

出國報告(出國類別：其他)

出席經濟合作發展組織(OECD)「競爭委員會」2021年11月例會、第20屆「全球競爭論壇」暨第六屆亞太地區競爭法主管機關高階代表會議視訊報告

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赴派國家 /地區：臺灣，中華民國

會議期間：110年11月29日至12月13日

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摘要

本報告詳述出席 OECD 競爭委員會 110 年 11 月 29 日至 12 月 3 日第二工作小組(WP2)、第三工作小組(WP3)、競爭委員會(CC)、12 月 6 日至 8 日第 20 次 OECD 全球競爭論壇(GFC)及 12 月 13 日亞太競爭法主管機關高階代表會議各項會議討論情形：

一、11 月 29 日舉行 WP2「圖書及電子書之競爭議題」聽證會；討論各國對圖書市場之競爭政策與管制的基本理由及其對電子書之發展與影響。

二、11 月 30 日舉行 WP3 會議討論(1)2014 年「OECD 總理事會有關競爭調查及行動國際合作建議書」監督報告草案及(2)「打擊公共採購圍標建議書」修訂案。

三、12 月 1 日至 12 月 3 日舉行 CC 會議：

(一) 12 月 1 日舉行「競爭執法中之環保考量」圓桌會議，討論環境保護與氣候變化如何納入競爭執法評估考量以及競爭架構如何整合此一因素。

(二) 12 月 2 日舉行「數位市場事前管制與競爭」聽證會，討論數位市場制訂事前管制法規之理由與景、管制之設計過程、範圍與類型及國際合作之必要性。

(三) 12 月 3 日舉行「新聞媒體與數位平臺競爭問題」圓桌會議，討論數位平臺是否濫用市場力及數位平臺與新聞媒體業者間分潤、付費及議價能力等問題。

四、12 月 6 日至 8 日舉行全球競爭論壇：

(一) 12 月 6 日「貿易、發展與競爭」圓桌會議，討論貿易政策與競爭政策及經濟發展間之關係。

(二) 12 月 7 日舉行「濫用市場地案件中之經濟分析及證據」圓桌會議，並分「衡量市場力量之技巧與證據」、「評估排他性交易及捆搭案件之技巧與證據」及「評估掠奪性訂價及價格擠壓之技巧與證據」三項子題進行分組討論。

(三) 12 月 8 日舉行競爭法主管機關促進競爭中立」圓桌會議，討論各國競爭法主管機關如何對管制措施推動競爭概念及如何取得公眾支持。

五、另 12 月 13 日 OECD 亦在會議期間同時舉行「第六屆亞太競爭法主管機關高階代表會議」，討論「危機時代中之競爭：政策、疫情及未來之路」。

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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。惟自2020年起因新冠肺炎疫情影響，OECD所屬各委員會無法循例舉辦實體會議，為利會員國間有效交換專業領域知能與經驗，OECD旋即於去年4月起透過視訊方式辦理各項委員會例及研討。

二、全球競爭論壇(Global Forum 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」，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。惟去(2020)年亦因疫情關係而改以視訊議方式舉行。

(二) 本年度全球競爭論壇為第20屆會議，係安排於本次競爭委員會例會後，於12月6日至8日接續以視訊會議形式召開。

三、本次出席上開競爭週及競爭論壇二項會議人員：我國代表團由本會陳副主任委員志民率綜合規劃處胡處長光宇、林文宏科長、杜幸峰視察、陳淑芳視察、黃明超專員、服務業競爭處吳佳蓁專員、製造業競爭處胡俊賢視察、法律事務處萬家宇科員、溫哲嘉科員、資訊及經濟分析室王性淵視察等人出席上開2項會議。另駐法國代表處經濟組及經濟部國際貿易局亦指派代表參與視訊會議。

貳、OECD各工作小組及競爭委員會會議重點

一、「競爭與管制第二工作小組」(Working Party No. 2 on Competition and Regulation, WP2)會議

(一) 11月29日WP2第72次會議，由WP2主席Alberto Heimler先生主持，本次會議舉行由挪威建議之「圖書及電子書之競爭議題」聽證會(Hearing on Competition Issues in Books and E-Books)，會中邀請美國西北大學教授Imake Reimers女士及荷蘭阿姆斯特丹大學教授Joost Poort先生與談，並邀請有執法經驗國家，如挪威、瑞典、冰島及美國代表等報告其執法經驗。主要討論問題包括：

- 圖書市場政策與管制的基本理由及其影響為何？它們是否達成其預定目標，例如圖書的品質及多樣性、讀者數量以及廣泛的零售商網絡？
- 競爭如何幫助實現文化政策目標？
- 圖書管制是否對電子書的發展有(或缺乏)影響？電子書的可取得性是否會改變圖書管制的基本理由或效果？
- 電子書執法案件是否對圖書與電子書市場發展產生影響？

(二) Reimers教授表示：

- 1、美國在2008年Amazon推出Kindle 閱讀器及2010年蘋果推出iPad後，加速了圖書數位化及其如何改變書籍的供給與需求關係，並提供有關實體(紙本)書與電子書隨時間推移的相對需求的數據，及新科技帶來的挑戰與機遇，包括消費者獲取更多資訊的能力、及業者成本的變化與自助出版的普及。而對傳統實體(紙本)圖書出版者而言，亦可因此提升品質，投資在更好的圖書。
- 2、在2013年時，最佳銷售書籍中幾乎有50%是電子書，但從2013年起電子書銷售數量一直維持此一水準，而實體書籍銷售雖有下降，但仍為市場之主流。圖書電子化的結果，盜版可能損及電子書之銷售，而對於盜版的保護可增加大約10%的電子書銷售。數位化結果對於消費者最直接的好處就是，更多的網路評論資訊可以協助消費者選購其想要之書籍。
- 3、在供給面，電子書幾乎沒有經銷成本，其銷售成本亦比實體書籍低，而固定成本明顯少了許多。寫書的成本幾乎沒變，但消費者變得較易取得這些書籍，市場供給量明顯增加。在美國2008年圖書出版(ISBN)為561,000冊，但至2012年即增加為235萬冊，新增部分大都為自我出版(self-publishing)廠商，傳統出版商則能更能掌握消費者所好，投資更多於高品質圖書之出版。

(三) 冰島報告其審查瑞典公司Storytel AB取得冰島著名出版公司Forlagið 70%之股權進行結合一案。

- 1、按Storytel AB公司係北歐地區著名之電子書、有聲書籍之媒體串流服務(streaming service)公司，除在瑞典經營Norstedts Förlagsgrupp 圖書集團公司、丹麥經營人民出版社(People's Press)及芬蘭經營 Gummerus 圖書公司外，並在世界20幾個國家或地區經營業務。而Forlagið則為冰島最大圖書出版公司(Publishing house)，主要業務係為出版傳統書籍、電子書、有聲書籍，以及連繫作家進行合作等，該公司利用線上作業進行圖書銷售服務消費者，並在首都雷克雅維克設立一家實體店面。
- 2、該案在冰島競爭局(Samkeppniseftirlitið)處理過程中，出現競爭疑慮。其中冰島作家聯盟(RSD)表示，該結合案將導致冰島之圖書及有聲書籍之出版由一家公司控制，使書籍市場失衡，不只產生實質減損競爭，亦將剝削消費者福利。由於冰島當局長久以來係從文化角度保護其小型圖書市場，是以一向持審慎態度處理此類結合案，而綜觀過去北歐地區圖書公司之整合經驗來看，Storytel AB對作家酬勞給付不高，且該公司與芬蘭、丹麥等北歐國家出版社合作情形不佳，使冰島當局有理由懷疑Storytel AB接近冰島圖書市場之動機，於是2020年11月

27日冰島競爭局就該案發表結合異議聲明書(statement of objection)，據其初步調查，認為該結合將扭曲冰島傳統紙本圖書及有聲書籍之市場，因此將持續觀察Storytel AB在冰島圖書市場之商業活動，同時並對結合團體提出相關矯正措施。嗣後該案結合申請人主動於2020年12月21日提出撤案申請，冰島競爭局遂停止審理。

(四) 挪威報告該國對於圖書維持轉售價格(RPM)執法經驗：

- 1、許多國家為達成保護其文化之目標，對圖書價格進行管制。在與其他國家相比較，挪威亦有規定圖書固定價格可以不受競爭法約束。但丹麥卻在2011年開放圖書市場。
- 2、挪威的價格協議係由出版者會員及圖書銷售者協會間之共同協議，出版者設定最終價格(維持轉售價格)，且會維持一段時間。此一協議之目標為達成「有效率的交叉補貼」(efficient cross subsidization)，即出版者以暢銷書之利潤支助低銷售量之書籍。且依經濟學理論，暢銷書籍在維持一段時間固定價格後，可提供出版商足夠利潤及誘因去出版及銷售低銷售量之書籍。
- 3、挪威的出版商擁有大部分實體書店，這可激勵繼續推廣實體書而非電子書，而固定價格模式是新數位商業模式的重大障礙，因為固定價格協議意味著出版商不能以串流媒體形式提供新書，且實體書的高價位也讓出版商無意開發新的數位商品，保守的出版行業領袖評論電子書為「相當愚蠢的產品，除了更多的可用性外，什麼都沒有添加」。
- 4、挪威的固定價格協議對市場有明顯的影響：暢銷書的價格更高，但沒有記錄顯示它已經實現了文化目標。從競爭法主管機關角度，應主張以競爭作為替代的直接措施，降低暢銷書的最終價格，同時以各種方式直接支持作者，更靈活的定價也可以更好地適應未來數位發展，但如何管制圖書行業最終仍取決於政治決定。

(五) 荷蘭阿姆斯特丹大學教授Joost Poort先生報告「對於書籍價格管制之政策考量及理由」，略以：

- 1、書籍是具有顯著規模經濟的娛樂產品，其為具有(可能)兼具消費與價值商品外部性的文化產品。政府干預圖書市場的經典動機通常為：(1)審查，(2)經濟干預：如創作、作者贈款或補貼、生產及經銷、降低增值稅或維持轉售價格、刺激對圖書之消費等，少數語言地區經常為需要更多此類干預的主要原因。而對於政府干預的普遍批評為：(1)干預往往使高等教育及高收入群體更為受益。(2)干預的有效性及效率證據通常不顯著，特別是在維持轉售價格(RPM)的情況下

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- 2、實體圖書市場的RPM可以阻止大型廠商、折扣店及超市透過價格競爭而取得市場佔有率，讓小型、獨立、有利基及廣泛存貨的書店得以生存，促進書籍的可及性及鄰近性。但實體市場的RPM可能會導致服務下滑及價格上漲，惟以該國廢除RPM及部分自由化的實證而言，尚無此一部分之證據。
 - 3、大多數RPM(不管有效與否)的經濟論點並不適用於單獨的電子書市場，因為有廣泛的庫存及充足的書店網路彌補庫存不足的小商店。電子書的低價侵蝕了實體書價格，而電子書的RPM有助於實體書商的生存，且書商可在圖書間進行交叉補貼，阻止數位化以減緩書店走向消失。但如此做法受益者僅是書店，而非消費者，且可能扼殺創新。
 - 4、盜版問題：歐洲大部分地區合法購買的市場基礎正在下降，而圖書盜版雖略有下降，但與音樂及AV相比下降幅度不大。2012-2017年間電子書盜版增加，盜版者多為雜食性，比較多集中在對影視傳播(Audio-Visual, AV)或書籍的盜版。在受過高等教育的人群中，50歲以上的盜版者也在增加；女性亦正迎頭趕上，盜版商(Bookaneer)越來越像普通讀者。
 - 5、P教授認為，為實體圖書的RPM辯護的證據充其量是微不足道的，而且對電子書RPM的理由仍然較弱。以其他手段提升消費者福利，例如降低增值稅稅率、對作者的獎勵或贈款，或對過往目錄數位化的補貼可能更有效、更高效且更少爭議。雖然大多數歐盟國家的音樂及AV(Spotify與Netflix效應)的盜版正在減少，但對書籍的盜版並未減少甚至增加。盜書者越來越多，且皆為有能力購買的普通讀者，盜版對書籍銷售的影響(置換率)相對較高，這可能是因為時間與預算之限制。我們需要創新及單一費率價格(flat-rate)的電子書串流，像音樂及AV行業一樣。
- (六) 瑞士：歐盟曾於2013年就10家法語圖書出版商(Albert le Grand SA;Dargaud (Suisse) SA;Diffulivre SA;Diffusion Transat SA;Editions Glénat (Suisse) SA; Interforum Suisse SA; Les éditions des 5 frontières SA;Les Editions Flammarion SA;OLF SA; andServidis SA.)於瑞土地區行銷系統設置障礙，導致下游瑞士書商無法自由輸入法語相關書籍，產生限制競爭之行為，處罰緩在案。今(2021年)相關法語圖書出版商又限制瑞士書商平行輸入法語圖書及影音有聲書籍(audio book)，導致瑞士法語區成為一個孤立的圖書市場(isolated market)，目前瑞士競爭局正尋求解決途徑。
- (七) 美國：

- 1、美國DOJ在2012年控告Apple及五大出版商操控電子書價格，次年美國地方法院認定Apple勾結出版商哄抬電子書售價，Apple提出上訴後美國上訴法院維持原判，表示Apple將面臨巨額罰鍰。
- 2、按美國司法部在2012年4月控告Apple及Hachette、HarperCollins、Macmillan、Penguin與Simon & Schuster等五大出版商聯合抬高電子書價格，違反美國Sherman Act。DOJ認為該等出版商為了對抗Amazon等公司低價銷售電子書之行為，遂與Apple簽訂「經銷協議書」並交由出版商負責制定電子書價格，顯示業者共謀調漲市售之電子書售價。Apple則認為這只是尋常的競爭策略與商業協調。
- 3、該案於2013年地方法院審查時指出，Apple與五大出版商的共同目的顯然是消弭電子書零售市場的價格競爭。因Apple不想在電子書價格上與Amazon或其他業者競爭，而出版商則想要終止Amazon的低價策略，這一切若沒有蘋果的串連便不會成功，因而認定Apple聯合出版商哄抬電子書的售價。

二、「合作與執法第三工作小組」(Working Party 3 on Cooperation and Enforcement, WP3)會議

11月30日「合作與執法第三工作小組」(WP3)第134次會議，由競爭委員會主席Frédéric JENNY先生擔任主持人，主要討論下列兩項議題：

(一) 2014年「OECD總理事會有關競爭調查及行動國際合作建議書」監督報告 (Monitoring of the 2014 Recommendation concerning International Co-operation on Competition Investigations and Proceedings)

1、秘書處報告：

- (1) 本項工作從2019年即已展開。OECD與ICN在2019年合作對其各自之會員進行本議題之問卷調查，於2021年春季提出問卷結果報告，並將於2022年度春季向總理事會提交執行監督報告。
- (2) 本建議書僅有巴西、羅馬尼亞及俄羅斯等3國於2014年簽署為支持者(Adherent)，2014年後即無其他支持者簽署，但各國廣泛合作行動直接或間接散播了本建議書。
- (3) 建議書中有關總理事會指示事項：(1)作為競爭委員會及工作小組之政策討論事項、(2)建立各國國際合作聯絡窗口及(3)盤點各國所簽署之備忘錄(MOU)皆已實施，惟(4)建立「拋棄權利聲明書」(waiver)範本及(5)建立合作協定之範本2項工作尚未完成。

(4) 各國皆有實施建議書之承諾，但法令障礙尚未克服，對諮商及禮讓(comity)各國尚乏實施經驗，通知則是最顯著使用及最有用之工具，尤其在結合案件，而合作調查及行動部分則大部分僅限於在結合案件中交換已公開之資訊或機關內部資訊及自願拋棄權利聲明書。

(5) 競爭法國際合作已在進行，建議書仍為重要相關文件，秘書處認為建議書無須修正，但須尋求更佳實施方式。

- 2、OECD法務處表示，競爭委員會可利用向總理事會報告之機會，釐清建議書實施之最佳典範及挑戰，並依總理事會指示進行更進一步之工作。
- 3、各國代表皆表示，應繼續推動各國執法合作，釐清法律障礙，進一步推動合作行動。義大利則建議應從區域性之合作協定開始推動，如歐洲競爭網絡(ECN)，並進一步推動在數位經濟的國際執法合作。

(二) 修訂「打擊公共採購圍標建議書」(Revising the Recommendation on Fighting Bid Rigging in Public Procurement)

- 1、OECD秘書說明本次修正主要聚焦於打擊圍標建議書的現代化，並提出新標準：如針對公共採購的綜合指導方針、針對政府基礎建設投標前階段可能產生聯合風險提出指導方針，及針對惡質卡特爾提出指導方針(如尋找圍標徵兆)等。
- 2、OECD公共治理委員會代表表示，從該委員會的角度來看，本次針對打擊圍標建議書之修正，強調了完善的採購流程等有助於打擊圍標。
- 3、英國表示贊同本次修正，並說明在公共採購部分，英國市場局(CMA)致力於提升採購人員對圍標的警覺性，分三個要素進行分享，第一，為公共採購採購人員建立線上訓練課程，使採購人員認識圍標的危險性、涉及圍標的諸多危險信號，並解釋如何向CMA通報。英國代表並分享了其向公眾開放的訓練課程的相關成效。第二，除了線上課程外，CMA並建立指導原則，公布於網站上。最後，CMA與中央和地方的採購部門緊密溝通合作，舉辦會議介紹圍標的型態、圍標的危險信號、回答問題、鼓勵通報及介紹通報方式等，讓採購人員有參與感及責任感，並了解如何與CMA一起打擊圍標。
- 4、愛爾蘭代表、澳洲、希臘代表相繼發言，贊成本次修訂內容。美國司法部(USDOJ)代表表示，美國在6月時提議將該國針對公共採購聯合行為的執法經驗納入本次修正，而本次打擊圍標建議書修正草稿的第三章已採納其提議，該國會在12月時提出其他修正意見。
- 5、加拿大代表表示，禁止因參與或預謀圍標而被定罪的廠商未來參與公共採購之投標無疑是一種有效的嚇阻方式，惟此種禁止政策應該有明文例外。

6、拉脫維亞代表表示，聯合投標不當然是問題，然而在某些案件裡，必須針對公共採購中的聯合投標給予更多關注。從競爭法的角度來看，聯合投標此種競爭模式，較有效率且市場亦較為習慣，而使產品能進入市場也有促進競爭的效果；而從執法機關的角度而言，亦會鼓勵投標者合法的合作。惟該類投標行為確實常有違法可能，並且十分難以偵查，認為建設完善的公共採購檔案資料庫並配合其他偵測工具有助於打擊該類投標中的圍標行為。

三、「競爭委員會」(Competition Committee, CC)會議

12月1日至3日舉行「競爭委員會」(CC)第136次會議，由CC主席Frédéric Jenny先生主持，各單日討論議題如下：

(一) 12月1日：「競爭執法中之環保考量」圓桌會議(Roundtable on Environmental Considerations in Competition Enforcement):

1、本圓桌會議討論環境保護與氣候變化如何納入競爭執法評估考量以及競爭架構如何整合此一因素。會中邀請法蘭克福歌德大學金融與經濟學教授 Roman Inderst 先生、香港中文大學副教授 Sandra Marco Colino 女士、荷蘭消費者與市場管理局首席經濟學家 Theon Van Dijk 先生及 Compass Lexecon 顧問公司資深副總裁 Nadine Watson 女士與談，主要討論問題包括：

- 競爭法主管機關在執行競爭法時如何考慮環境與氣候變遷因素；
- 競爭法主管機關如何在實務上將環境保護因素納入其競爭評估中。
- 在哪些情況下，現有法律架構可能需要調整或擴大法律解釋，以允許考慮環境保護因素；及
- 有哪些可用的實質性與程序性工具(例如質量評估、安全港、估計與量化技術、或假設性市場評估、影子價格等)，可適用於在也會對環境產生影響的具體案例中評估、估計和量化環境影響或限制競爭損害及利益。
- 證明會對環境產生影響的限制競爭及效率收益損害，以及探索量化它們的方法。

2、秘書處報告背景文件，略以：

(1) 在環保與競爭議題上，一般可能認為環保與競爭背道而馳，因為競爭會增加產量降低價格，導致資源過度消耗。惟競爭的另一意義在提高品質(產品的續性品質)、增加選擇(更多環保產品)及創新(增加綠色產品)。當消費者願意為永續性產品付費時，競爭會帶來最有效的結果，並刺激企業朝著綠色方向投資產品差異化，激勵對環境、社會和公司治理，包括對自然資源保護、溫室氣

體減排及綠色技術投資等參數的投資

- (2) 消費者的選擇有時候不一定會反映出是否願意為環保做出選擇。從需求面而言，環保產品可能增加成本而提高價格，可能不受消費者青睞，但只要讓消費者瞭解，使用環保產品是在為保護地球盡力，消費者願意為環保多付價錢，綠色產品還是可以競爭。
- (3) 當限制競爭損害與環境損害一致時，競爭與環境保護目標有機會相互依存。例如，漂綠卡特爾(*greenwashing cartel*)，公司可能以環境保護為藉口共同向消費者收取過高費用，或者公司共同降低或消除在產品差異化參數(即永續質量或創新)上之競爭。當公司共謀減緩或錯開綠色技術市場的引入，或者當他們同意不宣傳產品的環境性能時，就會發生這種情況。
- (4) 當競爭法承認與有益於競爭的環保積極行為及相關的公共政策利益豁免或效率防禦時，它也支持環境保護。該行為的促進競爭力將包括對其全部經濟影響的分析，包括其對質量、選擇和創新的非價格影響，例如綠色質量改進，或更可永續及乾淨的工藝與產品創新，因為效率可能超過價格效應。從某種程度上說，朝綠色方向投資可以使企業獲得競爭優勢、增加市場占有率、降低成本、增加規模報酬或使其更具創新性—競爭是應對氣候變化的有機驅動力。

3、荷蘭消費者與市場局首席經濟學家 Theon Van Dijk 先生表示：

- (1) 動態競爭可為環保之推手，但須在 2 項條件之下：第 1 個條件是消費者願意為環保支付額外費用，誘導環保產品之競爭，對環保產品之需求誘使廠商願意投資研發綠色產品。但是過度競爭亦可能造成對環境的損害，因為競爭會使價格下跌，廠商過度生產而浪費或污染空氣、水、土地等自然資源，這部分的外部成本並未反應在實際售價中，導致價格過低產量過高。
- (2) 第 2 個條件為廠商可能以合作代替競爭而使綠色產品不因價格過高而無法競爭，廠商亦可能合作以避免消費者選擇較便宜之非綠色產品「環保由你來做，我來享受成果」心態的搭便車行為。生產環保產品可能涉及須投入大量之固定成本與研發成本，個別廠商可能無法支付此一龐大成本，結合所有有意願廠商共同投資可能是達到環保之最佳途徑。
- (3) 為增強環境保護，提升社會福利，競爭法執法機關應促進此一合作而採取特別之執法態度。

4、義大利競爭管理局(AGCM)表示，該局處理環保議題之反托拉斯調查、倡議及和市場研究涉及兩個產業部門：傳統的廢棄物及回收管理與新興的電動汽車發

展、電動行動服務及其基礎設施等方面。AGCM 經驗顯示，限制競爭行為可能會阻礙立法中設定的環保目標，消除非法行為有助於建立更具競爭力的架構並實現更可永續發展的環境。

- 5、企業及產業諮詢委員會(BIAC)認為，環保是政府及一般民眾無法忽視的議題，而因為環保承諾所帶來的價格提高及選擇變少也是政府與民眾所要面對的困境。企業無論大小也將參與永續發展針對氣候變遷生產商品，善盡社會責任而非僅遵守法律。
- 6、香港大學副教授 Sandra Marco Colino 女士教授就「運用現有法律分析架構以考量環保因素」提出報告，略以：
 - (1) 歐盟在 2019 年 12 月公布之「歐盟綠色政綱」(The European Green Deal)即已討論將競爭政策對永續發展影響納入考量，該新政規劃歐盟預定於 2050 年達成碳中和，以使歐盟會員可維持永續發展，這是一個相當具有雄心的規劃。
 - (2) 在綠色政綱開宗明義介紹中，歐盟即宣告「這是一項新的成長策略，旨在將歐盟轉變為一個公平及繁榮的社會，擁有一個現代、資源高效及有競爭力的經濟體」，這裏指的就是競爭政策，永續發展必須與競爭政策並列討論。
 - (3) 為促進永續發展，歐盟運作條約(Treaty on Function of European Union, TFEU)第 11 條要求歐盟必須將環境保護納入歐盟政策和活動的定義和實施中聯盟的政策和活動。競爭政策即為其所採用的非常重要方式政策與方法之一。
 - (4) 競爭政策與永續發展應該是互補的，但如今所見亦有可能互有衝突。歐盟委員會無法限制投資方向，且有些行為亦可能受到競爭法反托拉斯或結合之規範，歐盟競爭委員會及各國競爭主管機關必須將永續發展納入執法考量。
 - (5) 因為永續發展而削弱競爭法執法力量可能傷及法律之威信，我們必須考量競爭執法採更多的經濟分析方法，強調市場效能及強化損害理論之論述，這也讓企業有更多的時間調整其行為，採取更多偏向永續發展之生產方法。
- 7、比利時表示，該國法律架構允許其競爭法主管機關在對違法與結合管制案件的競爭性評估中考慮環境因素，以評估是否存在歐盟運作條約(TFEU)中第 101(1)條意義上的競爭限制等同於經濟法典第 IV.1(1) 條，或者協議、結合或行為是否可以通過適用 TFEU 第 101(3)條獲得豁免，或者是否可以根據經濟法典中第 IV.9 條中的評估標準批准結合交易。
- 8、Compass Lexecon 顧問公司馬德里分公司資深副總裁 Nadine Watson 女士以「衡量競爭案件中之利益」(Measuring Benefits in Competition Cases)來說明消費者對環保產品之消費意願：

- (1) 對消費者是否願意使用環保產品的標準經濟方式，循傳統成本利益分析統模式端視：(1)消費願意支付之金額(付出成本);及(2)消費者得到非使用價值(所得利益：對環境之益處為何？訴求是否為真？何時可兌現這些訴求？)。但消費者如未真正瞭解環保的利益則分析將產生誤差。
- (2) W 女士認為，為環境利益付費的意願其總價值將隨以下因素而變化：(1)所選擇之環境；(2)消費者可用之資訊或本身之意識；(3)社會規範，而使用價值則直接來自消費所認知的價值。而產品功能的附加價值(即非使用價值 non-use value，或稱被動價值 Passive value)則為消費者所沒有直接或間接地消費或體驗之功能，消費者可能沒有意識到其價值。例如：埃克森瓦爾迪茲石油洩漏導致野生動物死亡，需要數年時間才能從海灘上清除石油、阿拉斯加州根據被動使用價值的損失要求賠償 30 億美元。如果消費者沒有意識到對環境的影響，那麼對消費者為環境利益付費的意願的分析將是不正確。WTP (willingness to pay for sustainability)是正確的分析方法，但方法論中必須要考慮非使用價值。
- (3) WTP 分析方法的選擇取決於個案特徵：限制性之大小、非使用性之相對重要性價值、及其未來屬性(誰是消費者)與態度(非消費者之看法、搭便車行為等)之影響、價格之預期影響(市場界定與外部利益)及實際購買決定。WTP 如果可持續，則其他人也會跟進。

9、法蘭克福歌德大學金融與經濟學教授 Roman Inderst 先生以「在消費者福利範例中提升永續性發展效益之競爭性評估」 (Improving the Competitive Assessment of Sustainability Benefits within the Consumer Welfare Paradigm) 提出報告，略以：在消費者福利方法中擴及對永續性利益的考量可考慮下列因素：

- (1) 原則上，消費者潛在為永續性支付更高價格之意願可被視為非價格效率。除了觀察到的購買行為外，亦可從直接反應(或使用價值)或假設選擇(聯合分析)中提取 WTP，廣泛用於營銷與成本效益分析。但要注意：從永續性效益中引出「非使用價值」會引發眾所周知的問題，尤其是環境依賴性。消費者願意為永續發展付費，但也有可能是「反事實」：當前支付意願低可能是由於觀察到其他消費者的非永續性選擇。消費者亦可能會在銷售點(商店)遵循根深蒂固的習慣，購買廣告中最低價格的產品等。反映/知情的決定可能會有所不同。
- (2) 集體支付分析，即其他消費者對個人消費者的選擇影響：比較其他消費者的選擇是否也發生變化。但問題是，儘管這是一項消費者福利分析，這是否仍

屬於競爭法執法範疇？例如，由於現狀在法律要求範圍內，這些外部性是否是為「市場失靈」的表現？

- (3) 我們是否應該強加「真實」偏好？我們必須留意競爭與消費者保護論點的主要區別客觀衡量區別，如對經濟、身體之傷害，什麼是消費者利他偏好的「客觀衡量標準」？

10、主席結語表示，在消費者福利標準下，環境經濟學的評估技術可以整合到競爭評估中。雖然如何將環境考慮因素納入競爭執法中並不總是顯而易見，但在許多情況下，現有的執法工具雖可用於將環境影響(危害和效率)納入案件分析，但仍可能需要重新檢視競爭法主管機關對其進行評估的方式。

(二) 12 月 2 日舉行「數位市場事前管制與競爭」聽證會(Hearing on Ex-Ante Regulation and Competition in Digital Markets)：本場次共計 10 個國家提出書面報告，會中除邀請美國聯邦交易委員會主任委員 Linda Khan 女士進行專題演講外，並邀請澳洲、美國(司法部反托拉斯署)、歐盟、德國、英國代表以及英國經濟學教授 Amelia Fletcher 女士等人分享相關見解。聽證會討論涵蓋三個主要問題：(1) 制定事前管制法規的理由與背景；(2) 監管的设计過程、範圍及類型，以及事前監管與競爭法之間的關係；以及(3) 國際合作的必要性。

1、美國聯邦交易委員會主任委員 Linda Khan 女士專題演講：

(1) 過去幾年以來考量針對數位市場進行事前監管之國家已大幅增加。從本質上而言，針對數位市場進行事前監管反映出具有市場地位之事業所引起的競爭執法挑戰，網路外部性、數據近用、規模經濟與範疇經濟等係為該等事業主導市場地位之關鍵因素。競爭法主管機關應針對包括數位市場在內完備相關競爭法規，因此 USFTC 將發布相關規範，以使其執法具有可預測性。美國立法制度要求參與和制定法規之機關須向公眾進行法規公告，並提供公眾充分參與的機會。明確規範之法規也有助提供執法一致性以及可預測的結果，減少法律模糊性，提供事業公平競爭環境。

(2) 美國目前針對競爭法案件提起訴訟之成本極高且耗時極長，而當法院作出矯正市場的判決時早已緩不濟急，例如 USFTC 於 2020 年針對 Google 違法行為所提起之訴訟，可能要等到 2023 年才會開庭審理，同時聘請經濟學專家之高額成本亦限縮競爭法主管機關對其他案件與違法態樣提起訴訟的能力。再者，依研究結果顯示，隨著時間經過，美國耗時且昂貴之訴訟程序可能導致政府執法力度下降。而完備競爭法規則有助減輕部分競爭執法之沉重成本，競爭法主管機關若以制定法規而非判決結果作為目標，應可降低延攬專家成本或

曠日費時之訴訟負擔，進而擱節大量資源。

- (3) 當前對逐案判決所產生之排他性有時剝奪市場參與者和公眾參與制定競爭法規的機會，藉由專業知識制定法規可有效協助競爭執法及政策制定者提出更符合實務所需之政策與法規。快速發展之數位市場對美國消費者、勞工與誠實企業帶來嚴峻的挑戰，因應這些挑戰並確保市場自由與公平是競爭法主管機關主要的優先工作事項之一，同時亦需妥善運用國會授予機關之所有工具。國會創建 USFTC 旨在補充司法部反托拉斯署職掌，而賦予該委員會與反托拉斯署不盡相同之執法工具，因而 USFTC 有責任善用包括制定競爭法規在內之所有工具，以提高執法成效。

2、澳洲：

- (1) 搜尋引擎、社群媒體、廣告技術應用程式、線上零售市集等數位平臺常運用不利經濟發展與創新之商業模式，由於該產業並不會完全遵循相關法規且會肆意損害競爭，因而競爭法主管機關應確實就其執法工具與相關法規進行盤點，例如於澳洲提起競爭法案件訴訟從啟動到結案至少需要 5 年，因而競爭法主管機關之執法與分析工具是否完善就相對重要，另在完備法規部分，因澳洲已完成研究數位平臺相關市場，預計將於 2022 年研提所需之相關法規，並盼藉由國際合作提高執法成效。
- (2) 澳洲以 2018 年至 2019 年進行相關的市場研究為基礎(最初針對數位平臺產業進行非常廣泛的調查，而目前則是聚焦於線上市集)，透過經濟學家、律師、數據分析師等專家進行大量討論後針對競爭相關議題作出結論，包括市場力量、進入障礙、自我偏好等，預計於 2022 年正式提出數位平臺相關法案時，將歷時 3 年半。另鑑於新聞媒體議價能力無法與數位平臺抗衡，而於 2021 年導入「新聞媒體與數位平臺強制議價法」(News Media and Digital Platforms Mandatory Bargaining Code)，以妥善處理這個議題。

3、德國：

- (1) 德國對於在 2021 年初生效之競爭法即特別針對平臺市場執法進行重大改革，包括在法規中闡明網路效應與中介權等術語、導入有關數據近用與守門員等相關規定，例如德國競爭法第 19 條與第 19A 條，係已明定符合守門員之標準。德國分別在 2017 年與 2021 年共完成 2 項有關數位市場之法律修正案，例如類似歐盟數位市場法(DMA)之第 19A 條即規範有關守門員之評估標準、舉證責任轉移之效率抗辯等。德國已分別對 Google、Apple、Facebook、Amazon 提起訴訟，指出該等事業隸屬第 19A 條之管轄範圍，希望能於 2022 年盡快進入

相關程序並獲得相關執法成果。

- (2) 德國在 2014 年向歐盟執委會寄出首封部長級正式信函，指出制定超越現有競爭法規之必要，事實上前開競爭法第 19A 條在某種意義上已促進競爭立法者間之競爭；惟特別為濫用數位市場地位案件另設新的競爭法規與程序，未必能為主管機關節省相關經費。傳統產業如鐵路、能源、電信等具有規模經濟，而數位市場則擁有巨大的規模經濟與網路效應，而使原有的競爭執法工具不足。未來是開放的，無法得知新興產業是否需要進行特別監管，因此競爭法主管機關需要快速的行政程序以及量身定製之法規以為妥善因應。

4、英國：

- (1) 主要聚焦於促進競爭之新興執法工具，以因應數位事業強大之市場力量，並在 CMA 以數位專案小組向政府建言之基礎上，於 2021 年中就數位市場制度進行相關諮詢。英國著重於評估具有市場地位事業之市場力量，以及該等市場力量是否為事業提供優勢地位，同時透過相關處理原則監控落入此項檢測之事業市場力量的影響，以防止其濫用，再藉由互操作性或數據近用等措施處理市場力量的來源等。
- (2) CMA 將針對前開議題儘速完成立法，同時 CMA 已於其機關內成立新的專責單位查處數位市場產業。英國代表並於會中以 Google 向 CMA 承諾，希望藉由共同制定隱私沙盒處理第三方 cookie 引起之隱私權問題為例，說明事業與競爭法主管機關/監管機關合作提供最適矯正措施以彈性處理競爭疑慮之英國模式給與會機關參考。

5、美國司法部反托拉斯署署長 Jonathan Kanter 先生：

- (1) 美國國會刻正考慮如何就數位平臺市場之競爭議題進行反托拉斯法之改革，以保護數位平臺市場之競爭，包括禁止損害競爭之自我偏好與歧視性行為、禁止消滅實際或潛在競爭對手之數位平臺間結合、實施基本數據之互操作性與可攜性等措施。另外，拜登總統於 2021 年中針對數位平臺發布相關行政命令，以利行政機關有效執法。
- (2) 美國部分傳統市場例如汽車分銷已採行事前監管制度，這個模式相信亦可運用於數位市場，惟該市場目前主要受數位市場相關法案所規範。美國競爭法多由立法機關推動、總統頒布實施後交由反托拉斯機關執行；倘若未能適時制定合宜法規並設計矯正措施，將無法因應現有與未來的市場競爭動態。為確保反托拉斯執法重點具有足夠的前瞻性以及充分的設計，K 署長強調競爭法主管機關間需進行緊密合作，以防範事業未來可能的反競爭行為，並提供

事業創新的空間。

6、歐盟：

- (1) 歐盟執委會於 2020 年 12 月提出「數位市場法」(DMA)，以作為補充競爭執法之新興執法工具，該項法案主要著重兩個面向，包括僅專注於在歐盟企業用戶與最終消費者間作為守門員之最大數位平臺，以及過去 20 年來全球競爭執法過程中從市場可競爭性及公平的角度所關注之相關議題，例如競爭法主管機關關切數位市場之自我偏好、數據之蒐集與使用、數位市場守門員等，特別是守門員一旦透過標準認定後，即需承擔相關義務，否則將被處以巨額罰鍰，最高可達全球營業額之 10%，且當該等事業再次違法時，執委會亦可採取行為面或結構面之矯正措施等。
- (2) 歐盟的數位市場法案是一項立法倡議，因此需由歐洲議會與歐盟理事會透過民主立法程序後發布，而本法案業已包含超越保護競爭過程的的社會價值觀。歐盟代表並支持 Amelia Fletcher 教授將監管一致性作為重要目標的主張。數位市場法案中之核心平臺服務列表實屬封閉性質，其核心包含網路中介平臺、搜尋引擎、社群媒體等服務，而其重要的共同特徵是該等平臺係充當歐盟商業用戶的重要網關並連結最終消費者。該法案之守門員標準為在歐洲經濟區營業額 65 億歐元或事業市值具 650 億歐元，惟此項標準刻正進行討論仍未定案，歐盟代表並以生產聯網汽車為例簡要說明。

7、英國經濟學教授 Amelia Fletcher 女士：

- (1) F 教授、Monika Schnitzer 與其他共同作者於 2021 年針對美國與歐盟之數位市場事前監管制度進行比較，並為美國與歐盟提出一些建言。關於監管的基本原則，F 教授認為首先即需有效掌握時間因素。由於競爭法發展進程緩慢，隨著生態系統快速演進，而使得掌握該系統之事業在數位市場的地位越發穩固，並進而利用該生態系統進入新的市場。
- (2) 再者，為了爭取執法成效，競爭法案件之相關定義普遍較為狹隘，而使競爭法案件之法律不確定性較高，這對事業、用戶以及關鍵第三方而言皆為不利因素，特別是這些第三方業者為了生存可能需要依賴相關事業或與相關事業競爭而亟需知道遊戲規則。
- (3) 此外，F 教授等人觀察到數位市場部分問題的驅動因素係屬內在的經濟層面，包括規模和範疇經濟、網路效應、數據反饋循環等，因而支持透過事前監管補充競爭執法；若進一步考量自我偏好、互操作性、數據近用等議題，就能理解事前監管設計之重要性。提供全球性服務的數位事業由於需要在不同國

家提供不同服務而使其成本高昂，同樣的，對其競爭對手而言也是代價不斐，終使這些事業降低品質、提高價格並抑制創新。而 F 教授亦提及此部分可能涉及貿易政策中之保護主義，甚至可視為政治因素。

(三) 12 月 3 日舉行「新聞媒體與數位平臺競爭問題」圓桌會議(Roundtable on News Media and Competition)

1、本議題共有包括我國在內的 9 個國家及 BIAC 提出報告，並邀請三位專家：倫敦 Oxera 律師事務所合夥人 Helen Jenkins 女士、哥倫比亞大學及哥倫比亞商學院商業與經濟學教授 Andrea Prat 先生及澳洲 Sedney 科技大學媒體轉型中心聯合主任 Derek Wilding 先生與談。

2、OECD 秘書處首先就背景文件提出說明：

(1) 網際網路徹底改變新聞內容的傳播，數位平臺的出現降低新聞資訊發布與傳遞的成本，加快新聞資訊更新之頻率，並增加消費者取得新聞來源之管道，簡言之，數位化擴大新聞資訊的受眾觸及範圍，最終致使新聞媒體產業面臨更為激烈的競爭。從新聞媒體的角度，數位平臺固然提供有效的新聞內容傳遞管道，卻同時產生新聞媒體業者可能過度依賴數位平臺的隱憂，形成短期經營機會與長期隱憂間的矛盾。

(2) 新聞媒體與數位平臺間之關係相當複雜，大致可區分為垂直和水平關係。在垂直關係方面，為確保新聞資訊的傳遞與受眾觸及，新聞媒體會與各種形態的數位平臺同時往來，故新聞內容是數位平臺的服務項目來源之一。另一種垂直關係則是因某些數位平臺同時兼任廣告供應鏈中主要供應商，此時新聞媒體透過數位平臺在廣告市場中的媒合功能，在新聞媒體自身網站與應用程式投放廣告。至於水平關係方面，由於數位平臺已成為新聞媒體重要的競爭對手，數位平臺扮演注意力媒合的角色，因此在爭取受眾注意力及廣告供應市場上，儼然成為新聞媒體不可小覷的競爭對手。

(3) 依據前述垂直或水平關係發展之損害理論分別為榨取(exploitative)及排他(exclusionary)行為。按傳統榨取濫用理論通常著重在價格效果，但在數位市場中，則將可能產生新聞內容品質下降等非價格效果。此外，數位平臺廣泛搜集使用者如何選擇新聞資訊以及相關互動數據，也可能會影響新聞媒體有效參與廣告市場競爭之能力。

(4) 至於目前觀察到各國執法均有不同，部分係針對數位平臺是否濫用市場力，影響數位廣告市場參與者之營收及競爭力展開調查，另有部分則是致力於解決數位平臺與新聞媒體業者間分潤、付費及不平等議價能力等問題。

- 3、澳洲雪梨科技大學教授 Derek Wilding：不否認澳洲「新聞媒體與數位平臺議價法」(News Media and Digital Platforms Mandatory Bargaining Code)(下稱媒體議價法)確實改善新聞媒體與數位平臺間議價能力，迄今為止，競爭法似乎在新聞媒體的分潤議題上取得部分成果，但仍然無法解決所有問題，長期而言，建議仍應該藉由立法規範因應網際網路所衍生之疑慮。
- 4、美國哥倫比亞大學經濟學教授 Andrea Prat：新聞媒體產業原有廣告收入模式逐漸式微，但並非競爭所引起的問題，而是如今有越來越多投放廣告的管道，因此政府恐難以介入分配新聞媒體之廣告收入，又介入的結果是否可能導致更多資源集中於少數大型媒體業者，澳洲媒體議價法施行的影響評估將有助於釐清此事。另一方面，訂閱模式的發展或許是改變新聞媒體業者收入模式的方法之一，然而也必須注意訂閱制度是否出現集中於特定媒體業者之情形，其所衍生之可能的競爭問題亦值得後續觀察和討論。此外，媒體多元性亦為各國所重視，但目前仍然沒有衡量媒體多樣性之具體方法，建議 OECD 可持續蒐集相關資訊並朝此方向研議。
- 5、英國顧問公司 Oxera 顧問 Helen Jenkins：
- (1) 新聞媒體業者收入減少係源自於網路資源的競爭增加，並非源自於平臺市場力，此僅僅係轉移過往紙媒所扮演新聞資訊傳播之角色，此外，廣告技術的進步亦促使廣告主能夠向特定受眾播送廣告，增加廣告空間的價值。
 - (2) 即使政府試圖削弱平臺市場力量讓新聞媒體業者得以取得更多報酬，卻不代表能解決目前已認知到市場失靈問題，特別是「誘餌式標題」(click-bait)問題(即使用誤導性標題誘使瀏覽人點擊)。對新聞媒體業者來說，短期內吸引瀏覽者注意力為優先考量，以提高其在數位平臺的排序和曝光度，有助推動短期流量、創造營收，此對於數位平臺而言，短期最佳策略也是繼續支持品質可能較低但點擊率較高的資訊，但長期觀之，平臺亦有誘因為用戶建立優質新聞內容、值得信賴的生態系統。
 - (3) 數位平臺對於新聞媒體和消費者相關傷害除了競爭法外，又如「誘餌式標題」(click-bait)之於新聞品質的影響、透明性不足、隱私權傷害、假消息等問題，亦涉及其他法規訂定或消費者保護議題，故其他形式的社會政策(例如補助新聞媒體業者製作優質內容)也應該被考慮，而非僅侷限於競爭法工具的使用。
- 6、日本：
- (1) 日本公平交易委員會於 2021 年 2 月發布「數位廣告市場調查報告」，該報告中觀察到新聞媒體與數位平臺間衍生之交易問題主要概分為兩方面，包括

(1)透明性問題：數位廣告交易的實際狀況不明確，複雜的交易結構使得內容價值難以評估，而且廣告發布商無法取得實際廣告交易數據，致使其難以為廣告空間量身制定銷售策略;(2)演算法問題：由於來自搜尋引擎的導流占比相當大，演算法改變將影響新聞媒體業者廣告收入，新聞媒體業者普遍對於排序、費用計算的透明性和公平性有所質疑，然而由於新聞媒體業者對數位平臺流量的依賴，縱使對於契約協議有所疑慮，也只能被迫接受。

(2) 針對日本公平交易委員會報告內容，主持人 **Frédéric Jenny** 進一步詢問上述透明性與演算法問題是否均為競爭議題，以演算法問題來看，舉例而言，超市也會依據消費者偏好決定貨品擺放位置，超市並未與供貨商討論，貨品擺放位置也確實會影響供貨商營收，但此事通常不會被視為是競爭問題，此兩者間之差異何在。日本代表回應表示，數位平臺同時掌握搜尋服務和廣告市場，取得大量用戶數據而未與廣告主或發布商分享，相較之下，至少供貨商處於超市內即可知曉自己的商品被放置於何處，但廣告市場參與者卻無法掌握交易的實際狀況。

7、西班牙：

(1) 2021 年西班牙國家市場與競爭委員會(CNMC)發布「網路廣告產業競爭狀況研究」，該研究發現兩項問題：缺乏透明度及市場力濫用與自我偏好(self-preferencing)。針對第 1 個問題，由於廣告市場交易欠缺透明性，廣告主不知道自己的廣告出現在哪裡，廣告發布商也不知道自身廣告版位將出現何種廣告，也因此發布商無法得知廣告主願意為其廣告資源支付多少費用，導致發布商難以優化其對於廣告空間之定價決策。至於第 2 個問題，研究發現大部分數位平臺並未開放其廣告工具和資源之使用，因而許多廣告商優先甚或獨家使用特定數位平臺，將可能排除其他第三方獨立廣告工具的競爭，數位平臺也可能將其在廣告供應市場的市場力量延伸至廣告買方市場，並有偏好使用自家廣告資源之傾向。

(2) 針對西班牙 CNMC 報告內容，主持人 **Frédéric Jenny** 提及 2014 年 Google 曾因被要求為新聞內容付費暫停提供新聞服務約 1 個月，倘若有關於那段時間對於新聞媒體流量或收入相關觀察研究，將有助於進一步釐清新聞媒體與數位平臺間利益分配議題。不過 CNMC 代表表示目前並無相關研究或數據資料。

8、BIAC 強調政府機關處理數位平臺與新聞媒體議題應從 4 方面審慎評估：(1) 確認欲解決的問題為何？(2)是否為競爭議題？(3)消費者是否會從相關矯正

措施中獲益？(4)矯正措施是否有效且可執行？目前各國主管機關所提疑慮有些並非涉及競爭議題，故應仰賴不同機關間(例如競爭主管機關、消保機關、隱私權主管機關等)之合作，而非全由競爭主管機關全盤處理所有議題。

9、澳洲：

(1) 澳洲競爭與消費者委員會(ACCC)在對數位平臺調查報告中發現 Facebook 和 Google 擁有相當大的市場力量，原因在於各新聞媒體業者均仰賴 Google 和 Facebook 帶來流量，然而 Google 和 Facebook 卻不需要任何新聞媒體業者，因此導致數位平臺得以從新聞媒體業者提供的新聞內容中受益，卻毋須付出任何費用，此即為市場失靈的現象，當交易雙方議價能力如此不對等時，無法進一步談判達成商業交易。故澳洲採取制定促進協商機制的媒體議價法，引導數位平臺與新聞媒體業者進行協商，倘若數位平臺不願協商，則將進入仲裁程序。如今已有許多新聞媒體業者與數位平臺達成商業協議，該法案促進議價能力較弱的一方尋求與數位平臺交易的可能並平衡雙方談判能力，因而解決市場失靈問題。

(2) 針對 ACCC 報告內容，主持人 Frédéric Jenny 詢問探討市場失靈問題是否有進一步評估過數位平臺與新聞媒體間議價能力不平等的程度，包括探討各新聞媒體業者本身之市場規模和占有率。澳洲代表重申，如前所述，Google 和 Facebook 並不需要任何新聞媒體業者，但新聞媒體業者卻在與 Google 和 Facebook 的互動上別無選擇，其次，Google 在澳洲搜尋引擎市場占有率達 9 成，Facebook 則在社群媒體市場占有率達 7 至 8 成，顯見市場相當集中，無論新聞媒體業者本身市場占有率多寡，之於數位平臺都是處於弱勢談判地位。

10、本會陳副主任委員志民於會中分享本會對於數位平臺與新聞媒體間競爭政策之執法角度與立場：

(1) 若新聞媒體業者欲以集體協商方式增加與大型數位平臺協商分潤的談判力量，得集體或由公協會代表依公平交易法第 15 條第 1 項但書規定，向本會申請聯合行為例外許可，本會將審酌事業擬實施聯合行為之性質及內容、參與事業之市場力、對未參與聯合行為之競爭者影響等情狀，並評估聯合行為許可對整體經濟利益及公共利益之影響。

(2) 本會對於聯合行為例外許可之審查標準大致可分為以下兩面項：(1)競爭評估方面，本會將審酌聯合行為參與者之市場占有率及集中度、與協商對象之相對市場地位、聯合協議之性質與內容(例如是否允許自由退出)、是否含有與集

體協商無關之協議內容等；(2)經濟利益方面，則會審酌聯合行為對於促進產業發展之關聯性、是否為最小必要手段(無其他可達成相同目的但限制競爭效果較少之手段存在)、經濟利益可否由社會大眾共享等。

- (3) 本會觀察到不同媒體類型(例如傳統紙媒及原生網路媒體)對於與數位平臺協商的議題所展現之積極程度亦有所不同。此外，如何評估公共利益及集體協商機制對於產業發展之影響均為未來將面臨的挑戰，本會也將持續關注各國對此議題之處理方式與經驗。

參、第 20 屆「全球競爭論壇」

- 一、12 月 6 日舉行開幕典禮及第一場次「貿易、發展與競爭」(Trade, Development and Competition)座談，會議由 CC 主席 Frédéric Jenny 先生主持。他首先說明 GFC 成立之目的在強化 OECD 競爭委員會與非會員競爭法主管機關之聯繫，聽取新興競爭法主管機關之執法經驗並與更有經驗之執法國家進行交流。GFC 從第 1 屆的 52 個國家參加，至今日第 20 屆共 110 個國家參加，可見本會議受到各國重視程度。今年的主題是「貿易、發展與競爭」，與 20 年前 GFC 剛開始一樣，但經過 20 年，許多情況都已改變，這些變化對經濟發展有何影響及我們未來應如何因應？

(一) OECD 秘書長 Mathis Cormann 先生致開幕詞，略以：

- 1、今年 GFC 的主題「貿易、發展與競爭」是經濟復甦的核心。競爭可增加生產，刺激創新並鼓勵投資而增加經濟成長率。同時，競爭也可創造更高品質之工作，提升生活水準。缺乏競爭或限制競爭行為傷及社會弱勢族群，阻礙了經濟發展。
- 2、長久以來，競爭已普遍被認為可推動經濟成長，但同時也是降低所得與財富不均及脫貧的重要因素。依最近 OECD 對 8 個會員國家所做之研究顯示，過高的市場力及價格，增加了 10%最富有族群 12-21%之財富，但降低了最低所得 20%族群約 14-19%的可支配所得。證據顯示，國外廠商的競爭可使國內廠商變得更有效率。但關鍵在必須確保全球性競爭。為此，OECD 與聯合國 UNCTAD、WTO 及世界銀行共同對補貼及今日主題有關的議題進行研究。我們期望今天的專題演講及討論可以深化 OECD 及 IMF 的合作。

(二) 專題演講：國際貨幣基金(IMF)總裁 Kristalina GEORGIEVA 女士就主題進行專題演講，略以：

- 1、良性競爭是一種巨大的動力，可以推動企業與勞工達到最好的效率，促進創新

與就業，提高生產力、成長及生活水準。競爭對總體經濟與金融穩定具有重大影響；因此，它與 IMF 的工作有著直接的相關性。然而，我們看到了一些正在抑制而非促進競爭的全球趨勢。

- 2、最近幾十年的特點是市場力量的不斷上升。在跨越貿易與地緣政治的分裂力量推動下，這些趨勢如果不加以解決，可能會進一步破壞競爭並使競爭及總體經濟決策者的工作複雜化。問題是：我們如何超越日益分散的局面，轉向促進競爭及共享繁榮所需的合作方式？在過去 20 年左右的時間裡，不斷上升的市場力量損害了投資與生產。大公司利用其市場力在勞動市場進行剝削，賺取大量超額利潤，傷害勞工。依 IMF 估計，在先進國家中勞工所占之比率下降中，市場力增強因素至少佔了 10%。
- 3、競爭減弱可能降低了貨幣政策與財政政策之有效性。因為這些擁有過度市場力的大公司通常擁有大量現金，使得它們對市場利率與政府財政政策措施反應較慢；再加上疫情的影響，雖然政府提供政策性支持的行動幫助了許多小企業生存，但我們也看到反競爭趨勢愈演愈烈。這種與危機相關的市場集中度增加可能會降低資本投資和創新。從中期來看，這可能會使先進國家 GDP 水平降低 1%，這是一個嚴重的問題。
- 4、政府應如何遏制過度的市場力量並促進更強勁、更具包容性的增長？
 - (1) 加強競爭法執法：如德國、奧地利通過根據交易價格審查對小型企業的收購，加強結合審查。澳洲及英國一直在進行市場調查，以儘早發現問題並採取行動。
 - (2) 讓勞動力市場更具競爭力是另一個關鍵優先事項，如防止公司之間達成「禁止挖角」協議，或者停止針對零售與速食餐廳等行業的低技能工人的競業禁止條款。更好的資料可攜性及相互操作性規則可以使數位經濟更加活躍，就如歐盟電話號碼可移植性一樣，加遽了行動運營商之間的競爭。歐盟數位市場法案(DMA)及美國創新與選擇法案正在推動有益的討論。當然，對競爭法主管機關來說，必須有足夠的預算來製定和執行政策事務。
- 5、目前可見 3 個新興的全球趨勢對競爭構成了風險及從疫情中復甦的風險。這不僅是競爭法主管機關責任，也是總體經濟政策制定者需要注意競爭風險及隨之而來的成本。這些趨勢中的第一個是「技術脫鉤」(technology decoupling)。日益增長的「數位柏林圍牆」建立在進出口限制及科學研究合作減少的基礎上，這種方法會使情況惡化，從經濟強國到較貧窮的國家。如果美國、歐盟和中國的某種技術組合要「脫鉤」，企業將發現像現在這樣競爭越來越困難。已經占

主導地位的科技公司將獲得更大的市場占有率，而保持創新的動力就會減少。在這種情況下，低收入及中等收入國家將不得不選邊站，一旦被鎖定，它們可能面臨更高的價格、更差的服務及更小的發展前景。這將產生全球成本。根據情景，脫鈎可能會導致未來十年左右的全球 GDP 損失 3% 至 6%。此一問題可以通過 OECD 與其他多邊論壇開展更多工作，以倡議最佳做法並加強跨境協調。如果僅在國內限制其大型科技公司限制競爭行為而不限制同樣強大的外國競爭對手，其效果是有限的。

- 6、第二個全球趨勢是貿易限制。2019 年 IMF 估計，前兩年創造或提高的關稅使全球 GDP 減少了 0.4%。這些因疫情而採取的限制措施基本上仍然存在，它們繼續阻礙全球生產量。雖然在疫情期間沒有導致全面的保護主義，但這些領域的限制導致了我們今天看到的大規模疫苗不公平，使全球復甦對所有人來說更加不平衡與脆弱，並且讓我們面臨新變異的風險一如 Omicron。雖然各國就放寬疫苗出口到 COVID 的傳播進行了良好的對話，但全球改革基本上仍停滯不前。我們不能將現有的貿易開放視為理所當然。
- 7、第三個全球趨勢就是氣候。各國不僅需要齊心協力阻止全球變暖，還必須努力避免不對稱或不協調的氣候政策。想想可能扭曲競爭的市場碳價格的巨大差異，因為一些國家沒有採取足夠的緩解政策。而「碳排放」，在一個國家減少排放的努力導致生產轉移到另一個國家，可能會削弱各國提高碳價格的動力。我們需要能夠就氣候發出正確價格信號但不破壞競爭、貿易和投資的政策。我期待與 OECD 和其他組織合作，研究不同碳定價方法的等效性。
- 8、結論：公平與公平的競爭。這些在全球和國內都很重要。競爭政策如此，IMF 的許多與「生計」有關問題也是如此。這也是我們認為合作如此重要的原因，無論是 IMF 與 OECD，還是協調政策的國家，或者與每個國家制訂總體政策官員合作的國家競爭法主管機關。因為全球競爭取決於國內政策行動及全球合作。為了克服正在推動威脅競爭的全球趨勢的碎片化，我們需要更強有力的合作，包括境內境外合作。如果你關心創新、就業和廣泛共享的繁榮，你就必須關心更好的競爭政策！

(三) 聯合國貿易發展會議(UNCTAD)秘書長 Rebeca Grynspan 女士以事先錄影之影片致詞，略以：

- 1、在去年因疫情經歷的經濟緊縮後，今年我們正朝向經濟復甦，但經歷了此一疫情，許多發展中國家正處於失落的 10 年，貧窮比例、食物安全及教育正往反方向發展，這已經阻礙了疫情後復甦的腳步。如此一問題如未能解決，全球經

濟將比 2019 年更脆弱。脆弱是因為不平等，分配不均，經濟兩極化，如先進國家的成長及疫苗接種是發展中地區的好幾倍。

- 2、貿易及競爭正是影響此一兩極化結果的重要因素。貿易促進成長，但必須是在公平的遊戲規則上。去除貿易障礙不僅是針對關稅、非關稅障礙或國家防衛措施，貿易障礙也包括跨境限制競爭行為，如跨國卡特爾，可能影響國家、地區甚至整個大陸。某些主要產業大公司的市場集中力，如藥品產業、綜合農業、最近的數位經濟，也正在興起。研究顯示，在 1995 年全球百大企業的資本是最底端 2000 家企業的 31 倍，但到 2015 年該比例則高達 7000 倍，而市場集中度增加卻未見勞工分額依比例增加。例如，百大企業資本增加 4 倍，但勞工僱用增加不到 2 倍。這顯示市場集中度在所得不均中扮演了重要的角色。市場集中度的增加提高了廠商的利潤，但卻降低了勞工的薪資所得比例及一般人民的購買力。
- 3、競爭政策可以，且應該針對此一不合理問題來反轉此一現象。因此，UNCTAD 認真的推動以聯合國為基礎之競爭法，這是唯一以多邊協議架構的競爭法，而且我們相信競爭政策可以在經濟發展中扮演重要角色，而且對微、小及中型企業在創造工作機會、創新及經濟成長中至為重要。要達到此一目標，我們需要堅實的競爭政策及國際合作以處理跨國公司的限制競爭行為，UNCTAD 就是推動國際合作的重要平臺。

(四) WTO 秘書長 Ngozi Okonjo-Iweala 女士亦以事先錄影致詞表示，

- 1、本次論壇包含了 WTO 兩個重要工作項目，貿易、競爭與經濟發展及競爭中立。這 2 項主題皆為 WTO 過去討論競爭政策時主要重點，也直接與 WTO 工作有關，即競爭政策與貿易政策如何在全球化中共同維護公平競爭環境。
- 2、在過去幾十年來競爭政策已成為全球經濟的一個重要因素，從 1997 年僅有 50 個國家有競爭法至今 WTO 的 135 個會員全都有競爭法及執法機關，這要歸功於 OECD、ICN 及 UNCTAD 的優秀引導及一些個人的努力的推動，如 Dr. Jenny。競爭政策中的一個重要因素就是市場公平競爭，而在今日全球貿易體系中，國際競爭力及政府干預(如補貼與競爭政策)息息相關，因此 OECD 提出了今天所討論的「競爭中立」概念。
- 3、今日的全球數位市場包括了規模經濟、市場集中及網路效果，而這些市場是否可抬升自身競爭以造福消費者是一個大問題。政府補貼政策也關係到產業是否公平競爭，造成市場長期扭曲。在 WTO，公平競爭一向是工作核心，恰如競爭政策，透明性、非歧視性及公平競爭是 WTO 的重要原則，WTO 會員的貿易

政策檢討也包括了競爭政策的檢視，並提供發展中國家技術援助。

- 4、各式的政府補貼政策，如農業補貼、漁業補貼，而對於貿易協定中對補貼的規範已無法約束國營事業，影響跨境貿易效果，造成對貿易極大之挑戰。
- 5、我們也必須對投資之管制更有彈性之做法，以免造成影響競爭之限制投資之流動，平衡的貿易與競爭政策可以創造市場公平競爭。今日競爭法主管機關的討論與 WTO 會員的討論為達成此一政策平衡之代表，期盼今日討論可達成可行之政策。

(五) 專家與談：本議題受邀與談專家包括諾貝爾經濟學獎得主哥倫比亞大學經濟學教授 Joseph E. STIGLITZ 先生、瑞士 St. Gallen 大學教授 Simon EVENETT 先生及歐洲重建與發展銀行首席經濟學者 Beata JAVORCIK 女士。

1、STIGLITZ 教授認為：

- (1) 美國的反托拉斯政策一開始並非為經濟效益，也非為消費者權益，而是為了民主權力，但今日已成為拜登競爭政策的主要政見，FTC 主任委員是最強有力的支持者。在川普任內曾把競爭政治化，在歐洲調查這些科技巨擘限制競爭時，認為是反美行為，這是個嚴重的錯誤。
- (2) 競爭政策與消費者福利的爭論，消費者福利分析方式是低估了競爭的動態效果，而競爭政策亦需良好的管制政策配合，且依國家國情不同而設計管制政策，才能發揮競爭政策之最大效益。
- (3) 有關經濟發展，產業政策一直是經濟發展的重要元素，而最關鍵的問題在於國家補貼之限制，在已發展國家可以允許對富有企業農業之補貼，但對於剛開始發展之國家卻不准其對可幫助其國家發展之剛起步工業補貼。在許多發展中國家眼中，這些規定只是已發展國家運用智慧財產權及補貼政策來創造不公平競爭環境。
- (4) 在美國，產業政策只有在供給鏈缺乏彈性而市場機能嚴重失靈時，才能得到兩黨無異議支持，正如現在許多科技產品短缺，而產業政策在過去 10 年的發展因美中貿易戰而產生了變化。
- (5) 在美國值得注意的是，事業壟斷的情形明顯增加，但法律架構卻無法與時俱進。美國企業不僅可以生產創新的商品，如行動電話、蘋果手機，但也在限制競爭方面十分有創意，如銀行、航空公司訂位契約，都在強化企業之市場力量，抗拒現有之法律架構，造成消費者必須為這些契約增加大量額外負擔。另外，整個經濟體系已與過去有所不同，例如數位化經濟，這對過去所重視的公平與民主造成惡化現象。我們所需要的是更多行動來促進經濟發展，達

成更廣泛的政策目標。

2、JAVORCIK 女士表示，國營事業與跨國大公司其實是平行的，因為經濟力量可以透過遊說而轉化為政治力量，這意味著大公司是「規矩制定者」而非「規矩接受者」，而國營事業是法規接受者，因為它們有受到明白的法規管制。新興國家雖有競爭主管機關，但受限於資源與能力，常常無法發揮其應有之行政功能，因此渠主張應設立跨國機關以解決行政能力不足之現象。

3、EVENETT 教授報告了過去 20 年貿易政策之演變：

- (1) 各國政府遵守貿易協議之意願逐漸降低，而這是貿易政策成功的最重要因素。我們見到各國無意簽署貿易合作協議，破壞 WTO 貿易糾紛仲裁結果，而自 1993 年後再無全球貿易協議。
- (2) 各國政策制定者或領導人不再相信所謂效率主張，不像競爭政策主張消費者福利，貿易政策改革可能有利於企業，特別是目前地域性敵對及國家安全考量雙重因素的影響。
- (3) 競爭政策從跨國及區域層次改變為雙邊及單方面，這是因為對各國執法能力差異，而且各國訓練制度不透明，及民粹政客與特殊利益團體所造成的退化因素。
- (4) 對進口競爭廠商的特別補助及出口誘因特別造成跨境貿易之扭曲。至少 80% 之貿易是帶有不同的補助或補貼，歐盟、美國及中國則占了至少 62% 的全球貿易量。競爭政策是否可有效遏止國家補貼值得觀察。
- (5) 除了上述發展現象及美中貿易戰，我們很難聽到公開討論貿易體制失靈，或應重回 1993 年協商的主張，我們也見到了玻璃健康症候群，亦即住在玻璃屋內的人不會對玻璃屋丟擲石塊。我們見到了越來越少的貿易糾紛案件，這已非與全球貿易量成長同步的現象，這就是目前全球貿易的現況，未來我們將見到更多違反貿易規則的事件發生。
- (6) 我們應該蒐集更多資訊供政府參考並提供更多如何達成社會目標，如環保，且加速跨境貿易有用之建議。

4、JAVORCIK 女士報告「多種破壞競爭的方法」(Many Ways of Undermining Competition)，略以：

- (1) 許多人談到國營事業便會聯想到中國，事實上不止中國，許多國家都有國營事業侵蝕民營事業產業。在後共產主義國家，國營事業甚至增加了 7%。而國營事業在過去 20 年中更重新獲得民眾之支持，在新興國家如此，甚至在先進國家亦然。很少人知道，除了美國、瑞士及丹麥等國家外，民眾對民主的支

持更大於對私有權的支持。

- (2) 歷史經驗顯示，此一現象會因疫情而更加擴大。這是因為民營企業在疫情期間可能消失或國有化，而此一現象即可能破壞民營事業之競爭。國營事業可能以租稅優惠、以低於市場價格取得其他國營之投入要素，或直接取得國家財務補助。
- (3) 公營金融事業同為扭曲市場之來源，而公營銀行事業在過去 20 年同樣在增加中。自金融危機後，民營銀行資產維持相當穩定，但公營銀行則明顯增加，例如、白俄羅斯、烏克蘭、中國或印度，其公營銀行資產增加過半，這是因為民營銀行在金融危機後的保守態度，公營銀行介入而在其帳目上增加了許多不良貸款。這雖是正面效應，但亦有其黑暗—政治力的介入。這亦影響了但借貸市場的公平競爭。
- (4) 貿易雖然帶來市場競爭，但國營事業可能逃避邊境稅賦(如進口關稅)而造成不公平競爭，影響貿易自由化。這不但存在而且盛行，且在許多國家中亦有明文記載，例如土耳其。
- (5) 我們可以看到，國營事業可能造成破壞競爭的因素至少包括：國營事業的不良管理、政治人物的濫用公營銀行，逃避跨境稅賦等。
- (6) 國際組織，如國際發展銀行，可以協助這些國家提升國營事業管理，遵循國營事業管理規定，以降低對競爭之影響。

二、12 月 7 日舉行「濫用市場地位案件中之經濟分析及證據」圓桌會議(Roundtable on Economic Analysis and Evidence in Abuse Cases)：

- (一) 本會議 OECD 共分成「衡量市場力量之技巧與證據」(Techniques and evidence for assessing market power)、「評估排他性交易及捆搭案件之技巧與證據」(Techniques and evidence for assessing exclusive dealing and bundling)、「評估掠奪性訂價及價格擠壓之技巧與證據」(Techniques and evidence for assessing predatory pricing and margin squeeze)等 3 項子題，邀請與會國家撰寫書面報告及分組討論進行口頭經驗分享。本會此次選擇「評估排他性交易及捆搭案件之技巧與證據」子題，於第二分組中分享本會審理有線電視業者涉及掠奪性定價案件之經濟分析方法與實務經驗。本項子題含本會共計有 19 個國家提出書面報告外，本會並受邀與日本公正取引委員會進行口頭報告及接受與會各國之提問與討論。
- (二) 本會提出「濫用市場地位案件中(掠奪性定價)之經濟分析及證據」書面報告，重點略以：

- 1、掠奪性定價經濟分析概述
- 2、關於掠奪性定價之理論，事業採行掠奪性定價須具有提高產品價格之能力，與排擠競爭對手之可能性。
- 3、關於掠奪性定價的檢驗方法，主要係透過「價格成本檢測」及「補償檢測」等二種檢測方法。近年來因國內有線電視產業管制政策鬆綁，相關業者選擇採行低價策略相互競爭衍生許多掠奪性定價案例

(三) 案例分享

- 1、2013年至2021年間本會共計審理10件有線電視業者涉及掠奪性定價相關案件，其中共有3件處分案，另有7件不處分案。其中全國公司檢舉永佳樂公司自2016年7月起針對該公司訂戶推出0元收視1年有線電視方案經本會決定為掠奪性定價行為。
- 2、市場界定及價格成本檢測分析：兩家事業之訂戶數分別為永佳樂公司125,352戶，全國公司19,324戶，兩者訂戶數市場占有率約為86%及14%。本會於2016年委外辦理有線電視替代性問卷調查，該問卷結果顯示，當有線電視費費用提高10%，其實際損失(26.72%)，小於臨界損失(38.70%)，故「有線電視」可單獨界定為本案之產品市場。
- 3、依據該公司「節目版權成本」及「訂戶安裝維修成本」與「訂戶數」之相關係數分別為0.9485、0.5110，具高度正相關性，確認其屬於變動成本。永佳樂公司有線電視收費為每月500元，其針對新進業者全國公司用戶推出0元免費收視1年之優惠，明顯低於其每戶每月平均變動成本366元，構成掠奪性定價行為。
- 4、結論：檢測事業是否採行掠奪性定價行為，通常可藉由比對事業之產品價格與成本進行分析，實務上由於取得相關事業邊際成本資料較為困難，因此，本會主要採用「平均變動成本」作為成本之參考指標。在分析事業各項成本究竟應屬固定成本或變動成本時，除可要求事業提出相關事證加以比對驗證外，亦可計算各項成本與產品數量之「相關係數」進行檢測與驗證。

(四) 會議主持人於本會口頭報告後，提問本會於審理相關掠奪性定價案件及採用「價格成本檢測法」時，相關業者是否有針對其低價策略提出任何正當事由抗辯，以及本會對於業者主張如何加以考量。本會針對主持人之提問回答略以：

- 1、多數有線電視業者均主張有線電視產業面臨MOD與OTT等其他媒體平臺業者之激烈競爭，近年來有線電視訂戶逐年遞減，我國有線電視產業與國際有線電視產業均面臨「剪線潮」之威脅，因此，業者為因應新進業者之競爭採行之低

價促銷策略，以競爭客戶。

- 2、此外，本會於書面報告中亦有說明，並不是所有低於成本之定價行為都是掠奪性定價，部分低價甚至是低於成本的定價行為不應被視為是具有掠奪性，而是具有合法商業理由的價格行為。例如廠商短期的價格促銷、多產品廠商對單一產品之低價行為、廠商間的價格戰、季節性或經濟波動所導致之廠商低價行為等。
- 3、本會於 2013 年至 2021 年間共計審理 10 件有線電視業者涉及掠奪性定價行為之相關案件，其中 7 件不處分案之考量因素即包括：
 - (1) 消費者因掠奪性定價行為產生之移轉之數量甚低，其限制競爭影響程度不大。
 - (2) 新進事業為參進市場競爭，提供短期促銷行為，其目的並非透過低價排除競爭，而是藉此得以順利進入市場參與競爭，並無減損市場競爭之機能。
 - (3) 掠奪性定價行為實施對象為原有訂戶，並非針對競爭對手訂戶實施，且該優惠價格與對手促銷價格相當，尚無阻礙競爭者參與競爭之意圖。

三、12 月 8 日舉行「競爭法主管機關促進競爭中立」圓桌會議(Roundtable on the Promotion of Competitive Neutrality by Competition Authorities)，由 CC 主席 Frédéric Jenny 先生主持，並邀請 Sophie Flaherty、Jordi Calve-Bademunt、Eleanor Fox、等專家參與討論，進行過程會分為三個部分，第一部分討論各國競爭法主管機關就本議題的相關執法標準，第二部分則討論部分競爭法主管機關如何設計競爭法等管制措施的型式，最後將會討論特定競爭法主管機關的公共支持標準。

(一) 由 OECD 秘書處報告背景文件，略以

- 1、競爭中立是指所有的事業都應該被提供一個與國營(包括中央、州、地區、省、縣及市等)事業相同監管制度及強度的市場競爭環境。OECD 在 2021 年 5 月通過了關於競爭中立建議書(The OECD Recommendation on Competitive Neutrality)，以確保事業間的競爭，防止出現國家選擇性地向特定事業提供優勢，因而妨礙了市場自由競爭；其中包括制定競爭中立的競爭法、維持競爭中立的競爭法等法令執法，及設計可能增強事業市場力量之制度時保持競爭中立等原則。
- 2、競爭中立性可能在競爭法架構與執行(the competition law framework and enforcement)、監管制度架構(the regulatory framework)、公共採購(public procurement)、公共支持(public support)、特殊或除外權利(special and exclusive rights)及國家激進主義(state activism)等 6 個領域被扭曲。主管機關可以用阻止

反競爭的立法及行政行為、支持政府設計監管及改革的工具與控制公共支持措施工具等三種方式來解決競爭中立的問題。

(二) 紐約大學法學院教授 Eleanor Fox：

- 1、渠認為國家或地方政府的限制以及混合私人及公眾的限制對競爭的傷害相當大，並質疑為何是建議尋求公平競爭地位，而不是簡單的消除所有不合理損害市場及消費者的國家或地方限制，表示所有不合理及不必要的國家或地方政府的限制都應該被根除。如果只關注在以對私人的約束來保護競爭，可能是徒勞無功的，事實上，理性的公司可能更喜歡公共的約束，其在抑制競爭方面可能更為有效。此外，公共與私人關係的混合將會為既得利益者帶來保護。
- 2、以國家內的限制來說，立陶宛和秘魯是個很好的例子，立陶宛競爭法第 4 條規定，任何行政機關不得透過法律或其他決定，給予任何事業個體特權或歧視，該國主管機關可以要求該行政機關取消該措施；秘魯則是對機關的行政法規實施事後控制，要求取消對一般事業不合理之限制。
- 3、以跨境或區域的限制來說，這些限制通常有國家參與，且是既得利益者促成的，例如提高關稅壁壘、保護壟斷及操縱採購等，歐盟雖然是一個整合內部貿易市場的典範，但未必可以在其他地方成功複製。對於發展中國家而言，區域一體化是個優先選項，非洲正是一個發展中的例子。
- 4、競爭法主管機關可以透過倡議及法律改革來推動競爭中立，至於區域的整合，雖然對域外有可能造成對競爭的約束，但對於域內的競爭障礙的消除卻是更為顯著。

(三) 拉脫維亞：現行拉脫維亞競爭法禁止公營事業，如中央、地方政府，所有之國有企業藉由設定相關制度或拒絕私營企業參與市場等方式，來過度限制一般事業於市場之競爭，如果主管機關初步發現可能的違法行為，渠會先與該事業協商，協商不成才會對其處分。同時，該國主管機關會定期檢視市場上是否存在反競爭的監理規定，並訂立防止扭曲競爭的建議，來避免競爭中立性遭到國營事業等所破壞，確保私營企業也能公平的參與市場競爭。

(四) 俄羅斯：俄羅斯的地方政府在執法上，可能會對事業參進特定市場的資格等為實體限制，或是對其他事業限制特定商品的自由流通等經營上不合理的要求，以及以資訊取得的優先性來創造對一般事業較為不平等的競爭條件，來造成競爭中立性的違反，而該國聯邦反壟斷局(FAS)在此時就可以對該等發布或制定對市場競爭有不利影響之監管法令規定或執法行為的其他行政機關進行調查，一旦確定該行政機關違反競爭法相關規定，就可對其裁罰。

(五) 立陶宛：立陶宛競爭法規定行政機關應該確保市場上的公平競爭，主管機關必須禁止任何賦予特定事業特權或歧視其他事業的法律行為或其他行政決定(例如以補貼等方式)，以避免相關市場競爭者面臨不同的競爭條件。旨在控制反競爭狀態的權力干預措施，其還可能具體包括國家援助或補貼控制等情。

(六) 芬蘭：芬蘭競爭法主管機關(FCCA)如發現其他地方政府或行政機關有創設造成破壞市場競爭的制度或執法時，可以介入調查，但該機關會傾向以協調等方式來移除該種市場限制競爭的狀態，以處理此種爭議，因為在彼此都是行政或執法機關的前提下，互相合作解決爭議應是較為合宜的作法。

(七) 澳洲新南威爾斯大學教授 Deborah Healey：

- 1、競爭中立性的基本主張是指應該要有個公平的競爭環境來以最優惠的價格向消費者提供最有效的商品或服務，藉以促進創新。因為政府具有市場制度的控制權，所以不僅是只能提供公平的競爭環境，故競爭中立性是為了確保市場的「中性」或為了公平競爭環境所實施的制度，但會受到國家或國際間的影響。
- 2、OECD 在 2021 年 5 月發布了關於競爭中立的建議，廣義的競爭中立包括多項倡議，如競爭法於政府業務的適用與執法、定期的競爭政策(包括法令)影響及評估、國營企業及相類主體的所有權與控制權的調整、公平公開非歧視性的政府採購、透明的公共服務與政策等。然而，有時在為了公共利益的考量下，競爭中立是可以被豁免的，但必須注意到該等公共政策是否符合公益的目標，並參考政治經濟學等理論。但為了確保市場可以充分競爭，這種例外的豁免應該受到嚴謹的限制，政府必須在其中取得平衡。
- 3、因此，政府的治理和其政策與其作為市場參與者的角色間的界線為何？政府應如何考慮其政策對市場競爭的影響？不受拘束的競爭是否必定可以實現最大的公共利益？政府是否需要對其長期未考慮特定情況所造成的負面影響負責？都是值得思考的問題。澳洲認為，一個完整而受推崇的競爭政策，競爭中立最終必須在每種情況下都符合公共利益，然而，在過往政府資產私有化的決策、出售機場及給予特定事業第二機場優先購買權與停車場長期壟斷、關鍵基礎設施的長期租賃等政策上，似乎並不是都能符合上述要求。
- 4、2010 年澳洲的競爭與消費者法賦予 ACCC 在相關政府政策或制度實施前可以對其是否符合競爭中立的面向進行調查及建議，聯邦及州監管機構也可對私有化的提案為公開審查，相關主管機關則可對具有顯著市場力量的資產實施監管，以防止壟斷獨占。

(八) 美國：

- 1、在美國，總統簽署的書面命令屬於一般行政命令，而非法律。目前拜登總統於 2021 年 7 月 9 日簽署發布關於促進美國經濟競爭的行政命令，相關管理的競爭項目約有 72 項，由白宮競爭委員會、司法部、聯邦交易委員會等機關負責執掌。此種行政命令的制定過程，通常需要跨部門的行政機關合作，例如，合併指南(Merger guideline)因牽涉到勞動力市場的競爭，所以有勞工與財政部門的參與，另外還有與農業部合作的 MOU、與交通部合作的 FAA 起降權分配、與銀行監管機構(包括美聯儲、聯邦存款保險公司、聯邦交易委員會等)合作的銀行合併指南等。
 - 2、目前 DOJ 實施的競爭行政命令中，其內容包括了行動計畫、新型態的代理關係、技術援助計畫、實施揭密者保護及共謀採購打擊等。FTC 制定的競爭行政命令則包括不公平的使用不競爭條款及其他阻礙工人流動的條款，並持續就不公平的數據收集與監控、處方藥行業的不公平反競爭行為與協議、房地產經紀業的不公平搭售或排他性作法等制度之排除。
 - 3、美國主管機關尚有聯邦宣傳計畫、合作備忘錄、跨機關工作小組等合作工具，相關人員並會藉由借調或培訓的方式來分享執法經驗。
- (九) 印度：印度係以該國針對公共採購的相關倡議制度為主題分享經驗。印度的倡議分為兩類，一種是特別針對個案，另一種則是一般性的情況，例如為了中央或州政府的公共採購計畫，該國主管機關(CCI)會針對採購官員進行培訓，讓他們了解採購相關的競爭問題，主管機關並會推動州政府訂立相關指導方針。當 CCI 以國家資源人員計畫(State Resource Person Scheme, SRPS)來推動相關人員培訓後，一些州政府已經有緩步設計有利於競爭的招標條件，迄今更已有 10 餘省訂立公共採購相關的立法。
- (十) 巴西與會代表分享了該國競爭法主管機關經濟防衛管理委員會(CADE)針對 Uber 案件與其他機關(SEAE)的合作案例，雙方透過分享技術及研究成果、交換意見與參加會議等方式，成功的推動相關立法。雙方合作過程中，曾有部分民眾針對 Uber 司機的暴力行為因為缺乏相關證據而遭駁回，也有主管機關調查 Uber 是否涉有不公平競爭與卡特爾行為等調查，因為未有明確事證證明 Uber 的存在對市場競爭造成損害而結案，甚至有部分州議會立法禁止 Uber 營運。是故，其他機關所提供的經濟分析等文獻對於爾後成功立法是相當重要的。
- (十一) Dr. Jose Luis Buendia Sierra :
- 1、渠以促進競爭中立是否為反托拉斯最困難的工作為題進行演說，並認為不只是

企業的反競爭行為會造成市場扭曲，國家措施也有同樣可能性，但因為國家可能有正當理由扭曲競爭，所以現實面應該要以政府或議會來控制此類行為才對。在此情形下，對單一國家而言，倡議往往是國家層面的唯一解決方法，僅有在超國家的國際組織(如歐盟)存在下，才有可能達到真正的執法。例如歐盟執委會作為競爭法主管機關，就有執行 TFEU 第 101 條、102 條等來防止企業所違反競爭行為等作用。

- 2、TFEU 第 107 條及 108 條是針對國家援助的相關規定，因為傳統的歐盟國家在執法和授權方面是高度集中的，但近年來開始有較多權力下放的情況。然而，如果國家自己無法公正執法，委員會就有採取行動的義務。另外，TFEU 第 106 條禁止歐盟成員以國家措施扭曲競爭，要求成員必須保持競爭中立，並賦予立法機關準立法權，來訂立透明度指令等規範，如果委員會沒有積極執行此條規定，國家法院或歐洲法院仍可加以應用。
- 3、最後，渠認為促進競爭中立對各國主管機關而言，都不是一件容易的事，因為在執法時即可能面臨各方強大的政治阻力，這時候，嘗試去說服各方團體似乎變成唯一選擇。

肆、亞太競爭法主管機關高階代表會議

- 一、OECD 於競爭週及全球競爭論壇後，接續於 12 月 13 日上午 8 時至 11 時(臺北時間下午 3 時至 6 時)邀集亞太地區競爭法主管機關舉行「第六屆亞太地區高階代表會議(the 6th Meeting of High Level Representatives of Asia-Pacific Competition Authorities)。」按 OECD 自 2016 年開始，每年皆於競爭委員會 11 月例會及全球競爭論壇會議中，另外安排時間舉辦「亞太地區高階代表會議」，本會皆由與會代表團團長參加，並於會中報告分享本會執法經驗。惟 2020 年及今年因 COVID-19 疫情關係，改成於會後以視訊會議方式舉行。
- 二、本次會議由 OECD 秘書處競爭組資深競爭專家 Ruben Maximiano 先生及 Leni Papa 女士組織召集，計有澳洲、汶萊、高棉、中國、香港、斐濟、印度、印尼、日本、韓國、馬來西亞、蒙古、紐西蘭、菲律賓、新加坡、泰國及我國等 17 個國家競爭法主管機關高階代表暨官員共 60 餘人參加。本會由陳副主任委員志民率綜合規劃處同仁與會。會議主題為：「危機時代中之競爭：政策、疫情及未來之路」(Competition in a Time of Crisis: Policy, the Pandemic and the Path Ahead)。會議共分 2 場次：第一場次會議旨在發布 OECD 於 2021 年出版之「亞太地區競爭趨勢報告」，重點關注該報告的兩個要素：經濟學的使用及結合管制。第二場

次則討論產業政策與競爭相容程度，以及競爭法主管機關可以採取哪些措施來幫助最大限度地減少此類政策對市場的任何潛在競爭扭曲。

三、會議由澳洲競爭及消費者(ACCC)前主任委員 Allan Fels 先生主持，OECD 金融及企業處副處長 António Gomes 先生首先致歡迎詞，他指出 COVID-19 疫情對經濟發展構成的巨大且持續的挑戰，並簡要說明本次會議主題及討論方向。主持人 Fels 先生首先建議與會人員為不幸於本年 11 月 5 日因心臟病去逝的印尼 KPPU 主任委員 Kodrat Wiboro 先生默哀 1 分鐘，再由亞洲開發銀行代理首席經濟學家 (Acting Chief Economist, Asian Development Bank) Joseph E. Zveglic Jr.先生進行專題演講，主要重點在於：

- (一) COVID-19 疫情在亞洲地區雖已因預防及疫苗而有所趨緩，但不平均的疫苗接種政策讓亞洲各國顯得更脆弱，而在歐洲及其他地區也因變種病毒而感染案例有所上升，疫情明顯離結束尚遠。
- (二) 亞太地區經濟活動隨著案例下降而慢慢有所恢復，歐美地區供給中斷問題對亞太地區尚未構成重大威脅，許多經濟體利用此一機會強化區域性及全球性之需求，並有助於控制通膨。
- (三) 亞洲開發銀行九月份預估 2021 年亞太地區之成長率為 7.1%，2022 年為 5.4%，2021 年通膨預估為 2.2%，2022 年則為 2.7%，12 月 14 日將公布的修正預估亦將不會有太大之修正。不斷成長中的數位經濟對市場競爭者呈現了最新的機會，但同時也為執法者帶來更新的挑戰。

四、OECD 韓國中心競爭計畫(Korea Centre Competition Programme, OECD/KPC)主任 Jungwon Song 先生報告該中心 2022 年預定舉辦之訓練計畫主題，分別為：2 月：市場調查(Market Studies)、4 月：數位平臺之競爭(Competition for Digital Platforms)、6 月(法官課程)結分管制之實質問題(Substantive Aspects of Merger Control)、10 月：競爭法主管機關之倡議策略(Advocacy Strategies)、12 月結分管制(Merger Control)。1-6 月預定將為網路視訊課程，如果情況許可，10 月及 12 月將為實際參加課程。

五、第一場次：

- (一) 由 OECD 競爭專家 Wouter Meester 先生則報告 OECD 公布之「2021 年亞太地區競爭法執法趨勢」(OECD Asia-Pacific Competition Law Enforcement Trend)。該報告係 OECD 分析亞太地區 16 個 OECD 會員及非會員國 2015-2020 年競爭執法趨勢，包括：澳洲、孟加拉、汶萊、中國、我國、香港、印度、印尼、日本、韓國、馬來西亞、紐西蘭、菲律賓、新加坡、泰國、及越南。他表示：

1、在過去 20 年中亞太地區已見證了競爭政策及競爭法的重要性。許多國家在最

近幾年制定了競爭法，而已有競爭法的國家則忙著修訂現有之競爭法規。大多數的亞太地區國家已提升其競爭法主管機關預算及執法人員之數量。據統計，在過去 6 年中亞太地區競爭法主管機關預算增加了 22% 的預算及人員，平均每年增加 3.5%。

- 2、新設機關大都專注於倡議及建立起競爭文化，因此執法案件有限且呈現不均之現象。如 2020 年寬恕政策前 3 名即占 78% 之案件，而已決議之單方行為案件中，前 2 名機關則占了 80% 之案件。卡特爾案件仍為罰鍰最大部分，但 2017 年的高通濫用市場支配地位案件為最高罰鍰案件。幾乎所有亞太地區都有結合管制政策，且為事前申報制度，惟在過去 6 年中僅有 8 件結合案為競爭法主管機關不同意而未能結合。將近 98.5% 的結合案件在沒有補救措施的情況下未遭異議而通過。
- 3、經濟分析慢慢成為評估許多競爭件的主要元素，各個機關的經濟學者人數雖遠低於 OECD 的平均數量，但新機關成立後的發展將改善此一現象。OECD/KPC 在亞洲地區扮演著經驗分享的重要角色，有助於新機關的能力建置，而因 COVID-19 疫情帶來的經濟危機也為競爭法主管機關帶來新的挑戰，同時也在經濟復甦上，透過倡議及執法活動而扮演更重要的角色。競爭法主管機關應在經濟復甦中努力就政府措施扭曲競爭的潛在風險提供建議，優先考慮關鍵部門以確保市場運作良好以及暫時允許合作與合作協議。

(二) OECD 報告後由澳洲 ACCC 委員 Peter Crone 先生、新加坡競爭及消費者委員會(CCCS)執行長 Sia Aik Kor 女士、馬來西亞競爭委員會(MyCC)執行長 Iskandar Ismail 先生、印度競爭委員會(CCI)處長 Sayati Chakrabarti 女士及紐西蘭商業委員會(NZCC)委員 John Small 先生依序分享了開展市場研究的經驗以及對在線平臺及電子商務的高度關注，及對於監管快速發展的數位經濟方法。

- 1、ACCC 委員 Peter Crone 先生表示，OECD 亞太地區競爭執法趨勢報告強調了市場研究在了解市場及產業中當前與新興問題，以及推薦解決方案以減輕所觀察到的危害方面的價值。他表示：澳洲已將市場研究作為全面、有條理方法的一部分，以了解數位平臺對其市場經濟的影響。ACCC 將在數位平臺服務調查的第五次中期報告中考慮是否需要進行更廣泛的數位平臺特定法律改革以解決這些市場的競爭及消費者問題，以及此類改革的選擇與適用框架，將於 2022 年 9 月完成。
- 2、CCCS 執行長 Sia Aik Kor 女士分享了 CCCS 最近進行的電子商務平臺市場研究，該研究於 2020 年 9 月完成，以更進一步了解電子商務平臺的商業模式和

運營環境在多邊市場競爭，例如送餐與叫車服務平臺。CCCS 在審查過程中沒有發現任何重大的競爭問題，並指出多個電子商務平臺上激烈爭搶客戶，且缺乏數據並非市場進入的重大障礙。她指出，CCCS 現有的競爭框架足以解決新加坡多邊市場的電子商務平臺增加可能引起的主要競爭問題，但 CCCS 打算更新其競爭指導原則，以澄清多邊平臺的市場定義、評估市場力量時可能考慮的相關因素、可能的損害理論(如自我偏好)以及併購評估(其中一家或多家公司是重要的創新者)。

3、MyCC 執行長 Iskandar Ismail 先生討論該委員會 2021-2025 年策略計劃的亮點，該計劃概述了 MyCC 通過實施及執行競爭法為馬來西亞實現強勁與永續經濟的行動計劃。其中包括計劃修訂第 712 號法案及第 713 號法案以引入結合管制制度，到 2022 年為馬來西亞的數位經濟政策發布有利於競爭的指導原則，公布運輸部門進行市場檢視(港口物流生態系統與機動車輛)結果，並與政府機構合作打擊操縱圍標與促進政府採購競爭。MyCC 還公布了調查與執法部門對 Covid-19 預防措施指導原則，其中概述了 MyCC 在執行防止 Covid-19 傳播任務時應採取之預防措施及步驟。

4、CCI 經濟處處長 Sayanti Chakrabarti 女士指出，CCI 體認到在促進競爭市場的過程中，需要用非執法工具來補充執法。在過去幾年中，委員會更加重視利用市場研究來更進一步了解不同行業、新出現的問題，並找出可能由市場或法規的結構性特殊性引起的競爭問題根本原因。CCI 於 2021 年 10 月啟動對藥品行業市場研究旨在了解影響該行業價格競爭的因素，重點在關注學名藥競爭與藥品分銷兩個領域。該研究確定了關鍵問題，包括對不同品牌之間質量差異的看法。CCI 已向國家管制機關提交了一份 9 點提案，以解決藥品質量問題。

六、會議第二部分主題為「產業政策及競爭政策」(industrial policy and competition policy)，主要討論在疫情期間產業政策及競爭政策之角色孰者為重？兩者是否可相互配合？競爭政策主管機關應如何對經濟復甦作出貢獻？會中邀請英國劍橋大學經濟學教授 Ha-Joon Chang 先生、香港大學副教授 Thomas Cheng 先生及葡萄牙競爭局首席經濟學家 Ana Sofia Rodrigues 女士進行專家討論。

(一) Ha-Joon Chang 教授以競爭政策與產業政策之短、中、長期影響說明對經濟之影響。他表示，正確之競爭政策對經濟之短期及非常長期(very long term)影響是非常明確的：防止價格勾結、提升商品品質、增加產業內競爭、規範自然獨占事業之行為。但競爭政策對於經濟之中期與長期影響可能會有所挑戰。例如景氣循環、金融危機、或如目前之 COVID-19 疫情外在衝擊等，而且國家在扶

持「幼稚產業」(infant industry)、國營事業或特定技術發展時，總是會犧牲競爭政策，如何調和兩者而找出何謂「正確之競爭政策」端視：產業種類、國家之優先順序、世界趨勢(氣候變遷、油價變化、疫情衝擊、金融危機)及時間(短、中、長期)而定。競爭政策的真正挑戰在於如何清楚決定何時、何地、及多久可促進競爭，透過何種方式而非僅是如我們所想像的減低企業之市場力或促進價格競爭而已。

(二) Rodrigues 女士討論了國家冠軍(national champion)企業的作用，以及葡萄牙競爭管理機構在疫情期間在政府政策設計中倡導競爭原則所做的工作。她指出，隨著 COVID-19 疫情對全球經濟體施加經濟壓力，放鬆結合管制、保護主義和國家冠軍的呼聲是周期性的。她強調，近期可信的實證研究證明，使公司免受競爭並不會使它們變得更強大。Rodrigues 女士表示，真正的冠軍來自穩定的總體經濟環境，具有競爭性及穩定的財政政策，企業可以獲得高品質的基礎建設及公用事業，受過良好教育的勞動力，並且可以在中立的監管和有效的司法系統下運營。因此，經濟復甦政策應該更關注這些變數，而非選擇放鬆結合管制及競爭政策與執法。

(三) Thomas Cheng 教授討論「不景氣卡特爾」(recession cartels)與「合理化卡特爾」(Rationalization Cartels)之關係，他認為不景氣卡特爾係為因應短期經濟衰退，而合理化卡特爾則為因應產業長期結構變化，兩者皆是針對調整產業產能過剩所需之政策，直接與競爭政策產生扞格，壓抑競爭政策而必須與競爭政策有所調和。

(四) 泰國、香港、我國、新加坡及菲律賓分享各自競爭政策與產業政策相互作用之經驗。

1、泰國貿易競爭委員會(OTCC)主席 Sakon Varanyuwatana 先生認為，競爭政策與產業政策應該平行、平衡及協調，各國必須採取產業政策來糾正市場失靈、促進經濟發展或納入更廣泛的戰略考慮。他指出，競爭法主管機關需要重視考慮平衡競爭與產業政策之間的關係，因此競爭法主管機關應該積極發言。他解釋說，在疫情期間，與較大的競爭對手相比，中小微企業往往處於相對劣勢，因為中小微企業可能無法獲得已建立的供應商、信貸條款及法律協助。OTCC 認為，競爭法因此可以在疫情期間及疫情後時代在保護中小微企業在市場中競爭方面發揮基礎性作用。為了應對 Covid-19 危機帶來的經濟後果，競爭法主管機關應為各級企業，特別是受到 Covid-19 疫情嚴重影響的中小微企業改善有利於競爭的環境和機會。

- 2、香港競爭事務委員會(HKCC)執行長 **Rasul Butt** 先生認為，原則上香港的競爭與產業政策之間不應有衝突，因為香港是透過有利於競爭的產業政策與反對保護主義。然而，HKCC 擔心的是現有的法規是否足以保護企業免受創新帶來的新形式競爭和破壞。HKCC 遇到的另一個問題是，香港政府的不干預、親市場、產業政策傾向導致政府自我監管。總而言之，香港是實施有利於市場、有利於競爭的產業政策的一個積極例子，但這並沒有削弱 HKCC 的政府諮詢職能的作用。
- 3、我國由本會陳副主委志民發言。他表示，本會在疫情期間的經驗顯示，競爭政策與產業政策可以並存，共同將疫情對市場和消費者的負面影響降到最低。他指出，本會在疫情期間調整了競爭重點，暫停了幾次無法在線進行的宣導活動，延長了提交結合通知的時限，以書面文件審核替代現場調查，暫停了對某些可能受到疫情重大衝擊行業的調查。陳副主委並強調了數位經濟在疫情期間的重要性，並指出本會已對最大的外賣平臺要求合作餐廳採取最惠國條款予以處分。他指出，本會必須加入政府關於撤除或退出所有疫情救濟、救助及刺激計劃的討論，以便能夠即時提供「有利於競爭的」退出策略。
- 4、CCCS 資深處長 **Hi Lin Tan** 先生說明在新加坡涉及產業發展的政府機關正在鼓勵企業(特別是中小企業)合作開發共用基礎設施與解決方案，以從數位化、行業轉型或支持永續發展目標。CCCS 體認能力共享等行業合作可能帶來規模經濟及互操作性等淨經濟效益，如能避免限制競爭行為，應予以鼓勵。CCCS 還就與具體措施相關之競爭問題向各級政府機關提供諮詢。近年來 CCCS 收到更多與行業發展工作相關的諮詢請求，包括為企業共享容量或交易開發共用的行業特定平臺。
- 5、菲律賓競爭委員會(PCC)委員 **Johannes Bernabe** 先生分享，菲律賓最近暫停委員會自行審查權力並將結合強制審查門檻提高到 10 億匹索，以作為全面經濟刺激計劃的一部分之立法決定使菲律賓的產業政策(即促進投資活動作為實現經濟彈性和復甦的途徑)與競爭法相衝突。他指出，這種衝突是可以避免的，並不是產業政策與競爭政策具體和真正不符的情況。儘管如此，PCC 還是利用這個機會在疫情期間加大力度，將更多資源用於執法活動，特別是濫用支配地位案件。這是為了向市場發出信號，即 PCC 將積極保護競爭與消費者福利，即使其防止不當集中的能力受到阻礙，也不管所涉實體的規模如何。PCC 還加倍努力將競爭觀點納入擬議的經濟立法中。

七、會議主席 **Allan Fels** 承認產業政策的特殊性對競爭政策的更廣泛、更普遍的優先

事項提出了挑戰，並表示 OECD 有空間繼續更多地討論產業政策和競爭政策的交叉點，以使該地區能夠制定一個至少有關競爭影響的問題框架，詳細說明行業政策。會議召集人 OECD 資深競爭專家 Ruben Maximiano 先生表示：「競爭法主管機關可以從市場監督者轉變為市場引導者，協助政策制定者制定促進市場運作良好的政策—這對於推動政府在經濟復甦的背景下扮演重要的角色。」

八、OECD 秘書處競爭組組長 Ori Schwartz 先生就會議總結表示，亞太地區競爭法主管機關高階代表會議是亞太地區競爭法主管機關領導人及高階代表的獨特年度聚會，旨在促進反托拉斯工作最高級別的知識、經驗與專業知識與執法之交流。本屆會議已進入第六屆，為競爭法主管機關提供機會，分享及發展高階主管在競爭法及競爭政策方面的實踐與應用，並產生新的思考方式來思考亞太地區所面臨的現有及新挑戰。

伍、心得與建議

- 一、本次 OECD 競爭週會議期間長達 8 日，從 11 月 29 日至 12 月 8 日，且因為時差關係，視訊會議皆於臺北時間晚上 7 時開始舉行，結束時間已超過晚上 10 時(或甚至超過 10 時 30 分)。參與同仁白天必須上班，晚上參與會議，並必須閱讀大量資料，對參與同仁之精神、體力及工作皆造成極大負荷，惟各場次參與同仁皆全程參與，值得嘉許。
- 二、OECD 討論近年討論議題皆圍繞在「永續發展」(環保與競爭)及「數位經濟」(或數位平臺)之競爭，本會應參考各國執法經驗研訂相關執法準則，以應付未來可能面對之執法問題。
- 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。

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English - Or. English

23 November 2021

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 2 on Competition and Regulation

Draft Agenda: 72nd meeting of Working Party 2 on Competition and Regulation

29 November 2021
via Zoom

The 72nd Meeting of Working Party 2 on Competition and Regulation will be held on 29 November 2021. Information on how to connect to the virtual session will be sent by the Secretariat prior to the meeting. Times mentioned in this agenda refer to the Central European Time (CET) zone (Paris time).

This agenda has been approved by delegates by written procedure.

Ms Federica Maiorano, Senior Competition Expert
Federica.Maiorano@oecd.org

JT03486064

Monday 29 November 2021

12:30-13:45

Item 1. Hearing on Competition Issues in Books and E-Books

This discussion will feature a series of presentations on competition and regulation in the market for books and e-books, where cultural considerations are important to public policy and there is a variety of measures in place to support the production and dissemination of books. These measures include subsidies, reduced taxes, restrictions to parallel imports and exemptions from competition rules, such as allowing publishers to set the retail prices of books. The launch of e-books has introduced new dimensions into the policy debate and the distribution of e-books has attracted scrutiny in a few jurisdictions.

The hearing will explore the role of competition and regulation in this market, drawing on the experience of selected jurisdictions in enforcing and advocating to governments on policy developments in the books and e-books markets. It will feature presentations by Dr. Imke Reimers, Department of Economics, Northwestern University, and Dr. Joost Poort, Institute for Information Law (IViR), University of Amsterdam, and by delegations, such as Norway.

13:45-14:55

Item 2. Scope of Competitive Neutrality Toolkit

The Recommendation on Competitive Neutrality, approved by the OECD Council on 31 May 2021, calls for the Competition Committee to develop a toolkit to support implementation.

This discussion will cover the possible scope of the toolkit. The discussion will benefit from a Secretariat note, circulated in advance of the meeting.

Note by the Secretariat - [DAF/COMP/WP2\(2021\)3](#)

14:55-15:00

Item 3. Future Work and Other Business

Competition Delegates will be called to decide topics for substantive discussions to be held in June 2022. Delegates should feel free to send to the Secretariat as soon as possible their views and propose topics for future work and Roundtables that they would like to submit to the consideration of the Working Party.

Annex

FOR APPROVAL BY WRITTEN PROCEDURE BY MONDAY 22 NOVEMBER 2021

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

For approval:

Agenda – [DAF/COMP/WP2/A\(2021\)2/FINAL](#)

Summary record of the 71st meeting (June 2021) – [DAF/COMP/WP2/M\(2021\)1](#)

For information:

List of participants – [DAF/COMP/WP2/PL\(2021\)1](#)

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23 November 2021

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

Draft Agenda: 134th meeting of Working Party No. 3 on Co-operation and Enforcement

30 November 2021
via Zoom

The 134th Meeting of Working Party 3 on Co-operation and Enforcement will be held on 30 November 2021 with a reduced agenda, which has been agreed in consultation with the Chair. Information on how to connect to the virtual session will be sent by the Secretariat prior to the meeting. Times mentioned in this agenda refer to the Central European Time (CET) zone (Paris time).

Some items originally planned for this agenda have been cancelled, postponed or will be handled in writing as set out in the Annex. The Secretariat may convene sessions to further discuss the issues when appropriate.

This agenda has been approved by delegates by written procedure..

Ms Sabine ZIGELSKI
Sabine.Zigelski@oecd.org, +(33-1) 45 24 74 39

JT03486075

Tuesday 30 November 2021

12:30 – 13:45

Item 1. Monitoring of the 2014 Recommendation concerning International Co-operation on Competition Investigations and Proceedings

For discussion:

Draft Monitoring Report to Council by the Secretariat – [DAF/COMP/WP3\(2021\)3](#)

Note by the Secretariat:

Topics and priorities for future work on international enforcement co-operation –
[DAF/COMP/WP3\(2021\)4](#)

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 meetings of WP3 in June and December 2019, the Secretariat presented a note on developments in Members and OECD's work on international co-operation since the adoption the Recommendation [[DAF/COMP/WP3\(2019\)3](#)], and the preliminary results of the joint OECD/International Competition Network survey on international co-operation. At the meeting of WP3 in December 2020, the Secretariat presented the [OECD/ICN Report on International Co-operation in Competition Enforcement](#), which summarises the status quo and the survey results, and outlines areas for future work.

A draft of the Monitoring Report to the Council will be presented and discussed. If approved by the Competition Committee subsequent to the WP3 discussion, it will be transmitted to Council for it to be noted and declassified. Priorities for future Committee work on international co-operation matters will be discussed.

13:45 – 15:00

Item 2. Revising the Recommendation on Fighting Bid Rigging in Public Procurement

For discussion:

Draft of the revised Recommendation on Fighting Bid Rigging in Public Procurement -
[DAF/COMP/WP3/WD\(2021\)32](#)

In June 2020, the Competition Committee started a discussion on the revision of the Recommendation, based on a letter by the Chair of the Competition Committee [[DAF/COMP/M\(2020\)1](#)]. At that meeting, delegates requested that the Secretariat prepare a note on the topics that could be included in an updated Recommendation [[DAF/COMP/WP3/WD\(2020\)24](#)]. Based on this note and a discussion at WP3 in December 2020, the Secretariat prepared a first revised draft Recommendation, for discussion at this session.

Annex

The following items will be dealt with as follows:

FOR APPROVAL BY WRITTEN PROCEDURE BY MONDAY 22 NOVEMBER 2021

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

For approval:

Agenda - [DAF/COMP/WP3/A\(2021\)2/FINAL](#)

Summary record of the 133rd meeting (June 2021) - [DAF/COMP/WP3/M\(2021\)1](#)

For information:

List of participants - [DAF/COMP/WP3/PL\(2021\)1](#)

For information:

Future Roundtable Topics – [DAF/COMP\(2021\)6](#)

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24 November 2021

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 23 November 2021

Draft Agenda: 136th meeting of the Competition Committee

1-3 December 2021
via Zoom

The 136th Meeting of the Competition Committee will be held on 1-3 December 2021 virtually with an updated agenda, which has been agreed in consultation with the Chair.

Information on how to connect to the virtual session will be sent by the Secretariat prior to the meeting. Times mentioned in this agenda refer to the Central European Time (CET) zone (Paris time).

Other items of the previous version of the agenda have been cancelled, postponed or will be handled in writing as set out in the Annex. The Secretariat may convene sessions to further discuss the issues when appropriate.

This agenda has been approved by delegates by written procedure.

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

JT03486135

Wednesday 1 December 2021

12:30-15:00

Item 1. Roundtable on Environmental Considerations in Competition Enforcement

In a context where public and private entities are called upon to align their conduct and strategies with the United Nations Sustainable Development Goals, a potential conflict between various sustainability goals and the protection of competition may arise. A conflict may exist, for instance, when competitors collaborate to adopt and implement greener initiatives or agree on common production or distribution standards, or when mergers may negatively impact the incentives of firms to invest in green innovation. This roundtable will build on the discussion on competition and sustainability we had in December 2020, and it will focus specifically on environmental protection and climate change. The roundtable will deepen our reflection on how environmental protection and climate change considerations can enter the competitive assessment and how the competition framework can integrate them. It will look at how anticompetitive harm and efficiency gains that also have an environmental impact can be considered, analysed and demonstrated in concrete cases as well as exploring the methodologies for quantifying them.

The Roundtable will benefit from a Secretariat Background paper focusing on the assessment of environmental considerations in competition enforcement and from a paper by Nadine Watson (Compass Lexecon) focusing on methodologies for measuring environmental benefits in competition cases. It will feature presentations by a panel of experts, including Roman Inderst (Goethe University Frankfurt); Sandra Marco Colino (Chinese University of Hong Kong), Theon Van Dijk (Netherlands Authority for Consumers & Markets) and Nadine Watson (Compass Lexecon).

For discussion:Background Note by the Secretariat - [DAF/COMP\(2021\)4](#)Paper by Nadine Watson - [DAF/COMP\(2021\)14](#)**Notes by delegations:**Austria - [DAF/COMP/WD\(2021\)46](#)Belgium - [DAF/COMP/WD\(2021\)47](#)Greece - [DAF/COMP/WD\(2021\)48](#)Italy - [DAF/COMP/WD\(2021\)49](#)Mexico - [DAF/COMP/WD\(2021\)77](#)Romania - [DAF/COMP/WD\(2021\)56](#)EU - [DAF/COMP/WD\(2021\)51](#)Brazil - [DAF/COMP/WD\(2021\)52](#)South Africa - [DAF/COMP/WD\(2021\)53](#)BIAC - [DAF/COMP/WD\(2021\)58](#)Summaries of contributions - [DAF/COMP/WD\(2021\)50](#)

Thursday 2 December 2021

12:30-15:00

Item 2. Hearing on *Ex-Ante* Regulation and Competition in Digital Markets

The past decade has seen an exponential development of digital markets. As more and more economic transactions and social interactions have moved online – a trend that has accelerated vastly during the COVID-19 pandemic—certain digital companies have reached a state of near-global dominance. The rise and importance of these companies in our daily lives cannot be understated. They have profoundly transformed the way we work, study, travel, communicate, shop, interact socially, and even the way we may meet our partners. In the process, these companies have also generated immense consumer benefits. As society is ever more interconnected, regulators are concerned about rises in market power and the growing influence of the large digital platforms within and beyond the market place. At the same time, competition law enforcement is perceived as being less efficient in addressing structural barriers that limit the ability of firms to compete in digital markets. This has spurred a debate about how and whether to regulate digital markets and proposals to intervene with ex ante regulation have multiplied.

This hearing will seek to create an understanding of what is on the table in terms of the content of ex ante regulation. In addition, the hearing will also shed light on the precise nature of the relationship between regulation and competition enforcement in digital markets, and in particular discuss the degree to which ex ante regulation and ex post enforcement are complementary rather than antagonistic. It will highlight the degree of convergence and divergence among the approaches taken in various jurisdictions to identify and regulate large digital platforms, as well as the reasons and potential shortcomings behind such ex ante positive and negative obligations. A higher-level question to be addressed relates to the protection of competitors rather than consumer welfare by proposed regulations, and the institutional implementation of the ex ante regulation.

The session will benefit from a Secretariat Background paper and from presentations by a panel of experts, including Jason Furman (Harvard Kennedy School) and Amelia Fletcher (University of East Anglia) and presentations from representatives of jurisdictions that are at the forefront of introducing ex ante regulations in digital markets.

For discussion:

Note by the Secretariat - [DAF/COMP\(2021\)15](#)

For reference

Competition Enforcement and Regulatory Alternatives
Secretariat Background Note (June 2021) - [DAF/COMP/WP2\(2021\)2](#)

Notes by delegations:

Belgium - [DAF/COMP/WD\(2021\)55](#)
Denmark - [DAF/COMP/WD\(2021\)57](#)
Germany - [DAF/COMP/WD\(2021\)61](#)
Korea - [DAF/COMP/WD\(2021\)65](#)
Mexico - [DAF/COMP/WD\(2021\)59](#)
Spain - [DAF/COMP/WD\(2021\)60](#)
Argentina - [DAF/COMP/WD\(2021\)62](#)
Brazil - [DAF/COMP/WD\(2021\)63](#)
South Africa - [DAF/COMP/WD\(2021\)64](#)

BIAC - [DAF/COMP/WD\(2021\)79](#)BEUC - [DAF/COMP/WD\(2021\)66](#)Summaries of contributions - [DAF/COMP/WD\(2021\)78](#)

Friday 3 December 2021

12:30-15:00

Item 3. Roundtable on News Media and Digital Platforms

While the internet represented a great potential for the news industry, digital platforms changed the entire ecosystem. Many news businesses largely depend on digital platforms as key sources of traffic, and concerns have emerged regarding terms on which news content may be distributed and monetised by digital platforms. Digital platforms also changed consumption of news, filtering and bundling content through algorithms. In a number of jurisdictions, competition enforcement and regulatory initiatives have been undertaken to address such concerns.

This Roundtable will build on our recent discussions on Competition in Digital Advertising Markets, and Abuse of Dominance in Digital Markets, addressing the future of news media in the age of internet and digital platforms, from a competition perspective. It will discuss the key questions that competition authorities are increasingly facing when assessing competitive dynamics in these markets, as well as recent enforcement actions and regulatory initiatives to address the imbalance of bargaining power between news publishers and digital platforms. It will also consider the competition between news publishers and digital platforms for users and advertising, as well as conduct in digital advertising and in other online markets that may affect the ability of news publishers to monetise their own content. Finally, it will look at the potential impact of digital platforms on news outlet reputation and on incentives to amplify mis- and dis-information, considering whether these issues can be addressed through competition law.

The Roundtable will benefit from a Secretariat Background paper and from presentations by a panel of experts, including Helen Jenkins (Oxera), Andrea Prat (Columbia Business School and Columbia University), and Derek Wilding (University of Technology Sydney).

For discussion:

Background Note by the Secretariat - [DAF/COMP\(2021\)16](#)

Notes by delegations:

Australia - [DAF/COMP/WD\(2021\)67](#)Austria - [DAF/COMP/WD\(2021\)54](#)Belgium - [DAF/COMP/WD\(2021\)68](#)Germany - [DAF/COMP/WD\(2021\)69](#)Japan - [DAF/COMP/WD\(2021\)70](#)Mexico - [DAF/COMP/WD\(2021\)80](#)Spain - [DAF/COMP/WD\(2021\)71](#)United States - [DAF/COMP/WD\(2021\)72](#)Russian Federation - [DAF/COMP/WD\(2021\)74](#)Chinese Taipei - [DAF/COMP/WD\(2021\)75](#)BIAC - [DAF/COMP/WD\(2021\)76](#)Summaries of contributions - [DAF/COMP/WD\(2021\)73](#)

Annex

The following items that were included in the previous version of the agenda will be dealt with as follows:

POSTPONED

Report by Working Party Chairs and Co-ordinators is postponed to future meetings of the Competition Committee.

FOR APPROVAL BY WRITTEN PROCEDURE BY 22 NOVEMBER 2021**Adoption of the draft agenda**

[DAF/COMP/A\(2021\)2/FINAL](#)

Approval of the draft summary record of the last meetings

Summary record of the 135th Competition Committee meeting - [DAF/COMP/M\(2021\)1](#)

Summary record of the 134th Competition Committee meeting - [DAF/COMP/M\(2020\)2](#)

For information:

List of participants - [DAF/COMP/PL\(2021\)1](#)

Election of the Chairman and Vice Chairmen for 2022

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 2022.

FOR DISCUSSION BY WRITTEN PROCEDURE BY 5 JANUARY 2022**Scoping Note on the revision of the OECD Recommendation on Intellectual Property Rights (IPRs)**

The Secretariat will circulate by written procedure a Scoping Note proposing options to delegates on the possible revisions or replacement of two OECD Recommendations on IPRs (1978 Recommendation concerning Action against Restrictive Business Practices relating to the Use of Trademarks and Trademark Licenses and the 1989 Recommendation on Patent and Know-how Licenses).

Scoping Note by the Secretariat– [DAF/COMP\(2021\)19](#)

FOR INFORMATION**Annual Reports on Competition Policy**

All delegations are invited to submit their annual report for 2021. Annual Reports are available to all delegations via ONE and are posted on the dedicated webpage of the Competition Division (www.oecd.org/daf/competition/annualreportsbycompetitionagencies.htm).

Other Business and Future Work

Competition Delegates will be called to decide topics for substantive discussions to be held in June 2022 and potentially in December 2022. 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. Proposals will be circulated by the Chair of the Competition Committee for approval by written procedure.

Future Roundtable Topics – [DAF/COMP\(2021\)6](#)

20TH
ANNIVERSARY



GLOBAL FORUM ON COMPETITION

Programme

6-8 December 2021



About the OECD Global Forum on Competition

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

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

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

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www.oecd.org/competition/globalforum



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oecd-competition-law-and-policy

DAY 1 – 6 DECEMBER 2021

Opening session

🕒 12:00 - 13:00 CET

 Opening remarks



Mathias Cormann
Secretary-General, OECD

 Introductory remarks



Frédéric Jenny
Chair, OECD Competition Committee

 Keynote address



Kristalina Georgieva
Managing Director, IMF

 Special remarks



Ngozi Okonjo-Iweala
Director General, WTO

 Special remarks



Rebeca Grynspan
Secretary-General, UNCTAD

Session 1. Trade, development and competition

🕒 13:00 - 15:00 CET

Competition can be a powerful force for economic development, growth and productivity. Both competition policy and trade policy can play a role in harnessing competition for these purposes, but the interaction between the two is not often considered. This may change in the years ahead, as policymakers consider how to promote development through competition in a world characterised by different economic and trading systems, as well as growing recognition of the need for a level international playing field.

This 20th edition of the Global Forum on Competition will make the link between these policy areas, and explore where there are tensions and common ground. Some key questions that will be covered include:

- How can competition and trade policy be used together to maintain a level playing field?
- Are there areas of conflict between trade and competition policy? How should they be managed?
- Should competition policy take into account differences in economic systems or policies such as subsidies that can create distortions in trade? If so, how?
- Should trade policy be used to promote greater harmonisation of competition policy across jurisdictions?

The session will be led by a panel of experts to debate these questions, and discuss with delegates in an interactive Q&A format.

All related documentation is available at oe.cd/tradedev.

Speakers



Joseph E. Stiglitz
Professor
Columbia University



Precious N. Ndlovu
Senior Lecturer
University of the Western Cape



Beata Javorcik
Chief Economist, European Bank for
Reconstruction and Development



Simon Evenett
Professor
University of St. Gallen

Chair



Frédéric Jenny
Chair,
OECD Competition Committee

Peer Review of Tunisia

🕒 15:10 - 16:00 CET

DAY 2 – 7 DECEMBER 2021

Session 2. Economic analysis and evidence in abuse cases

Expert panel 🕒 12:00 – 14:30 CET

The enforcement of laws against the abuse of dominance or monopolisation by firms with substantial market power can involve significant challenges. The theories of harm, rooted in economic concepts, depend significantly on the conditions in a particular market – conduct that is harmful in one case may be procompetitive in another. Thus, there is a need to conduct a careful economic assessment of the conduct in question. A range of economic tools and evidence will be needed in this process. This roundtable discussion will seek to provide practical advice on a range of topics associated with analysis in abuse (or monopolisation) cases, including:

- What theories of harm may apply, and what is the economic basis for these theories?
- What analytical techniques can be used to assess these theories, and what types of evidence are needed to use them?
- How should authorities proceed in gathering evidence in abuse cases, and what strategies can authorities use when quantitative evidence is limited?
- What other practical issues should authorities consider when undertaking analysis abuse cases, for instance with respect to having the right expertise?

All related documentation is available at oe.cd/analysis

Plenary chair



Frédéric Jenny

Chair,
OECD Competition Committee

Speakers



Claudio Calcagno

Director
GMT Economics



Helen Jenkins

Managing Partner
Oxera



Simon Roberts

Professor
University of Johannesburg



Elizabeth Xiao-Ru Wang

Executive Vice President
Compass Lexecon

Break-out sessions 🕒 09:00 – 11:00 CET and 16:00 – 18:00 CET

In addition to the expert panel discussion, this session will be divided into break-out sessions, organised in two time periods (morning and afternoon) to enable as many delegates to participate as possible. For each time period, there will be three break-out groups focusing on:

Topic 1: Techniques and evidence for assessing market power

Topic 2: Techniques and evidence for assessing exclusive dealing and bundling

Topic 3: Techniques and evidence for assessing predatory pricing, margin squeeze and exploitative abuses

DAY 3 – 8 DECEMBER 2021

Session 3. The promotion of competitive neutrality by competition authorities

🕒 12:00 - 14:30 CET

Significant market distortions may arise when some enterprises benefit from undue competitive advantages conferred by state actions, for example on the basis of their ownership, nationality or their activity in the market. These distortions can prevent competition from reaching its potential for economic growth, productivity and innovation. In particular, they may discourage investment, create regulatory uncertainty, and encourage other jurisdictions to adopt similar distortions that undermine a global level playing field. Competition authorities have a role to play in promoting the application of competitive neutrality principles, including addressing distortions through their enforcement tools, and advocating for neutrality in state actions ranging from subsidies to procurement.

This session will introduce the concept of competitive neutrality, explore how authorities around the world have promoted competitive neutrality, and highlight the recently-adopted [OECD Recommendation of the Council on Competitive Neutrality](#).

All related documentation is available at oe.cd/compneutrality.

Chair



Frédéric Jenny

Chair,
OECD Competition Committee

Speakers



Eleanor M. Fox

Walter J. Derenberg Professor
of Trade Regulation
New York University School of Law



Jose Luis Buendía

Partner
Garrigues



Deborah Jane Healey

Professor
UNSW Sydney

Peer Review of Eurasian Economic Union (EAEU)

🕒 14:40 - 15:30 CET

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Market definition clinic

📅 8-17 December 2021

The market definition clinic is an opportunity for competition authorities to ask the Secretariat questions regarding tools, techniques and challenges associated with market definition. While the Secretariat cannot provide advice on specific cases, they are in a position to discuss background papers, contributions, and key findings of past OECD roundtables, and to point participants to other resources that may be helpful. Further details are available in the invitation letter distributed to delegates.

This year's clinic will take place virtually, via Zoom, and thus can be scheduled at a mutually convenient time between 8-17 December 2021.

OECD Competition & Global Relations

Using its vast storehouse of expertise accumulated over the past 50 years, the OECD has created a range of mechanisms to engage with authorities around the world to help reinforce their competition framework.

Two **annual fora** disseminate the work of the OECD Competition Committee and bring over 100 jurisdictions into the OECD family: Global Forum on Competition and the OECD-IBD Latin American and Caribbean Competition Forum.

www.oecd.org/competition/globalforum

www.oecd.org/competition/latinamerica

The three **regional centres** for competition provide regular training seminars for the countries and economies within their regions: the OECD/Korea Policy Centre Competition Programme in Seoul, Korea, the OECD-GVH Regional Centre for Competition in Budapest, Hungary and the Regional Centre for Competition in Latin America in Lima, Peru.

www.oecd.org/competition/seoulrcc

www.oecd.org/competition/budapestrcc

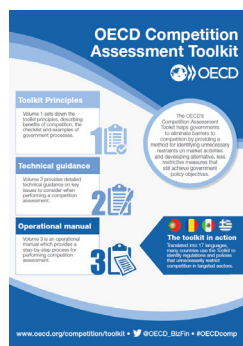
oe.cd/lima-rcc

Capacity building

Capacity building remains a cornerstone of the OECD's competition global relations activities.

Through bilateral or regional workshops, training, and advice, the OECD targets the specific needs of the participating authorities on topics ranging from cartel prosecution, merger analysis, competition economics for both specialists and non-specialists, abuse of dominance, legislative drafting, studies in sector specific regulation.

Fighting bid rigging in public procurement and competition assessment of laws and regulations are the OECD's flagship training programmes.



Competition Assessment

Laws, regulations or other government-imposed barriers can unduly restrain market activities. One important step to eliminate these restraints is “competition assessment”, that is, the evaluation of policies to find those unnecessarily restricting competition in order to develop alternative policies which still achieve governments objectives.

The OECD has developed a Competition Assessment Toolkit which can be used by competition specialists and non-specialists alike. The OECD has led projects on competition assessment of specific sectors in Greece, Mexico, Portugal, Romania, Tunisia and is currently working with Iceland and 10 ASEAN member countries.

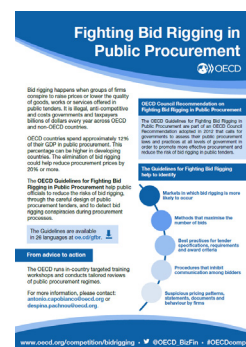
The toolkit is available for download in several languages at oe.cd/cat.

Fighting Bid Rigging in Public Procurement

Bid rigging happens when groups of firms conspire to raise prices or lower the quality of goods, works or services offered in public tenders. OECD countries spend approximately 12% of their GDP in public procurement and this percentage can be higher in developing countries. Efficient and competitive procurement processes are thus key to obtaining goods and services at the best value for money.

The OECD Guidelines for Fighting Bid Rigging in Public Procurement help public officials reduce the risks of bid rigging, through the careful design of public procurement tenders, and to detect bid rigging conspiracies during procurement processes. The OECD can help governments assess their procurement process and provide policy recommendations for improvement. After working with several institutions in Mexico and Argentina, the OECD is now working with Brazil, Peru, and Ukraine.

The Guidelines are available for download in several languages at oe.cd/gfbr.



For more information please visit

oe.cd/gfc



AGENDA

6th Meeting of High Level Representatives of Asia-Pacific Competition Authorities – Competition in a time of crisis: Policy, the pandemic and the path ahead



Start time: 8am CET / 15h Kuala Lumpur



Monday, 13 December 2021

Monday 13th December

8:00 – 8:05 CET	WELCOME <ul style="list-style-type: none"> Mr. António Gomes (OECD)
08:05 – 08:10	INTRODUCTORY REMARKS BY THE MEETING CHAIR <ul style="list-style-type: none"> Mr. Allan Fels, <i>Former Chairperson of the Australian Competition and Consumer Commission (ACCC)</i>
8:10 – 8:40	KEYNOTE MESSAGES <ul style="list-style-type: none"> Mr. Joseph E. Zveglich, Jr., <i>Acting Chief Economist, Asian Development Bank (TBD)</i>
08:40 – 9:50	OECD/KPC Launch of the Asia-Pacific Competition Trends <ul style="list-style-type: none"> Mr. Jungwon Song, <i>Director General, OECD/KPC Competition Programme</i> Mr. Wouter Meester, <i>Competition Expert, OECD</i> Jurisdictions Interventions and Experiences (5-7m) <ul style="list-style-type: none"> Australia – Mr. Peter Crone, Commissioner, ACCC Singapore – Ms. Sia Aik Kor, Chief Executive, CCCS Malaysia – Mr. Iskandar Ismail, Chief Executive Office, MYCC India - Ms .Sayanti Chakrabarti, Director, CCI
09:50 – 11:00	Panel Discussion on Industrial Policy or Competition in Times of Covid-19? Are they Compatible and How can Competition Authorities contribute to the Economic Recovery? <ul style="list-style-type: none"> Mr. Ha-Joon Chang, Professor Cambridge University Mr. Thomas Cheng, Associate Professor University of Hong Kong Ms. Ana Sofia Rodrigues, Chief Economist, Portuguese Competition Authority Jurisdictions Interventions and Experiences (5-7 m) <ul style="list-style-type: none"> Thailand - Prof. Sakon Waranyuwatana, Chairman, OTCC (industrial policy and recovery) Hong Kong - Mr. Rasul Butt, Chief Executive Officer, HKCC (industrial policy) Chinese Taipei – Andy Chen, Vice-Chairperson, FTC (industrial policy) Philippines – Mr. Johannes Bernabe, Commissioner, PCC

	Q&A
11:00– 11:10	REMARKS FROM THE PANEL AND OECD
11:10-11:15	FINAL REMARKS <ul style="list-style-type: none">• Mr. Allan Fels, Former Chairperson of the Australian Competition and Consumer Commission (ACCC)
11:15-11:20	CLOSING <ul style="list-style-type: none">• Mr. Ori Schwartz, <i>Head of Competition Division, OECD</i>

Unclassified

English - Or. English

5 November 2021

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

News Media and Digital Platforms – Note by Chinese Taipei

3 December 2021

This document reproduces a written contribution from Chinese Taipei submitted for Item 3 of the 136th OECD Competition Committee meeting on 1-3 December 2021.

More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/competition-issues-in-news-media-and-digital-platforms.htm>.

Please contact Mr Antonio Capobianco if you have questions about this document [Email: Antonio.CAPOBIANCO@oecd.org].

JT03484691

Chinese Taipei

1. The paper outlines general problems and challenges faced by news media companies in the digital platform era in Chinese Taipei, and then clarifies the competition agency's enforcement stance.

1. Market Overview

1.1. The impact of digital platforms on news and journalism

1.1.1. Distribution channels of news:

2. Since digital platforms arose, traditional news outlets have gradually been replaced by digital platforms. News media business now relies considerably on digital platforms to increase media exposure of their news articles in order to generate more interest and increase their click through rates. For an online media company, web traffic is essential to its business.

1.1.2. Advertising:

3. Compared to traditional media, digital platforms can reach a much wider audience and can enjoy more intensified network effects. Based on the number of active users and users' digital footprints owned by digital platforms, advertisers can attract more customers without depending on traditional media for advertising. Platform operators are also able to understand and analyze individual users' preferences to precisely implement targeted advertisements. More advertisers have therefore shifted from traditional media to digital platforms.

1.2. Pathways to news and news media credibility

4. The Reuters Institute's 2021 Digital News Report¹ indicates that the internet is by far the most common way for residents in Chinese Taipei to access news. Each year from 2017 to 2021, over 80% of residents accessed news over the internet, of which approximately 50% of residents obtained news from social media. In contrast with the internet, the proportion selecting newspapers as their main source to access news declined drastically, from 41% to 19% from 2017 to 2021. In terms of TV news, the percentage of viewers decreased from 77% in 2017 to 59% in 2021. It is evident that fewer people access news through traditional media.

5. Levels of trust in news differ depending on the source. Overall, approximately 31% of residents trusted the news that they read and accessed. This proportion is less than worldwide trust in news, which accounted for 44% of the total sample across countries. Of the overall trust in news in Chinese Taipei, trust in news through the internet was 29%, and trust in news on social media was 21%, representing the group with the lowest news trust

¹ Reuters Institute for the Study of Journalism, University of Oxford, "Digital News Report 2021", https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital_News_Report_2021_FINAL.pdf, p148-149, last visited on 12 October 2021.

among residents. That is, only one-fifth of survey respondents said that they trust news on social media.

1.3. Advertising market size

6. Based on the 2020 Taiwan Digital Advertising Statistics Report, which is published by the Digital Media and Marketing Association (DMA)², data shows that the advertising market in Chinese Taipei reached an overall value of NTD 48.2 billion in 2020, which accounted for a 5.3% growth rate between 2019 and 2020. After 2017, digital advertising expenditure overtook non-digital advertising expenditure and has continued to trend upwards. The gap between digital advertising and non-digital advertising has grown since then. In 2020, the share of digital advertising expenditure accounted for 65.3% of the overall advertising market, and non-digital advertising accounted for 34.7%.

2. Problems and challenges around news media and digital platforms

7. The digitalization of the media industry has changed the allocation of market resources and profit making business models. Content licensing between digital platforms and news media companies is not simply an issue around business negotiation, but also influenced by interaction effects of various policies, including industrial policy on the development of journalism, Intellectual Property policy and national digital policy. Concerns around content licensing go beyond competition issues. By observing public policy in a global context, it can be found that in recent years, governments worldwide have paid close attention to the impacts of global digital platforms on their domestic industries and social development. Many governments have proposed reforms of existing laws and launched inquiries into the affected industries in order to ensure that domestic businesses can compete and cooperate on a level playing field with large multinational companies.

8. In Chinese Taipei, the following problems have been encountered by the news media industry:

1. As commercial benefits generated from news content are shared disproportionately between digital platforms and news businesses, this contributes to a situation where news media companies, as content producers, are unable to sustain themselves with limited revenue to create original and quality news content. The industry has called on government to increase support for the industry.
2. Transparency concerns around advertising revenue of digital platforms have increased difficulties for news media companies to obtain such information, which is used as the base to calculate a share that they are entitled to receive.
3. There is a lack of mutual communication channels between digital platforms and news media businesses when digital platforms have power to unilaterally build and change their recommendation systems in terms of news presentation.
4. Algorithms used on digital platforms can manipulate news content in various forms and even impair media independence. They can also indirectly contribute to a rapid spread of poor quality news and misinformation, creating an environment harmful for the sustainability of professional news websites with quality content.

² Digital Media and Marketing Association, “Taiwan Digital Advertising Statistics Report 2020”, <https://drive.google.com/file/d/1NBD7qcEpjVhL9eIE8yOgeU0E98PhLWVw/view>, last visited on 12 October, 2021.

3. Interplay of news media businesses and digital platforms

9. Both digital platforms and news media businesses are in a symbiotic relationship. The former relies on the content produced by news media businesses to capture its users' attention, and then monetize web traffic through advertising services. The latter increases its content exposure through platforms' traffic and share advertising revenue with platform operators. Arguably, each seek mutual benefit and complement each other.

3.1. Revenue decline in the news media industry

10. To understand why the rise of digital platforms has led to a revenue decline for news media is challenging. In terms of news websites, there are two possible explanations. One is that the decline is associated with decreased web traffic, which subsequently compromise advertisers' incentives to purchase advertising services offered by news websites. The other is that the number of paid subscribers has decreased as media consumption habits change. Even if the revenue decline in respect of internet business mainly comes from a reduction of advertising revenue, a further study is needed to ascertain whether the lost advertising revenue for news media has shifted exclusively to digital platforms, or if it has been shared with websites operated by other content providers.

3.2. The impact of digital platforms on media independence

11. The common business models in online news media include advertising revenue and subscription fees paid by members. In a case where news media can share content-related advertising revenue generated from digital platforms, or even if such revenue becomes the main income source for news media, specific concerns on media independence may arise. For example, has the interaction between digital platforms and news media businesses been influenced by digital platforms' financial contributions? And can such contributions be considered as a *quid pro quo* for media independence?

4. Government's responses to issues relating to digital platforms

12. Fostering an environment where large digital platforms and domestic industries can collectively thrive involves various issues covered by different policies. They include policies concerning the development of culture and creative industries, news media industry, fair competition, taxation, protection of intellectual property and overall digital infrastructure development. To promote a coexistence of domestic industries and large digital platforms, a taskforce was established in 2021. It was convened by the Executive Yuan³ to gather relevant governmental departments together, which include the National Communications Commission (NCC)⁴, Intellectual Property Office under the Ministry of Economic Affairs, the Ministry of Culture⁵ and the Fair Trade Commission (hereinafter

³ Executive Yuan is the highest administrative organ in Chinese Taipei.

⁴ The National Communications Commission is a regulatory agency for the telecommunications and broadcasting industries. Its missions involve public interest matters, which include safeguarding rights to which news industries are entitled, ensuring sustainable development of local journalism, and promoting quality in news content.

⁵ The Ministry of Culture's mandate includes planning, guidance, rewarding and promotion of the publishing industry and print media.

referred to as CTFTC). The goal of this taskforce is to understand how other countries tackle these issues while exploring approaches applicable to the local context.

13. This multi-departmental taskforce has reached a conclusion on the allocation of responsibilities. Recently, the NCC and the Ministry of Culture have launched a series of public consultations to collect views from associations relevant to news media and other stakeholders to get a full picture of current cooperation models between news media businesses and digital platforms. The CTFTC is required to study the application of the Fair Trade Act, particularly cartel provisions on collective bargaining, exceptions and exemptions and procedural and substantial considerations in its enforcement.

5. Implications for competition policy and enforcement

14. The CTFTC is an independent authority with a role to enforce the Fair Trade Act (FTA). Its mission appears different to those of other regulatory agencies, which focus on development of industrial policies and the promotion of industrial development. As the resolution of the issues associated with content licensing and payment negotiation between news media and digital platforms require interagency coordination, the CTFTC should first consider its role in the process of business negotiation between news companies and digital platforms. The CTFTC needs to determine whether a competition agency can intervene in a negotiation process for the use of news content between news media and digital platforms and whether a revenue decline in news media that can be attributable to digital platforms could justify the CTFTC's investigation.

15. News media is undoubtedly a content industry. In the digital era, media companies endeavor to undertake digital transformation. At the same time, they also seek opportunities to bargain about revenue sharing with digital platforms. Both parties in the negotiation process need to take into account respective operational efficiencies and dynamics of market competition. The government should avoid very hands-on approaches to protect news media, which may conversely erode fairness and impede the growth of media firms. Furthermore, over-enforcement can create overdependence on digital platforms, enabling digital platforms to become a must-have channel for news distribution.

16. Subject to the enforcement powers under the FTA, the CTFTC may step in under the following scenarios: (1) to grant a cartel exemption under the cartel provisions to allow news media businesses to collectively negotiate with digital platforms; (2) to launch an investigation under the provisions on dominance abuse into a case where a digital platform allegedly forces news media businesses to accept unfair licensing terms by refusing or postponing the negotiation, or removing URLs of news content.

5.1. Approval for cartel exemption

17. Article 15 of the FTA prohibits enterprises from engaging in any concerted action unless the CTFTC grants a specific exemption, which meets the criteria of any of eight statutory categories, and is found beneficial to the economy as a whole and in the interests of the public at large. The term “concerted action” (i.e. cartel) is defined as where enterprises at the same production and/or marketing stage jointly engage in any conduct through contract, agreement or any other form of mutual understanding, which would affect the market function of production or trade in goods or supply and demand of service⁶.

⁶ Article 14 of the FTA provides that “Concerted action as defined under the FTA, means competition enterprises at the same production and/or marketing stage, by means of contract, agreement or any other

18. As noted above, in addition to specific criteria based on each of the listed exemption categories, cartel exemption will be granted when it is “beneficial to the economy as a whole” (overall economic benefits) and “in the interests of the public” (public interest). The term “overall economic benefits” suggests that the benefits resulting from cartel exemption should go beyond the parties involved. An application of cartel exemption needs to ensure that such positive effects, including economic benefits can be shared with the trading counterparts and the general public in a reasonable way. The term “public interest” encompasses economic efficiency and other non-economic interest.

19. The CTFTC may approve concerted action if the following tests are satisfied: (1) whether implementation of the proposed concerted action is beneficial to the economy as a whole and in the interests of the public; and (2) whether restrictions imposed by the parties in the concerted action on market competition is essential and proportionate to the achievement of the above-mentioned overall positive effects.

20. The CTFTC will consider the nature of the proposed concerted action and its type, market power of the parties involved, and the impact of the concerted action on other competitors that do not engage in concerted action. On top of all these factors, the CTFTC needs to evaluate the impact of its approval on overall economic benefits and the public interest. Where it is necessary, the CTFTC can impose conditions and time limits when it approves an exemption. Exemptions are generally limited to 5 years. The parties involved can file a written application for extension with justifications. Applications should be filed no later than 3 to 6 months prior to the expiry date, and each extension period cannot exceed 5 years⁷.

21. In the news industry, if news media businesses attempt to jointly negotiate with large digital platforms to increase their bargaining power for revenue sharing, under the proviso of Paragraph 1, Article 15 of the FTA, they can apply for an exemption collectively, or their business associations can submit an application on their behalf. As discussed above, the CTFTC will review the proposed cartel exemption, and grant an authorization if it meets statutory requirements.

5.2. Abuse of dominance

22. The FTA contains specific provisions prohibiting abuse of dominance. According to the legal requirements of these provisions, the possession of market power or monopoly power itself is not considered unlawful. The FTA only prohibits a misuse of market power or monopoly power, which aims to impede or exclude competition and strengthen market

form of mutual understanding, jointly determine the price, quantity, technology, products, facilities, trading counterparts or trading territory with respect to such goods and services, or any other behavior that mutually restricts business activities, resulting in an impact on the market function with respect of production or trade in goods or supply and demand of service.”

⁷ Article 16 of the FTA provides that “The competent authority may impose conditions or undertakings in the approval it grants pursuant to the provisions of the preceding article. The approval shall specify a time limit not exceeding five years. The enterprises involved may, with justification, file a written application for an extension thereof with the competent authority within three to six months prior to the expiration of such period; provided, however, that the term of each extension shall not exceed five years.”

position. A violation of Article 9⁸ or Article 20⁹ of the FTA can occur if a firm misuses its dominance or superior market position through any of the following conduct: unfairly preventing other businesses from competition; improperly setting prices of goods or services; giving a trading counterpart preferential treatment without justification, or engaging in other anticompetitive conduct, including boycotting, differentiated treatment, and unjustified vertical restraints.

23. If a digital platform operator misuses its superior or dominant market position in the process of negotiating with news media companies, such abuse of market power may violate the FTA. A situation where a digital platform with substantial market power requests news media businesses to accept unfair licensing terms by means of refusal to negotiate, negotiation postponement, or removal of news URLs is one such example. This can trigger the CTFTC's investigation to examine whether the digital platform's behavior represents a misuse of market power in violation of Article 9 or Article 20 of the FTA.

5.3. Sector inquiries into digital platforms

24. In response to high market concentration in the digital platform services sector, in July 2021, the CTFTC established a "taskforce for sector inquiries into large multinational digital platforms". This taskforce aims to broadly collect information with regard to the impact of these large multinational digital platforms on competition in domestic markets, and identify any conduct with potential anticompetitive effects, or any unfair business practices.

25. For interactions between news media businesses and digital platforms, the CTFTC will launch an inquiry into print media companies, news content providers and digital platform operators. The inquiry is designed to gather the following information: the level of digitalization in the news industry; how news media businesses cooperate with digital platforms and the degree of dependence on digital platforms. The inquiry results will help the CTFTC gain a better understanding of competition dynamics in the digital platforms markets, and then enable it to pinpoint potential concerns around the anti-competitive practices and unfair competition in the relevant markets.

⁸ Article 9 of the FTA provides that "Monopolistic enterprises shall not engage in any one of the following conducts:

1. directly or indirectly prevent any other enterprises from competing by unfair means;
2. improperly set, maintain or change the price for goods or the remuneration for services;
3. make a trading counterpart give preferential treatment without justification; or
4. other abusive conducts by its market power."

⁹ Article 20 of the FTA provides that "No enterprise shall engage in any of the following acts that is likely to restrain competition:

1. causing another enterprise to discontinue supply, purchase or other business transactions with a particular enterprise for the purpose of injuring such particular enterprise;
2. treating another enterprise discriminatively without justification;
3. preventing competitors from participating or engaging in competition by inducement with low price, or other improper means;
4. causing another enterprise to refrain from competing in price, or to take part in a merger, concerted action, or vertical restriction by coercion, inducement with interest, or other improper means;
5. imposing improper restrictions on its trading counterparts' business activity as part of the requirements for trade engagement."

6. Conclusion

26. The government recognizes the importance and complex relationships of news and journalism in the contemporary media environment. The issues between news media and digital platforms are closely related to the development of culture and creative industries, news media industry, fair competition, taxation, protection of intellectual property and overall digital infrastructure development. Chinese Taipei has set up a multi-departmental taskforce to seek a much more comprehensive approach, which is appropriate to address issues within the local context.

27. As an independent agency, the CTFTC's mission is to maintain market order and competition rather than directly step in to business negotiations to create a revenue sharing mechanism between businesses. The CTFTC should not directly intervene in industry restructuring or revenue redistribution. From a pro-competitive perspective, efficient prices will be established by the market forces of supply and demand in most cases. That is, prices will rely on negotiated outcomes between individual businesses and platforms.

28. The CTFTC may take actions in the following scenarios: (1) where news media businesses file an application to the CTFTC for an ex-ante cartel exemption of a collective bargaining measure; (2) where a digital platform operator refuses to negotiate or postpone negotiating with news media company in the process of negotiation. In the latter scenario, the CTFTC will look further into whether the digital platform's behavior constitutes a misuse of market power in violation of the FTA.

Unclassified

English - Or. English

16 November 2021

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

ECONOMIC ANALYSIS AND EVIDENCE IN ABUSE CASES – Contribution from Chinese Taipei

- Session II -

7 December 2021

This contribution is submitted by Chinese Taipei under Session II of the Global Forum on Competition to be held on 6-8 December 2021.

More documentation related to this discussion can be found at: oe.cd/eac.

Please contact Mr James Mancini if you have questions about this document [James.Mancini@oecd.org]

JT03485424

Economic analysis and evidence in abuse cases

– Contribution from Chinese Taipei –

1. This paper presents economic tools and evidence used by the competition agency in Chinese Taipei, the Fair Trade Commission (hereinafter referred to as the “CTFTC”) to analyze the abuse of market power in practice. It illustrates the CTFTC’s empirical knowledge and experience with a recent predatory pricing case.

1. A brief overview of economic analysis for predatory pricing

1.1. Theory of predatory pricing

2. In more general economic terms, predatory pricing is defined as a dominant firm’s conduct in setting a product’s price below its marginal cost of production with the aim of excluding competitors in a relevant market. By doing so, the dominant firm can drive equally or more efficient competitors out of the market, or deter potential competitors from entering into the market, and then charge a monopoly price for the product in question. Predatory pricing entails the following features:

- Predator’s negative profit, or loss, in the short run

As individual firms’ strength, scale, and operational costs will vary, prices set by each firm in a relevant market can also be varied. Prices based on a respective firm’s conditions and powers suggest the existence of price competition, under which individual firms’ short-term profits are not necessarily positive. In contrast, a firm employing a predatory pricing strategy will certainly have a negative short-term profit.

- Predatory pricing needs to be implemented by a firm with the ability to subsequently raise prices

Successful predation requires the predator to be able to recoup short-term losses with future gains. In other words, the possession of substantial market power is a precondition for a firm that engages in predatory pricing. Another implementation condition of predatory pricing is that there are high barriers to entry in the relevant market where the predator operates. Only if a firm has substantial market power, can it expel competitors from the market and regain profits to an extent compensating it for the losses resulting from price reductions.

- Rivals are likely to be excluded by predatory pricing

Predatory pricing strategies employed by a firm with market power will be considered to have the intent of excluding rivals.

- Below-cost pricing signifies that a firm with market power engages in predatory pricing

Below-cost pricing is the most salient feature of predatory pricing, which is also a major approach of examining predatory pricing claims.

3. Regarding how to determine predatory pricing, it is mainly established through two tests, i.e. the price-cost test and the recoupment test. First, the price-cost test will be used to find whether a product price is indeed below its cost. When it is found that the price is below its own cost, then it is necessary to run the recoupment test. Pricing is only considered predatory if it satisfies conditions set out in both tests.

- Price-cost test: This is used to examine whether sale prices offered by the predator is below its costs. Generally, a firm is free to set prices based on its own market conditions, characteristics of products or services, its costs and profit margins. In a case where the firm decides to reduce prices, such price cuts can be deemed as normal business practice to compete with the respective prices of rivals. Nonetheless, these prices should not be lower than the firm's costs, leading to economic losses. Below-cost prices may indicate that the firm is attempting to exclude its competitors by charging low prices instead of pursuing profits.
- Recoupment test: This is used to ascertain whether a firm is able to limit or prevent competition and subsequently earn excess profits to recoup losses incurred after engaging in predatory pricing. If it is impossible for the firm to recoup or be compensated for such losses, this type of pricing behavior will not be considered a rational strategy and is unlikely to harm consumer welfare.

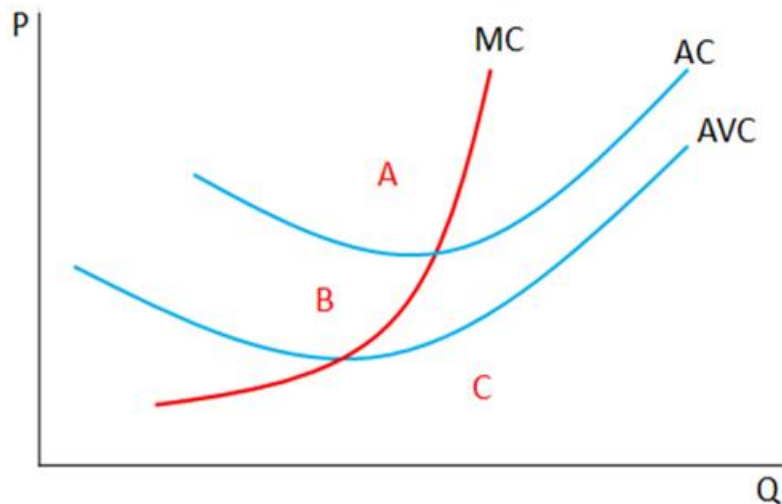
2. Cost measures to analyze predatory pricing

4. With regard to the term 'cost' used in the price-cost analysis, marginal cost (MC) is argued to be an ideal cost measure in the economic theory of predatory pricing. However, MC is not easy to measure and calculate in practice. Some scholars thus advocate for different cost measures as a practical proxy for MC, for example the average variable cost (AVC), average avoidable cost (AAC), average incremental cost (AIC) or average cost (AC).

5. Areeda and Turner (1975) proposed that short-term marginal cost could be used to determine a predatory price¹. They identified the following sections through three cost curves: A section, $P > AC$; B section, $AC > P > AVC$; C section, $P < MC$ (see Figure 1).

¹ Areeda & Turner (1975), Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, Harvard Law Review, Vol. 88, pp. 697-733.

Figure 1. Cost curves



6. Areeda and Turner concluded that any price set by a firm in either A or B section is not predatory. Predatory pricing will only be established if the price falls into section C.

- **Any price reduction in section A** will not exclude an equally efficient competitor from the market. As the price approaches MC, it is presumed to enhance the efficiency of resource allocation.
- **While price reduction in section B** is likely to exclude equally efficient competitors from the market, such price reductions can increase output and improve consumer welfare.
- **Price reduction in section C** is likely to exclude equally efficient competitors from the market, and consumers may benefit from lower prices. However, the increase in consumer welfare is derived from a change in producer surplus. Such pricing strategies further deviate prices from MC, which leads to inefficiency in production and resource allocation. Setting prices below MC are therefore considered as predatory pricing.

7. As information required to measure MC, AAC or AIC cannot be found in most businesses' financial reports, AVC is used by the CTFTC as a proxy for the price-cost test in practice.

8. The number of predatory pricing cases considered by the CTFTC is limited. In recent years, since the cable TV industry was deregulated to allow individual cable TV operators to provide services across multiple areas, then-current operators in their former designated areas chose to offer (unjustified) low prices as inducements, or employ predatory pricing strategies to strengthen their market positions or exclude new entrants from entering their geographic markets. As a result, issues on predatory pricing arose due to these incumbent operators' reactions to the policy change. A case involving alleged predation below illustrates the relevant statutory provisions and the CTFTC's analysis of predatory pricing.

3. Case examples

3.1. Provisions of the Fair Trade Act and its Enforcement Rules on predatory pricing

9. Depending on a predator's market power, predatory pricing may be subject to different provisions of the Fair Trade Act (FTA). If the predator is deemed as a 'monopolistic enterprise' under the FTA, Paragraph 2 of Article 9 of the FTA prohibits it from improperly setting, maintaining or adjusting product prices or service fees, including engaging in predatory pricing.

10. In the case where a firm has a market share of 15% or more², but has yet to reach monopoly thresholds, its pricing may be subject to Paragraph 3 of Article 20 of the FTA. This provision provides that 'No enterprise shall engage in any of the following acts that is likely to restrain competition: ... 3. preventing competitors from participating or engaging in competition by inducement with low price, or other improper means.' According to the legislative intent, this provision is designed to protect market competition by prohibiting a firm with some degree of market power from improperly undercutting or impeding competition, which may not constitute a violation of predatory pricing, but still have anti-competitive effects.

11. According to Article 27 of the Enforcement Rules of the FTA, the 'low price inducement' under Paragraph 3 of Article 20 of the FTA refers to the offering of prices below costs or being inappropriate so as to hinder competition or prevent competitors from participating in the market. In determining whether the 'low price inducement' is likely to restrain competition, the following factors can be considered: (1) the intent and purposes of the party(ies) engaging in the conduct; (2) market position; (3) market structure; (4) the characteristics of the goods or services offered by the party(ies); and (5) the impact resulting from implementing such restrictions on market competition. The legislative intent indicates that the cost measure for 'low price inducement' is based on AVC, with some exceptions where AAC, AIC or the cost of goods purchased may be applicable in markets with specific structures or industrial characteristics.

3.2. The cable TV industry in Chinese Taipei

12. In 2012, the National Communications Commission (NCC) announced and implemented policy to lift geographic restrictions in the cable TV industry by consolidating the designated operating areas from 51 to 22, delineated using primary administrative divisions, i.e. municipalities, counties and cities. This policy allowed and enabled incumbent operators and new operators to provide services beyond their previous operating areas, which were otherwise dominated by one or two operators prior to the policy change. Following implementation of the new policy, the levels of competition particularly in Taipei City, New Taipei City, Kaohsiung City and Changhua County became more intense with a growing number of new entrants and operators providing services in multiple areas. The incumbent operators and new entrants competed for subscribers in operating areas with aggressive price-cutting strategies. The CTFTC's enforcement statistics from 2013 to 2021, shows that it has received a total of ten cases involving predatory pricing complaints, of which three cases ended with the Commission's decisions to impose penalties. Seven cases

² The 1267th Commissioners' meeting on February 17, 2016 concluded that 'with regard to vertical non-price restraints under Article 20 of the Fair Trade Act, any firm that imposes such restraints will be presumed to have no market power if its market share is less than 15%, and accordingly the restraints will be unlikely to limit competition.'

closed with non-infringement decisions, that is, no finding of any violation of the FTA. This paper illustrated the CTFTC's enforcement experience with alleged predatory pricing against Yeong Jia Leh Cable TV Co., Ltd (YJL).

13. Before DigiDom Cable TV Co., Ltd (DCTV) started operating in the districts of Xinzhuang, Wugu and Taishan in May 2015, YJL was the only cable TV operator in these areas. The CTFTC received a complaint from DCTV, alleging that YJL offered DCTV's subscribers an annual plan at a zero price from July 2016. Data to June 2017 showed the number of households with cable TV subscriptions as 125,352 households for YJL and 19,324 households for DCTV, which respectively constituted 86% and 14% market share.

4. Product market definition and economic analysis

14. Both parties involved in the case were cable TV operators. To further examine whether emerging media services could be a substitute for cable TV services, for example Multimedia on Demand services provided by cable TV providers and Chunghwa Telecom company (the largest telecommunication company in Chinese Taipei), and other over-the-top media services, such as YouTube, Netflix and iQiyi, the CTFTC outsourced a consumer survey on perceived substitutability of cable TV, MOD and other media services in 2016.

15. The survey results showed that the number of viewers through cable TV systems dominated over other media distribution channels, accounting for 70.7% of total respondents. This was followed by 12.7% of the respondents who accessed services through digital TV broadcasting platforms. MOD was the third most common channel, accounting for 10.9% of respondents. The remaining respondents reported using OTT services, which 5.0% were accessing free internet-based platforms offering free audiovisual services and 0.7% were accessing internet-based platforms charging subscription fees for audiovisual services. Noticeably, only 1.7% of respondents reported that they switched from one distribution channel to another in the most recent year.

16. A questionnaire was used in the survey to implement a SSNIP (small but significant and non-transitory increase in price) test by means of an empirical tool, i.e. critical loss analysis. The sample size for the survey was 1,090, of which 771 respondents were cable TV subscribers. Having asked about the distribution channels used by respondents, the survey then asked what respondents would have done had the fees for cable TV services been 10% higher. The results (see Table 1 below) revealed that 565 respondents said they would remain connected to cable TV systems, and 206 respondents said they would turn to other audiovisual service providers, including MOD and OTT. The estimate of actual loss is 26.72% ($206/771 * 100\% = 26.72\%$).

17. Furthermore, the data showed that the average operating profit margin for domestic cable TV operators was 15.84%. According to the figure, the critical loss was estimated to be 38.70% ($10\% / (10\% + 15.84\%) = 38.7\%$). As the actual loss (26.72%) was smaller than the critical loss (38.70%), a product market could be defined for cable TV businesses in this case.

Table 1. SSNIP test used to define a relevant market against the candidate market - cable TV in 2016

Unit: number of respondents, %

Sample size	Viewers of cable TV	Unchanged after the price increase	Switched to other distribution channels after the price increase					Actual loss	Operating profit margin	Critical loss
			Total	MOD	Internet - based platforms	Digital TV broadcasting	Not watching TV			
1090	771	565	206	114	38	37	17	26.72%	15.84%	38.70%

4.1. Price-cost test

18. In this case, the CTFTC mainly adopted the price-cost test to examine whether YJL's zero-price offer could be considered predatory. To compare the price at issue with its related costs, the CTFTC used AVC (average variable cost), which in economics refers to costs that change when output changes. Variable costs for a cable TV operator would include total costs dependent on the number of subscribing households. Based on YJL's financial reports and the numbers of subscribing households, Table 2 below lists annual numbers of three major operating costs and subscribing households from 2006 to 2016, which were also used to calculate the correlation coefficients between individual operating costs and the number of subscribing households. As a result, estimates of YJL's correlation coefficients between 'license fees for copyrighted programs', 'installation and maintenance costs for subscribers' and 'transmission costs of programs', and 'the number of subscribing households' were 0.9485, 0.5110 and 0.0234 respectively.

Table 2. Annual numbers of YJL's operating costs and subscribing households from 2006 to 2016

Unit: household, NTD

Year	Number of subscribing households A	License fees for copyrighted programs B	Installation and maintenance costs for subscribers C	Transmission costs of programs D	Monthly AVC per household (B+C)/A/12
2006	90,954	222,661,000	50,374,000	107,947,000	250
2007	96,267	282,163,000	44,747,000	116,910,000	283
2008	123,354	325,323,000	59,551,000	128,600,000	260
2009	153,374	388,009,000	81,403,000	153,544,000	255
2010	160,031	438,024,000	97,764,000	132,826,000	279
2011	163,256	449,909,000	102,823,000	102,537,000	282
2012	150,148	444,164,000	112,907,000	99,861,000	309
2013	144,049	429,039,000	147,959,000	103,004,000	334
2014	144,424	419,902,000	183,933,000	105,511,000	348
2015	145,837	425,376,000	214,392,000	99,708,000	366
2016	143,978	431,820,000	200,973,000	86,208,000	366
Correlation coefficient		0.9485	0.5110		

19. Table 2 shows a highly positive correlation between ‘license fees for copyrighted programs’ and the number of subscribing households. YJL also confirmed that the calculation of license fees for copyrighted programs was based on the actual number of subscribing households. Installation and maintenance costs included running costs, such as outsourcing, fuel consumption and consumable materials. These costs partly reflected movements in the number of subscribing households. As such, ‘license fees for copyrighted programs’ and ‘installation and maintenance costs for subscribers’ were categorized as parts of YJL’s variable costs.

20. Given that the correlation coefficient between ‘transmission costs of programs’ and the number of subscribing households was 0.234, indicating a weak correlation, they were not included in YJL’s variable costs. The CTFTC then used the data on ‘license fees for copyrighted programs’ and ‘installation and maintenance costs for subscribers’ to calculate monthly AVC per household for YJL. These amounted to NTD 366 each month.

21. Furthermore, the CTFTC’s investigation found that YJL charged NTD 500 per month for basic cable packages earlier in 2016, and DCTV offered discounted package deals from NTD 193 to NTD 386 per month. After considering YJL’s below-cost pricing strategies and relevant evidence, the Commission concluded that YJL’s free annual offering for DCTV’s subscribers constituted predatory pricing in violation of the FTA as the offerings were evidently lower than DCTV’s discounted prices, and incommensurate with the calculated monthly AVC for YLJ (NTD 366).

4.2. Factors for consideration in non-infringement decisions

22. Setting prices to a level below a firm’s own costs is not necessarily considered predatory. Low prices, even at below-cost can sometimes reflect legitimate business choices in a competitive market. The following pricing strategies are generally determined legal by the CTFTC in most cases, for example, short-term promotional pricing; low prices charged by a multiproduct firm for only one type of product; a price war among rival companies, and seasonal discounts or price reduction in response to economic fluctuations.

23. From 2013 to 2021, the CTFTC investigated ten cases concerning predatory pricing in the cable TV industry, of which seven cases came to non-infringement decisions. The factors taken into account in the seven cases included (but were not limited to):

- Where the number of consumers who switched services to the firm that engaged in predatory pricing was very low. Such pricing strategies would not likely give rise to anti-competitive concerns.
- Where a new entrant in question offers short-term promotions at cheap prices to enter a new market. Its pricing strategy aimed to gain market share and get a foothold in the market, rather than excluded competitors from the market, which would not limit or distort market competition.
- Where the alleged predatory pricing strategies implemented by the firm in question targeted its current subscribers instead of subscribers of its competitors. Moreover, the discounted prices at issue were comparable with competitors’ promotional prices. No evidence showed the intent to prevent competitors from participating in competition.

5. Conclusion

24. One way to analyze and determine whether a firm is engaging in predatory pricing is to compare its prices with its costs. However, it is difficult to obtain data on marginal cost (MC). In practice, the CTFTC often uses ‘average variable cost’ (AVC) as a proxy for MC. When using AVC, it is important to differentiate fixed costs and variable costs by requesting the firm in question to submit internal documents for examination. In addition to internal documents, the CTFTC can use ‘correlation coefficients’ to measure and examine how strong a relationship is between each cost and the number of products/users at issue.

25. In Chinese Taipei, since regulatory restrictions on operating areas were removed in the cable TV industry, more businesses have decided to operate beyond their designated areas and enter into multiple geographical markets. Such a phenomenon brought a surge of competitive pressure for new entrants and existing firms, both offering promotional prices to retain current subscribers and attract new subscribers. In this context, several complaints pertinent to predatory pricing were filed with the CTFTC. When investigating alleged violations, the CTFTC first defined the cable TV product market by using surveys in critical loss analysis, and applied the price-cost test to determine whether the price at issue was predatory. In the price-cost test, the CTFTC identified variable costs of the cable TV operator through calculating correlation coefficients between each cost and the number of subscribing households.