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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Summary Record: ANNEX TO THE SUMMARY RECORD OF THE 123rd MEETING OF THE COMPETITION COMMITTEE HELD ON 15-19 JUNE 2015

Summary of Discussion of the Hearing on Competition Enforcement In Oligopolistic Markets

16-18 June 2015
Paris, France

The attached document is an annex to the Summary Record of the meeting held on 15-19 June 2015. More documents related to this discussion can be found at www.oecd.org/daf/competition/oligopoly-markets.htm.

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By the Secretariat

1. The Chair, Prof. Frédéric Jenny, opened the discussion on Competition Enforcement in Oligopolistic Markets noting that this topic had not been on the Competition Committee agenda for a while. He noted that the session, originally conceived as a hearing on oligopoly, received a surprisingly large number of written contributions (17), a sign of great interest in this challenging area of competition law.

2. The Chair recalled that competition issues in oligopoly markets can be addressed by different tools and that not all of them are available in all jurisdictions. There are special provisions on this topic in some jurisdictions, but these sometimes do not seem entirely useful. Other jurisdictions could rely on instruments which are in practice not used often, such as the notion of abuse of collective dominance. A number of countries consider market studies very helpful to learn more about oligopolistic markets. Oligopoly structures can be addressed also through merger control, but this may involve instruments that can be complex from a technical point of view and therefore difficult to use.

3. The Chair welcomed the three expert panellists: Professor Louis Kaplow, Harvard University; Professor Nicolas Petit, University of Liege; and Dr Jorge Padilla, Compass Lexecon.

4. The Chair explained that the session would be organised in five parts: first, an introduction of the oligopoly problem and the challenges with the current approach to address it; second, a discussion of special provisions covering oligopolistic situations in some jurisdictions; third, a review of the notion of collective dominance or monopolisation and whether it can be interpreted more widely; fourth, a discussion of other instruments, namely market studies and market investigations; and fifth, the analysis of co-ordinated effects in merger control and the challenges in this area. The Chair added that successes and challenges in enforcement would be discussed, if there was time left towards the end of the session.

1. Setting the scene – The oligopoly problem

5. The Chair invited the EU delegation to open the discussion. A delegate from the European Union set the scene by giving an example of how perfect competition functions, in contrast to oligopolistic markets. In the latter there are a relatively small numbers of sellers who can each – to some degree – influence the market price. The delegate based his example not only on a static equilibrium / one shot game, but also on a dynamic game model where the behaviour today can influence future periods. In addition, the EU delegate illustrated how a repeated game can lead to collusion.

6. Game theory tools found their way into EU competition enforcement in the *Airtours* case and are now reflected in the EU's horizontal merger guidelines. The criteria developed by the European courts in the *Airtours* case address the so-called "oligopoly problem" that market participants have to solve in order to co-ordinate to raise prices above the static equilibrium. The EU horizontal merger guidelines group these conditions under the following headings: reaching the terms of co-ordination, monitoring deviations, deterrent mechanisms and reactions of outsiders.

7. However, economic analysis does not answer the question of the behaviour that should be considered legal and the behaviour that should not. In some markets (those with very few sellers and homogeneous products) it may be possible to achieve higher prices without any communication among the oligopolists. In other markets, it may be necessary to resort to communication in order to achieve a similar price increase. Competition law seems to distinguish between the two situations, suggesting that the first is legal and the second illegal. The EU concluded by noting that there is a lot of debate about whether such a distinction is reasonable.

8. The Chair invited Professor Kaplow to address the EU's questions: is it reasonable for cartel laws to make this distinction between explicit and tacit collusion? Is the emphasis on inter-firm communication misguided? If so, how would one structure an alternative approach?

9. Professor Kaplow described the difficulties that competition authorities face in enforcing competition law in oligopolistic markets. This is especially the case when there is evidence of a successful co-ordinated price increase, but there is no evidence on how market participants achieved co-ordination.

10. There are three possible regulatory reactions in these problematic situations. The first is to say that the phenomenon does not create any liability despite the bad economic outcome. The second option is that there is liability if there is sufficiently strong evidence that co-ordinated rather than independent, competitive pricing, is taking place. The third option is to conclude that there is antitrust liability only if two conditions are met: there is evidence of a co-ordinated oligopolistic price increase and, in addition, this involves communication of some particular sort. Professor Kaplow explained that the third option closely resembles the conventional approach, which relies on communication between the parties, and added that, in his view, this is an unsatisfactory approach, which requires agencies to prove something that is not related to the economic outcome.

11. Professor Kaplow suggested an alternative "direct" approach to detection and sanction. He argued that an important criterion for detecting an anti-competitive price increase is the extent to which market conditions are conducive to co-ordination. This alternative approach builds on the assumption that there is some economic evidence that oligopolists have co-ordinated to increase prices. The question is how liability should be assigned to the oligopolists, in a range of situations where conduciveness to co-ordination varies, from very low to quite high. If market conditions are not at all conducive to co-ordination, the inference under the "direct approach" is that the parties did not co-ordinate. Therefore, it would make sense to exonerate the firms. When the conduciveness to collusion is higher, it is more likely that firms have indeed co-ordinated their price increase. In these cases, the price increase would be regarded as illegal.

12. Professor Kaplow contrasted this approach with the communications-based approach. He argued that, when the conduciveness to collusion is so high that it very easy to co-ordinate, the communications-based approach does not assign liability any more. This is because firms do not need to communicate and therefore would not be caught under cartel laws. This level of conduciveness to collusion can therefore be called the paradox region, where there is no liability because the firms do not need to resort to prohibited communications. In this region where conduciveness is greatest, the direct approach assigns liability while the communications-based approach exonerates.

13. Professor Kaplow proposed therefore to change the conditions for antitrust liability. Instead of looking at the prohibited communication where liability is based on inferences, one should use a direct prohibition when the conduciveness to collusion is high. In these cases there is the highest danger and the harm rises disproportionately.

14. The Chair thanked Professor Kaplow for his proposal and asked BIAC to explain their point of view, as their written submission suggested a very different approach from the one presented by Professor Kaplow.

15. BIAC pointed out that an oligopoly problem only exists if there is a competition problem. An oligopolistic structure is not on its own a sufficient condition for establishing an anti-competitive conduct. There are extremely competitive markets with only two or three players. So the outcome in most cases cannot be predicted by looking exclusively at the market structure. BIAC emphasised that competition analysis should always trump market structure analysis.

16. In addition, in BIAC's view, there should be no concerns simply because firms in oligopolistic markets that are acting in parallel and charging prices above the competitive level. Quoting Professor Whish, BIAC noted that it would be absurd to prevent firms from acting in a parallel manner when this is rational in light of the conditions of the market on which they operate. If there is evidence of anti-competitive conduct, be it in an oligopolistic market or in another market, competition authorities have enforcement tools at their disposal. BIAC continued by noting that there is no significant enforcement gap, or at least a gap that has created significant harm. The enforcement tools used are sufficient and have the required effect of deterrence.

17. Professor Kaplow responded that indeed pricing above the competitive level may be consistent with competitive behaviour. Regarding rational behaviour, he noted that in many cases it may be irrational to follow laws unless there is some penalty for doing it. Rational behaviour as a defence in competition law is therefore an incorrect notion.

18. A delegate from the United States asked Professor Kaplow to illustrate, on the basis of his model, how actors in an oligopolistic market should be advised to behave. Professor Kaplow answered that the actors should be advised to price competitively. He underlined that actors in such markets know what oligopolistic behaviour is.

2. Countries with special provisions covering oligopolistic markets

19. The Chair asked the delegation from Japan to describe their experience with a specific provision to deal with "simultaneous price increases" and to discuss how useful the tool was to prevent oligopolistic pricing. Japan pointed out that a specific provision dealing with simultaneous price increases was introduced in the Antimonopoly Act in the seventies, after the oil crisis, but the provision was subsequently abolished in 2005. This provision was initially introduced to alleviate the difficulties with detecting an agreement between companies in the case of parallel pricing.

20. The (abolished) provision required companies to provide the reasons to justify parallel price increases. A parallel price increase was defined as a price increase of the same or similar amount or ratio by the companies in an oligopolistic market within a period of three months. The main aim of this policy was to create deterrence and to prevent companies from raising their prices in parallel.

21. The provision was subsequently repealed for several reasons. First, due to the changed economic situation in the 1990s, the number of reports based on this provision had been decreasing. Second, the JFTC had the impression that the deterrent effects were limited. Third, the system created burdens not only on the companies which had to report to the JFTC but also on the JFTC itself.

22. Next, the Chair asked Korea to discuss the provision in their competition law allowing the Korea Fair Trade Commission (KFTC) to presume the existence of an agreement if certain circumstances are met. The Korean delegation explained that, according to the Monopoly Regulation and Fair Trade Act of Korea, an agreement can be inferred when there is reasonable probability that the firms have collaboratively engaged in prohibited concerted practices. This assessment takes account of matters such as the characteristic of goods or services, the effect of the relevant act, and the frequency and form of contact among firms. This presumption of an agreement is meant to lower the burden of proof on the competition authority. The Korean delegate underlined that the policy has so far been useful. However, the courts have rejected the applicability of the provision in some cartel cases in which the firms' conduct was affected by regulation or other acts by government bodies.

23. The Chair thanked the Korean delegation and concluded this part of the hearing.

3. Collective dominance or monopolisation

24. The Chair invited Professor Petit to discuss the concept of collective dominance and how it can be used in the context of oligopolistic markets.

25. Professor Petit started his presentation by illustrating a problem he called "the merger control blind spot". Professor Petit argued that enforcement in oligopolistic markets relies mostly on an ex-ante approach through merger control. This is complemented, at the margins, by provisions such as Article 101 of the Treaty on the Functioning of the European Union (TFEU) that could be used to address facilitating practices. However, merger control needs a merger in the first place to initiate the review process. Without such a trigger, anti-competitive co-ordinated effects in stable oligopolistic markets can go undetected. Players in an oligopolistic market often do not want to merge, because they know that such a merger would attract antitrust scrutiny and it would risk to be prohibited.

26. Based on these considerations, Professor Petit proposed to redefine the theory of abuse of collective dominance to enable authorities to handle tacit collusion. He focused on a scenario of tacit collusion in which cartel laws could not be applied and in which the parties did not merge. In such a situation, he assumed that an external shock disrupted the market equilibrium. A new tax or disruptive entry requiring quick reactions by the oligopolists are examples of external shocks. After a shock, the oligopolists would choose among a number of new pricing options. They may be successful in avoiding communication and other practices that would fall under cartel laws. Professor

Petit argued that the strategies adopted by oligopolists to re-price collusively through disruption and mitigate its pro-competitive effects could be deemed to constitute unlawful abuses of collective dominance or shared monopolisation. For instance, unilateral signalling strategies could fall under these provisions. The core evidentiary components of this theory of liability would entail proof of: (i) some degree of pre-existing collusion; (ii) disruption; (iii) re-pricing strategy; and (iv) a likely post-disruption return to collusive equilibria.

27. Professor Petit discussed the advantages and disadvantages of his approach, admitting that it is prone to errors because it applies only if there is a disruption. From this point of view, it is similar to merger control. One of the advantages of using abuse of collective dominance provisions, instead of cartel law, in the EU context is that it is difficult to prove an agreement under Article 101 TFEU. This contrasts with the case law on the abuse of collective dominance which is more generous, given that the definition of collective dominance may not be entirely clear.

28. Professor Petit concluded that his approach does not focus on collusion, but on disruption and on the pricing strategies adopted by oligopolists as a consequence of the disruption. Under this theory, one would have to prove likely tacit collusion pre-disruption and that would trigger the application of Article 102 TFEU.

29. The Chair thanked Professor Petit for his remarks and asked the delegation of the European Union whether there was more scope for applying collective dominance in the type of framework set out by Professor Petit. The EU answered that the application of the collective dominance should not become too broad and reserved the opportunity to comment later during the session.

30. The discussion on collective dominance continued with the experience of Chinese Taipei. The Chair asked this delegation to explain the amendments to their Fair Trade Act in this respect.

31. Chinese Taipei explained that the definition of "monopolistic enterprise" in their competition law covers also the situation where two or more enterprises hold a dominant position. The law defines two enterprises as dominant when they have a combined market share of at least two-thirds of the market. Three enterprises are deemed dominant when their combined market share amounts to at least three-fourths of the market. The delegation reported that administrative courts have supported most of the competition authority's decisions on concerted actions.

32. However, a small number of cases were challenged by the courts. The delegation provided the example of a joint price increase by three major industrial paper manufacturers in 2009 – 2010. The court stated that the competition authority did not obtain the sufficient evidence to prove that information had been exchanged among the paper manufacturers. In addition, the dates and rates of the price increases by the firms were different and the defendants were all affected by increasing costs. This case is still pending before the courts. The delegation commented that, under the new law amended in 2015 to provide for the use of circumstantial evidence for concerted practices, the authority should be in a better position for future cases. The Chair thanked the delegation from Chinese Taipei.

4. Countries with other instruments to address oligopolies

33. The session continued with a discussion on other tools agencies use to tackle competition problems in oligopolistic markets. The Chair invited the German delegation to discuss the use of sector inquiries by the Bundeskartellamt.

34. Germany noted that sector inquiries are a useful complementary instrument, but not a substitute for effective competition law enforcement. The Bundeskartellamt can initiate a sector inquiry if there are indications of competition concerns in specific markets. Most sector inquiries deal with oligopolistic markets. Contrary to other jurisdictions, such as the UK, there is no clear link between the result of the inquiry and the possibility to impose remedies. Enforcement actions have to be decided on a case-by-case basis, but the results of the inquiry can be a reason to start an enforcement action.

35. Sector inquiries are very useful instruments to deal with oligopolistic markets and the problem of tacit collusion. To illustrate this point, the German delegation gave two examples of sector inquiries carried out by the Bundeskartellamt. The first concerned rolled asphalt, which is produced by only four leading players on the German market. In the course of the investigation, a network of joint ventures on all regional markets was identified. After the inquiry, the Bundeskartellamt initiated several enforcement procedures to break up the joint ventures with the most severe competitive concerns. These procedures are almost complete and show how a sector inquiry can help

tackle implicit or explicit collusion in the market. The second example concerned the fuel sector, a market often considered conducive to collusion. A sector inquiry was the only tool for the Bundeskartellamt to look into this market in great detail. Again the results of the sector inquiry were used in enforcement actions. For example, in a merger case the results were used in court to support the Bundeskartellamt's view.

36. As a final remark Germany pointed to the challenge of identifying collusive equilibria. It is very difficult to know which equilibrium is realised in the market. This raises doubts on those theories which rely on findings of oligopolistic pricing in the market. It is a dynamic game and it is hard to identify whether a specific price level is really a strong indication for collusion. From the view of an enforcer it seems hardly feasible to use market outcomes for proxies of explicit collusion.

37. Professor Kaplow responded to the last comment from Germany that it is possible to identify co-ordinated oligopoly pricing in a subset of cases. For example if there are disruptions in the market, such as those mentioned by Professor Petit. Professor Petit added that the parties may possess internal documents revealing the existence of tacit collusion. This sort of evidence is helpful to understand whether there is a harmful equilibrium in the market.

38. The Chair commented that there may be situations in which this evidence would be available but that this is not very common. He then asked the United Kingdom to explain why market investigations in the UK are more than a complement to enforcement.

39. The United Kingdom explained that the Competition and Markets Authority (CMA) is allowed to initiate investigations into markets and to look holistically at all aspects of the behaviour of firms and consumers. These investigations are evidence-based and include hearings of interested parties. The CMA has the ability to intervene if there are structural features of the market that may be restricting, preventing or distorting competition. This tool is distinct from an enforcement action under antitrust law, as there is no illegal behaviour on the part of the firms even if there is a finding of adverse effect on competition. At the end of a market investigation, the CMA can impose structural or behavioural remedies, or make recommendations to the government to address the competition issues identified.

40. The UK gave examples on how to tackle the oligopoly problem with market investigations. One of the predecessors of the CMA, the Competition Commission (CC), looked at the cement market, a highly concentrated market. They identified the structural features of the cement market and discovered co-ordination between the three largest cement producers. The CC imposed both structural and behavioural remedies. These included the divestment of one plant to create a new independent producer. It is hard to see how the problems of this market could have been tackled with another tool. The market investigation allowed for interventions that moved the market away from the previous equilibrium.

41. The second example shows how market investigations can help addressing "poor" equilibria in markets where no firm has an individual incentive to move away from the equilibrium. An investigation in the payment protection insurance (PPI) market found high profits, low claims ratio and very little price competition. PPI was sold to consumers who had bought credit products such as personal loans, mortgages, secured loans and credit card debt. It was typically sold to consumers at the same time as the associated credit product. The CC concluded that PPI prices were higher and choice was lower than it would have been in a well-functioning market. The authority imposed a number of remedies, including a ban on selling PPI at the credit point-of-sale, a ban on single premium policies and informational remedies.

42. In the broader context of market investigations, the UK explained that these can also "clear the air" when investigations do not identify competition problems. For example, in its market investigation on the UK grocery market the CC did find some competition concerns, but was able overall to dismiss most of these concerns through an in-depth review of the sector. The CC held over 80 hearings and collected more than 100 submissions from grocery retailers and more than 600 submissions from consumer groups and other interested parties. This provided robust evidence to dismiss any competition concerns (or "clear the air").

43. The Chair thanked the UK delegation for the intervention and invited BIAC to comment on whether market investigations are a useful tool.

44. BIAC stressed the importance of distinguishing between investigations where there is evidence of improper conduct and investigations started simply because of concerns with a particular market structure. BIAC endorses investigations if there is evidence of improper conduct, as seemed to be the case in the Chinese Taipei paper case or the cement investigation in the UK. But BIAC stated that it is opposed to the regular use of market studies as a tool to look into a market for the sake of it. BIAC emphasised that the ability to impose remedies after a market study would be a power more suitable to a regulator than to a competition authority. BIAC added that the business community is especially concerned that the authority who has undertaken the study may feel the pressure to take some form of action, simply to justify the cost of these long investigations. BIAC argued that market studies, in principle, should be performed rarely and in exceptional circumstances.

45. The Chair thanked BIAC for the useful remarks and asked the US delegation to describe their activities in the area of advocacy and to explain how the "unfair methods of competition" provision is used in oligopolistic contexts.

46. The United States addressed the point on competition advocacy by giving three examples. In one case, the Federal Trade Commission (FTC) issued several opinions to the Federal Energy Regulation Commission (FERC) on electricity deregulation and the danger that a government monopoly would be replaced by privately-owned dominant firms, with strong incentives to collude rather than to compete. The FTC encouraged the regulator to rely to the greatest extent possible on structural mechanisms to favour more competition. In particular, it suggested to avoid behavioural remedies that would, in effect, force firms in a non-competitively structured market to act in ways contrary to their economic interest. In another case, the FTC issued an opinion to the environmental protection agency on greenhouse gas emissions. The agency was encouraged to be careful about mandating disclosures of various categories of sensitive information, which may facilitate collusion. As another example of competition advocacy, the FTC comments on proposed laws and regulations at state level. For example many US states enact "certificates of need" regulation in the healthcare sector. This means that new facilities can be created or existing facilities can be expanded only if the state recognises that there is a genuine need in a community. In concentrated hospital markets, oligopolistic behaviour can be enhanced if entry is potentially restricted through the use of these regulations.

47. The US delegation also noted that Section 5 of the Federal Trade Commission Act enables the FTC to address certain conduct not reachable by the Sherman and Clayton acts that is likely to harm competition and consumers, especially but not exclusively, in oligopolistic markets. For example, Section 5 allows the FTC to tackle conduct such as unilateral invitations to collude, which cannot be reached by the Sherman Act (which requires the establishment of an agreement). The US concluded that anti-competitive conduct in oligopolistic markets can be addressed also with traditional Sherman Act tools and not only through advocacy and Section 5 tools.

48. In response to the earlier comments by BIAC, Germany took the floor and noted that in a sector inquiry there is always an element of uncertainty on the competition concerns that can be found. If there was stronger evidence of anti-competitive conduct, the agency could always initiate an enforcement proceeding. It is also true that a competition authority conducting a sector inquiry is under a certain pressure to find something. It is up to competition authorities to resist that pressure when there is no evidence of a competition concern.

49. The Chair thanked the US and the German delegations for their comments. He noted that the discussion was leading towards some kind of consensus: cases that could be targeted would be those where there was a disruptive element and evidence that pricing was inconsistent with competition on the market.

5. Co-ordinated effects in mergers

50. The Chair concluded the discussion on market studies and other instruments used to address the oligopoly problem, and invited Dr Jorge Padilla to open the discussion on the analysis of co-ordinated effects in merger control.

51. Dr Padilla explained that tacit co-ordination can result in higher prices. Merger control is a pre-emptive instrument which can be used to tackle tacit co-ordination in oligopolistic markets. Dr Padilla referred to the conditions set out in the EU guidelines for a merger to produce co-ordinated effects: i) a merger produces co-ordinated effects when it causes firms to stop competing aggressively by maximising their short-term profits and to

tacitly co-ordinate their pricing and/or non-pricing strategies; ii) a merger makes tacit co-ordination easier, more stable or more effective for firms that were already co-ordinating before the merger, either my making the co-ordination more robust or by permitting firms to co-ordinate on even higher prices.

52. According to Dr Padilla, a merger is likely to enhance the likelihood of co-ordination if it facilitates detection and punishment, if it reduces the profits from deviation and if it increases the profits from co-ordination. These ideas were incorporated by the European Courts in the *Airtours* criteria, according to which co-ordination is more likely when firms are similar, and therefore their incentives to collude are symmetric, when there is sufficient transparency, when the punishment of a deviation is credible and when the profits from co-ordination are high. Dr Padilla noted that the *Airtours* judgment also emphasised that it is not enough to analyse whether the market is conducive to co-ordination, but it is also necessary to assess whether the merger changes any of these conditions.

53. Dr Padilla acknowledged the difficulty of assessing all the conditions outlined above. However, he argued that it is worth assessing the co-ordinated effects of mergers, because the impact on prices and consumer welfare of co-ordinated behaviour is bound to be greater than the impact of a change in unilateral conduct. A second argument for looking at co-ordinated effects in mergers is that *ex-post* enforcement is not very effective.

54. As a way forward, Dr Padilla suggested to apply a low materiality threshold when assessing unilateral effects. If co-ordinated effects theories are not applied frequently, it makes sense to be stricter in the assessment of unilateral effects. In addition – as Professor Kaplow suggested – one should concentrate on mergers in markets which are highly conducive to co-ordination, in highly concentrated markets where unilateral effects may be limited. Furthermore, authorities should focus on homogeneous products industries, especially if firms compete along a single dimension and if transactions are frequent. Authorities should be especially vigilant on markets with a history of explicit collusion and markets with evidence of dynamic pricing and price wars, since mergers can help eliminate the frictions that generated those wars and help firms co-ordinate.

55. The Chair thanked Dr Padilla for his presentation and invited Portugal to discuss their experience with quantitative techniques in merger cases.

56. Portugal noted that the two cases described in the written contribution should illustrate that single pieces of evidence can only be a component part of a fuller story. In the BCP/BCI merger, quantitative assessments were used to understand the impact of the merger on the incentive to collude. Payoffs from collusion pre- and post-merger were compared and this showed that firms had to gain from collusion as a result of the merger. However, this exercise does not indicate how likely collusion is. To increase the incentives to collude does not necessarily translate into higher likelihood of co-ordination.

57. According to the Portuguese delegation, the relevance of quantitative analysis should not be underestimated, as it may suggest the need of further investigations into the possibility of co-ordinated effects resulting from a merger. But the relevance of quantitative analysis should also not be overestimated, since it is only one of the elements to be taken into account. Other factors to consider are the characteristics of the market, the ability to reach the terms of co-ordination and internal and external stability of the co-ordination outcome. In addition, the authority has to assess whether the merger makes co-ordination easier, more stable and more effective.

58. In the BCP/BCI merger, the competition authority detected some characteristics of the market which could make it more vulnerable to co-ordination. But the authority considered that any co-ordination mechanism would necessarily have to include one of the market leaders and these leaders did not participate in the merger. The analysis did not provide indication that these players, if outside the merger, would change their pricing strategies, which had historically been rather aggressive in some of the relevant markets. Therefore, the external stability of the co-ordination outcome could not be taken for granted. Although the quantitative results showed substantial added payoff from collusion as a result of the merger, the authority considered that a theory of harm based on co-ordinated effects would be fragile as the merger seemed not to have an impact on the ability and likelihood of co-ordination. The merger was nonetheless challenged, based on concerns of unilateral effects, and was cleared with remedies.

59. The Chair thanked the Portuguese delegation and gave the floor to Australia.

60. The Australian delegation noted the challenges in convincing a court that there is likely to be a connection between increased market concentration and firm behaviour, outside the extreme case of monopoly. In the Macquarie/AGL Energy merger, the Australian Competition and Consumer Commission (ACCC) presented evidence suggesting that the structure of the retail electricity market post acquisition would be dominated by three large vertically integrated generators – retailers. However, the court believed that the ACCC provided no empirical support for its contention that three large generators – retailers were likely to result in a less competitive market. The Australian delegation concluded that economic modelling of competition in the market may have provided some guidance on the potential for competitive harm. However, it is not clear that the court would have placed much weight on the predictions from economic models alone.

61. Dr Padilla explained that he was struggling with the idea that the reason why there are relatively few co-ordinated effect cases in merger control is because of difficulties with modelling. Models and quantitative evidence used to predict co-ordinated effects in mergers are not different, in terms of complexity, from the models used in the analysis of unilateral effects. However, a more credible reason why there are few co-ordinated effects cases in Europe is that applying the *Airtours* conditions is complicated. He argued that one should try to simplify their implementation and to use quantitative modelling as a complement to other analysis, as it is the case in unilateral effects cases.

62. Germany added that, in co-ordinated effects cases, simulations can only quantify incentives for collusion in the market. In unilateral effects cases, the merger simulation can give clear indications on the extent of the price increase following the merger. This makes the use of quantitative techniques in co-ordinated effects cases more complicated.

63. The United States noted that in mergers where there is a risk of co-ordinated behaviour the agency can often rely on documents that are created in the ordinary course of business. These documents often indicate that the firms are already trying to take into account the likely competitive response of the rival. Often these documents provide insights on whether the rival is perceived to play along or whether it is viewed as a maverick. These are the reactions you would expect if the market was already susceptible to co-ordinated interaction. The quantitative and the qualitative analysis should support each other in these circumstances.

64. With regard to the *Airtours* criteria, Italy added that the legal burden is too high and that this is the reason why there is so little case law.

65. The Chair asked Chile to describe the combined effects of a number of decisions in the market for wholesale fuel distribution, as an example where the enforcer brought first cartel charges and, years later, blocked a merger. The Chilean delegation explained that in 2004 the National Economic Prosecutor's Office (FNE, Fiscalía Nacional Económica) brought a cartel claim against petrol stations based on evidence of price parallelism, high margins and vertical integration. However, the Competition Tribunal (TDLC, Tribunal de Defensa de la Libre Competencia) decided that this evidence was not enough to support a cartel claim. When eight years later, two of these firms filed for a merger, the Competition Tribunal prohibited the merger based on the same type of evidence used for the cartel case. However, the Supreme Court reversed the decision arguing that the prohibition of the merger was not proportionate to the co-ordination risk raised by the merger. The Supreme Court approved the transaction but also acknowledged the co-ordination effects resulting from the merger and imposed structural remedies.

66. The Chair highlighted that the same evidence that was not sufficient to establish some type of collusion was accepted in the context of a merger.

67. Dr Padilla agreed with the Chair's comment and added that perhaps in the case of the acquisition of a maverick it might be easier to convince courts of the risk of co-ordinated effects. According to Dr Padilla, agencies should investigate the likely impact of co-ordination and how significant the co-ordination risk is in comparison to the pre-merger equilibrium. He underlined that the *Airtours* conditions should not be viewed as a barrier. Authorities should not try to cover the four criteria separately, but should instead have a coherent theory of harm supported by evidence, and not necessarily models.

68. The Chair concluded the session by observing that the discussion was rich and covered many analytical issues. He thanked the expert panellists for their insights, all the participants in the discussion and the delegates.