

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

**Draft Summary Record: DRAFT SUMMARY RECORD OF THE 123rd MEETING OF THE
COMPETITION COMMITTEE HELD ON 16-18 JUNE 2015**

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DRAFT SUMMARY RECORD

1. Adoption of the draft agenda

The Committee adopted the draft agenda [[DAF/COMP/A\(2015\)1/REV1](#)].

On behalf of the Committee, the Chair welcomed Mr. Dong Kweon Shin, Commissioner at the Korean Fair Trade Commission. He also congratulated Ms Christine Meyer, Director General of the Norwegian Competition Authority for her recent appointment as Head of the Statistical Office of Norway, and thanked her for her many contributions to the Committee work over the years.

2. Approval of the draft Summary Record of the last meeting

The Committee approved the summary record of its previous meeting [[DAF/COMP/M\(2014\)3](#)].

3. Hearing discussion on Disruptive Innovation

On 16 June 2015, the Committee held a hearing to discuss new technologies and business models that profoundly disrupt existing industries, and the opportunities and challenges that these “disruptive innovations” pose for competition policy. The discussion was supported by a panel of experts: Dr. John Fingleton (Fingleton Associates, UK), Prof. Daniel Crane (University of Michigan, US) and Ms. Salle Yoo (General Counsel, Uber). In addition, several delegations, including the US, EU and UK presented their experience. As part of the BIAC delegation, Mr. Munesh Mahtani (Senior Competition Counsel, Google) participated actively to the discussion.

The discussion highlighted the significant benefits that disruptive innovations can bring to competition and consumers. At the same time, it was acknowledged that there are situations in which disruptive innovations are hindered by regulations designed for traditional business models. Disruptive innovations can sometimes be argued to obviate the need for such regulations because they address the underlying policy concerns (e.g. safety, consumer protection) or market failures that prompted the regulation in a different way. Or, sometimes the disruptive innovation simply casts a spotlight on seemingly already outdated, overly restrictive regulation in a way that was not apparent before. In either case, competition authorities can help ensure that such regulations do not unduly restrict competition by engaging in various forms of competition advocacy (or, perhaps, enforcement, in those jurisdictions where the competition authority has tools to challenge anti-competitive regulations).

The discussion identified several challenges: 1) there can be particularly strong resistance to disruptive innovation by incumbents, coupled with regulatory capture; 2) regulations hindering disruptive innovation may be highly fragmented (e.g. regulations at the local or at least sub-national level); and, 3) rightly or wrongly, there may be fairness or level-playing field concerns if regulations are deemed to apply only to the incumbents’ business model and not to the disrupters’ competing business model. It was also suggested that this is an area where competition advocacy efforts might benefit from greater international co-operation and experience sharing since disruptive innovations may tend to raise similar issues across multiple jurisdictions at the same time.

The discussion also briefly touched on the potential enforcement challenges that disruptive innovations can raise in the context of anti-competitive conduct cases or mergers (among incumbents, or between incumbents and disrupters). For instance, are traditional analytical tools like market definition well-suited for markets undergoing potential disruption? Can competition authorities adequately predict whether, when and how such innovations will change competitive dynamics? There was a general interest for the Competition Committee to come back to these questions in the future.

A detailed Summary record of the Committee discussion will be circulated separately under [DAF/COMP/M(2015)1/ANN2]. All of the materials for the hearing are available at: <http://www.oecd.org/daf/competition/disruptive-innovations-and-competition.htm>

4. Reports by Working Party Chairmen and by Coordinators

4.a. Competition Policy and Regulation

The Committee took note of the report presented by the Chair of Working Party No. 2 (WP2) on the workshop that took place on 22 April 2015. The workshop was organised in the context of the strategic theme on ex post evaluation and it was very well attended: 34 delegations were present in Paris with many representatives from the Chief Economist offices, and many delegations participated remotely. A large part of the seminar was dedicated to discuss actual examples of ex post evaluation. The UK, the Netherlands and Mexico presented three case studies (two on merger cases and one on a cartel case), which were subsequently thoroughly discussed.

The seminar also included a roundtable on Benefit of Ex post Evaluation. The main question addressed by participants was why ex post evaluation is important for competition authorities. All agreed that post evaluation helps agencies better enforce the competition law, as they learn from past, positive and negative, experiences. Participants also agreed that availability of data is key for an effective and useful ex post evaluation and that lack of reliable data can be a great challenge for agencies who wish to engage in this self-assessment. Agencies also concluded that ex post evaluation can be also important for accountability of competition authorities, as it helps showing impact of their activities on markets. Participants also discussed the many ways in which agencies can do ex post assessment, and concluded that many of these methods may have limitations, but that it is nevertheless important to continue do ex post evaluation.

The WP2 Chair also reported that WP2 approved amendments to Volumes 1 and 2 and the new Volume 3 of the Competition Assessment Toolkit. The amendments and the new volume were consequently presented to the Competition Committee for approval. Absent objections from delegates, the Committee adopted the amendments to Volumes 1 and 2 and the new Volume 3 of the Competition Assessment Toolkit.

4.b. Co-operation and Enforcement

The Committee took note of a report by the chair of Working Party No. 3 (WP3), on its 15 June meeting, notably on the following items:

- Relationship between Public and Private Enforcement: The discussion based on a Secretariat paper and 24 written contributions addressed the current state of private enforcement in OECD members and other selected jurisdictions. Delegates reviewed initiatives to promote more private enforcement and the tools available for this purpose. Many delegations referred to the ongoing reforms at European level following the adoption of the European Directive on Antitrust Damages Actions in December 2014. The roundtable focused especially on the relationship between public and private antitrust enforcement. There was a broad agreement that private enforcement can substantially improve the functioning of a competition regime. There was also agreement that individuals and firms who suffer injury from anti-competitive conduct should be entitled to reasonable compensation. Many delegations, however, emphasised that it is important to strike the right balance between public and private enforcement. Antitrust policy and antitrust law enforcement, including private enforcement, should be viewed as an integrated policy system in which numerous factors contribute to the complementary goals of deterrence and compensation. A detailed summary record of this discussion will be circulated separately as [DAF/COMP/M(2015)1/ANN3].
- Future work: Subject to further consultations with the other Chairs and with the Secretariat, WP3 agreed that a Roundtable on “Cartel Cases Involving Intermediate Goods” will take place in October 2015. Other topics that were suggested for consideration by WP3 included a discussion on how to define the “jurisdictional nexus” in merger regimes and a roundtable on “Public Interest Considerations in Merger Assessment”.

4.c. UNCTAD

The Committee heard a presentation from the UNCTAD co-ordinator on the 7th United Nations Conference to Review the UN Set of Competition Policy, which was scheduled to take place in Geneva on 6-10 July 2015. The agenda of the UN Conference included the following issues: Roundtable on The Role of Competition Policy in Promoting Sustainable and Inclusive Growth and Development; Voluntary Peer Reviews of Competition Law and Policy in Albania, Fiji and Papua New Guinea; Roundtable on Ways and Means to Strengthen Competition Law Enforcement and Advocacy; Roundtable on the Role of Competition in the Pharmaceutical Sector and its Benefits for Consumers; Seminars on (i) Competitive Neutrality and (ii) Enhancing International Deterrence of Cartels; Roundtable on International Cooperation in Merger Cases as a Tool for Effective Enforcement of Competition Law; Review of the Implementation of the United Nations Set of Principles on Competition Policy, including consultations on the revised chapters of the UNCTAD Model Law on Competition; Roundtable on Feedback for Improving the Efficiency of the Application of UNCTAD Voluntary Peer Reviews; and a Roundtable on Review and Perspective of Capacity-building and Technical Assistance on Competition and Consumer Protection Law and Policy.

4.d. ICN

The Committee could not hear the update from the ICN/OECD Coordinator who, however, sent the following statement after the meeting for inclusion in the Summary Record: In the past number of months there has been regular dialogue between the representatives of the ICN and OECD about ongoing and future work with a view to improve coordination. These discussions led to: having OECD representation at the ICN Annual Conference in Sydney; OECD representatives actively participation in all five ICN Working Groups; and the establishment of a principal point of contact at the OECD Secretariat (the OECD's Global Relations Manager) to communicate any coordination concerns. Further details on the upcoming work of the ICN will be provided at the Competition Committee meetings in October 2015.

5. Hearing discussion on Approaches to Issues in Oligopoly Markets

The Committee held a hearing discussion on the challenges to competition authorities posed by oligopolistic markets, where firms may tacitly co-ordinate. There was significant interest and participation in this hearing, with more than 15 written contributions from members and non-members. The discussion was supported by a panel of experts: Prof. Louis Kaplow (Professor of Law and Economics, Harvard University, US), Dr. Jorge Padilla (Senior Managing Director, Compass Lexecon Europe) and Prof. Nicolas Petit (Professor of Law, University of Liege, Belgium).

In particular, the Committee discussed the current emphasis on inter-firm communications in proving unlawful cartel agreements and debated the pros and cons of an alternative, more direct, approach proposed by Prof. Kaplow. The Committee examined different tools available to competition authorities to address tacit co-ordination including market studies and market investigations, and provisions on abuse of collective dominance or joint monopolisation. On the subject of collective dominance, the Committee heard a proposal from Prof. Petit for the application of abuse of collective dominance provisions to situations where oligopolists engage in conduct that helps them re-institute a (tacitly) collusive price following a disruption of a previously (tacitly) collusive equilibrium. The session concluded with an extensive and lively discussion on the analysis of co-ordinated effects in merger control, following a presentation by Dr. Jorge Padilla. The Committee discussed the merits and challenges of bringing cases based on this theory of harm and of presenting suitable evidence to courts, particularly quantitative evidence. In general, delegates acknowledged the potential for enforcement gaps in oligopolistic markets when firms tacitly co-ordinate, but were mindful that the antitrust laws should be interpreted in a way that is predictable for businesses and does not produce unnecessary chilling effects.

A detailed Summary record of the Committee discussion will be circulated separately under [DAF/COMP/M(2015)1/ANN4]. All of the materials for the roundtable are available at: <http://www.oecd.org/daf/competition/oligopoly-markets.htm>

6. Relations with non-Members

The Committee took note of the Secretariat report informing delegates of activities related to non-members developed by the Secretariat in the framework of the Committee Global Relations Strategy. The Secretariat reported in particular on recent activities and developments during the period July 2014 – May 2015.

The Committee also heard a presentation by Commissioner Shin, head of the Korean delegation, on the importance of competition advocacy in the Asian region and in particular on the advocacy and capacity building role played by the OECD/Korean Policy Centre in the region.

7. Experiences with the Use of Market Studies

The Committee heard a Secretariat presentation on the main findings of project by the OECD and the UK Foreign and Commonwealth Office launched in 2014 that aimed to provide support to Chile, Colombia, Costa Rica, Mexico, Panama and Peru in their use of market studies as an important competition tool.

The objective of the project was to run an in-depth analysis of methodologies in place, analyse best practices in some OECD countries and provide these countries with advice on how to improve their current legal framework and practices. Nine agencies in the selected countries are responsible for undertaking market studies. Through a detailed questionnaire and missions to these countries, the OECD collected information on their legal powers, the process for selecting markets to study, the methodology used, the results obtained and how these are evaluated. An in-depth analysis of this information, led to the identification areas for improvement. In parallel, the OECD studied the institutional and legal set-up and the good practices adopted in experienced OECD jurisdictions. This information was used to suggest how the use of market studies could be strengthened in the six countries. A final Report was officially launched in Santiago, Chile on 18 March 2015 during a two-day regional conference to promote the use of market studies by competition authorities in Latin America.

The presentation of the project was followed by a discussion on the usefulness of market studies and on country experiences with the use of this tool. The discussion showed that while there are many commonalities among OECD and non-OECD jurisdictions, there are also many differences with respect to the objective and purposes that agencies pursue with market studies, the powers that agencies have to collect information necessary to perform the market study, the way agencies prioritise the markets or industry sectors to analyse. It was therefore decided that the OECD should devote some work to this area of competition law and policy starting from the next meeting in October 2015.

8. Hearing and Roundtable discussions on Competitive Neutrality

On 17 June 2015, the Competition Committee held two sessions on Competitive Neutrality, a Hearing and a Roundtable. The purpose of both discussions was to explore the challenges and distortions of the playing field arising from state intervention. The Hearing covered the approached to competitive neutrality in several policy fields represented at the OECD; the Roundtable focused on competition enforcement related issues.

The Hearing consisted in a two-hour horizontal dialogue with experts from various OECD policy communities: corporate governance, investment, trade, tax, telecom, and transport. Experts, often the chair or vice-chair of the relevant OECD committee or working party, presented the ongoing work on competitive neutrality in their respective policy field. They explained which types of distortions their policy communities were concerned with and presented the tools and initiatives developed to address them. They were also invited to identify remaining challenges to ensuring a level playing field.

The Hearing emphasised the complementarity and the differences between the various approaches to competitive neutrality across the OECD. Different policy fields tend to concentrate on different dimensions of competitive neutrality: some focus more on the distortion of the level playing field between domestic and foreign players, other focus more on competitive neutrality as a domestic policy; some look at distortions between public and private actors. Differences also relate to the nature of the distortion addresses, e.g. state ownership, (de)regulation, differential laws treatment, subsidies, public and economic services. At the same time as showing different approaches to competitive neutrality, the Hearing also raised potential for synergies and complementarities, offering

an opportunity to look into competitive neutrality through a wider perspective. Representatives of each policy area also reflected on the importance of competition in the first place, and on the role of competition policy to ensure competitive environments.

The Hearing was followed by a Roundtable on Competitive Neutrality in Competition Policy. This discussion benefitted from 25 written contributions and from the participation of three expert panellists: Prof. Pierre-André Buigues (Professor of Business and Industrial Policy, Université de Toulouse, France), Prof. Thomas Cheng (Associate Professor of Law, University of Hong Kong, China) and Prof. Nicolas Petit (Professor of Law, University of Liège, Belgium).

Delegates discussed why competitive neutrality matters, hence the need to identify and tackle outstanding competitive neutrality distortions. They shared experiences revealing how the state, both at central and local level, can affect and distort competition: e.g. through state-owned or state-supported enterprises, through subsidisation or state aid, through entrustment of public service obligations to certain economic actors, or through distortionary and restrictive regulation. Each type of distortion calls for a distinct response and the discussion explored the rules and tools available across jurisdictions to address these competitive neutrality distortions. Some jurisdictions have specific competitive neutrality rules and frameworks, which may or may not be part of their competition policy. Other jurisdictions identified specific mechanisms which have proven useful in ensuring a level playing field in the market, although not part of their competition policy toolkit.

The Roundtable also looked at specific challenges arising when competition authorities enforce competition law against state-related activities and firms. All jurisdictions agree on the principle that competition law and enforcement should apply broadly, even in cases where the state has played a role or has an interest in the distortion under scrutiny. In other words, competition rules should apply equally to economic activities regardless of the involvement of the state, or the ownership or nationality of the actors involved. The discussion highlighted the importance and role of competition policy tools against any form of competition distortion. Competition authorities, however, face a number of challenges which can be institutional (e.g. government influence or veto on a case), practical (e.g. difficulties in collecting relevant data from a state-owned or state-supported enterprise) or substantive (e.g. competition rules may not always be well-suited to assess conduct of a state-owned or state-supported enterprise).

A detailed Summary record of the Committee discussions on Competitive Neutrality will be circulated separately under [DAF/COMP/M(2015)1/ANN5]. All of the materials for the Hearing and the Roundtable are available at: www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm

9. Annual Reports

9.a. Reports submitted for consideration:

Estonia - [DAF/COMP/AR\(2015\)2](#)

Greece - [DAF/COMP/AR\(2015\)3](#)

Ireland - [DAF/COMP/AR\(2015\)5](#)

Luxembourg – DAF/COMP/AR(2015)6

Mexico - [DAF/COMP/AR\(2015\)7](#)

Poland - DAF/COMP/AR(2015)8

Spain – [DAF/COMP/AR\(2015\)25](#)

United States – [DAF/COMP/AR\(2015\)10](#)

9.b. Reports submitted for information:

Belgium – [DAF/COMP/AR\(2015\)11](#)

Czech Republic – [DAF/COMP/AR\(2015\)12](#)

Denmark – [DAF/COMP/AR\(2015\)26](#)

Finland – [DAF/COMP/AR\(2015\)14](#)

Israel – [DAF/COMP/AR\(2015\)15](#)

Slovak Republic – [DAF/COMP/AR\(2015\)16](#)

Sweden – [DAF/COMP/AR\(2015\)17](#)

Turkey – [DAF/COMP/AR\(2015\)18](#)

Brazil – [DAF/COMP/AR\(2015\)19](#)

Colombia – [DAF/COMP/AR\(2015\)20](#)

Latvia – [DAF/COMP/AR\(2015\)21](#)

Lithuania – [DAF/COMP/AR\(2015\)22](#)

Romania – [DAF/COMP/AR\(2015\)23](#)

Russian Federation – [DAF/COMP/AR\(2015\)24](#)

10. Follow-up discussion on Changes in Institutional Design

The Committee continued the discussion started in December 2014 on Changes in Institutional Design of Competition Authorities. The discussion focused on three areas that were not covered in December due to lack of time, namely: 1) prioritisation; 2) staffing strategies; and 3) separation of investigative and decision-making functions. As in December, delegates presented a range of perspectives. While delegates agreed that there is no ‘one-size-fits-all’ approach, a number of useful trade-offs were discussed.

- **Prioritisation:** The first topic explored the extent to which agencies are able to prioritise the cases/complaints they receive, the criteria they consider when doing so, and how those criteria are determined. Delegates discussed the importance of having a sufficiently objective and transparent prioritisation system for predictability and accountability purposes, while also maintaining agency discretion in order to preserve independence and ensure that the agency can respond in a flexible way to the competition issues that arise.
- **Staffing Strategies:** The second topic explored the staffing strategies that agencies use to integrate legal, economic and other specialised skills (e.g. investigative, project management, sector expertise, etc.) in their case work to ensure both analytical rigour and efficiency of investigations. Delegates discussed, among other things, the merits of internal staff mobility, the use of horizontal work teams, and the pros and cons of having separate reporting lines for lawyers and economists on case teams, and allowing them to make separate recommendations to decision-makers.
- **Investigative and decision-making functions:** The third topic explored the extent to which investigation and decision-making functions are integrated within the competition agency, or carried out by separate bodies. In this connection, delegates discussed the trade-off between efficiency and fairness of process, and how a balance between these aims can be achieved in different ways in different institutional designs through a variety of internal and external checks and balances.

A detailed Summary record of the Committee discussion will be circulated separately under DAF/COMP/M(2015)1/ANN6. All of the materials for the roundtable are available at: <http://www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm>

The discussion was Confidential, and only the Members and the European Union were present for this discussion.

11. Accession Review of Colombia

The Competition Committee discussed and approved the draft Formal Opinion of the Competition Committee to the OECD Council in relation to the accession of Colombia to the membership of the Organisation [DAF/COMP/ACS(2015)2]. The discussion was based on an Updated Report on the Accession Review of Colombia [DAF/COMP/ACS(2015)3] and on an Additional Memorandum sent by the Colombia Government [DAF/COMP/ACS(2015)4].

The discussion was Confidential, and only the Members and the European Union were present for this discussion.

12. In-depth Review of Denmark

The Competition Committee carried out a review of the competition law and policy of Denmark on the basis of the Secretariat's background report [DAF/COMP(2015)1].

The delegation of Denmark was led by Ms Agnete Gersing, Director General of the Danish Competition and Consumer Authority and included two Deputy Directors General, Mrs. Bitten Soerensen, Mr. Carsten Smidt. The review began with an overview presentation by Ms Gersing focused on current enforcement efforts and priorities, and on recent legislative developments. This presentation was followed by a question-and-answer session, led by Greece, Norway, Mexico, Korea and Finland, covering topics addressed by OECD instruments on competition policy – Cartels, Mergers, Regulatory issues and International co-operation – and other issues of institutional structure and enforcement record.

The review focussed on the challenges to the Danish Competition and Consumer Authority's (DCCA) effectiveness resulting from structural and procedural features of Danish laws and competition framework. Two areas were discussed at great length: the complexity of the judicial review of the decision of the DCCA; the legal standard (which is a criminal standard) for imposing sanctions for infringements of the competition law; and the regime for exceptions and exemptions from the competition law.

13. Other business

13.a. Information points

The Committee heard oral presentations by the Secretariat on two OECD horizontal projects:

1. Trust and Business project (TnB): The project aims to help companies bridging the implementation gap in the application of international standards for business conduct by promoting the integration of business integrity considerations into solid corporate governance frameworks.
2. Inclusive growth initiative: The Inclusive Growth (IG) initiative was launched in 2012 in the midst of the crisis, in a context of persistently high joblessness and growing inequalities. The initial two-year effort produced a multidimensional approach to IG and provided a Policy Framework to assess, promote and monitor inclusive growth.

The Committee also heard a presentation on the development in the Romanian competition assessment project: The Secretariat and the Romanian Competition Council reported on the developments in the Romanian competition assessment project.

13.b. Future dates for Competition Committee meetings

Competition delegates agreed on the following proposed dates for the 2017-2018 meetings:

- 5-9 June 2017: Working Parties and Competition Committee (from Monday to Friday inclusive).
- 4-8 December 2017: Monday to Friday including the Global Forum on Competition on 7 and 8.
- 4-8 June 2018: Working Parties and Competition Committee (from Monday to Friday inclusive).
- 26-30 November 2018: Monday to Friday including the Global Forum on Competition on 29 and 30.

13.c. Future Work

The Committee agreed to hold a substantive discussion on price relationship agreements (i.e. those vertical agreements between suppliers and retailers that specify a relative price relationship between competing products or competing retailers), with a particular emphasis on Across Platform Parity Agreements (APPAs). In consideration that it will be a short Committee session, given the Global Forum on Competition on Thursday 29 and Friday 30 October, the Committee discussed possible topics for a second session: market studies, disruptive technologies and potentially something on competitive neutrality. It was agreed that the Chair would liaise with delegates to confirm the agenda for the October session after the Committee meeting.