

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

Draft Summary Record: 126th meeting of the Competition Committee

**29-30 November 2016
OECD Conference Centre, Room CC1**



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*Draft Summary Record of the Competition Committee
29-30 November 2016*

1. Adoption of the Draft Agenda

1. The Committee adopted the draft agenda [[DAF/COMP/A\(2016\)2/REV2](#)]

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

2. The Committee approved the summary record of its previous meeting [[DAF/COMP/M\(2016\)1](#)].
3. The Committee also approved the confidential Summary Record of the Accession Review of Costa Rica [[DAF/COMP/ACS/M\(2016\)5](#)]

3. Hearing on Big Data

4. The Competition Committee held a Hearing on Big Data. The discussion was based on the background note prepared by the Secretariat, with the support of Professor Maurice Stucke (Professor of Law at the University of Tennessee and co-founder of the Data Competition Institute). The session benefitted from the participation of a panel of speakers from academia, private sector and public agencies: Maurice Stucke (Professor of Law at the University of Tennessee), Hal Varian (Chief Economist at Google and Professor at Berkeley School of Information), Geoffrey Manne (Executive Director of the International Centre for Law and Economics and member of the US FCC's Consumer Advisory Committee), Annabelle Gawer (Professor of Digital Economy at the University of Surrey) and Alec Burnside (Managing Partner at Cadwalader). In addition, the session benefitted from oral interventions from five jurisdictions, a written contribution by BIAC and a note on online platforms by Professor Gawer.

5. The Hearing on Big Data aimed to identify some of the competition challenges brought by the increasing use of consumer data for commercial purposes, and to discuss possible reactions by competition authorities and other agencies.

6. Professor Gawer explained that while “big data” is a new concept, not all competition problems raised by Big Data are necessarily new. Indeed, traditional platforms facing high fixed costs and serving as an interface between multiple products benefit from economies of scale and scope. Likewise, multi-sided markets pre-dating the digital revolution already gave rise to network effects. It is also a common misconception that network effects necessarily lead to winner-takes-all markets, as there are many counterexamples of markets with network effects that have not been monopolised. However, unlike traditional markets involving simple money transactions between consumers and suppliers, Big Data has faded the line separating demand from supply agents, allowing the user of an online service to behave simultaneously as consumer and producer of data. In turn, that data can be immediately consumed by the supplier to improve the quality of the service, leading to a real-time feedback loop that was not observed before.

7. Professor Varian argued that data does not necessarily act as a barrier to entry since, regardless of its size, data is nowadays very cheap to collect, can be easily generated by small companies through multiple mechanisms (point of sale cash registers, weblogs, sensors...) and faces decreasing returns to the number of observations.

Moreover, Professor Varian claimed that the so called user feedback loops resemble a supply phenomenon known as learning-by-doing, which is virtually present in all industries, and that data is useless unless it can be turned into knowledge and action using data analytics, which requires heavy investment in complementary assets such as hardware, software and expertise. Due to cloud computing and open source tools, some of the fixed costs of these investments have been converted into variable costs, allowing small companies to enter the market. Therefore, data is not valuable per se; instead, business success depends more on the ability of high technology companies to develop new predictive algorithms, incorporate new regressors into the analysis and attract labour with expertise. Finally, Professor Varian noted that in digital markets we can usually observe incumbents competing across several products, as well as a dynamic competitive pressure exerted by entrants that are constantly coming with new ideas.

8. Professor Stucke argued that while market forces allow for an increasing number of free products and services, consumers feel that they have lost control over their own data. Data-driven networks effects may enable companies to exert market power in quality dimensions of competition, such as the reduction of consumer privacy (for instance, by acquiring sensitive data or using data in ways that are contrary to consumers' wishes). These network effects are not inherently good or bad, as they can also improve the quality of the product, but they should still be considered as part of the competitive analysis. Unfortunately, most competition tools, including the SSNIP test, are centred on price effects, and we still lack the analytical tools to access non-price parameters. Alternative tools such as the SSNDQ test (for a small but significant and non-transitory decrease in quality) were proposed in an OECD roundtable, but they are still hard to implement in the absence of good quality measures. Professor Stucke concluded with some recommendations for competition authorities, such as identifying intersections between privacy and competition policy, cooperating with other agencies, developing new tools to measure quality effects and tackling data-related exclusionary practices.

9. Mr. Manne counter-argued that antitrust law is not necessarily well suited to promote privacy rights, which should be a matter of consumer protection law. Firms do not need to have market power to violate privacy rights and, even if they do, it would still be necessary to prove abuse of dominance. In addition, not all product characteristics are necessarily relevant for a competitive analysis; and, despite the claims that consumers value privacy, there is evidence that consumers are usually willing to disclose sensitive information for a small reward, suggesting that the value of privacy is lower than what is usually attributed. Therefore, incorporating privacy into antitrust has the risk of increasing the level of subjectivity in competition law enforcement, due to the inherent difficulties of measuring consumers' willingness to pay for privacy and, eventually, to prevent companies from using data to actually improve the quality of their products.

10. Mr. Burnside, supported the nexus between competition policy and privacy, even though he recognised that in many situations violations of privacy rights should not raise antitrust concerns (for instance, when undertaken by a small firm in a competitive market). However, Mr. Burnside suggested that privacy law alone may not suffice, as we observe in digital markets a constant violation of the fundamental principle that data should be only used for the purposes that the individual (data subject) consented. After providing some recommendations to prevent abuse of dominance in the collection of data, such as the creation of a standard "do not track", Mr. Burnside noted the importance of cooperation between competition policy and consumer protection, referring to the recent work of the European Data Protection Supervisor on that subject.

11. At the end, two fundamental ways through which big data can be incorporated into competition law enforcement were identified: data as an asset/input that enables anti-competitive practices; and data as a quality element of competition (that increases customization but reduces privacy) While the discussion suggested that it may be enough to adapt existing tools in order to address big data as an asset, there is more work to do in order to incorporate data as a quality/performance issue into competitive analysis. As for areas of possible future work, delegates identified the analysis of lock-in effects, as well as a cooperative work between competition authorities and other agencies of consumer protection, in order to reduce any systemic risk of trust that could undermine the functioning of digital markets.

12. A detailed Summary record of the Committee discussion will be circulated separately under [[DAF/COMP/M\(2016\)2/ANN2/FINAL](#)]. All of the materials for the roundtable are available at: www.oecd.org/daf/competition/big-data-bringing-competition-policy-to-the-digital-era.htm.

4. Discussion on Competition Law Developments over the last 20 Years with Former Competition Committee Delegates

13. A selected group of former delegates to the Competition Committee discussed in a panel format the main developments in competition law enforcement that have occurred in the last 20 years. When the panellists attended the OECD, competition law enforcement was principally a national exercise. There were no significant numbers of multijurisdictional merger filings; there were few transnational cartel investigations. The competition world has changed dramatically. The panel discussed whether it is time for the international competition enforcement community to consider norms or best practices for competition authorities to consider before participating in international investigations. They suggested that the OECD should consider voluntary “norms” that competition enforcement agencies might employ in deciding not to exercise their jurisdiction in a particular matter because other agencies are better placed to do so and can protect their interest. The panel was moderated by Kurt Stockman (former Chair of the OECD Competition Committee and Vice President of the Bundeskartellamt), and included Allan Fels (former Chair of the ACCC), Douglas H. Ginsburg (former Assistant Attorney General for Antitrust, U.S. Dept. of Justice), and Monica Widegren (former Director and Head of International Affairs, Swedish Competition Authority).

5. Election of Chairman and Vice Chairmen for 2017

14. The Committee proceeded to the election of the Chair and its vice-Chairs. The Committee agreed that the 2017 Bureau should include the following delegates: Mr Jenny (France), serving as Chairman; Ms Walker (New Zealand); Mr Steenbergen (Belgium); Mr Pecman (Canada); Mr Mundt (Germany); Mr Shin (Korea); Mr. Sjoblom (Sweden); Ms Alejandra Palacios Prieto (Mexico); Mr Currie (United Kingdom); Mr Laitenberger (European Union). In addition, the Chair of WP2 (Mr Heimler), WP3 (Ms. Renata Hesse) and the UNCTAD co-ordinator (Mr Souty) will continue to serve in the Bureau in an *ex officio* capacity.

15. Concerning the application of Prof Reiko Aoki (Commissioner JFTC), as in past occasions the Committee agreed to postpone the decision on whether to elect her in the 2017 Bureau to give her an opportunity to participate in the work of the Committee before considering her application to join the Bureau.

6. Reports by Working Party Chairmen and by Co-ordinators

16. At the outset of this session, the Chair reported on the discussion that took place in the Bureau meeting the day before on how to reorganise and streamline the reports to the Committee by Working Party Chairmen and Co-ordinators. The Bureau agreed that a first report by the Working Party Chairmen should be circulated in writing in the meeting room during the Committee session. The WP2 and WP3 Chairs would then have an opportunity to expand on this very first summary in the weeks following the meeting for inclusion in the Summary Record of the Committee. However, Working Parties Chairs would continue to report orally to the Committee on any issue that would require a decision by the Committee (e.g. decisions related to instruments or best practices) or any suggestions that a Working Party may have for the Committee and which requires the Committee consideration, as could be for example the case of suggestions on the allocation of future work.

17. Concerning the reports by the ICN and UNCTAD Coordinators, the Bureau agreed that the report by the ICN Coordinator would remain unchanged to ensure effective coordination of the agendas of the two groups. The UNCTAD Coordinator would report only once per year (e.g. during the session previous to the IGE, the Intergovernmental Group of Experts on Competition Law and Policy) and convey any other useful information for the Committee via the Secretariat in written form.

6.1. Report by the Chair of Working Party Nr 2

18. The WP2 Chair reported that the Working Party had no issues to substantive issue to bring to the Competition Committee or that required a decision by the Committee. However, the WP2 Chair reported on the discussion held by the Working Party on future work. The Working Party agreed to organise a roundtable on Radical Innovations in Electricity in June 2017 together with a discussion on a proposed guideline for procurement officials in the areas of 1) separation of procurement contracts in lots and 2) abnormally low tenders. The WP2 Chair would liaise with the delegates on the other items for the WP2 agenda via written procedure.

6.2. Report by the Chair of Working Party Nr 3

19. The Chair of WP3 also reported on the discussion concerning future work for WP3. Two areas of possible work were identified by delegates. The first one concerned the monitoring of 1998 Hard Core Cartel Recommendation. WP3 agreed to give mandate to the Secretariat to survey the experiences of adherents with the Recommendation and to include in the survey a section on agencies' powers to provide Investigative Assistance. The Survey would serve as basis to prepare a report to the OECD Council. On Investigative Assistance there were proposals to organise a Hearing where experts from other policy areas (such as tax and securities) could be invited to present similar experiences in their field. Some delegations also suggested that the OECD could consider working on a set of best practices on investigative assistance. A second area for possible future work concerned a follow up to the discussion on jurisdictional nexus in merger control. There were suggestions to look more closely on the issue of residual jurisdiction and the methodologies used to set jurisdictional criteria based on turnovers. Delegations suggested that the OECD should coordinate with ICN in this area given the work ICN is conducting on the revisions of its Recommended Practices. It was also suggested that work could take place in between OECD meetings.

6.3. Report by the ICN coordinator

20. The ICN Coordinator reminded the Committee that market studies is an area of common interest to both OECD and ICN and that coordination between the two organisations is very effective in making sure that there are no overlaps and that outputs are complementary. He mentioned this as an example of effective cooperation between OECD and ICN.

21. He then reported on three ICN workshops: 1) the Chief Economist Workshop (Canada) discussed unilateral effects, vertical restrictions in digital markets and screening for cartels and merger remedies; 2) the Cartel Workshop (Spain) had four main themes: enhancing cartel enforcement, tools for cartel detection, deterrence and international cooperation; 3) the Advocacy Workshop (Mexico) discussed advocacy strategies for public procurement, explaining the benefits of competition to the general public and best practice for engaging in market studies. All these workshops saw the active participation of representatives from the OECD Secretariat.

22. To conclude he presented three ICN upcoming events: 1) the Merger Roundtable (France) will discuss two topics: designing merger thresholds and challenges in the digital economy in low turnover transactions; 2) the Merger Workshop (US) will have as themes investigative techniques and assessing evidence in merger cases; 3) the Annual Conference in Portugal will report on the many projects concluded by all ICN working group during 2016.

6.4. Report by the UNCTAD coordinator

23. The UNCTAD coordinator reported that the UNCTAD Secretariat has a new Head of the Competition Policy and Consumer Protection Branch, Ms Teresa Moreira, who was previously a delegate to the Competition Committee. This positive development is expected to strengthen the relationship and synergies between OECD and UNCTAD. He also called for a more active presence of delegates from OECD countries to the work of UNCTAD.

7. Roundtable on Price Discrimination

24. The Competition Committee discussed a roundtable on Price Discrimination. The roundtable looked at the potential exploitative, exclusionary and distortionary effects of price discrimination. It examined different approaches to remedying these concerns and whether price discrimination was likely to become a greater concern as big data and analytical advances create scope for near-perfect price discrimination.

25. Price discrimination can be investigated under abuse of dominance provisions in most jurisdictions. However, in some jurisdictions this is limited to the investigation of exclusionary or distortionary effects which can damage competition and hence indirectly harm consumers, while in others exploitative effects which can directly harm consumers are also a concern. Delegates heard that both Canada and the US had recently considered changing their rules on price discrimination, though no change has yet been made.

26. Prof Dennis Carlton (Professor of Economics, University of Chicago Booth School of Business) identified the ambiguous welfare effects of price discrimination and the complexity of identifying the particular welfare effects of a given scheme. There was a suggestion that using screens such as the effect of a scheme on output could help

identify the most harmful schemes. However, Prof Carlton emphasised that the incentive provided by the opportunity to exploit market power was a key part of an effectively functioning market and that as a result courts in the US had decided that monopoly alone was no harm to competition that required remedying. In contrast, Prof Damien Geradin (Professor of Competition Law & Economics at Tilburg University, the Netherlands and at George Mason University School of Law, Washington, DC) explained that in Europe the abuse of a monopoly or dominant position to reduce consumer welfare through price discrimination or excessive prices was an offence. Prof Geradin identified that in the absence of guidance on these exploitative abuses of dominance there was in some cases confusion on whether the issue at stake was an exploitative, distortionary, or exclusionary concern. He suggested that identifying which is the case was important because the legal tests that apply were likely to be different.

27. The UK explained that it had examined price discrimination, not as an abuse of dominance but within the context of a market study. In these cases, it had sometimes had concerns, not over price discrimination in and of itself, but that price discrimination was a symptom of an underlying problem in the market. For example, as a mechanism to exploit underlying demand-side issues which limit competition, such as weak customer engagement where firms might not have incentives to activate consumers. It also noted that price discrimination may result in or be accompanied by complex or opaque pricing structures, and that these can more unequivocally and directly harm competition through reducing the ability of customers to compare offers and drive competition.

28. Remedies were also discussed, and the UK noted that where the CMA has imposed remedies, it has tended to focus on addressing the underlying demand side issues rather than on the pricing behaviour of suppliers. Remedies that prohibited discrimination had in some cases succeeded only in increasing prices. Israel also described an unusual case where it had used a structural divestment remedy to an exclusionary price discrimination scheme. The Financial Conduct Authority made the point that where discrimination was between active and inactive consumers, remedies that increased the proportion of active consumers may not improve (and could worsen) the outcome for the remaining inactive consumers.

29. As for the risks of data increasing price discrimination, it was noted that online retailing markets display some characteristics that make price discrimination more likely to be harmful for consumers. Prof Carlton suggested that giving consumers a property right over their own data would allow them to sell that data to additional firms to ensure that a single firm could not set a discriminatory personalised price to them that extracted all of the surplus from the transaction.

30. A detailed Summary record of the Committee discussion will be circulated separately under [[DAF/COMP/M\(2016\)2/ANN3](#)]. All of the materials for the roundtable are available at: www.oecd.org/daf/competition/price-discrimination.htm.

8. Competition Assessment Project in Greece

31. The Committee heard a joint presentation by the Greek delegation represented by Mr Dimitri Loukas (HCC) and the Secretariat on the main findings from the OECD competition assessment project of five sectors in Greece: (1) wholesale trade, (2) construction, (3) e-commerce, (4) media and (5) the rest of manufacturing.

9. Annual Reports on Competition Policy

9.1. Presentation of Annual Reports by Delegates

Reports submitted for consideration:

- Germany– [DAF/COMP/AR\(2016\)28](#)
- Italy – [DAF/COMP/AR\(2016\)31](#)
- Latvia– [DAF/COMP/AR\(2016\)46](#)
- Norway – [DAF/COMP/AR\(2016\)36](#)
- Bulgaria– [DAF/COMP/AR\(2016\)41](#)
- Costa Rica– [DAF/COMP/AR\(2016\)42](#)
- Peru– [DAF/COMP/AR\(2016\)48](#)
- South Africa – [DAF/COMP/AR\(2016\)49](#)

Reports submitted for information:

- Australia– [DAF/COMP/AR\(2016\)23](#)
- Canada– [DAF/COMP/AR\(2016\)25](#)
- Chile – [DAF/COMP/AR\(2016\)26](#)
- France – [DAF/COMP/AR\(2016\)27](#)
- Hungary – [DAF/COMP/AR\(2016\)29](#)
- Iceland – [DAF/COMP/AR\(2016\)30](#)
- Japan - [DAF/COMP/AR\(2016\)32](#)
- Korea- [DAF/COMP/AR\(2016\)33](#)
- Netherlands- [DAF/COMP/AR\(2016\)34](#)
- New Zealand- [DAF/COMP/AR\(2016\)35](#)
- Slovenia- [DAF/COMP/AR\(2016\)37](#)
- Switzerland- [DAF/COMP/AR\(2016\)38](#)
- United Kingdom- [DAF/COMP/AR\(2016\)39](#)
- EU- [DAF/COMP/AR\(2016\)40](#)
- Egypt- [DAF/COMP/AR\(2016\)43](#)
- India- [DAF/COMP/AR\(2016\)44](#)
- Indonesia- [DAF/COMP/AR\(2016\)45](#)
- Malta- [DAF/COMP/AR\(2016\)47](#)
- Chinese Taipei- [DAF/COMP/AR\(2016\)50](#)
- Ukraine- [DAF/COMP/AR\(2016\)51](#)

Also available at: www.oecd.org/daf/competition/annualreportsbycompetitionagencies.htm,

9.2. Special Country Presentations

32. The Committee also heard two country presentations on recent legal reforms which have taken place in Argentina and in Chile. The presentations were delivered respectively by Mr Greco (Chairman, CNDC) and by Mr Irrazabal (Chairman, FNE).

10. The Role of Economic Analysis in Competition Law Enforcement

33. The Committee heard a presentation by Prof Katsoulacos (Department of Economics, Athens University of Economics and Business) on his recent research of the

factors that affect the choice of legal standards and, hence, affect the role of economic analysis and evidence in competition law enforcement.

11. Review of Policy Recommendations to Ukraine by OECD and other International Organisations

34. Delegates discussed the status of implementation of previous OECD, UNCTAD and EC recommendations on competition law and policy in Ukraine. Lead examiners debated the progress in the implementation of such recommendations and the remaining open issues as well as discuss further implementation strategies and reform priorities with representatives of the Anti-Monopoly Committee of Ukraine.

35. Ukraine was peer reviewed at the OECD in 2008 and subsequently at UNCTAD in 2013. Both reviews led to a number of recommendations for the competition agency (AMCU) and the Ukrainian government. Political changes and instability have for some time stalled the implementation of these recommendations. The AMCU has requested the OECD to review recent changes introduced to improve competition law and policy in Ukraine. The review covered developments in competition law and policy since the last reviews both in law and in the structure and work product of the AMCU. A number of new recommendations were given to Ukraine, in particular aimed at strengthening competition enforcement and competition policy in general.

36. The Ukrainian delegation was led by : Yuriy Terentyev, Chairman of the AMCU; Mariya Nizhnik, Commissioner in AMCU; Anna Artemenko, Commissioner in AMCU; and Denys Levin, Chief expert, international relations and European integration unit AMCU.

37. Following an introduction by the Chair, the two OECD consultants in charge the project, Bill Kovacic and Stephan Luciw, presented the main findings of the OECD report. These initial presentations were followed by preliminary remarks by the chairman of the AMCU, Yuriy Terentyev who emphasized the AMCU's goal and overall objectives. He thanked the OECD for the analysis and recommendations that he considered as a concrete roadmap to follow to achieve the agency objectives. Mr Terentyev's remarks were followed by questions from the lead examiners (USA, Israel and Slovakia) on the following topics: priority setting, resources, investigation powers, specialization of courts and mergers. The Ukrainian delegation responded to the questions presenting the work currently taking place in each of these areas and discussion the plans for future work.

38. After the review, the Committee held a closed session to exchange views on the information from the background report and the AMCU Chairman's responses. Overall, the Committee felt that the AMCU has made significant efforts to follow past recommendations and is heading in the right direction, but still does not comply with OECD competition instruments and standards. The Committee agreed that the Chair of the Committee should convey in a letter from to the Ukrainian government that the Committee acknowledges the AMCU's positive achievements but is also concerned that there are important areas for improvement.

12. Other Business and Future Work

39. Under Other Business, the Legal Department of the OECD presented the project "Consolidating the OECD as a Global Standard Setter". The purpose of this initiative by

Secretary-General is to conduct an OECD-wide effort to review, discuss, and as necessary update the Organisation's legal instruments, and to develop new ones in those areas which have the most impact and relevance for Members and non-Members. It was agreed that the Competition Committee would prepare an Action Plan and approve it by written procedure so that it could be presented together with the action plans of the other OECD committees to the Ministerial meeting in spring 2017.