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Global Forum on Competition

INVESTIGATIVE POWERS IN PRACTICE – BREAKOUT SESSIONS

- Summary of Discussion -

29-30 November 2018

This document prepared by the OECD Secretariat is a detailed summary of the discussion held during Session IV of the 17th meeting of the Global Forum on Competition on 29-30 November 2018.

More documents related to this discussion can be found at: oe.cd/invpw.

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Summary of Discussion of the Breakout Sessions exploring Investigative Powers in Practice

By the Secretariat

1. Introduction

1. In November 2018, the [Global Forum on Competition](#) included three breakout sessions for participants to discuss practical issues and share best practices regarding the use of investigative powers through three breakout sessions. Breakout Session 1 discussed challenges and best practices regarding unannounced inspections in a world where information is mostly produced and stored digitally. Breakout Session 2, explored requests for information, one of the most often used investigative powers, while Breakout Session 3 was devoted to due process and the protection of rights of subjects and third parties without hindering effective investigations.

2. **The Chair**, Frederic Jenny, introduced the agenda. The Chair started by stating that competition authorities have a tough time when they try to implement and enforce competition law. They need to find facts and this requires a wide range of information. The evidence has to be both relevant and abundant.

3. The sources of information for competition authorities are diverse. A source can be leniency applications, or from reading the press, and other sources of public information. The Chair underlined that a major instrument is the investigative tools. Therefore, the effectiveness of these tools is a one of the topics that was looked at during the discussion. The first breakout session discussed unannounced inspections in the digital world, in a world where a lot of information is in digital form. The second breakout session focused on the power to request information; the limitation of this power; and how to use this power effectively. The third breakout session examined due process in using those tools; the implications of due process to the evidence gathering process; and how to strike the right balance between due process and effectiveness in the gathering of information. The Chair asked the **Secretariat** to give a general overview of the topic.

4. The Secretariat opened by stating that it is true that authorities have many investigative powers and tools available to them, yet these tools differ from one jurisdiction to another. For instance, in some jurisdictions authorities can conduct inspections in non-business premises or can have access to communication data. In other jurisdictions, authorities may not have such powers. However, three tools stand out as the most widely used. These are on the spot inspections, request for information and interviews. These three tools are designed to obtain information from a specific target on a certain subject and most of the time they have a coercive aspect, which means that non-compliance with these tools are sanctioned.

5. The second aspect underlined by Secretariat is that investigated parties are most of the time the best source of information. However, they do not consider that providing evidence and information is in their interest. These parties tend to provide incomplete information or they may refrain from providing any information at all. Even when this is not the case, authorities need multiple sources to verify the evidence.

6. The last point relates to problems arising because competition investigations require extensive evidence gathering in a very short period. Authorities need targeted and compulsory tools to accomplish this task. Most of the time non-compliance is subject to sanctions. The sanctions may be pecuniary or custodial. Pecuniary sanctions include periodic monetary fines as well as non-periodic administrative and criminal fines. In some jurisdictions, if non-compliance amounts to an obstruction of the investigation, this can be sanctioned by imprisonment. In cases of inspection, competition authorities can seek the assistance of the police force to enter the premises, should the authority face resistance. There might be other consequences, which may discourage non-compliance. For example, a decision can be revoked if the decision was based on an incorrect information provided by the parties, or the third parties. In merger cases, most of the time the review period is suspended until the requested information is submitted to the authority. If the investigation was obstructed, it then becomes an aggravating circumstance in the final infringement decision. Sanctions and other coercive measures are important to enforce investigative powers effectively. However, they are not the only factors to consider regarding effective and efficient use of investigative tools.

7. First, co-operation with the parties and the third parties is critical. Transparency, procedural fairness, and credibility of the authority can address some of the concerns the parties may have.

8. Second, preparation and precision are very important. With preparation, authorities can ask the right questions to the right addressees and undertake the dawn raid properly. Precision is important because this quickens the process. Finally, combining different investigatory tools makes the process more efficient. Each tool can be a source of verification for the other as well as a preparation step for other ones. For example, a voluntary interview can be conducted before issuing a request for information. Authorities can identify the potential addressees or can learn the terminology that is used in a sector. These and many other points were discussed during the three breakout sessions.

9. The first breakout session about unannounced inspections from a digital angle was chosen because digitalization of sources of information and evidence is a major challenge for the authorities. These challenges include finding the right and appropriate legal basis to inspect the digital data, providing the right level, the optimum level of transparency to the parties, addressing the concerns of the parties about their procedural rights and of course building capacity in terms of equipment, infrastructure and human resources. The second breakout session would deal with requests for information. Requests for information are the most frequently used investigative tools, and the discussion has centered on the topic of how to use this tool effectively, while respecting its limitations.

10. At the third breakout session, the principle of due process was discussed, because it is fundamental for the sound administration of investigation cases but it is especially important for evidence gathering, because this is where the authorities intervene in the private sphere of the people and the undertakings. Due process is beneficial for the parties, for the third parties and for the competition authorities, because it increases reliability and quality of the evidence. However, authorities also find themselves in a position of having to find an optimum balance between due process rights and effective enforcement. This is a never-ending challenge for authorities and has many substantial and procedural implications for evidence gathering.

11. The Chair introduced the chairs of the breakout sessions. Ms. Sophie Bresny, Head of Inspection of the Autorité de la concurrence, France, chaired the first session. Ms Bresny was an investigator at the Direction générale de la concurrence, de la consommation et de la répression des frauds (DGCCRF) of the Ministry of Finance. The session will explore the issue of unannounced inspection in the digital age.

12. Mr. Mario Ybar, National Economic Prosecutor, Chilean Competition Authority (FNE), prosecutor's office as a lawyer in 2003 and then served as deputy chief of legal and investigation division and chief of mergers and research division before being appointed as the head of the FNE in October 2017. Mr. Ybar moderated the second breakout session on the topic of requests for information.

13. Mr. Amir Ibrahim, Chairman of the Egyptian Competition Authority chaired the third breakout session. Mr. Amir started his career as a case handler at the ECA before working as a lawyer in private practice in London. He completed a PhD completing from Queen Mary University. He was then appointed as head of the authority. The breakout session that he moderated examined due process in relation to evidence gathering.

2. Breakout Session 1 – Unannounced inspections in the Digital Age

14. The Chair, **Sophie Bresny**, welcomed speakers and attendants to the session on unannounced inspection in the digital age. Ms. Bresny underlined that competition authorities must keep up with digitalisation, and an important area for improvement is the area of unannounced inspections. Ms. Bresny added that effective inspections benefit from effective searches in digital media and broadens potential sources of evidence. Ms. Bresny emphasized that digitalisation also brings new challenges, such as piracy, legal privilege, capacity building and cost of digital searches. Another challenge is the importance of the data collected. Ms. Bresny explained that, in 2007 the *Autorité de la concurrence* (France) analysed more than 5 million files regarding an alleged abuse of dominance case, and out of this data only 1.4 percent of the files were relevant. The lawyers of the company under investigation claimed that the *Autorité* went on a fishing expedition and that the data copied would amount to the height of 50 Eiffel Towers in paper. Ms. Bresny concluded that technicality is another challenge of digitalisation.

15. Ms. Bresny introduced the speakers: **Mr. Diogo Thomson De Andrade**, Deputy Superintendent of the Conselho Administrativo de Defesa Econômica, Brazil (CADE); **Mr. Nuno Rocha de Carvalho**, Member of the Board of the Autoridade da concorrência (AdC) of Portugal; **Mr. Makgale Mohlala**, Divisional Manager, Cartel' Division South African Competition Commission and offered the floor to Mr. Diogo Thomson de Andrade.

16. **Diogo Thomson de Andrade** thanked the Chair. Mr. Andrade introduced the Brazilian experience of dawn raids. He noted that he is aware that not every competition authority has the same powers as the Brazilian competition authority. Mr. Andrade centered his presentation on the topic of big data. He stated that his definition of big data means huge amounts of data. Mr. Thomson de Andrade stated that for him there are two ways of approaching this concept of big data. The first one is a very optimistic one: it is about the digital means and technology that can be used to help competition authorities during inspections. To introduce this discussion, Mr. Andrade cited the example of a Brazilian bid rigging case. In this case, the competition authority was trying to hire firefighters and receptionists. The investigators became suspicious of one company and accessed information on the bids in the Cerebro program (“The Brain Program”). The program allows a search of all the bids in which the company participated in over the last 5 years. The investigators then apply economic tests and data mining. This allowed them to uncover questionable coincidences. Suspicious information was then extracted into a report. This report is extremely useful when a search warrant is sought. This process has allowed CADE to discover that 13 companies that participated in the bid had tried to rig more than 500 tenders within the same period of government. In October 2017, CADE was able to conduct a dawn raid based on this kind of investigative approach. Information found through the Cerebro tool was used to obtain a warrant for dawn raids.

17. Mr. Thomson de Andrade's second point of the presentation noted that in the future competition authorities will have to deal with huge amounts of data and that training and preparation is key. Before going on a dawn raid, one has to prepare, to know what to look for and what to seize. CADE has to work with 30 – 35 terabytes of data. Mr. Thomson de Andrade stated that the Brazilian authority has developed a protocol of requirements for dawn raids, so that nothing is forgotten. A key point, he emphasized is that for the competition experts must work with the IT experts present on the premises of the undertakings. He stated, anecdotally, that the IT people employed by companies are always helpful. They are most likely frustrated with the management and are happy to co-operate with the competition authority. CADE usually uses real time information sharing with the headquarters on the day of the dawn raid and is in contact with the team-leaders. This helps narrow down the search, especially if we are looking for servers.

18. Another point is the need to provide immediately copies of the gathered data to the party under investigation, so that the party can undertake an internal investigation and defend itself. Mr. Thomson de Andrade provided the audience with another piece of advice, that of making sure that the search warrant covers everything including personal mobile devices. Nowadays, people often communicate via social networks, which are installed on personal mobile devices. After the dawn raid, a separate team is set up. This team is made of the IT and, intelligence experts as well as the future case handlers who will review the collected information.

19. Mr. Thomson de Andrade stated that guidelines and protocols are important in order to ensure that the team is prepared for the analysis. CADE has developed training modules with the criminal intelligence and criminal authorities to learn how to search and how to deal with the information obtained. Finally, Mr. Thomson de Andrade concluded that nowadays competition authorities have stay up to date. As cartelists go digital, competition authorities have to go digital as well.

20. **The Chair** inquired if all the data in the Cerebro (Brain project) is open data.

21. Mr. Thomson de Andrade confirmed that the data is open and it is not really a problem to run statistics tests on it. The statistical tests are economic filters that are used from the 2013 discussion in OECD. The data-mining task, which is used in such cases, aims to discover if the same IP addresses are used.

22. **The Italian delegate** enquired about the investment in the Cerebro program and the hardware of the IT.

23. Mr. Thomson de Andrade replied that the development of this system was cheap for the competition authority as they were lucky to have a data scientist working with CADE. CADE hired two consultants, one in statistics and one in IT resources. These two people developed the system. Cerebos uses an open software, so it is SQL, and on languages available on the internet. The team also undertook online courses available on Coursera (a free learning platform) to understand big data and data mining. The cost amounted to the sponsorship and support of the high-level administration in the competition authority. People working on this are project staff and senior officers, moved from cases. Cerebos was seen initially as quite risky. CADE has investigated a case entirely from inside the authority, without the need for an informant or a collaborator. The only requirements were time and some knowledge of antitrust statistics and IT.

24. **The Latvian delegate** stated that it is very hard to get a court warrant for the competition authority in Latvia. The Latvian Competition authority cannot get a warrant based on assumptions. The Latvian Delegate asked if the Brazilian competition authority could go from one premise to another in cases where, during the dawn raid, they discover that some information is located elsewhere, for example, on the premises of an independent bookkeeper.

25. Mr. Thomson de Andrade stated that CADE usually knows the exact location of the server. When the warrant is sought, it covers all possible premises on which the servers are located. If the company decides to erase the data, CADE could always charge the company for obstruction of justice.

26. Ms. Bresny thanked the speaker and turned to **Australia** asking about its approach to pre-inspection planning and preparation for an effective electronic search during dawn raids. Australia agreed that preparation is indeed important. Preparation includes identifying the data carrier types to be inspected, finding a technique to search on them and adopting a protocol to separate privileged information from others. It explained that the ACCC co-operates with other public authorities, which have more experience on collection and analysis of digital information. The ACCC uses keywords and predictive coding to analyze huge amount of data in short period of time. Australia pointed out that access to conversation data such as WhatsApp messages is a challenge for the ACCC.

27. The moderator thanked Australia and extended the same question to **Peru**. Peru replied that they prepared all of the documents used during the inspection beforehand. If the unannounced inspection includes several targets, the authority conducts inspections simultaneously. It is good practice to have an experienced official in charge of the inspection team, a lawyer and an IT expert in the team. Before the inspections, a team meeting is held to share important information and a keyword list is prepared to narrow the search.

28. The moderator thanked Peru and moved on to the presentation of Mr. Makgale Mohlala, Divisional Manager of the Cartels Division of Competition Commission of **South Africa (CCS)**. He explained the legal framework of the CCS and process of digital evidence gathering. The CCS uses external independent IT experts for collecting, searching and analysing the data. The CCS provides keywords to analyse the data. Mr. Mohlala pointed out four challenges they face about conducting unannounced inspections on electronic media. The first challenges are time and the financial cost of dealing with large amount of data. Narrow keyword searches address these challenges. Other challenges include, mobile devices, such as laptops, which are not found at the inspected premises, servers that are hosted in third party premises, and data stored in a cloud. These challenges are addressed by ensuring that the scope of the warrant covers even devices that are relevant but are located outside the premises and expressly stating servers hosted in third party premises or stored on cloud be covered in the search warrant.

29. Ms. Bresny thanked Mr. Mohlala and asked **Brazil** about the co-operation between CADE and other public authorities. Brazil replied that the co-operation between CADE and the prosecutor's office is strong and efficient it is very important for sharing information and evidence.

30. Then the moderator turned to **Hong Kong, China**, and wished to know the role of the IT experts and other measure to inspect electric devices effectively. The delegate representing the Hong Kong, China competition authority replied that currently the authority benefits from external IT experts during dawn raids. Since it is very expensive, the authority is in the process of building its own capacity and acquiring an IT forensic system. As part of this process, it is critical to train the employees and identify the ones with interest to be trained in IT.

31. The **Chair** thanked the delegate from Hong Kong, China and asked **Mexico** to share their experience in conducting inspections in the digital time. The Mexican delegate stated that in Mexico there are two independent organisms responsible for competition, the IFT (electronic communications authority) and the COFECE, the competition authority. There are two different approaches, one when administrative law applies and the other when criminal law applies. This being said, it means that when criminal law applies, during the

dawn raid the IFT can take all the information they consider necessary and data tools are used to sift through legally privileged information and information which is not legally privileged.

32. The moderator invited **Ukraine** to share its experience with challenges posed by digital evidence gathering. Ukraine presented a case concerning the gasoline market where separating private and business data from each other was challenging. In addition, the undertaking under investigation was not co-operative. The problem which the Anti-Monopoly Committee of Ukraine has encountered was that all devices were stated to be personal.

33. The moderator stated that identifying relevant data indeed could be challenging and moved on to **European Commission**. Ms. Bresny asked how the EC sifts the gathered data during unannounced inspections. The EU explained that there are two approaches to sifting. Firstly, all the data can be collected and later sifted at the competition authority. Secondly, data can be separated on the spot. The disadvantage of this method is that the original data is not available if the inspection would like to have a second look. The EC also emphasised that the data collection should be kept to a minimum and in an ideal scenario the competition authority should come back with a relevant documents after the inspection instead of a huge volume of documents. , the European Commission has a team of six full-time forensic specialists of which two have an IT background and others have obtained the forensic training and certification.

34. The moderator thanked the **EU** and asked Mr. Nuno Rocha de Carvalho, member of the **AdC Board** to take the floor. Mr. Carvalho explained that the AdC has comprehensive inspection power; however, mobile phones, unread e-mails and documents protected by legal professional privilege are outside of its scope. Recently, the AdC adopted a new dawn raid model that relies on trainings, advanced forensics software, strong back office co-ordination and on-site preliminary review. New dawn raid procedures include new internal guidelines, preparation of e-mail systems, back-ups and so on, as well as new steps during the inspection (e.g. interviewing IT manager) and new techniques of documentation (e.g. review reviewing metadata, clusters and tags). He identified challenges as well that include legal issues such as LPP, fast changing technology, resources to build capacity.

35. The moderator thanked Mr. Carvalho and turned to **Austria** asking about the Austrian Federal Competition Authority's guidelines and procedural safeguards regarding inspections on digital sources. The Austrian delegate stated that guidelines are needed for successful dawn raids and protection of safeguards. The Austrian competition authority has published guidelines, a soft law on the dawn raid procedures. It is publicly available, on the website of the authority, even in English. The soft law is based on the jurisprudence stemming from dawn raids in Austria. It represents jurisprudence from the Constitutional Court, the high administrative court the Data Protection Commission. In Austria, the undertakings must give access to the digital data otherwise; penalties will be imposed against them. The Austrian delegate stated that they always create three copies of the data, one is a working copy; one is put into a sealed bag and stored. The last copy is given to the party. The one in the sealed bag helps to prove what was taken if the case is litigated later on. In cases where data is taken from the premises of the authority, a list is made and this list is given to the companies to comment on. In this way, it protects right of defence of the companies. In cases of privileged information, there is also a particular protocol of 'sealed information'. The Austria emphasized that the key to success is to document every step during the dawn raid to be able to defend its actions in case the case litigated. The second key to success is transparency and the third is to be able to rely on personnel.

36. Then the moderator asked **Hungary** to give information about procedural safeguards, especially the internal procedures and facilities of the Cartel Detection Section. Hungary replied that the Cartel Detection Unit has its own offices and network. Access to these offices and network is restricted. There are strict rules that ensure admissibility of the evidence.

37. The moderator thanked Hungary and opened the floor for questions. A delegate asked Portugal where the AdC gets the intelligence from about a possible case. Portugal replied that leniency, third parties and other methods are sources of information. Portugal said that it is important to gather information before unannounced inspections but the authority must be careful that the target is not alerted before the dawn raid.

38. The **Chair** thanked all of the participants and speakers and closed the session.

3. Breakout session 2 – Requests for Information

39. **Mario Ybar**, National Economic Prosecutor of Chilean Competition Authority (FNE) moderated the session. He opened the session explaining that a request for information (RFI) is a very useful and valuable tool. However, there are some challenges regarding this tool such as confidentiality issues as well as processing and verifying large amount of information. Mr. Ybar introduced the speakers of the session: **Mr. Ernest Bagopi**, Director of Investigations and Research Analysis Unit, Competition Authority of Botswana; **Mr. Tsai-Lung Hong**, Commissioner in the Federal Trade Commission, Chinese Taipei and **Mr. Christos Tsoumanis**, Case Handler at DG Comp of the EU Commission.

40. Mr. Ybar asked **Mr. Ernest Bagopi**, to make the first presentation of the session.

41. Mr. Bagopi started his presentation with a brief overview of RFIs. The CAB uses RFIs often either upon its own initiative or a complaint. It invites parties to submit information that may assist in the determination of the investigation. Such information is then stored in a secure room. The CAB ensures that information is collected legally.

42. In relation to effectiveness of RFIs, Mr. Bagopi pointed out that obtaining information from third parties could be challenging since they can fear upsetting a dominant company. In practice, third parties submit information in unilateral conduct cases. For instance, in a recent case, the authority was investigating four major wholesalers setting and imposing prices on the smaller undertakings. Parties co-operated so well that the CAB secured 100 statements and managed to obtain all of the information requested. However, in merger cases third parties are not as willing to provide information. Third parties are not legally obliged to provide information. In order to give them incentives to co-operate, the CAB explains the rationale of the request before issuing it. When third parties do not cooperate, the CAB can approach the police. This led in a recent insurance case to the third party to co-operating as requested. Mr. Bagopi, emphasised other challenges, too: confidentiality as grounds to oppose an RFI; receiving large volumes of information that require sorting and verification; and the time consuming procedure of collecting witness statements under oath by police.

43. Mr Bagopi said that the CAB has memorandums of understanding with other public bodies like the Central Bank of Botswana and the Directorate of Corruption and Economic Crime. This helps to assess the information received and to assist the authority in making an informed decision. For instance, in many cases, the CAB found that the information submitted to other authorities is not consistent with the one submitted to the CAB.

44. The moderator thanked Mr. Bagopi and commented that confidentiality is one of the important challenges.

45. The moderator asked the **Croatia** how it treats confidential information in relation to RFIs. Croatia replied that parties could submit non-confidential versions of documents alongside confidential information. If such non-confidential information is not submitted, the competition authority sends a reminder. If these documents are again not submitted, the competition authority assumes that the documents do not contain any business secrets. The competition authority seals confidential data or replaces them with ranges in documents it produces.

46. The moderator thanked Croatia and turned to **Serbia**. He asked Serbia to explain whether there is a tension between transparency and confidentiality. Serbia explained that while the Law on access to public information does not recognise confidentiality, another law requires that competition authority protect confidential information. If a conflict occurs, the dispute is brought to court to receive guidance. The Serbian representative stated that another significant problem in practice is the regulatory framework that allows the competition authority to protect confidential information only upon request. This can cause problems when the competition authority has some sensitive information from different parties and they do not request any protection. In such cases, disclosure of information may lead to exchange of sensitive information such as market shares and sales between competitors.

47. Then the moderator turned to the **Russian Federation** and asked whether Russia can request information from third parties under secrecy obligation, such as telecommunication service providers. Russia explained that the FAS has right to collect all kinds of information in written and digital form. However, communication service providers can refuse to submit information asserting the law on personal data. Access to secret information is possible only through court decision. This legislation will be amended to recognise an exception for competition proceedings. A draft has already been prepared.

48. The moderator turned to **Ukraine** and asked if there are grounds from refraining to provide secret information. Ukraine replied that in principle the Law on Competition in Ukraine allows the Antimonopoly Committee of Ukraine (AMCU) to request all types of information including information protected by the banking secrecy. However, in a recent case, when information was requested from a telecom provider about the length and the existence of calls to certain numbers, the telecom provider refused to provide this information stating that Article 22 of the Constitution of Ukraine protects personal communication. The AMCU appealed this refusal, and the case went to the Supreme Court of Ukraine. The Supreme Court of Ukraine stated that the AMCU has the right to request and obtain such type of information from third parties.

49. The moderator thanked Ukraine and gave the floor to Mr. Tsai-Lung Hong, a Commissioner of the Fair Trade Commission of **Chinese Taipei**. Mr. Hong said that when the Commission initiates an investigation, both concerned parties and third parties have an obligation to provide necessary information to the Commission regarding the investigation. Any evasion, obstruction or refusal to co-operate without justification is subject to penalties. If such behaviour persists, sanctions are aggravated. He also explained that the degree of obligation to provide information changes depending on the type of the requested information. If the requested information is directly associated with the allegation and indispensability to determine the case, the concerned parties and third parties are under a heavier obligation to provide the information. A lower level of obligation exists if the information is not directly related with the conduct in question (e.g. market definition, amount of transaction, product characteristics). He also stated that third parties are willing to co-operate in most cases as government agencies are under obligations of secrecy.

50. The moderator thanked Mr. Hon and turned to the **Dominican Republic**. The moderator enquired if the competition authority can issue compulsory RFIs to third parties and if they must co-operate or not. The delegate from the Dominican Republic replied that the competition authority became operational in January 2017 and has the power to collect information from individuals. However, since the provision of information is not mandatory for third parties, voluntary co-operation is necessary. In the authority's first case, the third parties did not co-operate voluntarily because they were intimidated by a potential retaliation from the firm who held a dominant position. Actions by the parties alleging confidentiality were rejected by the courts and the parties were forced to provide supply contracts. The final decision regarding the case will be published soon.

51. The moderator then asked **Albania** about its experience with collecting and processing large amounts of information through RFIs. Albania explained that the competition authority has recently conducted an investigation concerning 16 banks where it dealt with large amounts of information. The authority used alternative sources of information. For instance, an RFI was sent to the Albanian bank association and a questionnaire was sent to all banks of Albania. It emphasised that because of these actions, a huge amount of data the authority gathered the data in various formats. In addition, the authority found it difficult to assess the reliability of information. Analysing this data was the main challenge in the investigation. The competition authority requested information from the central bank in order to cross check the submitted data. The authority also organised a meeting with the representatives of the stakeholders.

52. The moderator thanked Albania. Then he turned to **Australia**, which deals with both challenges: processing large amount of data and collecting information from third parties. The moderator asked about Australia's experience with these challenges. Australia explained that the ACCC just started a market study in the banking sector. In this case, the main challenge arose from requesting information that is narrow enough to obtain relevant data yet broad enough to obtain all of the necessary information. In another case, regarding petrol retailers, a large amount of data created technical problems. The data was so voluminous that it could not be accessed through standard software. A new IT tool was used to access and process that data.

53. The moderator thanked Australia and gave the floor to Mr. Christos Tsoumanis, a case handler from the **European Commission**. Mr. Tsoumanis focused on merger cases in his presentation. He said that in merger cases fact-finding exercises aim at understanding products and the inner working of markets, assessing a transaction's competitive impact, collecting facts to substantiate a decision and collecting facts for possible remedy negotiation. Case teams must determine the rationale for an RFI, to whom it will be addressed and how the responses will be used in the decision. The EU conducts phone interviews before drafting an RFI, replaces competition law jargon with business terminology, avoids too general, ambiguous or leading questions and uses fixed or open ended questions.

54. Mr. Tsoumanis pointed out that assessing responses is also a significant stage of evidence gathering. Internal documents are considered as useful evidence. However, they must always be assessed in the context. A big volume of the data creates another burden for both the EU Commission and the parties. Therefore, third parties' internal documents must be carefully considered and the scope of the internal document requests must be tailored according to the case. He also recommended sending RFIs as early as possible, starting reviewing the answers promptly and sending sequential requests in order to understand which documents to ask for and what topics to focus on. Mr. Tsoumanis mentioned that sharing the draft RFI with the parties is a good practice, as they understand the documents and the business better.

55. The moderator thanked Mr. Tsoumanis and wished the **United Kingdom** to share its lessons learned in relation to RFIs. The United Kingdom explained that accurate and precise information is needed to take robust decisions in a timely manner. To this end, both formal and informal requests are used, however, the competition authority can delay tactics and voluminous information. It emphasized that RFIs need to be focused, well prepared, and aimed at obtaining only necessary information. The United Kingdom mentioned the following elements to prepare effective RFIs: i) thinking about information which is really needed; ii) formulating questions which are easy to understand, not only using legal jargon, but also tailoring questions according to the sophistication level and the capacity of the recipient; iii) conducting round tables if parties find it easier to respond orally; iv) addressing RFIs to best suited addressees to respond; v) use most appropriate means (e.g. post or e-mail); vi) sharing RFIs with parties to let them provide comments; and, vii) setting realistic deadlines.

56. The United Kingdom also explained that in case of non-compliance, sanctions are determined considering various factors such as nature and gravity of the failure to comply, its adverse effects on investigation, whether it is a flagrant failure, reasons provided by the respondent and financial resources of the parties.

57. The moderator thanked the United Kingdom and turned to **Sweden** on the same topic. Sweden stated that one of the main challenges it faces are delays in investigation process due to the large amount of information to be collected. It is critical to collect only relevant information. At the same time, RFIs have to be sufficiently broad to cover all the necessary data. Sweden pointed out that sometimes recipients of RFIs complain that RFIs are too broad. In such cases, objections are discussed with the parties in order to avoid excessive burdens.

58. Mr. Ybar asked **Mexico** as to how they manage to get replies on time. Mexico explained that the law compels recipients to provide information. Non-compliance is sanctioned by a monetary penalty based on days of delay. However only 3% of companies that received an RFI have been fined in recent years. Mexico stated that constant and open communication with parties have helped COFECE to be more efficient and address targeted questions and obtain relevant information.

59. After Mexico's intervention, the moderator gave the floor to **Singapore** to let it share its experience regarding the timing of the RFIs. Singapore explained that the required information is generally obtained through inspections. RFIs are sent for follow-up questions in relation to the evidence discovered. However, there are also cases where the authority decided to go ahead with RFIs first and inspections followed. Such RFIs aim at building a theory of harm. Inspections are not initiated before an economic analysis that strengthens suspicions.

60. The moderator asked the **United States Federal Trade Commission (FTC)** to explain how the FTC engages with addressees after issuing an RFI. The FTC said that engagement with addressees is a continuous exercise. The FTC is always open to discuss the scope, deadline and other aspects of RFIs with respondents. Initiative for dialogue can come from parties or FTC staff. The FTC also mentioned that it is important to request only the needed information without imposing undue burden on the respondents. Normally, parties only provide limited information. The FTC will then consider whether it must make additional requests. Parties can submit any useful information during the proceedings through submitting white papers and meeting with the staff.

61. **Mr. Ybar** provided the last presentation of the session on Chile's experience with RFIs. In his presentation, Mr. Ybar explained that the FNE has a broad power to request information, including from parties and third parties, private and public entities as well as companies and individuals. The FNE is obliged to respect professional secrecy and it may not conduct fishing expeditions with too broad RFIs. Mr. Ybar cited a case where non-compliance with an RFI was sanctioned by 4.8 million Chilean pesos (8,000 USD). This was the first time a sanction was imposed on an undertaking due to non-compliance with an RFI. He emphasised that the requested information was not complex at all and the association of surgeons omitted the information in its response although the FNE knew the association possessed that information. Since the association could not justify the omission. A monetary sanction was imposed. He said that the FNE hoped this case would provide a broader deterrence effect for future cases.

Breakout session 3 – Due process in evidence gathering

62. **Dr. Amir Ibrahim Nabil**, Chairperson of the Egyptian Competition Authority Breakout moderated session three. He introduced the principle of due process with a focus on its implications for evidence gathering. He explained that this is an important topic since due process is fundamental and requires a balancing between protection of due process rights and efficient enforcement of competition rules. To discuss this challenging subject, the speakers were **Mr. Adano Roba**, the Director General of the Competition Authority of Kenya; **Ms Carolina Garayzar**, the Deputy Director General of International Affairs of the Mexican Competition Authority; and **Mr. Cheow Han**, the Assistant Chief Executive of the Competition and Consumer Commission of Singapore.

63. The moderator asked **Mr. Lee Cheow Han**, Assistant Chief Executive of the Competition and Consumer Commission of **Singapore (CCCS)** to take the floor. He explained that due process is important for competition agencies as well as the parties. The decision must be able to stand up before the court and adherence to due process requirements effects the credibility of the authority. Because of their good record of accomplishment, lawyers and parties are more co-operative during the whole investigation process and especially at the inspections.

64. Mr. Lee Cheow Han started by saying that the Competition Act and relevant regulations in Singapore involves many substantive and procedural safeguards to ensure due process. In the investigative process, first, there is a preliminary enquiry stage where a case must meet the threshold of reasonable suspicion. A party can challenge whether the authority has the right to exercise its powers, as the authority must meet this threshold. In investigations, the authority has the power to conduct inspections and use other investigative powers. During inspections, the authority gives a 'reasonable time' for the undertaking to get legal counsel. In practice, this time is about one hour.

65. He also explained that once the investigative process is complete, a proposal (Proposed Infringement Decision) is made to the Commission to take an infringement decision if the evidence demonstrates violation of the law. The parties then have the opportunity to submit comments in relation to this draft and the right to access the documents of the competition authority. Moreover, decisions of the CCCS are subject to judicial review. The CCCS has never lost a case due to failure to adhere to due process.

66. The Chair asked how the CCCS handles confidentiality issues. Mr. Han replied that in an inspection notice, besides the scope of the investigation, the notice explains how parties can claim confidentiality. Such claims can be made throughout the investigation process. If the CCCS does not accept a confidentiality claim, it should explain its decision and the parties can challenge that decision.

67. The Chair thanked Mr. Han and said that adopting procedural regulations and guidelines seemed one of the measures that could be taken to ensure due process. He asked **Korea** if it made efforts to ensure due process and what are the main rules. Korea answered that the KFTC has made a special effort to ensure that investigations are conducted in line with due process requirements. In 2016, the KFTC adopted guidelines that specified rules regarding onsite inspections. These new rules clarified that the KFTC must give notice, parties must be informed about the purpose of the investigation and an attorney can be present at all stages of an investigations including during the inspection.

68. The Chair then pointed out court decisions as another source of guidance and turned to **Ukraine** asking its experience on this. Ukraine stated that there are approximately 300 open cases at the moment against the competition authority and 98 against the central office. Until now, only around 10 percent of decisions of the authority have been invalidated, mostly due to insufficiency of evidence. Breach of confidentiality is not a ground to invalidate a decision; however, it can be considered a violation of other laws. The Supreme Court of Ukraine has issued several clarifications on due process. Currently, the AMCU, the Association of lawyers and other stakeholders would like to amend the competition law to include due process standards including specific rights. There are already proposals of legislative changes and this is being discussed further this year.

69. The moderator invited Ms. Carolina Garayzar, Deputy General Director for International Affairs of the **Mexican Competition Authority (COFECE)** to deliver a presentation. In her presentation, Ms. Garayzar explained that there are constitutional principles that form the basis of due process in Mexico as well as checks and balances in the Mexican Competition Law. For example, the separation between the investigative body and the board of commissioners to ensure impartiality. Furthermore, COFECE's decisions are subject to a specialised judicial review. Ms. Garayzar emphasised that transparency, protection of confidentiality, the right of defence and impartial decision-making are ensured during the investigation process. To this end, guidelines about the investigative process and investigation initiation orders are published in the official gazette; access to file is not allowed during investigative stage; preliminary opinion is notified to the parties; and, parties can meet the commissioners.

70. The Chair thanked Ms. Garayzar and asked the **European Commission** about the role of proportionality in the EU. The EU replied that unannounced inspections are a key instrument. Inspection orders must include the date, the subject matter, the penalties for non-compliance and the right to appeal by the subjects. In the Nexans and Prysmian cases, the European courts clarified various conditions concerning the purpose and proportionality of inspections decisions. According to these rulings, inspections must be limited to the subject matter of the investigation.

71. The Chair thanked the EC and turned to **Hong Kong, China**. He asked Hong Kong, China to explain the interview process and privilege against self-incrimination in Hong Kong, China. Hong Kong, China stated that it has a prosecutorial system and for this reason, the due process rights are ensured by the courts. Privilege against self-incrimination is subject to important standards in Hong Kong, China. Parties can assert that right and the competition authority cannot use self-incriminating evidence before the court against the person who provided the evidence. One of the key questions that thus came up is that during the investigation at what point in an interview of a person does self-incrimination become relevant. In one case, a person admitted bid rigging. However, this information could not be used against that person. The company also argued that since the employee represents the company, this evidence cannot be used against the undertaking too. The competition authority objected to that argument saying that the employee was not a CEO nor does it have any particular representative power. The tribunal decided that if such statements cannot be used it would be very difficult to bring a case.

72. The Chair invited **Moldova** to describe its experience on due process in relation to interviews. Moldova indicated that it follows a very similar 3-stage procedure to that of the EU, which is composed of a preliminary investigation, the investigation and the decision. During investigations, the competition authority can use various tools including interviews. In the interviews, the interviewee receives a transcript of the interview and she or he can comment on the transcript. Interviews can be held via phone or internet.

73. The Chair thanked Moldova and gave the floor to Mr. Adano W. Roba, the Director General of the Competition Authority of **Kenya** (CAK) to provide a presentation on due process in Kenya. Mr. Roba started his presentation by giving a brief background on the CAK. The Constitution, the Competition Act 2010, the Evidence Act 2012, the Fair Administrative Action Act 2015 and the Criminal Procedure Code 2012 together provide a comprehensive framework for due process issues. He explained that the process involves a preliminary investigation, assessment of evidence, full investigation, hearing and a board decision.

74. Mr. Roba also explained that board decisions can be appealed to the competition tribunal and then to the high court. In a cartel case about fertilisers, one of the parties took the CAK's decision to court arguing that the evidence was unlawfully gathered. The court issued a conservatory order until the case was decided. The claimant could not meet the conditions to prove that the evidence gathering was illegal and the case was dismissed. The court concluded that the CAK complied with the statutes and commended the CAK for securing a search warrant. This case demonstrated the importance of obtaining a search warrant before on-site inspections even if it is not required by law.

75. The Chair thanked Mr. Roba and said that he would like to focus on due process in relation to inspections. Dr. Nabil asked **Slovakia** to share its experience with due process issues in inspections. Slovakia replied that the competition authority can conduct unannounced inspections at business and private premises, however, inspections of private premises require a court approval. The majority of the inspected parties challenge inspections ex-post. The courts are required to resolve many issues raised by the parties and establish various standards. For example, inspection authorisations must fulfil various requirements. The competition authority must prepare minutes at the time of the investigation, and the inspected parties must sign these minutes. In one case, the court upheld the power of the authority to request information orally but emphasised that these requests must be related to the subject and purpose of the investigation, which means technical issues relating to the inspection. These rulings have changed the practice of the authority and the authority revises its practices with each new court decision.

76. The moderator thanked Slovakia and asked **Korea** about its guidelines and rules specific to digital searches conducted during inspections. Korea said that the KFTC set up an investigation defence force in relation to cartels and digital evidence. There are various safeguards in relation to collection of digital data. For instance, the inspected parties can demand confidentiality and protection from access to data by third parties. Inspected parties can participate in the selection process of the data and they are provided with a copy of the data taken.

77. The Chair thanked Korea. Mr. Nabil explained that in its contribution the United States explained that the presence of lawyers or representatives of the investigated parties are not required during the actual search at the corporate premises. The Chair asked what other procedural safeguards are there to ensure due process during inspections. The **United States** confirmed that representation is not required during inspections; however, they can be present. It explained that the regular rules of criminal procedure apply in cartel inspections.

78. The moderator thanked the United States and opened the floor for discussion. **Hong Kong, China** asked **Mexico** what is the period for the investigations in Mexico. Mexico replied that an investigation can last up to 120 days and this period can be extended three times.

79. **Turkey** commented on representation during inspections. It explained that Turkish Competition Authority's staff has plenty of discretion to decide whether to wait for the legal counsels to arrive at the inspection location. Sometimes the target is a small family company that is not familiar with competition law. In such cases, the inspection team will advise the company to invite its lawyers. In other cases, inspection starts almost immediately. The Turkish courts have ruled that 10 minutes is an acceptable waiting time. However, the inspection team has the discretion to assess appropriate conduct according to the situation.

80. The Chair asked the **United States** how privileged information is treated during inspections. The United States replied that there is a filter team, separate from the investigation team, which goes through all seized documents. The filter team makes sure that the investigation team never sees privileged information.

81. The United States delegate addressed the same question to Singapore who replied that in Singapore, privileged documents are identified by looking at the first page and never seized. If there is disagreement between the investigation team and the inspected party then the concerned documents are placed in a sealed envelope and taken to the CCCS premises to be inspected in the presence of the representatives of the undertaking.

82. The Chair asked the **European Commission** how standalone judicial review of inspections affect the process. The delegate answered that when formulating an inspection decision, great care is taken to specify the scope of the decision. Case law and internal manuals guide the personnel responsible for drafting the decision. . Guidelines are also publicly available.

83. **Belgium** commented that it follows the EC precedents; however, the Belgian Court of Appeal has been stricter in terms of digital evidence. The investigation team cannot look into any document without the company concerned being present. The competition authority tends to copy the hard drives and then select the relevant information later on. It tries to filter documents as best as possible using IT tools to save time.

84. The Chair thanked all the participants and speakers and adjourned the session. He invited the delegates to move to wrap-up session room.

Wrap-up Session

85. **Frédéric Jenny**, Chair of the Competition Committee chaired the wrap-up session. He noted that the delay in starting the final session shows that the discussions in the breakout sessions were lively and productive. He asked the session Chairs what their top three take aways are from the discussion in the breakout session that they moderated.

86. Ms. Bresny explained that the discussion in breakout session 1 demonstrated that the key to effective unannounced inspections on digital data is preparation. Preparation includes getting well-trained IT experts and providing sufficient financial sources for IT forensic tools as well.

87. As to the breakout session 2, Mr. Ybar underlined the importance of protection confidentiality in order to gain credibility in the eyes of the parties to encourage them to cooperate. Mr. Ybar also reported that planning before issuing RFIs and standardizing RFIs were other significant factors for effective information gathering.

88. Mr. Amir said the in the breakout session 3 that the heart of the discussion was about the balance of the protection of due process rights and effective enforcement of competition law. Mr. Amir commented that all the participants showed commitment to highest due process standards to achieve reliability and credibility. Keeping an open dialogue channel emerged as a recommendable way to address concerns regarding confidentiality and legal professional privilege.