,這通常也需要透過廠商間直接對話才能成立。此外，資訊傳遞者，即第 3 方事業是否有誘因擔任垂直訊息傳遞的角色，亦為一大難題。

(2) 在第 1 類的情況中，由於協議的結果可能導致批發價格提高，因此零售商通常不具協助供貨商進行資訊傳遞之誘因。然而，實務上這樣的情況依然可能發生，原因是當供貨商市場力量夠大時，零售商通常別無選擇，或是供貨商對於協助資訊傳遞的零售商，有給予特別折扣，或對於零售商來說，相較於降低進貨成本，確保供貨穩定才是其經營要務等情況，都可能導致訊息垂直傳遞的情況發生。

(3) 第 2 類情況中，因為供應商通常樂見於零售商有較多的銷售數量，以確保較好的銷售表現及利潤，如果零售商藉由資訊交換提高價格，將導致銷售數量減少，對供貨商不利。故理論上供貨商不會支持這類會導致零售價格提高之資訊交換。然而，實際上供貨商仍可能進行資訊交換，其原因是如果這些零售商對於供貨商而言至關重要，供貨商可能別無選擇。且在同質性高、競爭激烈的市場中，供貨商倘拒絕，零售商即可能會轉向其他供貨商，在可能會失去交易對象的疑慮下，供貨商即有誘因介入零售市場，協調零售價格，其方式包括限制轉售價格，或是對於偏離市場價格的零售商給予懲罰等。另一方面，提供該項「價格維持」服務的供貨商，也會獲得零售商的青睞，再次增強供貨商參與零售價格聯合行為的誘因。在零售商價格穩定、競爭平緩的情況下，即使零售商本身具有成本上優勢，亦難將其反映在終端售價上，使零售商缺乏要求供貨商調降批發價格的誘因，即可能出現批發市場銷售數量下降，但整體批發市場產值卻提高(因批發價格提高)的現象。

(4) 此類軸幅式協議實務上難以被證明，原因是這類協議通常不會留下任何書面紀錄，縱使有，其內容亦經常曖昧不清，且因零售商與供應商間資訊交換係屬常態，競爭法主管機關也無法僅依據資訊上流動，即認定當中存有該類協

議，因此，這對於競爭法主管機關而言，無疑是很大的挑戰。

3、Rachel S. BRASS 女士：

(1) 軸幅式協議，係指事業藉由垂直交易限制，使其上游或下游廠商形成合意的一種卡特爾形式。該事業就像是輪軸中的軸心，藉由像幅條一樣的上下游交易關係，使另一個市場的廠商間產生一致的行為，就像是輪子的邊緣(輪輻)，因此得名。在美國競爭法中，因為此類水平事業聯合係屬行為不法，故軸幅式協議自也屬行為不法之類型。該協議在美國的觀察重點是，這些水平事業間是否確實達成協議。因為在美國，個別廠商之間的資訊交換，即便在水平競爭事業間，如未達成協議，亦難稱其有違反競爭法之規定。因此，在軸幅式協議中需要特別觀察水平競爭事業間，是否確實透過這種方式達成協議。

(2) 協議過程中無可避免會觸及限制轉售價格之規定。在供應商與零售商的交易過程中，各項資訊之交換係屬常態，而透過限制轉售價格之方式，無疑是進而形成水平協議最有效的路徑。限制轉售價格對於市場可能有著正反兩面的效果，一方面限制轉售價格可能促使生產者研發更異質化的產品、提升產品相關服務，亦使零售商更有推廣產品之誘因，然而另一方面亦可能削減品牌間競爭、降低廠商進行價格折扣之可能，也會使製造商失去降低批發價格的壓力。

(3) 在 FTC 對 Toys-R-Us(下稱 TRU)一案中，1980 年代最大的玩具零售商 TRU，要求上游玩具供應商拒絕提供某些特定型號的玩具，或拒絕銷售予其他低價搶市之競爭者，如 Costco。製造商也在確保其他製造商也加入該協議之條件下，同意 TRU 的要求。FTC 認為本案 TRU 以個別垂直交易關係，對於各家玩具製造商均達成同一協議的行為，不論以行為不法或以合理原則的觀點，都係屬水平杯葛的促成者，且 TRU 與玩具供應商之間的垂直協議，亦違反休曼法(Sherman Act)第一章的內容。TRU 則主張，本案 TRU 與玩具製造商間個別的、垂直的協議，並未促成製造商產生水平合意，即一致性行為的發生。最終美國第 7 巡迴法院考量實務上製造商突如其來對於部分業者採取抵制並不尋常，以及案關製造商間均有意識地放棄部份的獲利，意圖降低其對於 TRU 之依賴程度等違反商業邏輯之行為後，決定支持 FTC 於本案之見解。

(4) 軸幅式協議調查最困難的部分，係證明這些水平競爭事業間，存在聯合行為之合意。鑑於軸幅式協議中，訊息傳遞係經由垂直關係進行。當然，水平競爭事業間倘存有實體協議，係最簡單的情況，亦足以證明案關水平競爭事業間對於水平協議之存在，並非毫無所悉。法院也曾認為，當水平競爭事業間

認知到交易相對人對於其他水平競爭事業亦存在相同之協議內容時，渠等之參與即會被解讀為承認該水平協議之存在，即有可能會被視為水平聯合行為之參與者。然而，水平競爭事業間倘僅是「知道」供應商間存有非法之最低銷售價格要求，進而導致各零售商均會出現相同訂價，則這並不足以去推論該等水平競爭事業間具有聯合行為之合意，還必須進一步證明該等水平競爭事業間就該協議具有合意才行。

4、Okeoghene ODUDU 教授：

(1) 水平競爭事業間不論係透過直接，或是經由其他事業達成合意，歐盟均將其視為水平競爭事業間的聯合行為。因此，歐盟目前並沒有對於軸幅式協議訂有其他特別的規定，基本規範原理仍適用歐盟運作條約第 101 條第 1 項之內容。於此脈絡下，事業雖有獨立決策之義務，然而，並不意味著事業完全不能將其他競爭者過去及現行的表現納入考量。此時，重點即在於事業係如何取得資訊，以及取得資訊之管道為何，才會被認定為具有決策之獨立性。舉例來說，倘廠商 A 將其自身的重要經營資訊，告訴水平競爭事業 C，而 C 也沒有拒絕接收該資訊，於法院見解上，因為將自身營業資訊告訴其他競爭者，並不符合商業競爭的邏輯，其間隱含破壞市場競爭意圖的可能性相當高，故該行為會被視為有違事業決策獨立性。試想廠商 A 如果將未來訂價資訊告訴廠商 C，則依商業理性，廠商 C 不可能未將廠商 A 之未來價格資訊納入其決策考量。注意，雖然係使用「資訊交換」這個名稱，而在前開情境中，資訊是單方面的流動，即 A 到 C，仍然會被視為係資訊交換之類型。

(2) 要避免前開資訊交換並不困難。透過禁止廠商 A 釋出自身營業資訊，或是禁止廠商 C 接受來自廠商 A 的資訊，即可直接、有效地解決這個問題。然而，在英國經驗中可以發現，該方法於間接資訊交換的情境中並不適用。假設廠商 A 將資訊告訴上游供貨商 B，該行為本身並不會對於市場競爭產生任何影響，有時亦有其必要性，如提供供貨商 B 其未來銷售及供貨計畫等，因此直接要求廠商 A 不要透漏任何資訊予供貨商 B 有其困難。另一方面，如果供貨商 B 又將獲得資訊，傳遞予水平競爭事業 C，則廠商 C 基於事業經營之需要，自不會拒絕接受該資訊。英國法院對於這樣的情境認為，廠商 A 倘係於明知供貨商 B 會藉由提供資訊予廠商 C，以影響市場競爭之情況下，仍選擇將自身價格資訊提供予供貨商 B，供貨商 B 也確實將該價格資訊傳遞予廠商 C，廠商 C 亦確實利用該價格資訊作為廠商 C 未來的訂價之參考，則廠商 A、B 及 C 均可被視為意圖扭曲或破壞市場競爭之聯合行為主體。

(3) 對於競爭法主管機關，倘依前開法院之意見，最大的挑戰即是證明廠商之意圖。當然，廠商間倘存在具體、明文的協議，則競爭法主管機關即可明確界定其行為及意圖。但較多的情況是，這類行為通常未有書面協議，故英國訴訟實務上，會以提供之資訊是否必要，作為其意圖的判斷依據。基本上會限制市場競爭之資訊都被視為不必要，如果廠商將此類不必要價格資訊提供予交易對象，即有限制市場競爭之意圖。因此，資訊交換之重點並不在於廠商透過直接或間接之方式，將資訊提供予其他事業，而是廠商所提供的資訊，是否屬於必要之資訊。於前面所提情境中，供應商 B 係資訊的傳遞者，事實上廠商 A 或廠商 C 均不知道該資訊傳遞過程的全貌，因此在寬恕政策的適用上，英國即會將供應商 B 被視為重點對象。

(四)「市場退出障礙」圓桌會議(Roundtable on “Barriers to Market Exit”)：

1、各國競爭政策焦點多放在市場進入障礙(參進障礙)，但少見討論市場退出障礙。市場退出障礙可以定義為：由於退出市場之經濟成本可能高於留在市場中之成本，以致可能迫使事業繼續留在市場中運營之障礙。退出障礙之一項指標是企業活力持穩地下降。如同參進障礙一樣，市場退出障礙會減損市場競爭機制，使效率低落之事業仍持續留在市場內，導致市場資源無法有效進行有效分配，阻礙高效率事業成長以及創新性事業之產生，因而對水平市場競爭及經濟成長造成不利影響。本議題主要討論競爭法主管機關如何在其執法及倡議工作中考量市場退出障礙。

2、會中邀請法國 ESEEC 高等經濟商業學院 Jocelyn Mantel 教授、英國 Oxera 律師事務所合夥人 Matthew Johnson 律師、美國賓州理海大學經濟學系 Mary Beth Deily 教授及 OECD 經濟處資深經濟學者 Müge Adalet McGowan 女士與談。本議題計有 8 個國家及 BIAC 提出報告，會議分成 4 大主題進行討論：(1)市場退出障礙定義及其在競爭法執法中之角色，(2)退出障礙之法律與管制及競爭政策，(3)不同破產法廠商對於廠商退出產業的能力(或困難)之影響及(4)市場退出對於資源重新配置、創新與生產力之影響。

3、Müge Adalet McGowan 女士：

(1) 總體生產效率之增長有賴無生存能力之事業退出，使生存下來之公司進行內部重整、資源重新分配，進而能擴大增長。然而因法規或政策保護因素，導致退出障礙，使生產力低落、無生存能力之事業仍留在市場中，瓜分資源，這些所謂之「殭屍公司(Zombie firms)」正日益增加中，常見之因素如銀行低利率、政府政策支持、破產制度不健全等，故各國應提出有效對策予以因應。

(2) McGowan 女士指出，破產制度改革可以解決生產力低落之 3 個結構性根源：(1)減少沉沒入(sunk)殭屍公司之資本；(2) 將資本重新分配給生產力更高之事業；(3)透過更有效之技術擴散，使落後事業提高生產力。另外，來自體質較弱之銀行提供不良信貸，亦增加殭屍公司之生存率，倘若銀行體質獲得改善，即可減少對於殭屍公司寬容信貸之動機。此外，數據資料顯示，透過減少初創事業之行政管理負擔，亦對於落後事業生產力之提升有所助益。

4、Mary E. Deily 教授

(1) 渠以美國鋼鐵業為例說明市場退出障礙對於大型綜合鋼鐵公司及小型鋼鐵公司之生存影響。美國鋼鐵產品需求在 1973 年達到顛峰，嗣後 20 年來就未曾再達到該峰值，行業經歷嚴重萎縮。1970 年代，尚有 19 家綜合鋼鐵公司，到 2000 年代初期，大多數企業已被清算或轉移到另一個行業。造成鋼鐵業市場退出障礙因素，包含耐久資產(如高爐、煉焦爐)、高額結算成本(如資遣費、退休金、環境修復費用)。然而儘管需求停滯不前，仍有眾多小型鋼廠參進市場。小型鋼廠透過熔化廢鋼來生產鋼鐵產品，規模要比綜合鋼鐵公司小得多，惟其市占率從 1970 年的 15%增長到 2000 年代初的約 45%。因此，公司願意投資於擴大產品範圍之新技術，才有可能實現增長。

(2) 對於鋼鐵業而言，週期性效應及長期效應尤其難以視清，在 1970 年代末對 1980 年代美國需求之預測完全錯誤，最終，公司開始要求勞工進行讓步，關閉工廠，加速使用外包方式。部分公司為求生存試圖專注於核心業務，然而維持鋼鐵專業化卻是一個失敗例子，遵循該策略之公司都因此破產並清算。清算通常會導致某些資產出售，如果一個行業在衰退，破產重組會減緩產能減少，破產重整使部分公司延長一段生存期間之例子如 LTV 公司 14 年、Wheeling Pitt 公司 17 年。

(3) 在一個基礎穩定或增長行業中，FFD(failing firm defence)結合豁免最有意義；反之在衰退行業中，產能需要退出市場，以便價格可以稍微上漲，倖存者得以負擔成本；然而，當整個行業處於低迷狀態時，豁免壓力可能相當巨大。業界常存有美好之理想，期待合併效果使結合後之公司變成有效率之競爭對手，這在不同公司結果迥異，在 LTV 公司案例中，係以失敗收場；在 USX 公司案例中，其透過結合進行多元化經營則相當成功。綜合而言，幾乎沒有證據顯示，現存之市場退出障礙對新參進者有影響，也許是因為其退出障礙較低；高市場退出障礙確實延緩了事業退出，預期和重組之緩慢調整，加劇了這種現象；而水平合併並未創造出有效率、可行的競爭對手。

5、Matthew Johnson 律師：

(1) 在結合管制方面，標準結合管制之損害理論可能會因市場退出障礙之存在而受到影響，然許多結合管制政策多將重點放在結合對市場競爭所造成之增量影響，反較少去關注結合所導致之反事實效益。同樣地，在評水平或垂直限制競爭行為時，關注之重點往往在實際或潛在對手間之競爭，或對競爭對手之排除等影響，亦很少考量市場退出障礙。

(2) 當高效率、創新事業市占率提升，低效率事業市占率下滑時，則市場競爭之結果將使效能最差之事業退出市場，因此市場退出障礙阻止低效能事業退出市場，影響資源分配，不利於市場競爭。2014 年 OECD 競爭政策及宏觀成果情況說明書內容即指出，「外部重整」(external restructuring)方式對提高生產力之影響，顯然較「內部重整」(internal restructuring)方式(如約束事業在其現有結構下更有效率地產出)更具重要性。當退出障礙阻止競爭機制發揮作用時，將使市場效率及生產力等利益受到限制。

(3) 為解決市場退出障礙所帶來之不利競爭之影響，渠認為破產及行政管理猶如一把兩面刃，在理想情況下，它需要調整，以利效率低落之公司和資產退出市場，確保有效資產不會退出市場並重新分配給最有效率之事業，並避免體質上有效率但因遭受暫時性困難之公司意外退出市場。

6、Jocelyn Martel 教授：

(1) 市場進入和退出障礙是將資源有效分配給更高價值用途之關鍵因素，二者互相關聯，因此降低退出障礙將使事業更容易進入市場，經驗顯示，減少退出障礙有助於生產力成長。破產法是處理陷入財務困境之公司退出以及對資源進行重新分配之一種手段，然其與競爭法可能存在著相互衝突之目標。破產法為財務陷入困境之公司提供集體訴訟，其目標是最大化公司之價值(直接重組或出售資產)及債權人權利之恢復彌補。競爭法則禁止可能會大幅降低競爭、導致卡特爾或壟斷之交易。破產法具回顧性，與受破產影響之下游投資者(債務人及債權人)打交道，促進包括資產出售在內之快速解決方案，以最小化不確定性及成本，並求價值最大化，專注於最高出價者而非反托拉斯問題。相反地，競爭法具前瞻性，與事業破產時可能不在場之上游消費者打交道，分析交易對競爭影響之過程通常是漫長且成本很高，除非有顯著之效率提升，否則不會促使資產出售，競爭法主管機關可能會質疑已確認之破產決定，擔憂破產債權人和破產參與者為了限制交易而訂立協議之反競爭行為。破產法和競爭法之衝突目標可能導致事業財務困境有效解決後，反有礙於競爭法之

執行。

(2) 資源之有效分配受到許多市場失靈因素影響，公司之存亡受一套可能影響其進入或退出市場能力之法規支配，為處理破產公司困境而銷售部分或全部資產可能涉及競爭法問題，尤其是在買方來自相同行業之情況下。在維護債權人與消費者利益之議題上，破產法和競爭法之目標可能會相互衝突。實施過競爭法執法過嚴，可能導致其他生產性資產之拆解或分配效率低下，並降低債權人損失之追索率。反之，實施過於寬鬆之競爭法，可能導致未來競爭減低及消費者損失。對於一家財務陷入困境之公司，競爭法問題通常緊隨破產問題之後。因此，競爭法主管機關有責任建立一快速、完整之流程，來評估此類交易，以使迅速且價值最大化之破產程序得以確保。

參、亞太競爭法主管機關高階代表會議

一、OECD 秘書處競爭組在 12 月 4 日(星期三)下午 2 時 30 分至 6 時 30 分另外舉行「亞太競爭法主管機關高階代表會議」(Meeting of High Level Representatives of Asia-Pacific Competition Authorities)，我國由代表團團長洪委員財隆率杜幸峰視察出席。本次會議主題為：「數位化之競爭議題－從政策至實務(Competition Issues of Digitalisation – from Policy to Practice)，由澳洲競爭及消費者委員會(ACCC)前主任委員 Allan Fels 教授主持，計有澳大利亞、柬埔寨、香港、印度、印尼、蒙古、日本、韓國、泰國、新加坡、菲律賓、中國、美國、越南、紐西蘭及我國等代表參加。

二、Allan Fels 教授致詞時表示，本會議主要在探討，在數位化時代競爭法主管機關能做什麼？需要做什麼？實際可以做什麼？但會議討論主要將聚焦於競爭議題。

三、專題演講：從區域以外看數位問題(Keynote Views on Digital from Outside the Region)

(一) 美國聯邦交易委員會(USFTC)委員 Christine Wilson：

1、USFTC從 2019 年 1 月至 6 月進行了一系列有關數位經濟的公聽會(Hearings on Competition and Consumer Protection in 21st Century)，邀請專家學者就數位化時代之競爭法與消費者保護法執法趨勢提出政策建議，USFTC也正在進行幾個有關數位平臺實務的研究計畫，以對業者行為，包括結合併購及廠商之競爭行為制訂執法指引。

2、美國認為，對於數位經濟並不需要另外訂定法律來處理，也不需要特別的矯正

措施，也希望各國能就案件分析相互協助，提升數位經濟案件國際合作。

(二) 歐盟副署長 Chris Dekeyser 先生：

1、大科技公司已為我們日常生活中的一部分，也因為其市場力而產生新的競爭威脅。歐盟副主席兼競爭委員 Vestager 女士特別要求競爭總署就此一問題深入瞭解，以維持數位經濟中之公平競爭環境。歐盟競爭總署在去年即舉行「在數位化時代競爭政策之形成」(Shaping Competition Policy in the Era of Digitalization)研討會，討論各項競爭議題並聽取專家意見。

2、歐盟也就數位市場集中度進行市場調查，並就數位案件執法進行公眾諮詢。競爭總署認為，只要市場是可競爭市場(contestable market)，市場集中並非問題。目前競爭總署正在就有關亞馬遜取得消費者敏感資訊問題進行檢視，也將對 Microsoft 與 WhatsApp 合併案重新進行檢視。

三、會議召集人 OECD 資深競爭專家 Ruben Maximiano 就主題背景問題提出說明，略以：

(一) 數位市場的多邊特性使競爭法執法更困難，他建議競爭法主管機關應採取新的規範與方法，如對市場力、損害理論及市場界定等，都應予以重新檢視，並確保執法的有效性及較多可用的臨時措施。

(二) 在結合管制方面，他建議應對目前低於門檻不用檢視之案件加強審核。而對於採用目前的審核標準，則應採用「損害平衡測試」(balance of harm test)，並以保護消費者為最大考量及應對多角化結合加強審查。

(三) 對於矯正措施方面，他認為競爭法主管機關應有新的矯正措施選擇，如運用自律規範以創造更公平的競爭條件或使用事前管制工具以平衡資訊不對稱等。

(四) 對於競爭法主管機關，他建議應設立數位專家單位並與加強其他管制機關合作，運用新的管制工具及提升國際合作。

四、會議接續由印度、日本、新加坡、澳洲、歐盟、英國及菲律賓等國代表提出各國案例報告，我國則由團長洪委員報告本會處理蘋果公司 Apple Pay 被檢舉阻礙國內電子支付市場競爭，涉嫌違反公平交易法，經本會調查，認為依目前證據尚難認定有違反公平交易法案例。

五、會議最後由韓國代表報告 OECD／韓國政策中心競爭計劃（OECD／KPC Competition Program）去年運作情形及 2020 年計畫。

肆、第 18 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。他首先歡迎各國與會代表，他表示，本次GFC適逢法國交通業大罷工，對與會各國造成相當大的不便，儘管如此，仍有100個國家475位代表報名與會，各國所提報告計有55篇，並有11個國家報名「數位實驗室」，與OECD秘書處討論有關數位經濟問題。主席首先邀請OECD秘書長Angel Gurria先生致開幕詞，略以：

(一) 今年GFC的主題「遭受攻擊的競爭」(Competition under Fire)反應了目前很多地區的氛圍。不僅競爭法的目標與執法受到抨擊，而且全世界許多政府、公司、銀行，整個經濟體系都受到挑戰。

(二) 所得差距的擴大、商業與投資活動的缺乏，金融改革不平衡、數位經濟中的消費者保護與隱私權問題等，都引起民眾對於政府的施政產生質疑。據調查，OECD國家中僅有43%的公民信任其政府，有44%的人不信任企業正在做「對的事」，而競爭政策與競爭法當然也正面臨重要的挑戰。

(三) 從對於剛成立新興競爭者的「殺手級併購」(killer acquisition)到運算勾結，數位化經濟引發了人們對於競爭的憂慮。我們也見到了用於衡量企業市場力量的價格加成(mark-ups)幅度正在上升，同時產業併購活動也在加速，這意味著產業市場集中度正在上升。雖然這是整個經濟的趨勢，但在數位產業及數位科技密集產業中尤其明顯。

(四) 另一個我們面對的挑戰是：數位化正在改變競爭的本質。許多國家正在檢視其產業政策，渴望能提升其經濟成長，產能及高質量就業。但是，產業政策必須經過審慎設計，他們最有效的是可以為國內公司提供在全球化市場中取得成功所需要的工具，包括有能力的工人及厚實的基礎建設。但是，我們也必須警覺到產業政策的風險－扭曲競爭及選擇贏家與輸家－他們可能使消費者付出高昂的代價，且意味著國內企業將無法面對嚴峻的全球競爭，包容性成長也會因此而受措。

(五) 面對這些挑戰，我們必須繼續倡導有效的競爭政策。我們傳達的核心訊息並沒有改變：競爭是包容性成長的重要組成部分，我們無法通過扭曲性的政策來應對當今的挑戰，這些政策會使我們的公司效率降低，而使人民更加貧窮。競爭可以為人民帶來商機，並降低整個經濟中商品和服務的成本。我們必須確保全球化和成長帶來的利益往下普及。例如取消限制競爭法規的改變或對政府圍標與貪腐敗加強競爭執法，都可以促使經濟成長及節省納稅人的大筆金錢

(六) 這就是為何OECD幾十年來一直努力站在競爭政策的最前線，在競爭委員會及全球競爭論壇中研究討論並提供政策工具，以協助政府強化如藥品、流通業與

零售業等產業之競爭力與效率。OECD也努力提供數據並處理許多明顯不平等問題，不論是在性別、賦稅、健保還是教育方面；如透過OECD衡量幸福與進步架構及機會平等中心。

(七) OECD最近也成立了「商業促進包容性成長平台」(Business for Inclusive Growth, B4IG)，將政府和企業在一個廣泛基礎及可持續發展的議程上結合起來，專門設計將公共政策及企業實務更佳連結以實踐包容性成長，及加速為落後地區與人民帶來更具體成果的實際措施。

(八) 展望未來，OECD競爭委員會和全球論壇的工作將致力於促進OECD在刺激經濟，促進包容性成長與加強國際合作的努力。透過我們在衡量數位化轉型方面的工作，對於建議書與指南需要做與時俱進之修正。

二、「遭受攻擊的競爭法」(Competition Under Fire專題討論)：

(一) 主席先就本議題提出說明：

1、本議題主要在討論目前廣為流傳，對於以競爭為基礎的自由市場經濟及對於競爭法執法機關執法成效的批評。儘管許多經濟學者已建議競爭可以使資源達到最有效分配及提高效率與消費者福祉，但也有另一派批評認為，在受長期失業困擾及生產資源，不論是資本或勞力，並不如經濟學理論中容易移動的經濟體中，競爭並不能保證可以達到預期的效益。這些批評在政治舞台上得到了那些認為自己是競爭「受害者」的支持，他們譴責「競爭促進消費者福祉」的經濟口號，認為競爭加劇了他們失去工作或失去了經濟前景，接受對保護主義有濃厚吸引力的民粹主義政治哲學。

2、其他人也對靜態經濟競爭架構提出批評，認為靜態效率與動態成長及創新之間可能需要權衡取捨。他們認為，靜態架構中的促進競爭後果之一就是無視動態的產業政策，而該政策如果得到正確施行，將會有助於長期經濟成長與競爭。

3、另一種批評受到推波助瀾的是無視於競爭經濟學者及競爭法主管機關對於「分配效果」的認知，並認為國際貿易競爭「不公平」。國際競爭被視為是從不同法律與經濟環境與另一家在其本國受惠的企業相互競爭，而這些批評指在不公平的競爭環境中是不可能達到競爭的預期效果，而且會導致不公平的市場破壞。

4、許多批評聲浪也針對競爭法主管機關的執法活動，尤其是對於現行結合管制的作為。例如，在即將來臨的美國在總統大選中，結合管制及反托拉斯執法是否可以防範市場力的增加或在某些產業(如數位經濟)中濫用市場地位的爭論已經升高。此外，一些經濟學者指出，市場整體集中度及利潤率的增加是市場競爭

減弱的跡象。因此，一些經濟學者及政客指責競爭法主管機關狹猛的解釋競爭法及其職掌而使執法力道不足。在歐洲，也有人批評競爭法主管機關所應用之結合管制測試。他們認為競爭法機關太形式化而且太注重短期分析，某些政府提求修改結合管制法令要求，以允許政治實體可以推翻對某些策略案件的執法決定。

5、另外，在許多國家中認為競爭法及競爭法之執法缺乏與社會目標之相關性。例如推動競爭法不僅無助於減貧的社會目標，還可能助長廠商與人民間的經濟不平等。而在許多國家，有關競爭法與達成更廣泛的社會目標缺乏相關聯的批評已經激起對於競爭法主管機關在執行競爭法時是否應考量公共利益的爭論，而此一觀點往往被競爭法主管機關所拒絕。

6、本座談中專家們將就下列問題及其他批評進行討論，並考量下列問題：

(1) 對於競爭法主管機關的批評是否變得越來越普遍？如果是，為何？是否因為他們已經變得更加醒目而受到注意？是否因為對1990年代及2000年代初期的經濟自由化政策感到失望？還是因為社會價值產生了變化等等原因？

(2) 面對這些批評，競爭法主管機關如何應對？作為政府機關，我們應該附和民眾與政客的期望，亦或應考量我們做為專業機關的角色而提出競爭法為何及競爭法應做什麼的適當詮釋。如果是後者，是否競爭法主管機在倡議的方法出了問題？不回應這些批評的好處與代價為何？

(3) 我們是否應區分這些不同的批評，並考量如何在某些領域中修改競爭法？如果是，有那些批評值得我們反思以反映過去的做法及有關改變我們的方式的想法？

7、本議題將分2大部分，第1部分先由專家就這些對競爭法之批評進行討論，再連線請Jean Tirole教授進行專題演講，提出解決之道。

(二) 本議題與談專家包括南非競爭委員會委員Tembinkosi Bonakele先生，法國國家科學研究中心(CNRS)研究主任及巴黎政治學院Elie Cohen教授，美國喬治華盛頓大學競爭法中心主任William E. Kovacic教授，及喬治梅森大學Antonin Scalia法學院全球反托拉斯學院執行主任Joshua D.Wright教授。英國競爭及市場局(CMA)主席Andrew Tyrie先生因受到罷工影響而改以視訊發表其意見，CMA政策組組長Will Hayter先生則先以該局代表列席與談。

(三) CMA政策組組長Will Hyter先生：

1、大家都不否認競爭法正受到許多攻擊，但何謂受攻擊的競爭法？這要從政府主管市場機關的脆弱性談起，而這也正是廣受質疑的資本主義理論，其中一個很

主要的重點在於競爭法有益於消費者所依據之經濟理論受到政客們的質疑。在共產黨垮台後，資本主義所主張的競爭政策也未達成預期之效果；而獨立機關的角色也受到挑戰，如中央銀行在金融風後所受到質疑一樣。在2006年金融主管機關之角色十分穩當，但在金融風暴發生前夕，金融主管機關及中央銀行受到一些所謂自由開放言論的影響而做出一些與事實有間之決定。而在金融風暴發生後，人們不僅對於銀行，且對於主管業務的機關失去了信心，政府因而對這些機關進行一連串之改革。在英國的確發生了廢棄原有的金融監管系統而以全新的體系取代之情事。

2、競爭政策尚未有類似之情事發生，或許也不會發生此類情事，但還是有跡象可能發生。這些對競爭法可能無法達成其目標所廣受質疑的跡象，例如主張歐洲應培養最強企業，德國主張應支持國家企業以抗拒外國併購，在英國前政府就實施了零售價格上限制法令，在幾年前這是不可能出現的現象。某些地方民眾開始抱怨有市場集中度及利潤率上升的現象。這些跡象或許在暗示，我們可以做得更好。

3、在數位市場，我們是否應該怪科技進步讓人們不安？在數位經濟下，人們所關切的是網路危害及安全，而不會瞭解競爭法主管機關所關切的平臺競爭。正如人們不瞭解金融管制機關的工作一樣，人們也不會關切競爭法主管機關所做的事，消費者也不見得會讚許我們所完成的工作。舉例而言，CMA最近對數位市場進行問卷調查，但民眾不瞭解數位市場特質，他們認為就像股票市場一樣。另外，CMA最近也處分了排水管卡特爾，但民眾也不瞭解這個處分的重要性。

(四) 南非競爭委員會委員：

1、在南非，競爭法在執法上就一直都有公共利益的考量，如就業、對中小企業影響等。競爭法受如果受到政擊，在南非早就成為灰燼了，因為在過去20年競爭法在南非一直都受到攻擊。

2、所得不均引起對全球化的不滿及極端主義者的興起，不論是左派或右派。不僅競爭法受到攻擊，全球化也受到攻擊，我們如何分享全球化的福利也受到質疑。這是因為分配不公平而受到的挑戰，這些攻擊只會把國內及各國的弱勢推到更深的角落。

3、我們知道競爭政策早已被扭曲，在某些國家農民是受到補貼，這就是扭曲，有些國家大型國企可以取得更佳的財務優勢，它就不可能與其他企業公平競爭。我們要有公平的競爭環境概念完全不可能，因為我們見到各種對於競爭扭曲的方式。在南非施行競爭政策是為了從種族隔離政策，另一種形式的扭曲，過渡

到自由經濟，讓所有人可以自由參與市場競爭，並且舒緩社會緊張，這個是公共利益考量的原因。很幸運的在原始競爭法制定時即因為歷史因素而考量到社會挑戰層面，這也是競爭法在南非較易受到接受的原因。

(五) Elie Cohen教授

1、最近的歐盟競爭委員會所處理的Alstom-Siemens結合案引起極大的爭議。歐洲競爭政策一直是歐盟競爭委員與法國和德國經濟部長之間激烈辯論的核心。歐盟主張競爭政策的核心價值應予保留，歐洲公司不需要國家支持，而對法國與德國而言，該案的決定是經濟與政治上的錯誤。但是該案真正的問題是「產業政策與競爭政策」孰重孰輕問題，這也引發了競爭法主管機關的職掌功能爭論。

2、本案為何會成為歐盟競爭策略象徵性案件？首先，因為歐盟競爭總署在輸了GAFA案件後，做出錯誤的分析，而突然間競政策的合理性、理論基礎及其工具都受到質疑(所有市場集中在經濟上不一定都是負面的)。再者，因為法國與德國第一次同意共同質疑歐盟競爭委員的決定，並提議對結合法律進行改革，恢復產業政策。

3、依據歐盟競爭委員Vestager女士，拒絕該案的結合是因為Alstom-Siemens結合後成為歐洲市場最大主導集團，會產生負面效果。但是對消費者而言，該案並未考慮來自中國接受政府補助及以低利潤贏得第三市場的競爭。競爭總署所指的負面效果來自於推動歐洲冠軍與自由不扭曲的競爭相比較結果，市場高集中度也帶來就業、投資及創新的負面效果。而所說的中國進入歐洲市場只是一個遙不可及的預測(une perspective lointaine)。

4、這個決定犯下了3個錯誤：(1)W. Baumol的可競爭市場理論可以說明中國進入歐洲市場只是一個遙不可及的預測實際上是錯誤的，(2)經濟上的錯誤：因為委員會削弱了產業中的2個主要成員，並拒絕對中國的競爭做出適當回應，(3)政治上的錯誤：拒絕對法國與德國提議做出回應。爭論中並未反對歐洲內部2種政治競爭觀點：國家干預以促進產業基礎，及捍衛單一結合守則的全球競爭觀點。但是這2派爭論並未把Baumol的可競爭性理論納入考量。這3項錯誤及經濟學者的爭論將在歐洲引發關於產業政策與競爭政策的辯論及對歐盟體制的質疑。

5、競爭對創新有利，對消費者有利，競爭政策的反托拉斯也不是問題，從事後來看，對歐盟拒絕某些併購的案件我們可以批評，對於競爭委員會面對GAFA的示範作用可以表示敬意，這些都是為了應用更好的競爭工具。但是我們也要針

對經濟行動及對外行動的綜合競爭和貿易政策進行新的思考。

(六) Kovacic教授：

1、消費者當然喜歡競爭，因他們喜歡更好的產品，更低的價格。但生產者、勞工則不一定，因為他們可能受到替換，生產廠商或者是整個產業，他們可能因為某一衝擊或經濟因素而受到影響，做為居民，也不一定喜歡競爭，因為競爭可能為社區帶來劇變。依據熊彼特1942年「資本主義、社會主義及民主」一書中「創造式破壞的過程」：創造性破壞產生不斷的衝擊，新的商品、科技、供給來源及新型態組織出現，對於現有廠商基礎及營運產生致命的影響，並且產生了政治上顯著的意義。

2、例如Malcom McLean創造了海運貨櫃，改變了整個海陸運輸型態。沒有他，也不會有今天的全球貿易，這是一個競爭的重要案例。但是他創造了工作，也摧毀了某些產業及國家的工作機會。另一個案例是底特律的Fisher Body Plant 21，該廠生產汽車車身，提供4家汽車生產公司使用，創造了無數的工作機會，但因為全球競爭，消費者不再只購買美國生產的汽車，享受更好品質的產品，該工廠早已荒廢，底特律也不復往日榮景，美國汽車業承受了競爭的結果。匹茨堡，另一個美國鋼鐵都市，曾經創造了無數的工作機會，但今日該城市已不再有鋼鐵生產，許多工作機會也流失了，這也是因為全球競爭的結果。

3、在經濟景氣不好的時候，這些問題一一浮上枱面，消費者與就業勞工成為對立，競爭法主管機關夾在當中只能說「這些破壞性創是是值得的，因為所有人都可以受惠」，這些應該是我們應該探討的問題。

(七) Joshua Wright教授：

1、在美國有越來越多的呼聲，要求反托拉斯執法機關強力執行反托拉斯法，並且具體要求：

(1) 廢棄以消費者福祉為主的審核標準，因為它沒有考量市場集中度增加所帶來的害處。

(2) 將反托拉斯執法目標擴展至其他非福利因素，如就業、經濟／所得分配不均、廠商大小等。

(3) 建議擴大結合執法範圍。

(4) 大就是不好，建議分拆大科技公司，尤其是禁止數位平臺之垂直結合。

2、這些批評主要在針對美國反托拉斯執法機關對於提升消費者福祉無法設計良好之法規及執法，而消費者福祉標準無法考量其他重要社會價值目標。國會眾兩院議員紛紛對於大企業之併購提出各樣之限制法案，以防止市場集中度之增

加。如果以他們所提出之規定，很多現已成功之併購可能都無法通過，如Amazon併購Whole Food及Zappos，Facebook併購WhatsApp，Google併購DoubleClick等。

3、但反托拉斯法專家們，包括法律學者及經濟學家，都認為消費者福祉標準是成功的，不論是垂直或水平分拆，都可能對競爭及消費者產生巨大成本。而且實證研究並不支持對於競爭法執法太過寬鬆的批評，大多數的研究對於垂直整合或垂直併購的交易都認為是有利於消費者的。

4、大多數對於反托拉斯政策的建議都是基於明線(bright line)假設，而非經濟分析，而許多這些建議的結果都是對競爭及創新不利的，包括對數位平臺。往好處看，這些建議提供了一個實證檢視許多競爭的基本假設的機會，而反托拉斯執法機關應提供更多這些重新評估基本實證研究的機會。

三、專題演講：法國土魯斯大學經濟學院Jean Tirole教授受邀在本次「遭受攻擊的競爭」進行專題演講，惟因受法國交通大罷工影響，無法親自到場而改以視訊發表演說。他以「在十字路口的競爭政策」(Competition Policy at a Crossroad) 為題，討論近來受到攻擊的競爭政策及其未來。內容略以：

(一) 最近有人提出重申政治應在公共決策中居首要地位的建議，例如在產業領域，有人提出了「確保這些提議不因要求恢復舊式部長級決策而停止」的提議，但他們可能通過賦予政客否決競爭法主管機關決定的能力或將產業或公司排除在競爭政策範圍之外，而使競爭法主管機關陷入困境。他們還可能向競爭法主管機關授予更廣泛的任務，例如利害關係人之保護，照顧就業環境，或者執行某些產業政策。

(二) 歐洲剛經歷了Alstom-Siemens結合案劇情的餘波盪漾。贊成通過者認為中國最大的公司將在一個龐大且基本上封閉的市場上營運，且擔心中國公司實際上將成為歐洲的支配廠商。如果Alstom與Siemens有進入中國市場的問題，應該透過WTO爭端解決機制來解決。這個機制雖然非常緩慢，但這才是正確的解決之道。而反對者認為，Alstom-Siemens在短期內將完全支配歐洲信號系統及高鐵車輛市場。歐盟競爭委員的決定是正確的，法國與德國的提案將賦予會員國否決競爭法機關對於結合或其他決定的權力，但實際上歐盟並未有太多禁止結合的案例，實際上在其他領域歐盟應該禁止更多的結合案件。

(三) 各國民粹主義者利用了選民的挫敗感，如金融危機、歐洲地區危機、失業率攀升、經濟成長遲緩、中產階級社會地位下降、不平等等理由，以及人們對未來恐懼害怕的情緒，如氣候變遷、人工智慧及機器人可能取代們的工作及其他如

某些國家的國債及退休金等問題，來做有效的陳述。政客本身也陷入了混亂，因他們必須對選民訴求有所反應，民眾不理會專家，而政治市場即對此種需求做出回應，這即是其所說的以政治為上綱，此一想法並不特定在競爭政策。以中央銀行為例，在印度、美國、土耳其及在歐洲等許多國家，中央銀行的獨立性受到質疑，而且非常確定的存在一個引人入勝的因素：在2008年金融風暴後，各國央行不得已採取非常規的貨幣政策以更貼近政治決策，而政客們也注意到這個問題，對他們而言，利用中央銀行做為政策工具是非常誘人的。在某些國家，甚至司法獨立也受到質疑，而本專題要說的是對於競爭之質疑。

(四) 政客們的其他反應也是有問題的。他們第一個是推卸責任，例如以公司替代政府。這並非問題，公司可以對社會責任進行投資，但社會責任投資的精髓在於分散處理方式，這對於政府是非常不協調的，例如政府不敢提出任何定碳價或非常低之碳定價，卻要求企業做出好像有一個碳定價一樣。第二個問題是政府傾向於在不採取行動時假裝採取行動。例如，2015年聯合國氣候變化大會(COP21)達成了協議，但政府卻只是裝模作樣或是漂綠(greenwashing, 打著環保口號，實際卻是反其道而行)，實際上很少行動。而真的採取行動時， 卻以行政管理方法及曲折難懂的系統來敷衍民眾。

(五) 最近的趨勢是：強調機關獨立的合理性是非常重要的。但獨立機關永遠是不會獨立的。獨立機關的使命原則上是由政客們控制，國會始終可以干預而全盤推翻政策，但並非每一次都如此。實際上我們不希望政客們有個遊說團在後面推動干預的具體實例。但政客就是政客，他們常會受到遊說團體的壓力，他們會順應選民，他們想當選，這就是為何我們需要中央銀行獨立的原因。中央銀行必須獨立是因為我們要控制通貨膨脹及因為我們要進行更嚴格的審慎監管，而政客們想要連任而干預中央銀行可能會導致信用大增及通貨膨脹。電信或電力或鐵路管制也是一樣，我們成立了獨立機關，或是我們讓法官來負責。在美國沒有民營化問題。因為公用事業實際上是在1900年代開始民營化，政客們當然想要降低價格以使其受歡迎，但這與公用事業對基礎設施的巨額投資背道而馳，所以在美國由法官保護投資人對公用事業之投資，以免政客為順應選民而胡亂定價。這是我們需要獨立機關的第一個理由。

(六) 第二個理由有點複雜但卻是事實：獨立機關內通常有更多的專家。例如競爭法主管機關內的經濟學博士或其他領域博士通常比其他部會的專家多。一個政府機關必須有自己的任務與使命，而許多機關有多重使命，加上選民不瞭解與資訊不足，常常對於政府機關的表現透過選舉程序來要求官員負責。獨立機關則

不同，它們有清楚的任務與使命，專業人員對內可以創造自己的使命感，對外則有一致性與法律確定性，也讓其施政倡議聚焦並且負最終責任，這是其他政府機關無可比擬的。而這些獨立機關的任務使命不能因為可透過其他或適當政策工具可以解決的考量而被「污染」。如所得不均可透過所得重分配、健保可以利用對菸草課稅、全球暖化可以利用訂定碳價格及補償，失業可以透過勞工保護法，貿易扭曲可以透過貿易組織WTO等。

(七) 產業政策顯然在今日又捲土重來，他以2種干預態樣來說明市場失靈：第一種是非目標性政策，政府並未特別選定贏家或輸家，例如對研發之補助，另一種則是針對某一特定產業、科技或甚至公司的產業政策。產業政策有其良好基礎，有其利與弊也有強力的論述支持。支持者的論調是(1)群聚效應：可以共享基礎及資訊(如矽谷)，或邊學邊做(如新興產業)，勞動成本也較低。(2)政府的研發成果可以溢出給產業，(3)在某些產業，可以降低市場力(如前所述空中巴士及波音案例)。但這些論述並不得到經濟學家的支持，就像古老格言：「國家選擇贏家，輸家選擇國家」，產業選擇是為了保護現有企業而卻不是正確的選擇。在法國有很多這樣的例子，例如協和客機、湯姆笙公司等，而失敗的產業政策經驗如柴油補貼政策。但亦不乏成功的案例，如美國國防高級研究計畫署(Defense Advanced Research Projects Agency, DARPA)、國家衛生研究院(National Institute of Heath, ,NIH)及國家科學基金(National Science Foundation)等對於科技、生物醫學科技及資訊科技之影響。

(八) 對於採用產業政策，Tirole教授提出下列8項建議：(1)釐清市場失靈問題，知道我們要干預什麼，以設計適當政策；(2)運用獨立高階專家以選擇計畫及接受政府基金；(3)注意供給面，而非僅在於需求面；(4)採取競爭中立政策；(5)設定目標，不要預先判斷解決方案；(6)進行事後評估並宣揚結果，在計畫中包含「落日條款」，在有負面評估時強制結束該計畫；(7)讓民營事業適當介入以分擔風險，避免大而無用情形產生；(8)強化大學教育，讓更多的新創由大學開始。

(九) 對於如何改進反托拉斯，他認為競爭法主管機關不需要制訂新的法律，僅需要更多的指南。例如，競爭法主管機關對於積極的機構投資者在共同所有權問題上會產生競爭疑慮，但對於卡特爾的法律規範已經存在，其所需要的僅是設計清楚的規範以讓投資機構可以不違反法律。同樣的，對於網路平臺「最優惠價格」或最惠國待遇(MFN)及「殺手級併購」，競爭法主管機關所需要的是清楚的處理原則，以減少法律的不確定性。

(十) 競爭法主管機關也要改善程序。就一般標準處理方法而言，競爭政策太慢又太

遲，公用事業管制方法對於全球性公司又行不通，他建議應以「參與式反托拉斯」，即企業、專家向競爭法機關提供建議，而競爭法主管機關再透過企業檢視信函(Business review letter)制訂指導原則或法規，這樣可以減少法律不確定性，引導產業提供資訊並適應管制法規。競爭政策獨立性是值得大家努力爭取的，而且是正當爭取而來，我們可以一起來改進它的經濟理論基礎及程序，在運用產業政策時也必須重視獨立的正當程序。

四、「貿易協定中之競爭條款」圓桌會議(Roundtable on "Competition Provisions in Trade Agreements)：

(一) 本節主要討論各國在簽署自由貿易協定時，協定中之競爭專章或競爭條款內容，包括採用或維護競爭法之目的與影響，競爭政策之國際合作或程序保障及競爭法主管機關在協商競爭專章或條款之角色。會中邀請Cleary Gottlieb Steen & Hamilton律師事務所François-Charles Laprévote律師、世界貿易組織(WTO)法律事務專員Anna Caroline Müller女士及OECD貿易與農業組處新興政策議題組組長Susan Stone女士與談，另有18個國家與BIAC、OECD工會諮詢委員會(TUAC)、世界銀行及UNCTAD等4個國際組織提交報告。

(二) Susan Stone女士

1、當今的貿易協議內容已超越了傳統措施(例如關稅和配額)，而包括影響商品及服務貿易之法規，例如投資、競爭、智慧財產權、數位化交易等(所謂的深度貿易協議-Deep trade agreement)。自1990年代以來，區域經濟整合之規模及深度都在成長，伴隨著多邊貿易規則之訂定，優惠性貿易協定(Preferential Trade Agreement，PTA)影響經濟體整合及其運作甚鉅，然數據及分析尚未擷取到PTA發展之新面向。

2、現今關於PTA衝擊影響之證據，多集中在總體性及廣泛性之探討。實證結果證實擁有較低市場支配力與做出更大讓步間具相關聯性，顯示簽署協議後貿易不對稱之變化；簽署協議前貿易額較少之國家間，通常事後不必然會創造更大貿易效應；兩國距離越遠，創造的貿易額越少；人均GDP和殖民地關係之存在，也發揮影響作用。在這些變量中，最顯著之發現是，進出口商之經濟規模(以原值GDP衡量)與事後貿易創造效應呈正相關，而人均GDP較低之國家往往享有相對較高出口增長。深度PTA主要透過全球價值鏈(Global Value Chains，GVC)，增加出口之國內增值量。在PTA中增加一項條款，可使中間產品和服務出口之國內增加值提升0.48％、國外增加值提升0.38％；惟未發現對最終產品及服務出口之國內、外增加值有重大影響。與服務加值型貿易相比，深度貿易協議

對服務加值型貿易之影響通常較高。

(三) François-Charles LAPRÉVOTE律師：

1、渠以世界貿易組織(WTO)資料庫所包含267個自由貿易協議(FTA)為樣本，歸納分析FTA中有關競爭條款規定之類型及現況。依據WTO數據庫顯示，267個FTA中，有178個涉及發展中國家，約90％之FTA內容包含競爭條款或章節，36％採取措施規範反競爭行為，55％對濫用市場力行為予以規範，12％僅規範反競爭性之結合，49％監管特定獨占事業、國有企業或其他被賦予特殊權利事業，43％包含有關補貼或國家援助法規，僅27％規範競爭執法原則，50％包含競爭之合作與協調規定(從司法、技術協助，到溝通、磋商及信息交流等)，27％明確將競爭事務排除在一般爭端解決機制之外，40％建立針對競爭之爭端解決機制

2、LAPRÉVOTE先生認為，正如大多數FTA內容所提及，導入競爭條款無疑是有用的目的(倘只是為了促進貿易及全球福利)。競爭政策也可以透過其他方式(如WTO、ICN或競爭機構間之雙邊關係)加以促進或協調。FTA中之競爭條款也可能會提供一些附加價值，特別是通過具有約束力之爭議解決機制以有效執行競爭條款，惟樣本中大部分FTA均將競爭事項排除在其一般爭端解決機制之外，或將此類事項置於輕型(諮詢)機制之下。

3、競爭政策條款越來越頻繁地被明定在FTA中，為獲得對此類倡議之支持，重要的是，設計出降低在FTA中納入與競爭有關規定之成本，或增加其誘因之方法。首先，有必要繼續根據現有之FTA內容確定趨同領域，以調和競爭執法途徑間之潛在差異並彙整最佳作法。其次，要降低在FTA納入與競爭相關規定之政治成本，可能需要進行有針對性的宣傳工作，強調競爭政策對實現經濟發展目標之重要性，以克服某些發展中國家民眾之反對意見，尤其是那些尚未將競爭規定納入FTA之國家。根據上述方法，運用軟性融合之方式，為FTA設計競爭章節之範例(包含：普遍禁止之行為、結合規定、競爭倡導、競爭執法原則、爭端解決機制)，確定應包括之競爭政策領域，而讓協定締結當事方可以輕易達成共識。在分析過程中，LAPRÉVOTE先生發現，解決競爭相關問題各種方法間，在形式及語言上存在重大差異。此種不一致往往使查找和分析自由貿易協定中與競爭有關規定，變得困難且耗時。因此，其建議建立一全面性、易於使用之數據庫，總結FTA中之競爭規定，以便在談判與競爭相關規定時，提供指引方針。

(四) Anna Caroline MÜLLER女士：

1、與20年前相較，現今競爭政策不再被視為國內事務，它已成為全球經濟法律和體制框架之重要組成部分。在1997年，世界上僅有不到50個經濟體擁有競爭立法，如今已約有135個WTO成員擁有此類法律。迄今為止，在國際貿易體系框架內建立競爭政策總協定之努力一直沒有成功。但是，關稅及貿易總協定(General Agreement on Tariffs and Trade，GATT)、服務貿易總協定(General Agreement on Trade in Services，GATS)、與貿易有關之智慧財產權協定(Agreement on Trade-Related Aspects of Intellectual Property Rights，TRIPS)、與貿易有關之投資措施協定(Agreement on Trade-Related Investment Measures，TRIMS)、WTO協定等，其內容都已包含了有關競爭政策之多項具體規定。

2、有效的國家競爭政策，對於實現參與多邊政府採購協定(Agreement on Government Procurement，GPA)所產生之利益，亦影響重大。在申請加入WTO程序中，以及在一些WTO所屬機構(如貿易政策檢視機構、TRIPS理事會)的工作中，所進行之討論及關於競爭政策之通知，亦清楚地表明了競爭政策對全球貿易之重要性。這些規定及活動至少反映出，其制定者及倡議者認為競爭政策對國際貿易體系具直接且重要之補充地位。除上述內容外，自2004年以來，競爭政策章節已被廣泛的納入區域貿易協定(Regional Trade Agreements，RTAs)中，這些RTA將全球已開發、開發中及未開發經濟體聯繫起來，此可證明，在WTO成員領域中，競爭政策與貿易具有相當關聯性。

3、在上述情況發展之同時，各國國際政策也越來越重視對全球經濟具有重要意義之競爭執法與政策特定問題，包括：競爭法案件之國際範圍以及由此產生之溢出效應和管轄權衝突之可能性；確保在國際範圍內之競爭執法公正、不歧視、程序透明；針對智慧財產權競爭政策之廣泛應用；數位經濟市場中獨占及維持競爭潛力問題；國有企業、產業政策作用及在新興經濟體中維持競爭中立之問題等。上述每個問題均涉及多個管轄區之利益，或直接影響國際市場及供應條件。實際上，「WTO貿易與競爭政策互動用工作小組」(the WTO Working Group on the Interaction between Trade and Competition Policy)在1997年至2003年期間之工作內容，以及ICN、OECD、UNCTAD等等機構所為之重要工作，已為審查這些問題奠下堅實之基礎。

4、MÜLLER女士指出，在任何相關的國際安排中，都應格外謹慎去維持或加強競爭領域執法行動之急迫性及獨立性。或許，正確之做法僅僅是鼓勵在主題區域已經活躍之論壇上，針對國際上相關問題繼續進行對話。上述問題相當具有重要性，因為其不僅對國內及全球之貿易、繁榮與發展產生影響，且當前對競爭

領域之協調需求亦日益增加。如果判斷時機已經成熟了，則在已開發國家和新興國家間，將有更穩固之基礎，來進行廣泛、有意義之討論與對話。

五、「動態市場中之結合管制」圓桌會議(Roundtable on “Merger Control in Dynamic Markets)：

(一) 本議題先進行大會討論，邀請歐盟首席經濟學者團隊組長Giulio Federico先生、國際法律及經濟學中心主席及創辦人Geoffrey Manne先生及葡萄牙波多大學副校長Helder Vasconcelos教授與談，討論競爭法主管機關在評估動態市場結合時，如何決定「未來」時間範圍之長短。

(二) 本議題共有包括我國在內的19個國家及BIAC提交報告，並依各國提交報告內容進行分組討論：

1、第1分組(國家字母A－J)由埃及競爭局局長法律顧問Fatma Al Zahraa女士擔任主席，討論結合之競爭評估。

2、第2分組(國家字母K－Z)由菲律賓競爭委員會主任委員Arsenio M. Balisacan先生擔任主席，討論結合之競爭評估。本會代表參與第2分組討論並於會中提出報告。

3、第3分組 由烏克蘭反壟斷委員會經濟分析組組長Darya Cherednichenko女士擔任主席，討論結合效率效果與矯正措施之設計。

(三) 我國被分配在第2分組，並於分組中與韓國、肯亞、歐盟及英國分別提出報告：

1、韓國：

(1) 韓國公平交易委員會(KFTC)首先就韓國結合管制所涉及之限制獨占及促進公平交易法(Monopoly regulation and Fair Trade Act，MRFTA)規定進行介紹。該法第7條規定，事業之結合倘有限制產業競爭之虞者，不得為結合，並於同法第12條規定，事業之結合倘達到特定門檻規定者，必須向KFTC申報。依現行申報規定，參與結合事業之一方營業額倘達2.5億美元，另一方達2,500萬美元以上，即有向KFTC申報之義務。為有效審理結合申報案件，KFTC訂有結合申報審理原則，提供相關結合申報案件之審查標準及考量因素。

(2) 為因應動態市場下的結合管制，KFTC採行「以交易價格為基準的結合門檻」(Transaction value-based threshold)，以捕捉新創事業規模雖小，卻具有高度發展性的受讓模式。2018年12月，KFTC修正前開MRFTA第12條規定，除調整上述銷售金額門檻外，另新增倘交易價值(投資報酬率)大於特定金額，或受讓事業於韓國境內有從事特定活動(如營運研發設施，或聘用相關研究人員)者，仍有依該法向KFTC申報結合之義務。同時在結合申報審理原則中，明確定義

新創產業之產品市場，如參與結合事業之一方所處產業倘具有創新競爭特性，且該事業亦為該市場重要競爭者時，則與該事業具有相同或類似之研發活動之業者，可分別被定義為創新市場，或是更廣義的，銷售(或製造)行為之競爭市場，且在此類研發密集的產業中，只要有投入相關研發行為，均會被視為該產品市場既有業者之潛在競爭者。

(3) 同時，在結合申報審理原則中，亦提出計算創新市場業者之市占率時，因難藉由產品銷售金額估計案關業者的實際市占率，因此得改以廠商的研發支出、創新活動資產(或資源)規模、相關領域的專利數，或參與研發人員數量等指標來計算，並列舉5項創新市場中的結合行為，是否會減損市場創新競爭的判斷要件，分別為：(1)參與結合事業是否為該市場重要的創新者(2)參與結合事業間是否有從事類似研發活動(3)結合後創新市場中是否仍有足夠競爭者(4)參與結合事業與其他競爭者創新能力之差距(5)參與結合事業之一方，是否得藉由創新活動，成為另一方之潛在競爭者。

(4) 總結來說，對於動態市場的創新產業，雖然KFTC採行上述事業交易價值測試後，結合相關案件審查時間確實有顯著的增加，然而相關結合申報審理原則的修正，也確實提供KFTC更佳的創新及動態市場結合影響評估機制。

2、肯亞：

(1) 動態市場競爭，係商品、服務或製程於市場中亮相的過程。在這樣的動態市場中，涉及創新、研發活動的不確定性、專利權保護，或是知識外溢等各方面議題。在肯亞，競爭法主管機關會採用市場界定、集中度、價格壓力指標(GUPPI)衡量市場的競爭程度。然而，評估競爭影響常會遇到的困難是，錯誤定義過窄的相關市場，使得有些重要的市場參與者未被納入評估分析，且同時亦面臨數位經濟、多邊市場、大數據等非價格競爭型態的挑戰，因此肯亞於2019年7月翻修相關結合審理原則(Merger Guidelines)。

(2) 在肯亞，動態市場主要的案件類型可分為一般廣告、叫車軟體及線上支付平台，如在Mydawa & Africa Healthcare Master Fund PTE Ltd.一案中，所涉市場為線上藥局市場，其同時具有單邊及雙邊市場之特性，且分析上除要考慮其他線上藥局(即其他平台)之替代性，同時亦必須考量線上藥局是否與實體藥局具有替代關係。本案肯亞競爭法主管機關鑒於該線上藥局屬24小時營業，與奈洛比96家藥局、全國1,985家藥局具競爭替代關係，且亦適用4類健康保險類型，而線上藥局之進入成本亦不高，因此將市場界定為單邊，且囊括所有型態消費者(含線上與實體)的市場較能符合該案的狀況。

(3) 另外，在Tim Bidco 1’s Travelopidia & Enchanting Africa一案中，所涉產品為旅行套裝商品，該案較困難的地方是地理市場界定。因境外消費者事實上得透過境外事業購買肯亞相關套裝行程，這些境外事業會再與案關事業位於肯亞之子公司聯繫，組織套裝商品後再提供予消費者，最終肯亞競爭法主管機關決定本案不以事業利潤來源區域作為地理市場，而是以提供該服務之區域作為相關地理市場。

3、歐盟：

(1) 歐盟過去結合管制多側重於找尋產業中重要，且足以影響競爭之競爭者，傳統上也會要求對於動態市場相關案件必須進行競爭評估，且在歐盟結合相關處理原則中，也規定如何對於動態市場進行評估並進行調查，要求必須分析、比較結合前後之市場狀況。因為進行結合分析時，其目的無非是希望從過去的要素中，觀察、猜測結合行為對於未來市場競爭可能的影響。然而，動態市場中，基於其市場特性，預測其結合或未結合後的市場發展具有高度不確定性。因此歐盟會在適當條件下，選擇忽略廠商(即供給面)對於市場界定的看法，且不做出具體的市場界定，以捕捉結合後所有潛在可能發生之情境。

(2) 舉例來說，在WhatsApp的案件(即Facebook與WhatsApp之結合申報案)，一個係屬即時通訊軟體，另一個為社群網站，兩者並不相同，然基於渠等產業特性，對於未來發展具有高度不確定性，因此本案歐盟競爭委員會並未對於即時通訊服務與社群媒體是否具有差異，做出明確定義，轉而側重於評估該交易可能造成的影響，並且假設了一個較大的市場，將WhatsApp視為社群媒體平台，進而與Facebook產生競爭關係。

(3) 此外，在歐盟水平結合處理原則中，亦提到可以反事實推理(Counterfactual)，然後再進行評估。其方法係假設在結合未發生的情況下，廠商可能進入或退出市場的情形，以作為對照。市場參進方面，一般會評估大約2年間廠商參進之情形，不過實際上採行多長的期間，仍會視個案屬性而定。同時廠商退出市場之評估，會考量結合未發生時，相關廠商(包含參與結合事業)是否會退出市場。委員會會考量各種可能情境，含參與結合事業會不會因為結合被禁止，導致有退出市場之可能。

(4) 最後，委員會亦會視情況考量除本結合案外，其他可能發生之交易，如委員會曾經在個案上，先假設市場處於結合前狀態，然後發現即使被收購事業並沒有與該收購事業進行結合，市場中依然存有其他結合交易之可能，致使被收購事業最終仍會被其他事業收購，進而退出市場，因此拒絕相關結合申請。

(5) 進行以上所述評估，最困難的地方在於證據資料之使用。鑒於個案案情均不相同，所涉產業特性也不一樣，故需依據個案選擇適當調查方向。舉例來說，委員會曾對於Novartis/GlaxoSmithKline's oncology business及J&J/Actelion二案，進行研發相關競爭結構分析，並成功呼應調查中所發現，該等廠商在歐洲經濟區僅開發附加產品(非主產品)之事實；或者，委員會也會細部檢視事業之間的研發合作協議，以衡量事業結合會對於整體研發市場之影響。

(6) 雖然事業內部資料極富有參考價值，但去證明動態市場中的反競爭行為影響仍是一大挑戰，尤其在數位市場方面，因為其發展多是破壞性創新，且缺乏架構性的演進脈絡，這樣的情況使我們開始反思，是否在數位市場某些領域，實際上並不需要創造新的分析工具或方法。譬如在2019年4月即曾有報告指出，現行歐盟合併法所採行的競爭評估方式，在數位市場結合評估方面仍舊有效，該報告認為應該要重新審視，過去結合行為對於市場競爭產生傷害的理論，特別是當具有優勢地位之平台，合併消滅小型新創公司時，這些優勢平台有義務證明結合帶來的效率提升，足以彌補市場競爭減損所帶來的傷害。

4、我國：

(1) 我國結合申報相關事項，主要係依據公平交易法第13條規定，衡量結合所帶來之整體經濟利益，以及限制競爭之不利益，進而作出禁止或不禁止其結合之判斷，也會視情況延長結合案件審理期間，以取得更多證據資料。有時市場競爭環境及結構因為快速變化而難以預測，此時公平會會設定結合負擔，以控制、審視結合後之市場競爭狀態。我國結合申報案件之處理原則中，規範水平結合行為應考量單方效果、共同效果、參進程度及抗衡力量等因素。如同其他競爭法主管機關一樣，動態市場之市場界定亦是我國處理相關結合案件所面臨之挑戰，對此，公平會使用HHI、消費者調查、移轉率，以及GUPPI等方法，有時亦徵詢相關產業主管機關之意見。

(2) 本會代表提出4件有關動態市場之相關結合案件進行報告。第1件是有關我國前2大卡拉OK業者之結合案，該案有趣的地方在於它糾纏本會長達15年的時間。2003年，該2家卡拉OK業者第1次向本會申報結合，當時本會並未禁止其結合，但業者自身卻因故最終並未實施。嗣後，公平會接獲檢舉，指稱該次結合申報，業者所提出之申報資訊並非真實，經調查後本會認定確有該等情事，並對提供不實申報資訊之2家卡拉OK業者進行裁罰。2006年，該2事業再度向本會提出申報，該次本會經調查後發現，這此2家事業於相關市場具有高度集中度與市占率，尤其在都會地區，甚至可達90%以上，因此公平會最終

決定禁止其結合，參與結合事業隨即向公平會之上級機關提起訴願，於是該案於2007年發回，惟公平會仍維持原見解，禁止其結合。最終這個案件一路上訴到最高法院，最高法院維持本會之決定後才宣布告終。雖然被禁止結合，然而在2010年至2014年間，這2家事業實際上處於共同經營之狀態，因此本會在這期間曾進行2次裁罰。今年(2019年)，這2家事業再度向本會申報結合，他們主張現行市場情況已和過去有所不同，隨著科技發展，市場上已出現各式卡拉OK伴唱設備，如電話亭卡拉OK、家庭用伴唱機，或是網路伴唱軟體。因此，過去所界定之「視聽伴唱視聽歌唱服務市場」應有重新評估之必要。然而，公平會進行消費者調查後發現，當此2家事業結合後，僅有約2%的消費者會選擇其他新型態的卡拉OK設備，且有6成消費者仍會選擇於該等事業消費，顯然科技的發展尚未改變消費者對於卡拉OK的消費方式，因此最終仍禁止其結合。

(3) 第2個案子係有關2013年的計程車結合申報案件，在我國，消費者可以藉由撥打計程車叫車業者，派遣計程車，本案參與結合事業即市佔率超過50%之計程車叫車業者。不過經調查後發現，該市場仍有接近30個其他計程車叫車業者，且2013年如UBER等手機叫車APP剛剛興起，這些潛在競爭者亦對該市場競爭產生影響，因此本會最終並未禁止其結合。

(4) 第3個案子係Google與HTC結合案，Google向本會申報收購HTC子公司，以充實其在手機製造方面的產能。本案非屬水平或垂直結合，屬多角化結合之情形，因此本案側重於結合效率提升之考量。公平會認為，Google可藉由結合案充實手機製造產能，HTC亦可利用google之資源，從事其他產品之開發，對於該等事業效率之提升有所助益，故不禁止其結合。第4個案件是有關5大電信業者合資經營信託服務管理平臺案，雖公平會最終並不禁止其結合，惟附加多項負擔，包含應於5年內逐年向公平會申報事業經營相關情形，以便掌握該市場之競爭狀況。

(5) 從上述案件可知，公平會依據個案情況不同，會採用不同的調查方法，包含消費者調查、產業主管機關資料等，也會利用矯正措施掌握市場競爭情況，以利公平會在動態市場的結合案件中做出正確的判斷。

5、英國：

(1) 討論動態市場之競爭評估前，應先確定競爭法主管機關是否應對於該結合案件進行管轄。在英國，市場與競爭管理局(CMA)會使用較具有彈性的測試方式，判斷該案件是否須經由CMA進行審理。第1個可能採行的方式為實質影響

力測試，其係在收購比例未達100%的結合案件中，評估收購事業是否對於被收購事業具有實質影響力，而第2個為市場供給比例測試，則是衡量結合後廠商在市場供給比例如達到25%，CMA即得對於該類案件進行審查。在2002年企業法(Enterprise Act 2002)中，賦予CMA於相關商品或服務界定方面較大的自由裁量空間，有時得讓CMA能夠審查到其他競爭法主管機關未觸及的結合案件，如Google與Waze、Facebook與Instagram等案件，因為他們的服務係免費提供，因此CMA是依據參與結合事業市佔率超過25%的門檻進行審查，然而在Ryanair與Aer Lingus、Sky與ITV的案件中，雖其持股比例分別僅占29.8%以及17.9%，CMA卻發現收購事業對於被收購事業具有實質的控制能力，因此進行審查。然而CMA之所以得採取這樣的彈性測試方法，可能係由於英國並非採行強制結合申報制度所致，因此並未有固定的審查模式也可以被接受。

(2) 由於動態市場結合的高度不確定性，難以預測其未來發展，因此與市場未來發展有關的資訊即格外重要。然而這樣的不確定性，並不會降低結合行為本身可能減損市場競爭的本質。相關判決中也曾提到，各種評估方式於未來市場發展上將變得更不精確且無法預測，因此讓CMA維持經濟上，尤其在結合案件中的判斷餘地即格外重要。

(3) 談到虛擬條件，在動態市場的結合評估中，通常都是以「現行競爭狀態」(prevailing conditions of competition，即結合前狀態)作為出發點，但也要注意「現行競爭狀態」在動態市場中，會隨著時間而有所改變。再來就是假設如果沒有該項收購案，則收購事業會採取什麼行動，以及被收購事業如果沒有這個結合案，其是否能夠成長為該市場有力之競爭者。舉例來說，在eBay與motors.co.uk以及PayPal與iZettle的結合案中，CMA即曾探討如果沒有該結合案，eBay於線上車輛分類廣告市場是否能成為更具競爭力之市場競爭者，以及Paypal是否會因此轉而自行開發線下支付服務等評估。

(4) 除價格外，有時結合行為亦會對於市場造成其他非價格之影響，如減損產業創新能力等。在Thermo Fisher與Gatan的結合案中，Thermo Fisher是一家顯微鏡製造商，而Gatan則是相機以及顯微鏡周邊設備之提供者，因此本件係屬水平與垂直結合，CMA對於本案特別注重於該結合案是否會對於未來相關產品的品質及研發能力造成影響。

(5) 最後是證據，動態市場評估中，證據是不可或缺的。有時CMA會藉由公開市場行情衡量被收購事業之價值，如果買方出價明顯高於市價，即可能意味著

該結合案對於市場競爭係有所減損。另一個是事業內部文件，藉由內部文件可以得知事業的獲利能力，預測事業於相關市場上之價值，以及未來發展的可能性。關係事業的內部文件，則可以觀察相關市場競爭者對於結合的對應策略、未來營運計畫等，均是非常有價值的資料。不過在動態市場中，過去的歷史資料是否能代表未來市場的實際競爭狀況，也是要特別注意的地方。

六、「獲取市場之競爭」圓桌會議(Roundtable on “For the Markets”)：

(一) 某些產品具有特殊性質得使事業競爭成為整個產品或服務市場之供應商，而不是僅爭奪部分市占率，這些特徵包括自然壟斷(具有規模經濟)、因公共資助壟斷、受法律保護壟斷(如受智慧財產權保護之產品)、平台壟斷(如具有強大、直接或跨平台網絡效應之數位平台，可從規模上產生越來越大之價值)。本議題主要在討論有關如何對自然壟斷及政府出資之獨占事業，尤其是對這些服務給予特許權利後之競爭法執法挑戰。會中邀請羅馬第二大學經濟學系Elisabetta Iossa教授及Macmillan Keck律師事務所創辦人Rory Macmillan律師與談。本議題計有12個國家及BIAC提交報告。

(二) Rory MACMILLAN 先生：

1、特許權係公部門為了提供公共服務而與私營事業締結契約，授予特許經營權，如鐵路運輸、水資源供應、廢棄物處理、能源、運營及維護收費公路與港口等基礎設施。特許權通常藉由招標程序授予，具有長經營期限及排他性。與其他公共服務契約不同的是，在公共服務契約中，承包商提供服務之對象為政府機關。特許經營者則是為了公眾經濟利益而在服務市場進行商業營運，轉讓商業機會與風險與業者是特許經營性質之核心

2、鑑於許多特許權是根植於基礎設施且具有特定地理性，因此，在特許權授予之標案中，關注的重點之一即是投標者間之競爭程度。贏得特許權者通常會被授予提供服務之專有權，從而會在服務市場中確立或永久占據主導地位。雖然藉由定期、密集之競標，重新締約之舉措，可對特許經營者帶來壓力而避免恣意行為。但是，如果特許經營權具有長效期或強大續約權利，則會削弱此類壓力限制。另外，事業在特許經營權下於市場所建構之市場力量，也可能有助於其在特許權續約時，取得主導地位。

3、由於特許權以基礎設施為核心的角色，使其容易受到獨占(dominance)、在位優勢(incumbency advantage)及排他性行為(exclusionary conduct)之影響，僅靠改善招標程序或契約條款之設計，不足以防止利益衝突或反競爭性歧視待遇。可能需要競爭執法來介入，以解決合於招標程序與契約規定之「反競爭行為」。對

於結合相關之特許經營權授予標案，必須保持戒心及創造力，審慎評估該結合對未來競爭之影響。此外，確保特許經營契約本身之執行，也是保持特許經營者誠信及維護市場競爭紀律之重要因素，同時也間接地促成了競爭執法。

(三) ELISABETTA IOSSA 女士：

1、在設計公共服務供應標案及契約條款時，政府常需處理在位優勢(incumbency advantage)之有礙競爭問題。跡象顯示，2006年至2016年2月期間，歐洲公共採購僅一次投標之公開招標數量，從17%增加到30%；每個招標之平均參標者數量從5下降到3；現行經營事業(incumbent firms)屢屢贏得公共標案之續約；中小企業僅贏得超過歐盟的公共採購契約價值之45%，遠低於其在經濟中之權重，顯示政府採購市場有集中之趨勢。常見促使此類限制競爭形成之因素有：設計不當之招標作業及契約內容不鼓勵參與、圍標、參進障礙(沈沒成本)、在位優勢、獨占權利濫用、公共購買者能力、關說與貪瀆、政治干預等等，本次報告重點則在探討在位優勢對於市場競爭之影響及因應。

2、由德國短途鐵路及客運服務之結構模型、香港駕駛學校之經營、南非公車運輸營運等例子以觀，在位優勢限制了創新，影響市場參進。許多國家面對採購失敗所採取方法通常是，重新設計政府採購法律，以減少政府當局自由裁量權，並對私人主動提出之契約內容建議施加限制。但是，沒有實證經驗顯示此種方法是有效的。事實上，諷刺的是，法律限制範圍更廣之國家往往體制效率較弱且腐敗程度更高之國家。此外，不斷地修法亦增加法律之不確定性，從而抑制了私人投資。較佳的替代策略，應該是增強公共部門之專業能力和責任，並增加獨立機構之參與度，以便針對每個部門和特許類型設計標準化之招標作業和契約內容，為事後評估提供標準與績效數據，並為競爭做好充分準備。

3、營造一個輪流競爭之市場，需要之條件包含：公平的競爭環境、消除參進之技術與資訊障礙，並對依據過去經驗及市場知識可能會產生在位優勢予以妥善應對。為解決在位優勢，政府當局可考慮分拆契約，批次分配給不同事業，可幫助增強來自其他活躍事業之市場競爭壓力，即便此舉會導致短期效率低下。然後，採購部門可協調不同城市之相同或相似服務之招標時間，視個案性質採同步或交錯招標，降低影響限制競爭行為介入可能性。主管機關還應透過鼓勵中、小企業及新進入者之參與來保持長期競爭，因此，較短期限和更頻繁之契約締結將會有所助益。此外，輔助服務(如搬運、停車或餐飲服務)應從主要契約中分離出來，單獨招標；而為中、小企業提供信貸支持，也有助於維持長期競爭。

七、數位案例實驗室：

(一) 本屆數位案例實驗室係OECD秘書處第1次舉辦，針對數位經濟議題相關分析工具及實際應用方法，與參與會議之競爭法主管機關進行1個小時的個別討論。我國部分由OECD秘書處資深競爭法競爭專家Ruben Maximiano先生與本會代表杜幸峰視察及楊哲豪專員與談。

(二) 對於本會於會前所提出之問卷，如何以問卷調查方式衡量間接網路效應之方法及相關案例，OECD目前對於該問題並沒有具體結論或參考文件，惟據其所知，近期英國CMA於調查食物外送平台之相關案件中，似乎曾就該問題進行討論，惟因OECD並非競爭法主管機關，實際上亦不清楚CMA於該案所採用之問卷細節及方法，秘書處方面倘有蒐集到其他相關資料，將再提供予本會。

(三) 同時，M氏亦就本會所詢事項，提供下列思考方向供本會參考：

1、如要衡量雙邊市場中網路效應及間接網路效應，應從本會所關切的重點出發。以外送平台的例子而言，或可考慮詢問消費者，合作商家的數量對於消費者來說重不重要，或是詢問消費者，當合作商家減少到哪個程度，受訪者即不再使用該外送平台。嗣後再對合作廠商進行調查，詢問當使用外送平台的消費者人數減少到何種程度，即不再與外送平台合作，在這個一來一往的過程間，或許可以得到一些有用的資訊。然而，這個過程也許有點複雜，原因是不同消費者或不同廠商間，可能有不同的答案，進行此類問卷調查時必須要衡量不同的群體跟要素，因此在操作上會更顯複雜。另外亦可以思考個案調查中，是否要藉由計量方法精準測量網路效應及間接網路效應，或是僅需要證明其相對大小及程度即可。

2、除問卷外，雖不確定我國法制中，取得事業內部資訊的容易程度為何，不過本會倘有機會取得公司內部資訊，或許也可以藉由事業定價在變化時，消費者相對應的反應行為進行觀察，藉由這樣的事後觀察法，或亦可能找出些許蛛絲馬跡。

伍、心得與建議

一、WP3 本次會議討論之「案件閱覽及機密資料保護」各國發言踴躍，各國法規對於案件閱覽與機密資料保護方式描述十分詳盡，可供本會在國際合作及未來修法與制訂相關規定時參考。

二、全球競爭論壇本次討論議題十分豐富，「遭受攻擊的競爭法」議題中亦討論到社會對於競爭法與競爭法執法機關之期待，尤其在競爭法與其他社會、經濟、政治

相關議題之關聯，競爭法主管機關應如何看待這些議題及如何因應，與會專家所提意見值得本會研究參考。

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(2019)2/REV2

For Official Use

English - Or. English

28 November 2019

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 18 November 2019

Working Party No. 2 on Competition and Regulation

Draft Agenda of the 68th meeting of Working Party No. 2

2 December 2019
Paris, France

To be held on 2 December 2019 (09:30-15:45) in Room CC1 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris, France.

Chris PIKE, Competition Expert
Chris.Pike@oecd.org, +33 (0)1 45 24 89 73

JT03455470

Monday 2 December

09:30-09:35

Item 1. Adoption of the Draft Agenda

DAF/COMP/WP2/A(2019)2/REV2

09:35-09:40

Item 2. Approval of the draft summary record of the last meeting (4 June 2018)

For approval:

Summary record of the 67th meeting (June 2019) - DAF/COMP/WP2/M(2019)1

For information:

List of Participants - DAF/COMP/WP2/PL(2019)1

Summary of discussion of the roundtable on Designing publicly funded healthcare markets – DAF/COMP/WP2/M(2018)2/ANN1/FINAL

Executive summary of the roundtable on Designing publicly funded healthcare markets – DAF/COMP/WP2/M(2018)2/ANN2/FINAL

Summary of discussion of the roundtable on Publicly funded education markets – DAF/COMP/WP2/M(2019)1/ANN1/FINAL

09:40-12:40

Item 3. Roundtable on Independent Sector Regulators

This roundtable will discuss agencies' experiences on the role and mandate of sector regulators, the functions and policy objectives they pursue, and the relationship with competition authorities.

Independent regulators are those that operate autonomously and with no undue influence from political forces or private entities. This independence, and their relationship with competition authorities that focus on merger control and antitrust enforcement, is important as an effective regulator can helpfully complement the role of the competition agency and thereby ensure a consistent and coherent competition policy for the sector. It can do so not only by avoiding unnecessary anti-competitive regulatory measure in pursuit of its broader objectives, but also by stimulating more competitive outcomes through better regulation, such as through interventions to tackle asymmetric information, limits on the exploitation of behavioural biases, as well as by reducing barriers to entry and setting standards for portability or interoperability where appropriate. Given the broad adoption of independent regulators in utility industries it is therefore surprising that many other regulated markets lack an independent regulator (with regulations set either through self-regulation or by government ministries). In addition where there are independent regulators there remain a wide variety of different approaches to ensuring consistency between the regulator and the competition authority.

The Roundtable discussion will explore these issues, giving the opportunity to learn from the experiences that delegations have had in advocating for (or against) the creation of, and cooperating with independent sector regulators. The Roundtable will benefit from a Background Paper and from presentations by a panel of experts including Anne Yvrande Billon, Chair of the OECD Network of Economic Regulators and vice-president of the French transport regulator and Professor Sean Ennis, Director of the Centre for Competition Policy, University of East Anglia.

For discussion:

Background Note by Sean Ennis - DAF/COMP/WP2(2019)3

Notes by delegations:

Summaries of contributions - DAF/COMP/WP2/WD(2019)24
Australia - DAF/COMP/WP2/WD(2019)26
Belgium - DAF/COMP/WP2/WD(2019)27
Czech Republic - DAF/COMP/WP2/WD(2019)14
Israel - DAF/COMP/WP2/WD(2019)15
Italy - DAF/COMP/WP2/WD(2019)28
Japan - DAF/COMP/WP2/WD(2019)16
Korea - DAF/COMP/WP2/WD(2019)17
Mexico - DAF/COMP/WP2/WD(2019)31
Norway - DAF/COMP/WP2/WD(2019)29
Spain - DAF/COMP/WP2/WD(2019)30
United States - DAF/COMP/WP2/WD(2019)18
Colombia - DAF/COMP/WP2/WD(2019)32
Croatia - DAF/COMP/WP2/WD(2019)25
Peru - DAF/COMP/WP2/WD(2019)35
Romania - DAF/COMP/WP2/WD(2019)33
Russian Federation - DAF/COMP/WP2/WD(2019)21
South Africa - DAF/COMP/WP2/WD(2019)22
Chinese Taipei - DAF/COMP/WP2/WD(2019)20
Ukraine - DAF/COMP/WP2/WD(2019)23
BEUC - DAF/COMP/WP2/WD(2019)19
BIAC - DAF/COMP/WP2/WD(2019)34

12.40-12:45

Item 4. Future Topics and Other business

Competition Delegates will be called to decide topics for substantive discussions to be held in June 2020. 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.

Lunch break 12.45-14.15

14:15-15:45

Item 5. Discussion of Draft Text of a Possible Recommendation on Competitive Neutrality

For discussion:

Note by the Secretariat - DAF/COMP/WP2/WD(2019)13

A discussion of the draft text of a possible Recommendation on competitive neutrality. The discussion will benefit from a note containing the draft text that was put together by a drafting group in September. The text will be circulated in advance of the meeting.

Organisation for Economic Co-operation and Development

DAF/COMP/WP3/A(2019)2/REV2

For Official Use

English - Or. English

28 November 2019

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 18 November 2019

Working Party No. 3 on Co-operation and Enforcement

Draft Agenda: 130th meeting of Working Party 3 on Co-operation and Enforcement

2-3 December 2019

The 130th Meeting of Working Party 3 on Co-operation and Enforcement will be held on 2 and 3 December 2019 (16:00 to 18:00 on December 2 and 9:30 to 13:00 on December 3) in Room 1 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris.

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

JT03455479

Monday 2 December 2019

16:00-16:05

Item 1. Adoption of the draft agenda for this meeting and of the summary record of the last meeting

For approval:

Agenda - DAF/COMP/WP3/A(2019)2/REV2

Summary record of the 129th meeting (June 2019) - DAF/COMP/WP3/M(2019)1

For information:

List of participants - DAF/COMP/WP3/PL(2019)1

Executive summary of the roundtable on the Treatment of legally privileged information in competition proceedings- DAF/COMP/WP3/M(2018)2/ANN2/FINAL

Summary of discussion of the roundtable on the Treatment of legally privileged information in competition proceedings - DAF/COMP/WP3/M(2018)2/ANN1/FINAL

Executive summary of the roundtable on the Standard of Review by Courts in Competition Cases - DAF/COMP/WP3/M(2019)1/ANN2/FINAL

Summary of discussion of the roundtable on the Standard of Review by Courts in Competition Cases - DAF/COMP/WP3/M(2019)1/ANN1/FINAL

16:05-17:00

Item 2. Transparency and Procedural Fairness

For discussion:

Draft OECD Recommendation on transparency and procedural fairness - DAF/COMP/WP3/WD(2019)66

At the June 2019 meeting of Working Party 3, the Working Party discussed the first draft for an OECD Recommendation on transparency and procedural fairness. Based on comments received by delegations, the Secretariat prepared a second draft, which will be presented at this session.

17:00-18:00

Item 3. Monitoring the implementation of the Recommendation concerning International Co-operation on Competition Investigations and Proceedings

The Recommendation concerning International Co-operation on Competition Investigations and Proceedings instructs the Competition Committee to monitor the implementation of the Recommendation by Adherents and report to the Council every five years. Therefore, the first monitoring started in 2019.

At the meeting of WP3 on June 4 2019, the Secretariat presented a note on developments in Members and OECD's work on international co-operation since the adoption the Recommendation. At that meeting delegates decided that the OECD and the International Competition Network would conduct the same survey on international co-operation as in 2012 (www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf) in order to draw comparative results. The survey includes a section on the implementation of the Recommendation.

In the summer of 2019, the OECD and the International Competition Network will conduct the survey, and the preliminary results will be presented in this session.

Tuesday 3 December 2019

9:30-12:50

Item 4. Roundtable on access to the case file and protection of confidential information

As a rule, jurisdictions provide parties the opportunity to access the evidence forming the basis for the adoption of an enforcement decision or judgment. Providing access to the information in the agency's file protects the parties' rights of defence and promotes transparency and the rule of law. Access to this evidence may be granted in the context of the administrative proceedings (in administrative systems) or under discovery rules (in prosecutorial systems). The scope of the right to access the file varies across jurisdictions. Some agencies provide access to virtually the whole file, while some others provide access only to evidence in the file used to establish an infringement. The moment at which parties can access the file also vary.

The protection of confidential information sets a limit to the right to access the agency's file. In general, 'confidential information' is a concept given meaning through agency practice and case law. Protection of confidential information can involve not disclosing the confidential information at all or doing so through mechanisms that limit such disclosure (e.g. confidentiality rings or data rooms). Agencies may disclose confidential information to the parties in the proceedings in order to respect their rights of defence. They might also disclose this type of information to other agencies – for co-operation purposes – or to claimants for private enforcement.

This roundtable will examine the different approaches to providing access to the file in competition proceedings. It will also explore how jurisdictions protect confidential information, including such issues as the types of information considered confidential, the procedures used to determine whether confidential treatment must be granted, and the methods used to protect confidentiality.

The discussion will be backed by a Secretariat background paper and written contributions by jurisdictions, as well as two expert speakers: Chief Judge Beryl A. Howell of the US District Court for the District of Columbia and Marc Jaeger, Judge at the General Court of the European Union (President from September 2007 to September 2019).

For discussion:

Background paper by the Secretariat – DAF/COMP/WP3(2019)6

Notes by delegations:

Summaries of contributions - DAF/COMP/WP3/WD(2019)52

Austria - DAF/COMP/WP3/WD(2019)65

Belgium- DAF/COMP/WP3/WD(2019)54

Canada - DAF/COMP/WP3/WD(2019)58

Chile - DAF/COMP/WP3/WD(2019)33

Czech Republic - DAF/COMP/WP3/WD(2019)34

Denmark - DAF/COMP/WP3/WD(2019)35

Germany - DAF/COMP/WP3/WD(2019)55

Greece - DAF/COMP/WP3/WD(2019)67

Hungary - DAF/COMP/WP3/WD(2019)36

Ireland - DAF/COMP/WP3/WD(2019)63

Israel - DAF/COMP/WP3/WD(2019)37

Latvia - DAF/COMP/WP3/WD(2019)38

Lithuania - DAF/COMP/WP3/WD(2019)64

Mexico - DAF/COMP/WP3/WD(2019)39

New Zealand - DAF/COMP/WP3/WD(2019)40

Norway - DAF/COMP/WP3/WD(2019)56

Slovenia - DAF/COMP/WP3/WD(2019)57

Spain - DAF/COMP/WP3/WD(2019)41

Switzerland - DAF/COMP/WP3/WD(2019)42

Turkey – DAF/COMP/WP3/WD(2019)60

United Kingdom – DAF/COMP/WP3/WD(2019)59

United States - DAF/COMP/WP3/WD(2019)43

EU - DAF/COMP/WP3/WD(2019)44

BIAC - DAF/COMP/WP3/WD(2019)45

Bulgaria - DAF/COMP/WP3/WD(2019)46

Colombia – DAF/COMP/WP3/WD(2019)61

Croatia – DAF/COMP/WP3/WD(2019)53

Romania - DAF/COMP/WP3/WD(2019)62

Russian Federation - DAF/COMP/WP3/WD(2019)48

Singapore - DAF/COMP/WP3/WD(2019)49

South Africa - DAF/COMP/WP3/WD(2019)50

Chinese Taipei - DAF/COMP/WP3/WD(2019)47

Ukraine - DAF/COMP/WP3/WD(2019)51

Coffee break 11:15-11:35.

12:50-13:00

Item 5. Other matters and future topics

Delegates will be called to decide topics for substantive discussions to be held in June 2020. 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.

Organisation for Economic Co-operation and Development

DAF/COMP/A(2019)2/REV2

For Official Use

English - Or. English

29 November 2019

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 18 November 2019

Draft Agenda: 132nd meeting of the Competition Committee

3-4 December 2019, CC1

The 132nd Meeting of the Competition Committee will be held on 3-4 December 2019 in Room CC1 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris.

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

JT03455514

Tuesday 3 December 2019

14:30-14:35

Item 1. Adoption of the draft agenda

DAF/COMP/A(2019)2/REV2

14:35-14:40

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

For approval:

Summary record of the 131st Competition Committee meeting - DAF/COMP/M(2019)1

For information:

List of participants - DAF/COMP/PL(2019)1

Summary of Discussion of the hearing on Market concentration - DAF/COMP/M(2018)1/ANN6/FINAL

Executive summary of the hearing on Market Concentration - DAF/COMP/M(2018)1/ANN7/FINAL

Summary of Discussion on Blockchain and Competition - DAF/COMP/M(2018)1/ANN5/FINAL

Executive Summary of the Hearing on Blockchain and Competition - DAF/COMP/M(2018)1/ANN8/FINAL

Summary of Discussion of the roundtable on Gun Jumping and suspensory effects of merger notifications – DAF/COMP/M(2018)2/ANN4/FINAL

Executive Summary of the roundtable on Gun Jumping and suspensory effects of merger notifications – DAF/COMP/M(2018)2/ANN3/FINAL

Summary of Discussion of the roundtable on Licensing of IP rights and competition law - DAF/COMP/M(2019)1/ANN5/FINAL

Executive Summary of the roundtable on Licensing of IP rights and competition law - DAF/COMP/M(2019)1/ANN6/FINAL

14:40-15:00

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 2 December (WP2) and 2-3 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.

15:00-16:00

Item 4. Peer Review of Mexico

For discussion:

Report by the Secretariat - DAF/COMP/WD(2019)77

In 2019, Mexico is undergoing an in-depth review of its competition law and policy. This review will be led by Lead Examiners and it will be open to members, associates, participants and to the European Union. The review will be performed based on a Secretariat report to be circulated in advance of the meeting. The examination of the issues identified in the peer review exercise will take place on 23 September 2019 in

San Pedro Sula, Honduras, on the margins of the Latin American and Caribbean Competition Forum (LACCF). Lead Examiners will report back to the Committee the findings from the examination and final conclusions will be presented during the Competition Committee in December 2019.

16:00-18:15

Item 5. Accession review of Costa Rica [CONFIDENTIAL]

For discussion:

Report by the Secretariat – DAF/COMP/ACS(2019)1

Following a first examination of Costa Rica which took place on 16 June 2016 an additional accession review will take place in a confidential session based on a Secretariat report on the developments on competition occurred in the Costa Rica since June 2016. A separate agenda for this confidential item will be distributed on ONE under DAF/COMP/ACS/A(2019)1/REV1.

Wednesday 4 December 2019

10:00-10:10

Item 6. Election of the Chairman and Vice Chairmen for 2020

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 2020.

10:10-13:00

Item 7. Roundtable on Hub and Spoke Arrangements

Hub & Spoke conspiracies are horizontal restrictions of competition that are facilitated/implemented through vertical relationships. In the extreme form they result in a full blown horizontal hard core cartel (mostly price fixing), without the cartelists ever having any direct communication between them. The roundtable will be a continuation of existing work of the Committee on vertical restraints, e-commerce, RPM, and on information exchanges between competitors. The main aim of the roundtable is to outline the case practice (mostly EU and US) with regard to hub and spoke arrangements and the standards of proof as established in main jurisdictions. Particular attention will be given to the risk of hub and spoke arrangements arising in digital markets. During the roundtable delegates will have an opportunity to present their case practice and jurisprudence, to exchange views on the practical difficulties related to investigating such arrangements, on the burden and standard of proof, and on the applicability of leniency programmes to vertical restraints with horizontal effects.

The Roundtable will benefit from a Secretariat Background paper and from presentations by a panel of experts, including Matthew Bennett (Charles River Associates, London); Rachel S. Brass (Gibson Dunn, San Francisco), and Okeoghene Odudu (University of Cambridge, UK).

For discussion:

Background Note by the Secretariat - DAF/COMP(2019)14

Notes by delegations:

Summaries of contributions - DAF/COMP/WD(2019)79

Australia - DAF/COMP/WD(2019)80

Austria - DAF/COMP/WD(2019)103

Belgium - DAF/COMP/WD(2019)102

Chile - DAF/COMP/WD(2019)81

Germany - DAF/COMP/WD(2019)104

Greece - DAF/COMP/WD(2019)105

Hungary - DAF/COMP/WD(2019)82

Japan - DAF/COMP/WD(2019)83

Korea - DAF/COMP/WD(2019)84

Latvia - DAF/COMP/WD(2019)85

Portugal - DAF/COMP/WD(2019)86

Sweden - DAF/COMP/WD(2019)87

Turkey - DAF/COMP/WD(2019)107

United Kingdom - DAF/COMP/WD(2019)106

United States - DAF/COMP/WD(2019)88

EU - DAF/COMP/WD(2019)89

Colombia - DAF/COMP/WD(2019)108

Russian Federation - DAF/COMP/WD(2019)91

Singapore - DAF/COMP/WD(2019)92

South Africa - DAF/COMP/WD(2019)93

BIAC – DAF/COMP/WD(2019)112

Lunch break 13:00-14:30

14:30-17:00

Item 8. Roundtable on Barriers to Exit

This roundtable will offer an opportunity to delegates to address a topic that was never discussed before by the Competition Committee. Most of the focus has been on barriers to entry and their effects on competition. However, for competition to be effective there must also be firm exit. Barriers to exit, like barriers to entry, decrease the market discipline mechanisms of the competitive process to relocate resources from one market or firm to another according to changing conditions. This can lead to less efficient firms staying in the market. As a result, resources (both financial and human capital) are 'trapped' longer in existing firms instead of being relocated to their most efficient use. This makes it difficult for more efficient firms to expand and crowd-out the growth of more innovative firms. Therefore barriers to exit can have an adverse effect on the level of competition, hinder innovation and change, be an important driver of productivity slowdown, and have an adverse impact on economic growth. Delegates will have an opportunity 1) to discuss how authorities consider barriers to exit in their enforcement and advocacy work; 2) to present cases where barriers to exit were an important consideration to the case; 3) to analyse how barriers to exit were assessed; and 4) to discuss the difficulties they encountered when identifying appropriate remedies.

The Roundtable will benefit from a Secretariat Background paper and from presentations by a panel of experts, including Jocelyn Mantel (ESSEC Business School, France), Matthew Johnson (Partner, Oxera),

Müge Adalet McGowan (Senior Economist, Economics Department, OECD), Mary E. Deily (Professor of Economics, Lehigh University).

For discussion:

Note by the Secretariat - DAF/COMP(2019)15

Notes by delegations:

Summaries of contributions - DAF/COMP/WD(2019)95

Belgium - DAF/COMP/WD(2019)98

Italy - DAF/COMP/WD(2019)99

Mexico - DAF/COMP/WD(2019)97

Spain - DAF/COMP/WD(2019)101

Turkey - DAF/COMP/WD(2019)109

Colombia - DAF/COMP/WD(2019)110

Russian Federation - DAF/COMP/WD(2019)96

Ukraine - DAF/COMP/WD(2019)111

BIAC – DAF/COMP/WD(2019)94

17:00-17:45

Item 9. Annual Reports on Competition Policy

All delegations are invited to submit their annual report for 2018. Following a recommendation by the Bureau, only some Delegations will be allocated time to make presentations on a key development that has taken place during the relevant period (e.g. a legal reform, a new policy approach, an important decision, etc.). 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. It will subsequently contact Delegations to ensure a consistent approach to such presentations.

17:45-18:00

Item 10. Other Business and Future Work

1. Preliminary discussion on the Programme of Work and Budget for the biennium 2021/2022

In the course of 2020 the Competition Committee shall, under OECD rules of procedure, develop a proposed input to the OECD Programme of Working and Budget for 2021 and 2022. Delegates are invited to have a preliminary discussion of its future priorities and preferred work streams, based on a document prepared by the Secretariat.

For discussion:

Note by the Secretariat - DAF/COMP(2019)18

2. Future work

Delegates will be called to discuss topics for substantive discussions to be held in June 2020 and potentially in December 2020. 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. For topics that could be considered by delegates for both the Committee and its two Working Parties, you are invited to consult the list of topics suggested by delegates over time [DAF/COMP/WD(2018)7]

DRAFT AGENDA
3rd Meeting of High Level Representatives of Asia-Pacific Competition Authorities

OECD Conference Centre, Paris **4 December 2019**

Following from a very successful meetings in 2017 and 2018, the third meeting of the OECD High Level Representatives of Asia-Pacific Competition Authorities will again bring together high-level representatives from the authorities of the Region as a forum to share experiences and discuss topics of common interest. We expect this third meeting to continue to build a better understanding of other jurisdictions' laws, practices and policies and to help identify best practices amongst their regional peers. The main theme for this third meeting will be digitalisation and the issues it raises from a competition policy and enforcement perspectives. This will include discussing, for instance, some of the effective tools that may be used by competition authorities in the region as well as the importance of cooperation amongst agencies in the region.

DRAFT Agenda

Wednesday 4th December (Room E)

14:00 – 14:10	**INTRODUCTORY REMARKS** • Mr. Antonio Capobianco, Acting Head of Competition Division, OECD
14:10 – 14:20	**UPDATE ON THE OECD ASEAN PROJECT**
14:20 – 14:30	**OECD BASIC COMPETITION STATISTICS**
14:30 – 14:45	**KEYNOTE SPEECH ON DIGITAL (TBC)**
14:45 – 17:45	**MAIN THEME: COMPETITION ISSUES OF DIGITALISATION – from Policy to Practice** Digitalisation has led to the introduction of new markets, change of old ones, and a transformation in how consumers obtain information and make purchases. This Session will explore the common competition issues and challenges arising from the digitalisation of economies. In particular, digital products and markets can exhibit some particular characteristics that affect market structure, including: strong digital platform network effects, substantial economies of scale and scope, significant user data, low or zero prices. These will be discussed to allow decision makers at competition authorities in the Region to consider the most recent practices from the Region and from other jurisdictions by looking at recent studies undertaken in a number of jurisdictions as well as through cases. Session Chair: Ruben Maximiano, Senior Competition Expert and Asia-Pacific Regional Manager, OECD

	- Initial presentation setting the scene and characteristics that make such markets different (OECD)
	
	- *Policy initiatives and prioritisation (1hr)*
	  ○ Main presentation on market enquiries and policy initiatives from across jurisdictions – Peter Alexiadis, Partner Gibson, Dunn & Crutcher, Brussels
	  ○ Why and How to prioritise cases in digital – interventions from participating jurisdictions
	- *Market definition and market power in the digital space (1hr)*
	  ○ Guest Speaker – EU (TBC)
	  ○ interventions from participating jurisdictions
	- *Merger control (1 hr)*
	  ○ Main presentation on theories of harm (Guest Speaker from US FTC TBC)
	  ○ interventions from participating jurisdictions
	
	• OPEN FLOOR

17:30 – 18:15	**Final Remarks** • Mr. Antonio Gomes (Acting Deputy Director, DAF OECD)

Organisation for Economic Co-operation and Development

DAF/COMP/GF/A(2019)1

Unclassified

English - Or. English

1 December 2019

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 31 October 2019

Global Forum on Competition

Draft Agenda: Global Forum on Competition

5-6 December 2019

The 18th meeting of the Global Forum on Competition will be held on 5-6 December 2019 in Room 1 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris.

Ms. Lynn ROBERTSON, Manager GFC, LACCF, Competition Expert, OECD Competition Division. E-mail address: Lynn.ROBERTSON@oecd.org, Tel.: +(33-1) 45 24 18 77.

JT03455579

Thursday 5 December 2019

Chair: Frédéric Jenny, Chairman of the OECD Competition Committee

OPENING SESSION

09:30-10:30

Opening Remarks

Angel Gurría, OECD Secretary-General

Keynote Address by Jean Tirole, Honorary Chairman of the Jean-Jacques Laffont - Toulouse School of Economics Foundation and Chairman of the Institute for Advanced Study in Toulouse (IAST)

Introductory Comments

Frédéric Jenny, Chair, OECD Competition Committee

SESSION I: COMPETITION UNDER FIRE

10:30-13:00

The current policy debate criticising the activities of competition authorities is broad and wide ranging from questioning the inadequacy of the consumer welfare standard, to concerns about the current merger control standards. Competition authorities face questions about the effectiveness of their activities and whether competition maybe skewed, favouring large firms to the detriment of smaller ones or certain economic classes of the population over others. Considerations of industrial policy, and public interest objectives, also enter into the debate of whether competition as we know it is still relevant. This session will address the growing scepticism of competition, examining and responding to the broad criticisms which antitrust policy has been subject to in recent times. The panel will also look at the role that competition policy could play when pursuing such broader interests; the enforcement standard that agencies could apply; and, if competition should have any role in promoting industrial policy objectives and reduction of inequalities in modern societies. The session will be led by a panel of experts from different policy areas to debate the question and discuss with delegates in an interactive Q&A format.

Chair: Frédéric Jenny, Chair of the OECD Competition Committee

Speakers:

- **Tembinkosi Bonakele**, Commissioner, South African Competition Commission
- **Elie Cohen**, Economist, Research Director at France's national scientific research center (CNRS) and Professor at SciencePo
- **William E. Kovacic**, Global Competition Professor of Law and Policy; Professor of Law Director, Competition Law Center, George Wahsington University
- **Joshua D. Wright**, University Professor of Law and Executive Director, Global Antitrust Institute, Antonin Scalia Law School, George Mason University

Special remarks by Rt. Hon. Andrew Tyrie, Chair, Competition and Markets Authority (CMA), United Kingdom

Documentation:

Documentation is also available at: oe.cd/cunf.

GFC official photo for all participants (13:00-13:20)

Lunch break (13:20-15:00)

SESSION II: COMPETITION PROVISIONS IN TRADE AGREEMENTS

15:00-18:00

The majority of trade agreements include a competition policy chapter or individual competition provisions. These cover a range of issues, such as the adoption or maintenance of competition laws, international co-operation on competition policy or the introduction of procedural safeguards. This session will consider the purpose and impact of these competition provisions in practice, to discuss their usefulness in broadening and strengthening the application of competition law worldwide. In addition, the session will look at the role of competition authorities in the drafting and negotiation of competition provisions in trade agreements.

Chair: Frédéric Jenny, Chair, OECD Competition Committee.

Speakers:

- **François-Charles Laprévote**, Partner, Cleary Gottlieb Steen & Hamilton LLP
- **Anna Caroline Müller**, Legal Affairs Officer, WTO
- **Susan Stone**, Head, Emerging Policy Issues Division, Trade and Agriculture Directorate, OECD

Documentation:

Call for contributions: DAF/COMP/GF(2019)1
Paper by François-Charles Laprévote: DAF/COMP/GF(2019)5
Paper by Robert D. Anderson, William E. Kovacic, Anna Caroline Müller and Nadezhda Sporysheva: DAF/COMP/GF(2019)11
Note by the Secretariat: DAF/COMP/GF(2019)6

Contributions from:

Algeria - DAF/COMP/GF/WD(2019)9
Australia - DAF/COMP/GF/WD(2019)10
Botswana - DAF/COMP/GF/WD(2019)51
Canada - DAF/COMP/GF/WD(2019)5
Eurasian Economic Commission - DAF/COMP/GF/WD(2019)25
European Union - DAF/COMP/GF/WD(2019)7
Finland - DAF/COMP/GF/WD(2019)11
Hong Kong, China - DAF/COMP/GF/WD(2019)2
Indonesia - DAF/COMP/GF/WD(2019)1
Mexico (COFECE & IFT) - DAF/COMP/GF/WD(2019)12
Philippines - DAF/COMP/GF/WD(2019)6
Serbia - DAF/COMP/GF/WD(2019)13

Singapore - DAF/COMP/GF/WD(2019)14

Switzerland - DAF/COMP/GF/WD(2019)15

Turkey - DAF/COMP/GF/WD(2019)16

Thailand - DAF/COMP/GF/WD(2019)60

Ukraine - DAF/COMP/GF/WD(2019)4

United States - DAF/COMP/GF/WD(2019)3

BIAC - DAF/COMP/GF/WD(2019)17

TUAC - DAF/COMP/GF/WD(2019)18

World Bank - DAF/COMP/GF/WD(2019)8

UNCTAD "Assessing regional integration in Africa: Next steps for the African Continental Free Trade Area" https://www.uneca.org/sites/default/files/PublicationFiles/aria9_en_fin_web.pdf.

Summaries of contributions: DAF/COMP/GF/WD(2019)20

Documentation is also available at: oe.cd/cpta.

18:00-18:15 **UNCTAD: Brief presentation of the Guiding Policies and Procedures under Section F of the UN Set on Competition**

Speakers:

- **Teresa Moreira**, Head, Competition and Consumer Policies Branch, UNCTAD
- **Pierre Horna**, Legal Affairs Officer, CCPB, UNCTAD
- **Akari Yamamoto**, Competition Expert seconded to UNCTAD

UNCTAD document is available at:
https://unctad.org/meetings/en/SessionalDocuments/ccpb_comp1_%20Guiding_Policies_Procedures.pdf

SIDE MEETING: DIGITAL CASE LAB

15:00-18:00

The Digital Lab will provide practical support to authorities seeking guidance on competition and the digital economy. In an innovative new format, the OECD Secretariat will share its work and expertise directly with authorities seeking advice and information on specific digital issues, providing guidance on methodologies and analytical tools to participating agencies. Meetings throughout the GFC will be held between the Secretariat and individual authorities based on the results of the questionnaire circulated and returned to the Secretariat prior to the GFC.

Documentation:

Explanation and participation questionnaire: DAF/COMP/GF(2019)2

Documentation is also available at oe.cd/dclab.

This side meeting will take place in Room 9.

Cocktail hosted by Peru – G. Marshall/R. Okrent rooms, Château de la Muette, OECD (18:30-21:00)

Friday 6 December 2019

SESSION IV: INTRODUCTORY PLENARY - MERGER CONTROL IN DYNAMIC MARKETS

09:30-11:15

The modern competition dynamics observed in rapidly-evolving sectors, such as high-technology, consumer services and online retail, is challenging the role of competition authorities in merger control, where enforcement decisions fundamentally depend on an effects-based analysis of the likely future effects of the merger. This plenary session on Merger Control in Dynamic Markets will debate the relevant timeframe of merger control and to try to determine how far into the future should authorities look when assessing the effects of a merger. This session will allow participants to discuss through three breakout sessions.

Chair: Frédéric Jenny, Chair, OECD Competition Committee

Speakers:

- **Giulio Federico**, Head of Unit, Chief Economist Team, DG COMP, European Commission
- **Geoffrey Manne**, President & Founder at International Center for Law and Economics
- **Helder Vasconcelos**, Vice-Rector, Porto University

Contributions from:

Brazil - DAF/COMP/GF/WD(2019)53

Colombia - DAF/COMP/GF/WD(2019)21

Chile (FNE) - DAF/COMP/GF/WD(2019)55

Egypt - DAF/COMP/GF/WD(2019)22

European Union - DAF/COMP/GF/WD(2019)27

France - DAF/COMP/GF/WD(2019)23

India - DAF/COMP/GF/WD(2019)24

Japan - DAF/COMP/GF/WD(2019)26

Kenya - DAF/COMP/GF/WD(2019)49

Korea - DAF/COMP/GF/WD(2019)52

Malaysia - DAF/COMP/GF/WD(2019)28

Moldova - DAF/COMP/GF/WD(2019)50

Romania - DAF/COMP/GF/WD(2019)58

Russian Federation - DAF/COMP/GF/WD(2019)56

Singapore - DAF/COMP/GF/WD(2019)29

South Africa - DAF/COMP/GF/WD(2019)47

Chinese Taipei - DAF/COMP/GF/WD(2019)30

United Kingdom - DAF/COMP/GF/WD(2019)31

United States - DAF/COMP/GF/WD(2019)32

BIAC - DAF/COMP/GF/WD(2019)41

Summaries of contributions - DAF/COMP/GF/WD(2019)34

Documentation:

Call for contributions: DAF/COMP/GF(2019)3

Background note by the Secretariat: DAF/COMP/GF(2019)8

Documentation is also available at oe.cd/mcdym.

BREAKOUT SESSIONS: MERGER CONTROL IN DYNAMIC MARKETS

11:30-13:30

Breakout Session 1: Competitive assessment of mergers

This session will also debate additional tools and information that might be relevant to assess potential competition, as well as to evaluate dynamic effects of the merger in the relevant market or in future markets.

- **Moderator: Fatma Al Zahraa**, Legal Advisor to the Chairman on Competition Law and Policy, Egyptian Competition Authority

Breakout Session 2: Competitive assessment of mergers

This session will also debate on the Competitive assessment of mergers.

- **Moderator: Arsenio M. Balisacan**, Chairman, Philippine Competition Commission

Breakout Session 3: Efficiency Effects and Design of Remedies

This session will discuss dynamic efficiency effects, as well as the design of remedies that may help addressing competitive concerns without necessarily compromising efficiency gains.

- **Moderator: Darya Cherednichenko**, Deputy Chair, AMCU, Ukraine

Lunch Break (13:30-14:45)

WRAP-UP PLENARY: MERGER CONTROL IN DYNAMIC MARKETS

14:45-15:30

Chair: Frédéric Jenny, Chair, OECD Competition Committee

1. Report by Moderators

2. General Discussion

3. Summary and final remarks by session Chair

SESSION IV: COMPETITION FOR-THE-MARKET

15:30-18:00

Some products have characteristics that lead firms to compete to be the supplier of a whole market of product or services, rather than for market share (whether it be a share of units, of contracts or of consumer relationships). These might for example include: a) natural monopolies (with large economies of scale); b) publicly-funded monopolies (that would not be provided by markets); c) legally-protected monopolies (e.g. products protected by intellectual property rights); and d) platform monopolies (e.g. digital platforms with powerful direct or cross-platform network effects that generate increasing value from scale). This Roundtable will focus on the first of these categories, natural monopolies, and publicly-funded monopolies, particularly on the enforcement challenges that arise when concessions are offered on these services.

Chair: Frédéric Jenny, Chair, OECD Competition Committee

Speakers:

- **Elisabetta Iossa**, Full Professor of Economics, University of Rome Tor Vergata
- **Rory Macmillan**, Founding Partner, Macmillan Keck

Contributions from:

Albania - DAF/COMP/GF/WD(2019)35

Colombia - DAF/COMP/GF/WD(2019)36

Ecuador - DAF/COMP/GF/WD(2019)46

Hong Kong, China - DAF/COMP/GF/WD(2019)40

Latvia - DAF/COMP/GF/WD(2019)38

Lithuania - DAF/COMP/GF/WD(2019)39

Mexico (COFECE & IFT) - DAF/COMP/GF/WD(2019)62

Peru - DAF/COMP/GF/WD(2019)42

Russian Federation - DAF/COMP/GF/WD(2019)57

South Africa - DAF/COMP/GF/WD(2019)48

Thailand - DAF/COMP/GF/WD(2019)59

United States - DAF/COMP/GF/WD(2019)44

BIAC - DAF/COMP/GF/WD(2019)61

Summaries of contributions - DAF/COMP/GF/WD(2019)45

Documentation:

Call for contributions: DAF/COMP/GF(2019)4

Paper by Elisabetta Iossa: DAF/COMP/GF(2019)10

Background note by the Secretariat: DAF/COMP/GF(2019)7

Documentation is also available at oe.cd/cmkt.

FINAL SESSION: OTHER BUSINESS AND PROPOSALS FOR FUTURE WORK

18:00-18:30

Chair: Frédéric Jenny, Chair, OECD Competition Committee

Organisation for Economic Co-operation and Development

DAF/COMP/WP2/WD(2019)20

Unclassified English - Or. English

13 November 2019

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 2 on Competition and Regulation

Independent Sector Regulators – Note by Chinese Taipei

2 December 2019

This document reproduces a written contribution from Chinese Taipei submitted for Item 3 of the 68th OECD Working Party 2 meeting on 2 December 2019.
More documents related to this discussion can be found at
http://www.oecd.org/daf/competition/independent-sector-regulators.htm

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

JT03454553

Chinese Taipei

1. Independent regulatory agencies and their development in Chinese Taipei

1. Before the 1980s, industrial polices and sector-based supervisory regimes were mostly governed and controlled by government bodies under ministerial level agencies in Chinese Taipei. For example, the Directorate General of Telecommunication (Ministry of Transportation and Communications, MoTC) was responsible for telecommunication-related industries and the Ministry of Economic Affairs (MoEA) was in charge of public utilities, including water, electricity, natural gas and energy related industries (Table 1, sector-specific government agencies and their current regulatory matters in Chinese Taipei). Following the trend of global liberalization in economic sectors by the 1980s, establishment of independent regulatory agencies (IRAs) became an eye-catching topic in Chinese Taipei to explore timely regulatory measures in response to industrial changes, ensure the credibility of policies and maintain technology requirements.

2. After liberalizing markets in terms of financial services, air transport, petroleum and telecommunications in Chinese Taipei over the past 20 years, it was critical to initiate discussions on re-regulation to address issues that arose from liberalizing those highly regulated markets. In 2002, Chinese Taipei proposed to introduce independent administrative institutions in its bureaucratic restructuring plan. The nature of independent administrative institutions is similar to "IRAs", which requires relatively high professional competence and a safeguard against political interference. Although such independent agencies were part of the executive government, they could exercise their authority autonomously without being directed or supervised by other agencies (including superior agencies)[1].

3. To avoid overextending and to streamline its organization structure, the Government in Chinese Taipei takes control of the total number of central administrative agencies. Before 2010, there were five independent agencies, including the National Communications Commission (NCC), the Central Election Commission, Central Bank, the Financial Supervisory Commission (FSC) and the Fair Trade Commission. The independent statutory statuses of the FSC and Central Bank were changed under the 2010 bureaucratic restructuring plan[2]. Currently, there are ten ministries, six commissions and three independent agencies.

[1] Article 3 of the Basic Code defines independent agency" as "a commission-type collegial organization that exercises its power and functions independently without the supervision of other agencies, and operates autonomously unless otherwise stipulated."

[2] Article 9 of the Organizational Act of the Executive Yuan provides that "The Executive Yuan establishes the independent administrative institutions equivalent to the second-level agencies of the Central Government:(1) Central Election Commission;(2) Fair Trade Commission; and (3) National Communications Commission."

Table 1. Sector-specific regulators in Chinese Taipei

Sector	Service Provider	Regulator	Regulated Matter(s)
Water	Taiwater	Water Resource Agency, MoEA	Determination of water tariffs
Electric Power	Taipower	Bureau of Energy, MoEA	License grants and determination of electricity tariffs
Petroleum	CPC Corporation, Formosa Petrochemical Corporation		Pre-notification of petroleum prices
Natural Gas	A single provider in each designated area		Adoption of regional monopolistic management and determination of price tariffs
Bus	Bus operators	Directorate General of Highway, MoTC	Determination of bus routes and fares
Taxi	Taxi companies and independent taxi drivers		Determination of fare rates and operating areas
Maritime Transport	Vessel carriers	Maritime and Port Bureau, MoTC	License grants, determination of fare rates, and pre-notification of maritime routes
Air Transport	Air transport operators	Civil Aeronautics Administration, MoTC	Determination of airfares, airline routes and flight schedules
Tourism	Travel agents	Tourism Bureau, MoTC	Registration and license grants
Financial services	Banks	Financial Supervisory Commission	Banking license, capital adequacy and coverage of banking services
Education	Schools	Ministry of Education	Determination of tuition fees
Telecommunication	Telecommunications companies	National Communications Commission	Spectrum auctions and telecommunication license
Broadcasting services	Broadcasting operators, program suppliers		License grant and operating areas

2. Mandates of independent agencies

4. The Organic Act of each independent agency in Chinese Taipei explicitly sets out its establishment purposes and mandates. For example, the "Organic Act Governing the Establishment of the FSC", which retained its independent status remained until 2010[3], states that the FSC is responsible for development, supervision, regulation, and examination of financial markets and financial service business with the aims of promoting sound business management at financial institutions, maintain financial stability, and facilitate the development of financial markets[4].

5. Mandates of an independent regulator are not only stipulated in its Organic Act. Sometimes the independent regulator also carries out missions to protect constitutional

[3] When the FSC established on 1 July 2004, it was a second-level independent agency. Its independent statutory status was altered by following structural reforms of the central government in 2010. However, the mandates and missions of the FSC remain unchanged. To the extent that applicable laws permit, the FSC can exercise its power independently on financial supervisory matters irrelevant to policy making to ensure its independency and professionalism.

[4] Article 1 of the Organic Act Governing the Establishment of the Financial Supervisory Commission states that "The Executive Yuan hereby establishes the Financial Supervisory Commission to promote sound business management at financial institutions, maintain financial stability, and facilitate the development of financial markets." Paragraph 1, Article 2 of the same Act states that "The FSC shall be the competent authority for development, supervision, regulation, and examination of financial markets and financial service enterprises."

rights. An interpretation delivered by the Constitutional Court[5] acknowledged that independency of the NCC was to help the expression and distribution of diversified opinions in society and achievement of public supervision[6].

3. Sector-specific regulatory control

6. To implement mandates stipulated by organic laws, regulatory agencies manage and supervise areas of oversight through various regulations and policies. The consequences of breaches of these statutory regulations are different from breaches of internal regulations developed by industries themselves. While the Bankers Association develops its own self-regulatory regime, a disciplinary action for a member in violation of these internal regulations will be taken on the basis of at least two-thirds of commissioners present at the disciplinary commission meeting, where more than half of them reach a consensus. Given that commissioners are representatives of banks, it is questionable whether they can make an independent and impartial decision. Furthermore, the Association only issues non-binding warning letters to first-time violators. In contrast, a bank in violation of applicable laws and regulations may be subject to the FSC's investigation and administrative penalties. Such a breach may also impact on extension or renewal of its banking license.

7. Considering the limited effect of self-regulation and self-discipline on individual businesses, Chinese Taipei intends to govern industry practices through specified sector-specific regulators or independent regulators in order to implement industry policies, and monitor and investigate any conduct that may raise concerns. In this regard, these regulators are required to have comprehensive understanding of industries, business practices, technology development and future trends. To facilitate this, individual firms in their related industries may be obligated to submit industry information to keep regulators informed of the latest updates on industry developments.

8. The NCC is the independent regulator of the cable TV industry. With substantial fixed costs (i.e. server rooms, cables and equipment), this industry has inherent characteristics of a natural monopoly, which may easily result in market failure. Therefore, the NCC pays close attention to the market power of respective cable TV operators and market competition. In practice, the number of household subscriptions in each designated area is used to assess market power of a cable TV operator. Cable TV operators are required

[5] Constitutional Court, Judicial Yuan is the highest judicial organ set up under the Constitution in Chinese Taipei. The power of the Justices consists of providing rulings on the following four categories of cases: (1) Interpretation of the Constitution; (2) Uniform Interpretation of Statutes and Regulations; (3) Impeachment of the President and the Vice President of the Republic of China; and (4) Declaring the dissolution of a political party violating the Constitution.

[6] Interpretation No. 613 of the Constitutional Court: "… if the lawmakers intend to make the NCC, which is in charge of the supervision and management of communications, an independent agency that may exercise its functions and duties independently pursuant to the law, thus removing it from the hierarchical administrative system of command and supervision while giving it more autonomy to make independent decisions based on its expertise, it should be considered to be consistent with the constitutional intent of protecting the freedom of communications in that it is conducive to the elimination of any potential political or inappropriate interference from superior agencies and political parties, thus ensuring the expression and distribution of diversified opinions of the society and serving the purposes of public supervision."

to submit the number of household subscriptions quarterly under Article 24 of the Cable Radio and Television Act[7]. By doing so, the NCC can monitor market competition and changes on market power of respective operators to more effectively prevent market failure.

4. Responses to innovative development

9. Theoretically, independence without political interference and industry expertise of independent regulators can enable them to respond to fast-changing regulated industries in a timely manner and develop more tailored-made regulations and policies. However, in Chinese Taipei, whether a regulator is independent or not does not seem particularly relevant to adaptive governance of industry innovation.

10. As noted above, the NCC is the independent regulator of telecommunications. Considering the development of 5G technology and its features, the NCC took a number of active actions to review and amend relevant telecommunication regulations to accommodate this latest cellular network technology into the current governance regime. For example, the winning bidder of 5G spectrum can share it in part with other bidders with the NCC's approval to improve spectrum efficiency. Another sector facing innovative technologies is the financial industry. Although the FSC was integrated into the executive body in 2012, the FSC was able to rapidly amended relevant regulations in response to emerging online-only banks along with innovative transaction models and identity verification. The FSC set out a framework containing basic rules, including: "prohibition of merging with physical banks", "separation between industry and financial sectors" and "separation between financial businesses". The FSC also lowered the entry requirements of online-only banks accordingly. Shareholders of an online-only bank are not required to be financial related businesses. An online-only bank may qualify to apply for a banking license if 25 percent of its shares are held by a financial business. The FSC has recently issued three licenses to online-only banking service providers.

11. These two examples show that the NCC, an independent regulator, is able to take prompt actions to deal with the development of 5G at its own professional and independent discretion. Likewise, the FSC is also well equipped with its professional capability to face challenges and impacts resulting from innovative technologies, even though the FSC is a sector-specific regulatory agency rather than an independent regulator.

5. Pro-competitive regulations and competition policies

12. The competition law of Chinese Taipei, the Fair Trade Act (FTA), was promulgated in 1991, and Chinese Taipei Fair Trade Commission (FTC) was subsequently established the following year. FTC is a collegial agency with 7 commissioners to enforce the FTA. The FTA covers anti-competitive conduct (abuse of dominance, merger notification and cartels) and unfair competition conduct. As the FTA generally applies to businesses in all sectors, the FTC has paid close attention to business practices in either regulated or non-regulated industries, which may have an impact on market competition. The FTC has

[7] Paragraph 3, Article 24 of the Cable Radio and Television Act states that "the System operators shall report the number of their subscribers for the previous three months in January, April, July, and October of each year to the central regulatory agency."

initiated various competition advocacy programs to encourage sector-specific regulatory agencies (including independent regulators) to incorporate competition policy into industry policies for the purpose of effectively promoting competition and development in industries.

13. In 1996 the FTC set up a "Deregulation / Promotion of Competition Task Force", to identify twelve industries[8] and negotiate with relevant regulatory agencies to facilitate deregulation. In the process of investigations on competition cases, the FTC may also consult with sector-specific regulators if it is necessary. Their opinions may be used to facilitate the FTC's determination on whether an enterprise has violated the FTA or not. Sector-specific regulatory agencies may also seek the FTC's comments on competition related matters in the industry under their oversight, and invite the FTC to discussions on amendments that may have an influence on market competition.

14. Public utilities in Chinese Taipei are mostly conferred exclusive rights to operate in a given area, and their service charges are subject to applicable laws and regulations and pre-approval of regulatory agencies. With the wave of enhancing market openness, the electricity generation market has been gradually opening to private operators[9] along with a proposal for a "trading market for electric power"[10], which is designed to facilitate the exchange of electricity between generators and retailers.

15. In the case of cable TV, the previous industrial policy aimed to control the number of licenses and directly impose regulations on licensed operators. In 1993, the Government Information Office (GIO) set up 51 service areas, or zones, after considering natural environment, delineation of administrative regions, population density and economic conditions. Each designated area allowed no more than five cable TV operators providing services to customers, and a cable TV operator could only operate within its designated operating area. The GIO planned to maintain competition to some extent in each designated area, but also encouraged mergers within operating area to avoid duplicate investment and idle resources. Following this industrial policy, most of operating area were monopolized by a single operator, or were dominated by two operators.

16. In 2006, these and other GIO responsibilities were to be transferred to the NCC. In the meantime, the FTC continued to have discussions with the NCC on the openness of relevant markets and how to promote competition by integrating competition policy into industrial policy. In 2012, the NCC decided to reclassify the operating areas down from 51 to 22, and allow operators to provide services across different areas. It also removed certain barriers to facilitate market entry of newly established operators. Since that time competition in the cable TV industry has been more intense with a growing number of new entrants and operators providing services in multiple areas.

[8] The identified industries included state-owned consumers cooperatives, cable TV industries, telecommunications, government procurement of freight services, warehouses of export processing zones, electronic information related to securities trading, wholesale markets regarding distant water fisheries, salt, petroleum products, liquefied petroleum gas, customs clearance information and digital system of telephone exchange.

[9] The electricity industry covers the generation, transmission, distribution and sales of electric power. The generation function now can be carried out by private operators. Except for renewable power, electric power generated by private operators is required to be sold to the stated-owned company (Taiwan Power Company) for further distribution, transmission and resale.

[10] A trading market for electric power is planned to be ready in 2024.

17. While a number of anti-competitive practices (such as predatory pricing, abuse of dominance or price discrimination) were observed, potentially as a result from an increase in the level of competition, it is worth noting that the price decreased significantly in highly competitive markets, and operators provided verified value-added services to compete for consumers. For example, a 24- hour monitoring service for the safety of children and the elderly.

6. Coordination and cooperation between independent regulators and the competition agency

18. To coordinate competition law and industrial regulations in the case where sector-specific agencies are planning to introduce competition policy into regulated industries, or where competition law and industrial regulations concurrently apply, the FTA expressly states that the competition law will apply to any competition related practices, provided that other laws conflict with the legislative purposes of the FTA[11]. Furthermore, the FTC can consult with relevant government agencies when sector-specific regulators overlap in jurisdiction with the competition agency in the process of implementing industrial policies[12].

19. The FTC issued the "Operational Guidance on Coordination between the Fair Trade Commission and other administrative agencies" for internal use. The Guidance lists key factors for the FTC to determine whether to intervene and the extent of any intervention: 1) the level of scrutiny required by industrial laws and regulations; 2) whether industrial laws and regulations contain competition related provisions; 3) the level of impacts on public interest; 4) resources and tools available for regulators[13]. The Guidance also sets out the following principles applying to the circumstance where other government agencies draft or amend industrial laws or regulations that relate to market competition or issues that concurrently apply to the FTA[14]:

1. Where the specific law or regulation is applied to a given industry, and its level of scrutiny is higher than competition law, the common principle is that general laws defer to specific laws. The specific industrial law or regulation has precedence over the FTA.
2. Where administrative penalties for breaches of the industrial law or regulation are more severe than those for violation of the FTA, the common principle is that the law with the most severe penalty applies.

[11] Article 46 of the FTA provides that "The Act has precedence over other laws with regards 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."

[12] Paragraph 2, Article 6 of the FTA provides that "For any matter provided for in this Act that involves the authorities of any other ministries or commissions, the competent authority may consult with such other ministries or commissions to deal therewith."

[13] Point 2, the "Operational Guidance on Coordination between the Fair Trade Commission and other administrative agencies"

[14] Point 4, the "Operational Guidance on Coordination between the Fair Trade Commission and other administrative agencies"

3. Where administrative penalties for breaches of the industrial law are less severe than those for violation of the FTA, it has precedence over the FTA due to the fact that the industrial law is considered as a "special law".

20. The 2016 amendments to the Cable Radio and Television Act and the Satellite Broadcasting Act serve as clear examples that have concurrent application with the FTA. These two laws incorporate competition-enhancement provisions to prohibit illegal discrimination in the cable TV industry and satellite television industry[15]. The FTA has a similar provision[16]. The concurrent application leads to an overlapping jurisdiction between the NCC (independent regulator of telecommunications and broadcasting) and FTC (competition agency).To resolve potential conflicts over matters and promote legal compliance of relevant businesses, the FTC organized consultation meetings with the NCC and both agencies reached conclusions to allocate their responsibilities and set out general rules of respective jurisdictions.

21. As a result, the FTC has two approaches to address overlapping jurisdictions with other regulatory agencies and solve conflicts between the FTA and industrial laws – Articles 46 and 6 of the FTA. Through consultation meetings, the FTC can diminish overlapping issues and avoid unregulated "grey area", where two government agencies may shirk their responsibilities due to a concurrent application of competition and industrial law.

7. Conclusions

22. Characteristics of independent regulators in Chinese Taipei, and their relationships with the competition authority are summarized as follows:

- Since the concept of independent administrative institutions was introduced by Chinese Taipei in 2002, they have been designed not only to be an agency with high levels of professionalism in independence from political interference, but also a forerunner to draw up industrial policies and lead future industrial development and innovation. The independent status of such institutions may infer structural protection of constitutional rights.

- The legal effects of breaches of industrial laws and regulations and self-regulations within industries are different. Regulators can impose penalties on any business failing to fulfill mandatory and legally binding obligations subject to industrial laws

[15] Paragraph 1, Article 37 of the Cable Radio and Television Act states that "System operators shall set up fair, reasonable, and unbiased on / off shelf standards for satellite channel program provider, other type channel program provider, foreign satellite broadcasting business, and wireless television business, and implementations shall be carried out according to the said standards." In addition, Paragraph 1, Article 25 of the Satellite Broadcasting Act stated that "A direct satellite broadcasting business and the branch office of a foreign satellite broadcasting business that operates direct satellite broadcasting business shall not treat satellite channel and program supply business and the branch office or agent of a foreign satellite channel supply business differently without justification."

[16] Article 20 of the FTA states that "No enterprise shall engage in any of the following acts that is likely to restrain competition: … 2. treating another enterprise discriminatively without justification;…"

and regulations. In addition, compliance of industrial self-regulations cannot be used to grant an exemption under industrial laws or competition law.

- Both independent regulators and sector-specific regulatory agencies have high levels of professionalism and practical expertise to enable themselves to take appropriate action in response to innovative developments in industries. In recent years, the competition authority has continued to engage in competition advocacy and successfully work with independent regulators to form competition-oriented industrial policies.

- The FTC consults with relevant government agencies in the case of an overlapping jurisdiction over competition-related matters. If competition law and industrial laws concurrently apply, the FTA expressly states that the competition law will apply to any competition related practices unless otherwise specified in industrial laws and their legislative purposes do not conflict with the FTA.

- In practice, the FTC organizes coordination meetings to have discussions on respective jurisdictions with other sector-specific regulatory agencies. If it necessary, the FTC may seek opinions from sector-specific regulatory agencies and can take them into account in investigations and competition analysis.

Organisation for Economic Co-operation and Development

DAF/COMP/WP3/WD(2019)47

Unclassified English - Or. English

22 November 2019

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 30 October 2019

Working Party No. 3 on Co-operation and Enforcement

Access to the case file and protection of confidential information – Note by Chinese Taipei

3 December 2019

This document reproduces a written contribution from Chinese Taipei submitted for Item 4 of the 130th OECD Working Party 3 meeting on 2-3 December 2019.
More documents related to this discussion can be found at www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm

Please contact Ms Despina PACHNOU if you have any questions about this document [Despina.Pachnou@oecd.org, +(33-1) 45 24 95 25]

JT03455174

Chinese Taipei

1. This paper explains the legal bases and practical approaches regarding access to files of ongoing investigations conducted by the Fair Trade Commission (hereinafter referred to as the "CTFTC"), which has sole responsibility for enforcing competition law provisions in Chinese Taipei. The paper also outlines applicable laws and measures to ensure the security and safety of confidential information obtained by the CTFTC.

1. Legal bases and practical approaches regarding access to files

2. The Administrative Procedure Act (hereinafter referred to as the "APA") is the fundamental statute governing all activities of administrative agencies in Chinese Taipei. It encompasses rendering administrative dispositions, entering into administrative contracts, issuing legal orders and administrative rules, determining administrative plans, giving administrative guidance and dealing with petitions. Its legislative purpose is to ensure that any administrative act complies with a fair, transparent and democratic process on the basis of the principle of administration by law. Such legal compliance can effectively protect the rights and interests of individuals and ultimately enhance administrative efficiency.

3. The APA is designed to ensure rights of defense for parties during administrative procedures, and to enable them to acquire sufficient information relevant to investigations, in which they are involved, in order to properly defend themselves[1]. To fulfill these objectives, Paragraph 1, Article 46 of the APA provides that the party or an affected person (i.e., an interested third party) may apply to an administrative authority to examine, transcribe, copy or take photographs of relevant materials or records. In addition to this, Article 9 also states that an administrative authority shall take into consideration all circumstances favoring or hindering the parties in applicable administrative procedures.

4. The materials and files that parties or interested third parties are granted by administrative authorities to access are limited to the extent necessary to claim or protect their legal interests[2]. On the other hand, administrative authorities cannot deny any application for access to files without justification. A request for documents and information can be refused only if it meets one of the following circumstances[3]: (1) where drafts and other preliminary operational documents are prepared before an administrative authority adopts its decision; (2) where information concerns national defense, military, diplomacy and any other official secrets, which is legally required to be kept confidential; (3) where information concerns personal privacy, professional confidentiality and trade secrets, which is legally required to be kept confidential; (4) where the disclosure of information is likely to infringe any right of a third party, and (5) where the disclosure of information is likely to interfere significantly with performance of official duties

[1] Furthermore, Paragraph 4, Article 46 of the APA provides that "Where a party finds any error in the materials or records referred to in paragraph 1, concerning the party himself, he is entitled to request the administrative authority to make correction upon producing proofs of the facts."

[2] The proviso to Paragraph 1, Article 46 of the APA.

[3] Paragraph 2, Article 46 of the APA.

concerning social security, public safety and the public interest. It is permissible to examine any part of the information specified under (2) and (3), which need not be kept confidential[4]. In practice, where any document or material in a case file is required to be kept confidential, it will be removed, sealed or redacted from the party requesting to examine it.

2. Procedures and practices associated with access to files during investigation

5. Given the importance of transparency and fairness throughout the investigation procedure, from the initiation of an investigation to the adoption of a decision made by the CTFTC, the parties involved will be given opportunities to make statements and defend themselves from accusations against them as well as access evidence in relevant files. The parties will also be informed of the CTFTC's competition concerns in order to guarantee the parties' rights of defense. In terms of determinations on requests for access to files, the CTFTC should comply with Article 46 of the APA and the rules detailed in the CTFTC's "Directions on Application for Access to Files and Documents".

6. Only parties involved in investigations and interested third parties, whose rights or legal interests will be affected by such administrative procedures, have access to materials and files. Before accessing files, an application form is required to be submitted with a case name, purposes and an intended scope of access. When an interested third party applies to access files, how his/her legal interests may be affected needs to be clarified in the application form in addition to the above requirements.

7. The CTFTC, upon receiving an application, shall notify providers of information to make comments within 10 days, except where they have agreed to provide or make the information available to the public during the investigation process. If providers of information do not reply within the timeframe, the CTFTC is able to approve or deny the access request at its sole discretion. In the case where providers of information submit comments, those comments will simply be used as non-binding reference for the CTFTC to determine the scope of files and documents available to be accessed. In general, the CTFTC will decide whether to approve such an application within 15 days from receiving the application form, or the day after the deadline for which providers of information are required to submit comments.

8. As mentioned above, the materials and files obtained from investigations can only be accessed to the extent necessary to protect the legal interests of parties or interested third parties. Based on an applicant's status and the criteria of Article 46 of the APA, the CTFTC provides a list of accessible and inaccessible materials and documents as per the table below:

[4] Paragraph 3, Article 46 of the APA.

Source	Category	Item	Accessibility
Information obtained from parties involved in investigations	Identification of complainants or respondents (i.e., enterprises alleged to violate the Fair Trade Act)	Certificates of business registration and/or identity documents	Inaccessible
	Factual materials provided by complainants or respondents	Information on production and sales, written and/or oral statements and other information relevant to investigations	Factual materials can generally be accessed unless otherwise specified in the following circumstances where: such information is regarded as being of a confidential nature. the CTFTC considers that the request for confidentiality made by any of the complainants or respondents can be justified. disclosure of information is likely to interfere with performance of the CTFTC's official duties concerning the public interest.
		Information irrelevant to investigations (simply in connection with other laws and regulations)	Inaccessible
Information obtained from related parties	Background information of related parties	Certificates of business registration and/or identity documents	Inaccessible
	Factual materials of related parties	Information on production and sales, written and/or oral statements and other information relevant to investigations	Factual materials can generally be accessed unless otherwise specified in the following circumstances where: the CTFTC considers that the request for confidentiality made by any of the related parties can be justified. disclosure of information is likely to interfere with the performance of the CTFTC's official duties concerning the public interest.
		Information irrelevant to investigations (simply in connection with other laws and regulations)	Inaccessible

Source	Category	Item	Accessibility
Information obtained from the CTFTC's investigation	Records of oral statements		Accessible in general except that: such information is classified as confidential. the CTFTC considers that the request for confidentiality made by the respondent can be justified. disclosure of information is likely to interfere with the performance of the CTFTC's official duties concerning the public interest.
	Expert opinions	Expert testimony	Accessible in general except that: experts or providers of professional opinions request confidentiality. disclosure of information is likely to interfere with the performance of the CTFTC's official duties concerning the public interest.
		Professional opinions	
		Identification of experts	Inaccessible
	Opinions from discussion fora	Records of individual attendees' opinions	Accessible in general except that: attendees request confidentiality. disclosure of such opinions is likely to interfere with the performance of the CTFTC's official duties concerning the public interest.
		Summary of conclusions	Accessible
	Opinions obtained from business associations or other organizations		Accessible
	Opinions or materials provided by other government agencies	Agencies' written opinions or oral statements made by their representatives	Accessible in general except that: agencies request confidentiality. disclosure of information is likely to interfere with the performance of the CTFTC's official duties concerning the public interest.
	Materials relating to identities of applicants who apply for immunity or reduction of fines	Conversation records and original documents with identities of the applicants, as well as other documents that are more likely to reveal identities.	Inaccessible

9. To ensure reasonable opportunities for enterprises involved in investigations to defend themselves, the CTFTC usually allows them to examine relevant evidence and materials obtained from investigations. Nevertheless, the CTFTC has discretion to disclose information in part in any of the following circumstances: 1) where such information concerns personal privacy, professional confidentiality and trade secrets, which is legally required to be kept confidential; 2) where the disclosure of such information is likely to infringe any right of a third party; 3) where the disclosure of such information is likely to interfere significantly with the performance of official duties concerning social security, public safety and other duties in the public interest. Upon requests for confidentiality made by providers of information, the CTFTC can also approve or deny such requests after taking into consideration the reasons for seeking access to files, the need for confidentiality and parties' rights of defense on a case-by-case basis.

10. Any party, to whom approval to access specific documents enclosed in a case file is given, must go to the CTFTC's office on the designated date. It will then be able to examine, transcribe, copy or photograph the accessible materials in the CTFTC's inspection room after its identity has been verified. Any inaccessible materials will be removed or sealed by CTFTC staff to keep them separate from the rest of the documents in the case file. The party is prohibited from adding comments to, tampering with, removing and replacing, marking or defacing the documents. The CTFTC can withdraw its approval and stop access if a party ignores the on-site instructions of the responsible official(s) and any prohibited conduct continues. Any information and materials obtained from examining case files may not be used for any other purpose but for the case itself.

3. Legal requirements in relation to rights of defense for enterprises subject to investigations

11. In other jurisdictions, including the EU, access to documents and information in a case can only be granted after the competition authority carries out an investigation and then issues a Statement of Objections on the basis of its preliminary findings. After receiving the Statement of Objections, the parties under investigation can request access to the case file and defend themselves effectively. By contrast, in Chinese Taipei, the APA does not impose limits as to when parties or interested third parties can make requests to access files and the number of times they are allowed to access them, nor does the CTFTC impose such limits during the investigation. Parties and interested parties can access materials and documents in case files at any time until the corresponding investigations are closed or completed.

12. Soon after the CTFTC initiates an investigation ex officio or upon a complaint(s), an inquiry with the alleged infringements will be sent to respondents[5]. The inquiry not only takes into account the alleged violations and applicable provisions of the Fair Trade Act, but also requires respondents to reply to questions listed in the inquiry and provide relevant

[5] Article 39 of the APA provides as follows:

"Where it is necessary for the purpose of inquisition into facts and evidence, an administrative authority many give any related person a written notification, requiring that he appear to give his opinions.

The notification shall give such details such as the purpose of the inquiry, the time and place where the person notified is required to appear, whether or not he is allowed to appoint another person to appear on his behalf, and the consequence for failure to appear."

documents[6]. During the early stages of investigations, respondents or related parties are usually required to submit written responses, while the CTFTC can directly request that they appear and make oral statements to the extent necessary to clarify the facts. Such oral statements will be recorded in a uniform format in compliance with applicable regulations. Later the CTFTC may make further inquiries and ask respondents to submit supplementary information or appear to make oral statements again if it is necessary. Before a conclusion on the investigative findings is reached in the Commissioners' meeting, the CTFTC may inform respondents of competition concerns and suspected violations in a timely manner and provide them with opportunities to exercise their rights of defense[7]. Consequently, respondents can access materials in the case file in order to examine evidence obtained therefrom and then submit supplementary information to elucidate themselves. Each respondent can be protected by due process of law any time before an investigation closes.

13. Prior to a substantive decision (a final determination of violations) being made by the CTFTC, its decision to approve or refuse access to files during the investigation cannot be appealed against. This procedural decision can only be challenged when the party or the interested third party appeals against the associated substantive decision[8], which has an adverse impact on them.

[6] Paragraph 1, Article 104 of the APA provides as follows:

"When offering the person subject to the disposition an opportunity to state his opinions, the administrative authority shall give such person a written notice containing the following particulars and shall cause it to be published if necessary: 1. the name of the person subject to the disposition and his place of domicile or residence and business office or business establishment; 2. The cause in fact for and the legal basis on which the administrative disposition restraining or taking away a particular freedom and right is rendered; 3. explanation to the effect that a written statement may be submitted under Article 105 hereof; 4. the time limit within which the written statement, if any, must be submitted and the consequence of non-submission of the statement; 5. other matters as may be necessary."

In addition, Paragraph 1, Article 105 provides that "A person subject to the administrative disposition who presents a written statement under the preceding article shall state therein the facts and his point of law".

[7] Article 102 of the APA provides as follows:

"An administrative authority shall, before rendering an administrative disposition to impose restraint on the freedom or right of a person or to deprive him of the same, give the person subject to the disposition an opportunity to state his opinions, unless a notice has been given to the person subject to the disposition under Article 39 hereof to enable him to state his opinions or it has been decided that a hearing will be held, except where it is otherwise prescribed by law".

[8] Article 174 of the APA provides as follows:

"If the party or an affected person is dissatisfied with the decision made or the action taken by an administrative authority in conducting the administrative procedure, he may file a statement to this effect only if and when he is also dissatisfied with the substantive decision and files a statement therefor; provided that this does apply where the decision made or the action taken by an administrative authority is enforceable or it is otherwise provided for in this Act or any other law or regulation."

4. Definition of confidential information

14. Confidential information can be classified as "national security information"[9] and "general official information"[10], which are respectively subject to the National Security Information Protection Act (hereinafter referred to as the "NSIPA") and other applicable laws. Information classified as "general official information" means any information held or maintained by a government agency with a statutory duty of confidentiality (except for that required by the NSIPA) – for example, trade secrets, public procurement information, personal information or complaints about infringements. Furthermore, the CTFTC has developed an internal guidance[11] on the classification of confidential information, which may include information provided by enterprises involved and the related parties; internal investigative process or decision-making process; materials not yet resolved in Commissioners' meetings; information obtained from industrial inquiries; identities of complainants and trade secrets received through investigations.

5. Provisions to safeguard confidential information in Chinese Taipei

5.1. Appropriate measures to protect confidential information

15. Once any information obtained by the CFTFC is classified as "official", specific regulations apply to each stage of handling such information, from receiving, distributing, using, maintaining, copying and transferring it in accordance with relevant laws and the "Guidance on Handling Official Documents". When materials submitted by foreign companies are considered as trade secrets, they will be protected under applicable laws in the same manner as those submitted by domestic companies[12].

16. Considering the balance among rights of access to files, the public interest and confidentiality of information provided by parties and interested third parties, confidential information is generally not accessible, and will be either redacted or removed from a case file. The identity of a leniency applicant shall also be kept confidential, unless otherwise agreed by the applicant in advance, to minimize the risk of identity disclosure during an investigative process and/or appeal process and avoid retaliation. The identity disclosure may lead to difficulties in collecting additional evidence to establish a cartel case and reduce incentives to apply for leniency. Conversation records and original documents with identities of leniency applicants, as well as other documents that are likely to reveal identities, need to be sealed separately using special file covers. Such records and

[9] Article 2 of the National Security Information Protection Act states that "The term *classified national security information* referred to in this Act means information that is owned by, or under the control of the Government and that has been determined pursuant to this Act to require protection against unauthorized disclosure, and that is so designated according to its level of classification for the purpose of safeguarding national security or the national interest." It may include classified official information relating to military plans, weapon systems, military operations, diplomatic matters and ICT in the public sector.

[10] "General official information" is defined under Point 51 of the "Guidance on Handling Official Documents" issued by the Executive Yuan.

[11] The "Classification of Confidential Information held by the CTFTC".

[12] Point 12 of "Directions on Cases Involving Foreign Enterprises".

documents cannot be accessed by or provided to any agencies, groups or individuals other than prosecution and judicial agencies unless otherwise stipulated under applicable laws[13].

5.2. Liabilities for breaches of confidentiality

17. To prevent confidentiality breaches, relevant administrative laws and criminal laws impose administrative or even criminal sanctions on civil servants who breach confidentiality obligations. Civil servants are required to carry out an unconditional duty of confidentiality under Article 4 of the Civil Service Code. The provision serves as an overarching principle and any specific responsibility or sanction for a failure to maintain confidentiality is provided for under different laws, such as the NSIPA or Criminal Act.

18. First, a sentence may be imposed on a civil servant, who intends to disclose, deliver, pry into or collect classified national security information and classified general official information[14]. In terms of administrative responsibilities, when civil servants reveal classified information and such a breach constitutes a dereliction of duty, they may face disciplinary dispositions[15]and receive demerits[16](the most severe breach can lead to dismissal). Furthermore, civil servants may be liable for damages claims arising from their intentional or negligent breach of confidentiality under the Civil Code[17]. When civil servants breach confidentiality in performing their duties and in the exercise of public functions, any person whose rights have been violated by such behaviors may be entitled to claim compensation from the government[18]. A list of liabilities and their legal basis that may apply to civil servants who reveal confidential information is provided below:

[13] Article 20 of "Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases".

[14] Articles 32- 34 of the NSPIA; Articles 109-112, 132, 317, 318 of the Criminal Code; Article 13-1 and 13-2 of the Trade Secrets Act.

[15] Article 2 of the Civil Service Disciplinary Code states that "If necessary, a disciplinary action against a civil service employee may be appropriate for one of the following types of conduct: 1. illegal performance of public duties, dereliction of duty and other omissions; 2. illegal conduct irrelevant to public duties, resulting in severe damage to the Government's reputation and credibility".

[16] Subparagraph 2, Paragraph 3, Article 12 of the Civil Service Performance Evaluation Act states that "When a civil servant does not make his/her best efforts to implement a national policy, or performs his/her duties neglectfully or reveals confidential information obtained from work, which may result in severe damage to the Government, he/she will immediately receive two demerit points and, in the most severe cases, he/she may be dismissed."

[17] Article 13-1 and 13-2 of the Trade Secrets Act; Paragraph 1, Article 12 of the Trade Secrets Act.

[18] Paragraph 2, Article 2 of the State Compensation Law provides that "The State shall be liable for any damage arising from the intent or negligent act of any employee of the Government acting within the scope of his or her office or employment which infringes upon the freedom or right of any person. The same shall be applied when the damage results from the omission of any employee of the Government."

Liabilities	Relevant Laws (an inclusive but not exhaustive list)
Criminal	Articles 32- 34 of the NSPIA Articles 109-112, 132, 317, 318 of the Criminal Code Article 13-1 and 13-2 of the Trade Secrets Act
Administrative	Article 2 of the Civil Service Disciplinary Code Subparagraph 2, Paragraph 3, Article 12 of the Civil Service Performance Evaluation Act
Civil	Article 13-1 and 13-2 of the Trade Secrets Act Paragraph 1, Article 12 of the Trade Secrets Act Paragraph 2, Article 2 of the State Compensation Law

6. Restrictions on sharing information with other government agencies and foreign competition authorities and practical experiences

19. In some cases in connection with other government agencies' competence or litigation proceedings, the CTFTC may provide relevant information to other administrative agencies, legislative or judicial agencies upon request. However, the CTFTC may decline such requests if any information contained in requested documents is required to be kept confidential under any of the following circumstances: 1) confidentiality is expressly stated in international treaties, agreements or MOUs; 2) it involves an on-going investigation; 3) the provision of information may impair the national interest. When confidential information concerns personal data or trade secrets, the CTFTC may provide it to the requesting agency in a sealed case file or otherwise appropriate manner, and require the requesting agency to treat it confidentially[19].

20. In respect of international cooperation on competition enforcement, the CTFTC may be able to exchange information under bilateral trade agreements or MOUs, when the reciprocity principal is applied, and the counterpart agency protects information in the same manner as the CTFTC. However, the scope of information exchange between two jurisdictions is subject to respective domestic laws and regulations (for example, the NSPIA, Trade Secrets Act and Personal Data Protection Act in Chinese Taipei).

21. Considering the importance of international cooperation in reviewing cross-border merger cases and detecting international cartels, the CTFTC uses informal communication channels (emails and phone calls) to actively share its empirical experience and observations with foreign competition authorities. Such sharing is limited to non-confidential information, which may include market scope, product and geographic market definition, investigation procedures, investigative techniques and application of economic analysis. The cartel between optical disc drive makers (HP and Dell) was the first leniency case in Chinese Taipei. In this case, the CTFTC obtained voluntary confidential waivers during the investigation and then empowered itself to have discussions on this case by phone with the Canadian and EU competition agencies in order to benefit the CTFTC's further investigation[20]. In Chinese Taipei no confidential information will be exchanged through informal cooperation, for example during teleconferences, and no meeting minutes from any such discussions will be made available to be used as evidence.

[19] The CTFTC's guidance on handling requests for information from other government agencies.

[20] This case was presented at the "10th Anniversary Celebration and Workshop: International Cooperation in Cross-Border Competition Cases", organized by the OECD/Korea Policy Centre, Competition Programme in 2015.

7. Conclusions

22. It is essential for parties involved in investigations to express their opinions and answer factual questions as well as address legal issues raised by government agencies. The rights of defense are expressly stipulated in the APA. To make an appropriate decision, taking into account all circumstances favoring or hindering the parties, the CTFTC conforms with the applicable provisions of the APA, in particular in relation to access to case files. The scope and key characteristics of access are as follows:

1. To protect parties' rights of defense, information in a case file is generally accessible except for information that is required to be kept confidential under applicable laws.
2. Parties and interested parties can access materials and documents in case files at any time from the initiation of an investigation to the adoption of a decision made by the CTFTC. After examining files and relevant evidence, parties can be better equipped to defend themselves. Each party can also be protected by due process of law.
3. The procedural decision of approval or refusal of access can only be challenged when the party or the interested third party appeals to the courts against the associated substantive decision.

23. Although the right of access to files is crucial to parties under investigation, the scope of disclosure is subject to applicable laws. Information obtained from the CTFTC's investigations, including sensitive information submitted by complainants and leniency applicants and trade secrets may be classified as confidential. Therefore, the CTFTC intends to strike a balance among protection of access, collaboration with other government agencies and ensuring confidentiality by following the practical principles below:

1. Confidential information needs to be securely stored and disposed of in an appropriate manner. Civil servants are obliged to carry out their legal duties in relation to confidentiality under various laws.
2. When receiving a request for access, the CTFTC will first seek approval from the providers of the information. If any information contained in a case file is classified as "confidential", it needs to be removed, redacted or sealed prior to disclosure of the file.
3. When other government agencies require the CTFTC to provide confidential information concerning personal data or trade secrets, the CTFTC may provide it to the requesting agency in a sealed case file or otherwise appropriate manner. Other types of confidential information are usually inaccessible.
4. Subject to domestic legal restrictions, in general, only non-confidential information, including empirical enforcement experience and observations, can be shared with foreign competition authorities.

Organisation for Economic Co-operation and Development

DAF/COMP/GF/WD(2019)30

Unclassified English - Or. English

22 November 2019

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

MERGER CONTROL IN DYNAMIC MARKETS – Contribution from Chinese Taipei

- Session III -

6 December 2019

This contribution is submitted by Chinese Taipei under Session III of the Global Forum on Competition to be held on 5-6 December 2019.

More documentation related to this discussion can be found at: oe.mcdym.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

JT03455139

Merger Control in Dynamic Markets

- Contribution from Chinese Taipei –

This paper presents the existing merger regime in Chinese Taipei, and highlights important considerations and certain approaches to competition assessment when the Fair Trade Commission (hereinafter referred to as the "FTC") reviews merger notifications in fast-changing industries. Several case examples in this paper underline the impact of different market conditions on the FTC's decisions.

1. Merger control regime in Chinese Taipei

1. The current provisions relating to mergers under the Fair Trade Act (hereinafter referred to as the "FTA") are designed to prevent potential anti-competitive practices arising from acquisition or strengthening of dominant market position as a result of structural changes through notified mergers. A mandatory pre-merger notification is required for any transaction or acquisition meeting one of the notification thresholds under Article 11 of the FTA[1].

2. To clarify merger review standards and support businesses to promote compliance, the FTC enacted the "Guidelines on Handling Merger Filings" (hereinafter referred to as the "Merger Guidelines"). Non-exhaustive considerations regarding the FTC's assessment on the overall economic benefit and the effect of restricting competition, which vary depending on the type of merger (horizontal, vertical and conglomerate mergers), are set out in the Merger Guidelines. In a case where the FTC finds no significant competition concerns posed by a notified merger, a preliminary conclusion may be made that the overall economic benefit from the merger generally outweighs disadvantages resulting from competition restraint. Nevertheless, the FTC is required to further evaluate whether the

[1] Paragraph 1, Article 11 of the FTA states that any merger falling within any of the following circumstances shall be filed with the competent authority in advance: 1) A post-merger market share reaches one third of the market share; 2) Prior to the merger, one of the merger parties has one fourth of the market share; 3) Sales for the preceding fiscal year of the merger parties exceed the threshold amount publicly announced by the competent authority.

On 2 December 2016, the FTC announced the following turnover thresholds. Any merger falling under one of the circumstances needs to be notified to the FTC:

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 merger parties in the preceding fiscal year exceed NT$15 billion while the domestic total sales of one of the other merger 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 merger parties in the preceding fiscal year exceed NT$30 billion while the domestic total sales of one of the other merger parties in the preceding fiscal year also surpass NT$2 billion.

benefits are greater than the disadvantages resulting from the competition restrictions when a likely effect of substantially lessening of competition is identified[2].

2. Competition assessment in dynamic markets

3. To assess the competition restraints resulting from a horizontal merger, the Merger Guidelines set out several key factors, including unilateral effects and market-specific anticompetitive effects. Although no specific timeframe for competition assessment is provided under the Merger Guidelines, the likelihood and timeliness of entry by potential competitors, and whether such entry would exert competitive pressure on the existing enterprises in the market shall be examined. If barriers to entry cannot be overcome to allow potential competitors to enter into the merger related market in a timely manner, the threat of a lengthy delay to entry may not be able to resolve or address competition concerns that an attempted merger may raise.

2.1. Assessing the level of competition in a dynamic market

4. When assessing the level of competition in rapid developing industries, one of the challenges the FTC faces is definition of relevant markets, which may shift from time to time as a result of various substitute products or services being launched in markets with new technologies. The starting point for the FTC to assess mergers in these markets includes changes to the pre-merger and post-merger market concentrations, market shares of merger parties and other market participants, as well as supply-side responses to mergers and buyers' responses to price changes.

5. If the merger at issue involves a heterogeneous market, the FTC will make further evaluation on the closeness of substitution between these products or services provided by merger parties, and the pre-merger profitability. To determine the degree of substitution, the FTC may look at a number of factors: 1) whether one product or service is the best alternative for another; 2) whether there is a highly overlapping customer base between these products or services; 3) how close the respective product positioning and pricing strategies are; 4) whether these products or services are delivered via the same distribution channels.

6. Tools used to define markets may include the Herfindahl-Hirschman Index (a measure of market concentration), consumer survey and diversion ratio as well as the GUPPI (gross upward pricing pressure index). In addition to quantitative analysis, the FTC also seeks industrial opinions and first hand experiences on the status quo in merger-related markets from research institutions, business associations, competitors, and upstream and

[2] Point 10 of the Merger Guidelines states that:

"In principle, the FTC shall further assess the overall economic benefit when adopting the regular procedure to review horizontal mergers that involve one of the following situations:

The aggregate market share of the merging parties achieves half of the total market.

The top two competitors on the relevant market account for two thirds of the total market share.

The top three competitors on the relevant market account for three quarters of the total market share.

Under the circumstances described in Subparagraphs 2 and 3 of the preceding paragraph, the aggregate market share of the merging parties shall achieve twenty percent of the total market."

downstream firms affected by notified mergers. The FTC may also consult with regulatory agencies if it is necessary.

7. For example, in the following merger case, where two karaoke service providers filed a notification to the FTC in February 2019, a controversial issue was the impact of technology development and the internet on the definition of the "audiovisual and singing service market". To define an appropriate market under competition law, the FTC conducted a questionnaire survey and applied different methodologies, including diversion analysis, critical loss analysis and regression analysis to this merger case.

Case 1: A merger between the top two karaoke service providers

8. Company A and Company B, the two largest karaoke service providers, filed their first merger notification to the FTC in May 2003. The relevant market was defined as "the audiovisual and singing service market" in which complex-service providers offer audiovisual, singing, catering services and karaoke stages. While the FTC did not prohibit the merger, the two companies did not complete the proposed transaction on the planned date. In December 2006, Company A and Company B notified a new merger proposal to the FTC. In this case the merger was prohibited due to smaller geographic market definitions. The product market was defined the same as in the FTC's previous decision, i.e. " the audiovisual and singing service market", but the FTC's investigation found that the attempted merger was likely to impair competition in urban areas, particularly in the northern region (where appeared to be duopoly). The merger might have also resulted in monopsony power, which could be used to impact upstream karaoke disc products and set hurdles for new entrants.

9. In February 2019, Company A and Company B proposed a further merger transaction and notified it to the FTC. As mentioned above, with advanced technology and development of the internet, there were more innovative types of audiovisual and signing services - for example, karaoke booths, singing apps and online KTV. The definition of the "audiovisual and singing service market" and the associated competition assessment had been challenged by market participants. During the evolution of such a dynamic market, the FTC analyzed information obtained from questionnaires and the merger parties through different methods (diversion analysis, critical loss analysis and regression analysis), in order to properly define the relevant market and conduct an assessment of competition.

10. The FTC's analysis indicated that in the case of an increase in the post-merger price, less than 2 per cent of consumers would switch to innovative types of KTV services (karaoke booths, singing apps and online KTV), and 30 per cent of consumers would switch from the post-merger party to other existing service providers. 57.5 per cent of consumers would remain with the post-merger party. Accordingly, the FTC did not consider innovative types of KTV services as substitutes of the audiovisual and singing services provided by the merger parties. The results of the regression analysis also showed that the proposed transaction gave rise to a unilateral effect and the overall economic benefit arising from the merger was not significant. The FTC subsequent reached a decision to block the merger.

2.2. Market entry and potential competitive pressure

11. Timeliness of entry usually refers to the period from when potential entrants plan for entry to the time when new entrants are able to remain viable in the relevant market. Some variables may have an influence on the timeliness of entry, including statutory restrictions, minimum capital requirements and acquisition of patents and other intellectual

property rights. In the aforementioned merger case regarding the two largest karaoke service providers, the FTC noted that all operators of premises with a karaoke system for business, including providers of online audiovisual and signing services could compete with the merger parties to some extent. Given that no statutory restrictions or minimum capital requirements were applied to the industry, any potential entrant would be able to timely enter into the relevant market within 1 to 2 years, thus the level of barriers to entry was not considered high.

12. Historical data can be used as an important reference to evaluate the likelihood of entry in a dynamic market. Together with historical patterns of entry and exit into and out of the relevant market, profitability of merger parties can be used to assess whether the relevant market will attract potential entrants. Assessment factors for the likelihood of entry may include: the existence of actual entrants in the relevant market; probability of market entry for operators who are granted licenses to run business; changes in consumer behavior and amendment of applicable laws and regulations.

13. To determine whether potential competitors may create competitive pressure on parties involving in a notified merger, from a historical perspective, the FTC may first observe scales of new entrants and competitive products in the relevant market. Then the FTC may further consider whether the merger parties are capable of using their markets shares to gain competition advantages (for instance, greater bargaining power), and potentially lead to higher barriers to entry. By doing so, the proposed merger may interfere with entry of potential competitors and lower their incentives to compete with the merger parties.

Case 2: A merger between two taxi companies

14. In a merger case proposed by taxi companies C and D in 2015, the FTC found that their combined market shares exceeded 50 per cent in the Greater Taipei joint operations area. Under the Merger Guidelines, this merger required further assessment to weigh the overall economic benefit against disadvantages resulting from competition restraint. The FTC eventually concluded that the overall economic benefit of the merger would outweigh the disadvantages resulting from competition restraint, and conditionally cleared the merger to prevent abuse of dominance. The FTC's decision was underpinned by two main findings:

1. There were more than 30 registered taxi companies operating in the Greater Taipei joint operations area. If the post-merger party increased prices, taxi drivers could easily join other taxi companies without significant switching costs. Therefore, the FTC determined that the merger parties were not able to exercise the market power to unilaterally increase service charges.
2. In a taxi dispatch service market with lower barriers to entry, market participants were not restricted to registered taxi companies. In this market, other operators without licenses for passenger transport services (for example, helloTAXI, EZTAXI, UBER) would also deliver the same or similar dispatch services to compete with the merger parties and posed noticeable competitive pressure on incumbent firms.

3. Assessment of overall economic benefit and economic efficiency

15. Paragraph 1, Article 13 of the FTA states that the FTC may not prohibit any notified mergers if "the overall economic benefit" outweighs "the disadvantages resulting from competition restraint". With regard to the overall economic benefit, the FTC will consider the following factors: 1) economic efficiencies; 2) consumer interests; 3) whether the merging parties are in a weaker position prior to the merger; 4) Whether one of the merging parties is a failing enterprise; 5) Other tangible outcomes benefiting the overall economics. Economic efficiencies need to be verified to meet three requirements: 1) they can be achieved over the short term; 2) they cannot be accomplished in absence of the notified merger; 3) they can be passed through to consumers.

Case 3: Proposed acquisition of Communications Global Certification Inc. by Google Inc.

16. Google Inc. intended to acquire Communications Global Certification Inc. (hereinafter referred to as "CGC"), HTC Corporation's subsidiary, and filed a merger notification to the FTC in 2017. Google's main businesses covered internet search services, mobile operating systems and online advertisements, and CGC provided terminal certification testing services. The proposed acquisition was considered as a conglomerate merger, in which the merger parties did not compete with and did not face potential competition from each other. Moreover, the merger parties claimed that the merger would enhance capabilities of research and development of CGC's parent company, i.e. HTC Corporation, in emerging technologies such as virtual reality, augmented reality and artificial intelligence. The FTC recognized the pro-competitive claim and acknowledged that the proposed merger would benefit the development of related industries and ultimately stimulate innovation in the domestic industry. The merger was cleared as the FTC's investigation showed that Google was not able to leverage its market power through this merger, and the overall economic benefit of the merger outweighed disadvantages resulting from competition restraint.

17. In respect of merger-specific efficiency claims, the aforementioned merger between the two largest karaoke service providers serves as an example of the FTC's standpoint. The notified merger was purported to integrate human and financial resources through the merger with commitments proposed by the merger parties to update existing facilities and equipment, invest in research and development and the design of equipment, and engage in technology development programs associated with entertainment services. The FTC found that each of the merger parties could proceed with resource integration and improvements to service quality independently and respectively in response to competition in the relevant market. The merger parties failed to prove that the benefit could only be brought about through the merger, and subsequent investment and research and development would not occur in the absence of the merger. Therefore, the FTC did not adopt the efficiency claim proposed by the notifying parties.

4. Merger remedies

18. Under Paragraph 2, Article 13 of the FTA, the FTC may impose conditions or undertakings on its merger decisions in order to ensure that the overall economic benefit of the merger outweighs the disadvantages resulting from competition restraint. In an industry featuring dynamic competition, however, the competitive environment changes rapidly over time and future changes in market structure are difficult to predict. In view of higher costs of structural remedies, the FTC may intend to adopt behavioral remedies in such industries. The case below presents several behavioral remedies (prohibitions of discrimination, group boycott, interference in entry and exit into and out of the relevant market) required by the FTC to a joint venture for mobile payments in order to prevent anti-competitive issues arising from the merger.

Case 4: Mobile payments joint venture

19. The FTC decided in 2013 not to prohibit a joint venture, set up by five telecommunication companies and one company issuing electronic stored-value cards to operate a Trust Service Management (TSM) platform. Considering the joint venture involved horizontal integration that might raise anti-competitive or unfair competition concerns, the FTC attached 11 conditions (structural and behavioral remedies) to minimize competition restrictions incurred, and secure the overall economic benefit. These conditions included:

1. Structural remedies: (i) upon establishment of the joint venture, the total shares held by, or the capital contributions from, the five telecommunication companies (and their subsidiaries and affiliates) can not exceed one half of the voting shares or total capital of the joint venture for four years (ii) upon establishment of the joint venture, the shares held by, or the capital contributions from, the company issuing electronic stored-value cards (and its subsidiaries and affiliates) can not exceed one tenth of the voting shares or total capital of the joint venture.
2. Behavioral remedies: without justification, the newly-established joint venture and the merger parties can not prohibit competitors (including mobile communications service providers and electronic stored-value card issuers) from entering or exiting from (through share holdings, acquisition or disposal) the joint venture. The joint venture and the merger parties should make a lawful public offering based on the principle of open and free capital investment, and qualified investors would include, but not be limited to, the competitors of the merger parties.
3. Monitoring measures: after its establishment, the joint venture was required to provide the FTC with the following information before the end of March each year for four consecutive years: a list of shareholders, total sales in the previous year, the number and names of service providers, regulations on operation of the TSM platform, and new business items not registered in the merger notification (if any).

5. Conclusion

20. The "overall economic benefit" and "disadvantages resulting from competition restraint" are the FTC's assessment criteria in reviewing merger notifications. The Merger Guidelines provide details on a number of considerations, including the FTC's evaluation of anti-competitive effects and overall economic interests. Nevertheless, the FTC may take different approaches in its competition assessments to address the characteristics of industries in question, particularly in fast-changing industries. For example, the FTC may further take into account relevant factors and available tools in dealing with digital economy effects on industries.

21. The FTC will also consider market data or opinions provided by regulatory agencies, research institutions, specialists and academic experts, business associations and related businesses in the process of assessing unilateral effects, coordinated effects and other potential anti-competitive effects. If the FTC determines any competition concerns, it can exercise its authority to impose proper conditions or undertakings to ensure that the overall economic benefit outweighs the disadvantages resulting from competition restraint.