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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Summary of discussion of the roundtable on Competition issues in labour markets****Annex to the Summary Record of the 131st Meeting of the Competition Committee held in
5-7 June 2019****5 June 2019**

This document prepared by the OECD Secretariat is a detailed summary of the discussion of the roundtable on Competition issues in labour markets held during the 131st meeting of the Competition Committee on 5 June 2019.

More documentation related to this discussion can be found at
<http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>

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Summary of the Roundtable on Competition issues in labour markets

In 5 June 2019, the OECD Competition Committee held a roundtable discussion on competition issues in labour markets chaired by Professor Frédéric Jenny. The discussion featured three invited speakers:

- **Herbert Hovenkamp**, Professor, University of Pennsylvania School of Law and Wharton School
- **Carl Shapiro**, Professor, University of California, Berkeley
- **Marshall Steinbaum**, Research Director at the Roosevelt Institute and Assistant Professor at University of Utah

The **Chair** introduced the topic by highlighting that competition law is applicable to employers as purchasers of labour and there are a number of ways in which employers may infringe competition law, by entering into agreements with other employers preventing, restricting, or distorting competition law, by abusing their monopsony power and by increasing their market power through mergers. The Chair drew the important distinction between bargaining and monopsony power, explaining how the exercise of monopsony power can create allocative inefficiencies in the upstream market and to have negative impact on workers and consumers. After mentioning some of the possible reasons for the current lack of enforcement in these markets, the Chair explained that the discussion would be divided into two main parts:

1. The enforcement of competition law in labour markets, including the economic foundations of enforcement in this area and the issue of consumer welfare standard;
2. The available non-enforcement tools and advocacy initiatives that competition authorities can undertake to address labour monopsony power, in particular when facing platform workers and other self-employed category of workers.

The Chair invited the **Secretariat** to summarise the background note prepared for the discussion. The Secretariat observed how it was the first time they had dedicated a whole session to competition issues that arise in labour markets. The Secretariat mentioned how the conditions for employer's monopsony may not be as rare as had been thought and how this brings into play the role that the competition law and policy can play in addressing monopsony and market power held by employers. The Secretariat went on to outline the ways in which employers may artificially reproduce situations similar to monopsony, and exploit it in an anti-competitive way. The Secretariat added that thus far the enforcement of competition law in labour markets has been limited, perhaps partially due, for example, to legal and economic analysis on monopsony being less developed than on monopoly, as well as due to the theoretical and practical challenges of analysing labour markets. The Secretariat discussed a number of possible non-enforcement tools, such as guidelines, market studies or ex post assessment of mergers that could also be adopted in labour markets, in addition to enforcement, to address the negative effects of monopsony power, as well as the ongoing debate concerning the possibility that collective bargaining exemptions could be extended to specific categories of self-employed workers to countervail the monopsony power existing in some labour markets.

The Secretariat finished up by stating that the discussion would look at the challenges that competition authorities face in this field in order to identify possible solutions and to ensure that labour markets are competitive and well-functioning.

1. The Enforcement of Competition Law in Labour Markets

Moving to the first main issue, the Chair turned to **Professor Hovenkamp** and asked what explains the fact that competition authorities seem to be less active in labour markets than in product markets and whether the consumer welfare standard could be the reason for that. Professor Hovenkamp commenced by relaying his views on wage participation in the US economy having declined and outlined the main reasons behind this, listing, among various factors, such as technologic changes and anti-union policy in the US, also possibly a lack of antitrust enforcement. Professor Hovenkamp then stressed how competition enforcement in labour markets in the US has been very limited, but still has been more than in most other countries. He then briefly recalled how it is helpful to think about the consumer welfare standard in terms of output rather than price, whereby consumers and labour both benefit from higher output.

Professor Hovenkamp started his presentation by outlining the practical issues that have confronted the application of antitrust law in labour markets, one being market delineation and how the size of geographic markets may vary when looking at buy-side and sell-side market. Commuting areas and job search ranges may be significantly different from the area where a product is shipped or sold. Therefore, product markets often have boundaries that do not match up in a consistent way with labour market boundaries. The case of Intuit and eBay (*United States v. eBay Inc.*) and the fact that they entered into a no-poaching agreement for hiring computer engineers in spite of not really being competitors in the product market was used to illustrate this. This may lead to overestimating the geographic size of buy-side labour markets and shows the importance of defining market with respect to the investigated restraint. Professor Hovenkamp highlighted two points regarding labour market concentration: (1) geographic markets for labour may be much smaller than generally thought and (2) small towns and rural areas tend to have much higher levels of labour concentration than urban areas.

Professor Hovenkamp then moved to discuss the issues arising in relation to merger policy and the effects of merger transactions on wages. After a short introduction on the Clayton Act to clarify that its Section 7 applies to both supply-side and buy-side mergers, Professor Hovenkamp discussed efficiencies within labour markets and the difficulty of determining whether a merger that reduces employment opportunities is anti-competitive or is efficient.

Professor Hovenkamp explained the difference between the negative effects of monopsony power and the positive effects of the elimination of duplicate roles, which generally produces increased output and lower costs. Whilst distinguishing the two situations can be difficult, in a monopsony power situation, the merged entity acquires the ability to suppress wages.

The panellist then discussed no-poaching agreements, which are agreements between employers not to hire each other employees, and price-fixing agreements, stressing how they are treated as naked agreements that are *per se* illegal under US law. He also discussed how in labour markets one has to distinguish between monopsony wage fixing and joint hiring. Particularly in the context of temporary work, there are agencies representing a number of independent employers, which staff short-term workers and apply similar wage

structures to all hires, but they do so in a way that is most likely legitimate and ancillary to the functioning of their market.

Unlike horizontal agreements, vertical non-compete agreements are usually analysed under the rule of reason under US law, because there may be beneficial effects deriving from them. There is, however, an increasing problem concerning non-compete agreements, such as intra-franchise ones, including for professions that are not typically highly skilled. Professor Hovenkamp noted that he finds these agreements as problematic, and he raised the question of whether they should be treated as vertical (which they are formally) or horizontal agreements (which is more descriptive of their effects). If they were to be treated as vertical agreements, the rule of reason would apply and there would be a market power requirement and consequently a market definition.

Anti-competition occupational licensing also needs more attention. Some professional associations apply anticompetitive restrictions that prevent access to their market, in a way that works very similarly to cartels.

The Chair then turned to Dr **Marshall Steinbaum**.

Dr Steinbaum opened by suggesting that the consumer welfare standard is not adequate at dealing with issues presented by monopsony power in labour markets. When business models appropriate value upstream by means of exploiting monopsony power that is a competition problem. For instance, in the example of no-poaching agreements, we are used to ask ourselves whether there other efficiencies benefiting consumers, but perhaps we should ask whether they should benefit workers, which are the counterparty in the contract. The common interpretation of consumer welfare has, therefore, made it very difficult to enforce competition law in upstream markets. In this area, it is particularly clear the kind of restriction that it imposes on the scope of competition law.

Dr Steinbaum continued by mentioning that the so-called ‘fissured’ workplace, where there is a progressive erosion of the legal status of employee, is cancelling the sharp boundary between where labour law ended and antitrust began, the area in which the company could operate. This is just one example of how this interpretation of the consumer welfare standard allows anticompetitive business models that are not captured by antitrust laws.

Next, Dr Steinbaum introduced his alternative vision developed with Maurice Stucke, which aims to return to the original goal of antitrust laws, the dispersal of private market power. This would be interpreted in labour markets as meaning that labour markets and workers would be treated in the same way as output markets and consumers by antitrust authorities. In labour markets, the equivalent of product output is the level of employment, vacancies, and other such measurable factors.

Under this interpretation of the consumer welfare standard, Dr Steinbaum also noted that the evidence of employer power could be, in addition to concentration, factors like a firm’s ability to impose wages unilaterally or to impose non-compete agreements, which may well exist even in cases where concentration is not as high as expected. Further, no-poaching and non-compete agreements would be illegal for any firm that has market power; there would be a monopsonisation offence; and labour market effects would be taken into account in merger review.

The Chair moved on to Professor **Carl Shapiro**.

Professor Carl Shapiro started by saying that the competition authorities should be promoting competition in all input and output markets. From an economist’s viewpoint, the analysis is very similar and it is important to ensure that there is access to the market and

parties have options. He continued by saying how the OECD Competition Committee had already collected significant learning on the functioning of input markets, although not especially as regards labour markets yet. He cited examples of cases in input markets in the US, such as one where the Justice Department intervened in a merger between chicken processors because it would reduce the places where chicken farmers could sell their chickens. Another case, more recently, is the Grifols/Biotest merger that the FTC challenged and where the two companies were purchasers of blood and plasma and in some cities were the only buyers. He stressed how similar this kind of example is to workers being disadvantaged.

He continued by mentioning that the question of the consumer welfare standard can be easily solved by noting that it is a misleading name and that it should be agreed that what is meant by it is that it is a “protecting competition standard” and not just about consumers.

He agreed with Professor Hovenkamp that labour markets tend to be local markets by specialty, but it is an open question to assess how much labour market power there is in any specific market, depending on the labour market and the country. He also mentioned that he expected the issue of concentration of labour markets to be not so common in big urban areas. Unionisation may be an extremely relevant factor in the analysis, but it does not eliminate the issue, as workers still benefit when the unions are able to negotiate with more employers.

In merger control, he noted that we have the tools to assess labour market power and harm. Professor Shapiro noted that when he took a lead role as chief economist at the Justice Department in the revision of the 2010 US Horizontal Merger Guidelines, they included a specific section on mergers that increase buyer power, which applies also to labour markets.

He elaborated on potential challenges arising when a merger leads to buyer power in a local labour market but creates benefits for consumers in broader product markets and on how to do the balancing between the two.

On the conduct side, there is a number of no-poach and no-hire agreements, including some franchise arrangements, that competition economists should look at with suspicions and a quick look approach would be appropriate.

The Chair remarked how the consumer welfare standard could be seen as having a wider interpretation than has been the case traditionally and how there may significant similarities between the analysis of downstream and upstream markets. The Chair then turned to the **United States Department of Justice (DoJ)** and posed questions on the US treatment of no-poaching and wage-fixing agreements as *per se* violations of competition law.

The United States DoJ took to the floor and talked of its approach to naked no-poach and wage-fixing agreements. The US delegate noted that in October 2016 the FTC and DOJ issued a document called “Antitrust Guidance to Human Resource Professionals” and recommended its reading. The delegate spoke of the evolution of the DoJ’s enforcement in labour markets and of how certain horizontal practices in labour markets, such as naked horizontal restraints, are as condemnable as bid-rigging, price fixing or market allocation in product markets and therefore can be prosecuted criminally. The DoJ brought several cases before announcing its intent to criminally prosecute naked restraints in labour markets. A particularly interesting one is the Westinghouse/Faiveley merger, where the DoJ discovered documents suggesting that there were no-poach agreements between three of the world’s largest train equipment manufacturers. After an investigation, the matter was resolved with a civil consent decree because the agreements at issue began and ended before October 2016. The DoJ’s consent decree asked the parties to notify employees and

recruiters of the decree and to publish in the industry specialised magazines a notification that the no-poach agreements were no longer enforceable. He finished the segment by mentioning how the DoJ thinks about labour markets when assessing mergers and concerns about the exercise of buyer power in labour markets were examined, particularly in the healthcare sector.

The **US Federal Trade Commission's** (FTC) representative took to the floor and outlined how just like the DoJ is actively monitoring competition issues in labour markets, the FTC is also doing extensive work in this area. In October 2018, the FTC held a hearing on this subject. The FTC Chairman Simons instructed all merger divisions to consider labour issues in their merger control activity. In addition to the Grifols case mentioned above, another case was brought involving companies providing therapists staffing services in Texas, which had agreed to lower therapists' wages and invited other companies to do the same. The FTC's experience with counteracting professional licensing conditions, which may severely restrict job opportunities and be distortive of competition is also brought to attention.

The Chair turned to **BIAC** and asked just why it thinks no-poaching agreements have such complexity that they should not be treated as illegal *per se*.

BIAC stressed the importance of looking at these restrictive agreements as a way to exercise monopsony power. To do so, it is important to have a clear understanding of the markets affected and the levels of concentration in those markets. Local and specialised markets are more likely to be subject to labour market harm and a problem is more likely to arise when there is a reduction in output. BIAC respectfully disagreed with the views of the US competition agencies in the concept of no-poach and wage-fixing agreements being treated as *per se* unlawful.

BIAC thinks that a reduction of a variable input cost, like labour is, reduces output cost and final prices and increases output. A *per se* approach in its rigidity, according to BIAC, ignores potential downstream effects and potential downstream benefits which it would make sense to balance out. Similarly, where labour costs are driven up the prices for final consumers are also bound to increase, which harms consumers.

The delegate further suggested how it made sense to apply caution in merger cases, absent a specific mandate of the competition agency to consider employment issues in merger control. BIAC considers that a reduction of input costs should be generally treated as an efficiency, whether it concerns labour or not, and that therefore labour costs should not be treated differently than other input costs in the merger assessment – while agreeing that there can be cases that can result in anti-competitive outcomes, but those are better dealt with through legislative action.

Next, the Chair introduced **TUAC** and asked if they are reassured as said by Professor Hovenkamp and Mr Shapiro that there are ways to accommodate the consumer surplus standard in such a way that harm taking place at the input level in labour markets can be captured.

TUAC started by stating that they envisage competition authorities should take employment into account in their merger assessment, beyond the consumer welfare standard. TUAC spoke of a problem of competition in the labour market, noting how they see as necessary not only to treat the symptoms of labour market monopsony, i.e no poaching agreements and non-compete agreements, but also to go to the root of the problem – the excessive and unbalanced relationship between employer and employee. The delegate said the main message was to look at the rule of collective bargaining as an essential way

to mitigate the impact of monopsony power. TUAC pointed to a graph illustrating a drop off in labour income, employment levels causing inequality and an economic and welfare fairness problem. Trade unions make a strong correlation between the rise of monopsony power and this economic situation.

The level of collective bargaining has declined significantly from 2000-16 in the OECD and what the trade unions say is that you have more and more concentrated employers who are more powerful and workers who are more and more isolated. A traditional competition approach focused on product market prices may not capture the problem. If you instead focus on monopsony, you may anticipate and mitigate the employment effects of a merger. The delegate finished up by welcoming further work from the OECD on drivers and causes of industry and labour market concentration.

The Chair turned to **Japan**. Japan started by outlining recent changes in their labour market including things such as more diversified employment contract forms and enhanced competition in the human resource market, which has all led to workers having less access to information and weaker negotiating positions. The Japan Fair Trade Commission (JFTC) felt a need to clarify the application of the anti-monopoly act (the AMA) to labour markets and a study group was set up which looked at assessing the framework for anti-competitive practices in the labour market (the Report of the Study Group on Human Resource and Competition Policy, 2018).

The report outlines ways of applying the AMA in practice to concerted practices by multiple employers and unilateral conduct by a single contracting party. Japan also highlighted the advocacy activities undertaken on labour markets and notable successes in raising employer awareness of competition compliance and tangible changes such as those made by the Japan Rugby Football Union.

The Chair then brought up **Spain** and how there is no exemption for labour agreements written into Spanish law. He asked Spain to comment on their cases, but also on how they respect the EU jurisprudence, which says that collective agreements for the purpose of employment should not be looked at under competition law.

Spain took to the floor and explained how collective agreements are not unconditionally and absolutely excluded from the application of competition law, but the rules of competition are applied by the competition authority on a case-by-case basis. In a recent case, backed by the Supreme Court, involving cargo handling companies operating in ports stated that, in certain circumstances, trade unions may be responsible for their involvement as necessary collaborators when introducing competitive restrictions in a specific market.

The delegate concluded by clarifying that the Spanish competition authority considers that collective bargaining in good faith and under the framework of the law has automatic immunity, but if agreements go beyond that, and impact other markets or firms not taking part in such agreements without any justification, these can then be analysed from a competition perspective.

Specifically, in actions taken by the Spanish Competition Authority against cartels, agreements have been identified in the sphere of labour, with the effect of creating a labour monopsony in two cases in the fields of freight forwarders (case: Transitarios) and professional hairdresser products (case: Peluqueria profesional). Those cartels included no-poaching agreements between the companies and involved basically under the so-called “gentlemen’s agreement” to not recruit their salespeople (sales staff). Although it is not necessary an analysis of the effects of this conduct that constitutes an infringement under Article 1 LDC (Ley de Defensa de la Competencia - Spanish Competition Act) and 101

TFEU, in those decisions the Spanish Competition Authority recognizes as consequences of no-poaching agreements that they affect the free movement of workers, have a negative impact on the employee's negotiating capacity and their remuneration, and finally considers agreements regarding employee hiring to be a competitive strategy with an impact on costs and margins, with the same depressive effect on the market as price agreements, replacing free and individual business autonomy in adopting certain decisions with a sort of pact, with the ability to falsify competition

The Chair invited **Portugal** to speak, in particular to describe to the Committee a recent fee schedule case, which was set by a trade union and amounted to an anticompetitive agreement.

Portugal stressed that the case was a good illustration of the difficulties arising in applying competition law to a physical person, employees and self-employed, and to draw the line between the person's labour and economic activity. Only the latter is in fact subject to competition law scrutiny. The case involved a trade union of interpreters, tourist guides and translators, which imposed a fees schedule to its affiliated members, thus setting the prices for their clients-employers. The Portuguese delegates explained how they concluded that this was an anti-competitive (price-fixing) decision by an association of undertakings which was to be treated no differently to cases against other professional associations. To that purpose, the Portuguese competition authority found that the members of this association were not workers, but self-employed professionals. While the lines between employees and self-employed may become more blurred with the current changes in the workforce and business models, the relevant guidance provided by the European Court of Justice on what should be considered as an undertaking that is subject to the application of competition law are particularly helpful.

The delegate went on to describe the advocacy work undertaken in the field of occupational licensing in Portugal, where numerous recommendations were issued to the government to remove legal barriers to entry into 12 self-regulated professions in a joint project with the OECD. The goal was to increase job mobility and foster opportunities for employment.

The Chair turned to **Turkey** and invited it to share the no-poach agreements cases they had investigated.

The Turkish delegate outlined how he would explain two cases. The first being about a private school and school association where the Turkish competition authorities analysed whether allegations that the private schools fixed their fees and coordinated their personal policies through the association were justified. An exchange of information on these elements was found.

The delegate noted that it is possible that firms that collude in product markets may do so in the labour markets too or vice-versa.

The B-Fit case involved a no-poach agreement between franchisor and franchisees in the market of sport centres. The no-poach provision did not prevent the transfer of the employee, but it limited, because it required the franchisor's consent. The delegate highlighted that, in practice, transfer of employees was ultimately not prevented and the firm's market share was low, so an official warning was sent instead of investigation. A warning has been sent to eliminate also the non-compete agreements imposed by the employers on personal trainers.

The Chair remarked how there are two types of cases: (1) restrictions on competition in labour market which is designed to reduce competition on the product market and, (2) the

issue of restriction of competition on the labour market. The Chair then offered the floor to the **European Commission (EC)**.

The European Commission's representative noted that they have limited experiences to date with labour markets but stressed that they are closely following the issue. The delegate agreed that the current characteristics of labour markets across different jurisdictions increase significantly the likelihood that workers are faced with monopsony power held by employers. Misallocation of labour and redistribution of wages away from workers to higher profits firms are profoundly problematic for overall economy and contribute to inequality. While unionisation and the minimum wage laws have been the traditional instruments to counteract the negative effects of monopsony power, other tools can be used: i) by ensuring collective bargaining to categories of workers that are genuinely dependent and may be facing employer's monopsony power and ii) by enforcing competition law against no-poaching and wage-fixing agreements. As regards enforcement in antitrust and merger control, further reflection is required to adapt the competitive analysis to labour markets and, importantly, the design of remedies.

The Chair then moved the discussion on to ask **France** about an interesting case where for the first time the minister intervened to clear without remedies a merger that had been cleared with remedies by the French competition authority. The Chair introduced a representative of the Direction générale de la concurrence, de la consommation et de la répression des frauds (DGCCRF) to explain why the Ministry decided to make use of its 'pouvoir d'évocation' in this case.

The French delegate elaborated on how the merger involved the ready meals market and Cofigéo taking control of the Agripol group. Background was given on the French legislative context and how since 2009, merger control was transferred from the Ministry of the Economy to the French competition authority, while the ministry retained the power to clear a transaction with a view to preserving the creation and stability of employment. He added that the planned divestments ordered by the competition authority were not compatible with the planned revitalisation of the industry and could have a significant negative impact on employment. In particular, the French delegate noted how the remedies imposed by the French competition authority could have a negative impact on i) the industrial strategy of the acquisition and the profitability of the group; and ii) the financial situation of the group. This would have jeopardised, according to the ministry, around 500 jobs. Instead of those remedies, the ministry therefore imposed a requirement to maintain employment for 2 years.

The French delegate rounded up by adding how important it is to view this case in its specific context and how the ministry's analysis was based not on a competitive assessment, but on an analysis specific to the protection of public policy interests, including the preservation of employment.

The Chair remarked on how this case also shows the impact that a merger can have on a local labour market and that the assumption that labour markets are always deep and flexible may be a misreading.

Professor Carl Shapiro commented that it remains doubtful whether, once the two-year period has gone by and the requirement is over, the lack of a divestment is really in the best interest of workers in the long run. He added that, apart from the specific case, there may not often be that much tension between protecting competition in the product and labour markets.

Professor Hovenkamp opined that it is a mistake to assume something like an anti-poaching agreement, if naked, is going to improve the welfare of consumers by reducing costs. He said a naked agreement is so because it reduces labour output. It suppresses wages but it reduces labour output, and that usually entails output in the product market going down also, especially if proportions between labour and output are fixed. Suppression of wages on the input side can lead to increased prices on the output side if the firm has market power.

Professor Shapiro said he agreed with this and that naked agreements should be treated as *per se* infringements.

The Chair next turned to **Brazil** and its preparation of a labour antitrust guideline document.

The Brazilian delegate explained how they are at the preliminary stage of work on the document but outlined some cases which gave them the motivation to proceed with said document. The first one was a no-poach agreement in the IT sector, where the Brazilian competition authorities considered whether the market presented significant mobility constraints. The investigation was ultimately interrupted but was the first important experience of the agency with labour markets. Next, was a case from 2010 in the market for recharge of prepaid mobile phones which was also a no-poach agreement and in this case they did not go further as there was a leniency and cease and desist agreement.

A third case featured exclusive dealing of doctors, physicians and healthcare plans which was considered a *per se* violation of competition law. Based on the experience gained in these cases, Brazil is working to build guidelines to govern this area.

The Chair turned to **Finland** who had raised two important questions in its contribution: i) about non-compete clauses; and ii) independent workers in the ‘grey zone’ in-between employees and undertakings.

Finland started by explaining how the Finnish employment law allows signing a non-compete agreement that limits the employees freedom after the employment relationship ends. However, there has to be a reason for such agreements and they should only be used when necessary, which hasn’t been always the case in practice. Their use has actually increased in recent years, and according to surveys almost half of highly educated people and professionals have a non-compete clause in their contract, which can prevent them from changing jobs or starting a new business. Finland said the routine use may mean legislation needs updating, such as, for instance, by requiring compensation for non-compete agreements of all duration.

Another big debate at the moment in Finland is about the status of the new self-employed, such as Uber drivers, but it remains to be seen if the Competition Act will be amended to allow collective bargaining on behalf of the new self-employed.

The Chair commented that the proportion of labour markets where there were non-compete agreements is extremely high and one wonders how justified they are.

Professor Hovenkamp remarked on the same phenomena in the USA, especially regarding the fast food and other franchise industries, and the substantial rise in cases.

2. The collective bargaining rights of self-employed workers and the advocacy activity of competition authorities

The Chair moved the debate on to the extent to which self-employed workers should be sheltered from competition law and protected from it when they are negotiating their wages and working conditions. He said that in some countries governments have decided to counter the monopsony power of certain employers in specific markets by adopting collective bargaining exemptions for workers in this grey zone and this is supported by the **OECD Directorate for Employment, Labour and Social Affairs (ELS)**.

Next, ELS took the floor to present extracts from the [OECD Employment Outlook 2019: The Future of Work](#), with a focus on labour market regulation and collective bargaining. The main issue discussed is how there is evidence the employment relationship is characterised by an imbalance of power which is due to the dependence and subordination of workers, but also how workers have few or no outside options which creates some degree of monopsony power. This is particularly problematic when workers have no ability to organise collectively.

ELS underlined how even the best employment policies could never eliminate the issue that workers in many markets tend to have very few outside options. ELS added that, for this reason, protections also from outside labour law become very important and these also include protections of the right to collective bargaining.

ELS focused in on the problem of the distinction between employee and self-employed, which is often blurred, and the platform economy makes very salient. ELS added that in many cases false self-employed may be unduly affected – where working arrangements are essentially the same as for employees, but they do not benefit from exemptions from the application of competition law.

ELS set out the three possible routes that may be followed by countries to extend collective bargaining rights outside or beyond formal employees. The first one, which poses no threat to competition, tackles misclassification to distinguish true from false self-employed. A second one is to extend labour rights to workers in the grey zone. This raises difficulties, however, because of the rigidity of any categorisation. A third way, often called the reversal of the burden of proof, allows the worker to benefit from the labour rights as a default option and only if a specific factor test is satisfied pointing to the self-employed status those rights would not be granted.

ELS pointed to the fact that, overall, clearly distinguishing workers from real economic undertakings in the economic sense probably poses little threat to the effectiveness of competition law. A bit more problematic is when an exemption is made, which would therefore need to be limited to specific occupations or sectors where it is clear that the workers are subject to significant monopsony power and the labour supply elasticity is close to zero (for instance, Amazon Mechanical Turk workers).

The Chair gave thanks for the thoughts from the OECD ELS and for adapting them to the competition perspective. Next, he turned to Dr **Marshall Steinbaum** and his views on employees in the digital economy and the status of employees.

Dr Steinbaum spoke about US actions against workers who work on digital platforms for bargaining collectively and how he viewed it as a misuse of competition laws, given the existing imbalance power.

Dr Steinbaum started by clarifying he would discuss the issue of collective bargaining for those workers not having protection from the competition laws, but also the enforcement of the competition laws against the platforms themselves for reducing competition, which he believes has been seriously overlooked. Dr Steinbaum said that thus far, gig economy labour platforms have been successful at this classification of their service providers as independent contractors and not “employees”. An argument most recently brought by the federal labour regulators has been that the independent service providers on these platforms essentially do exercise control to a degree and they have gains and risk losses depending on their performance on the job. The control of the platforms themselves can thus slip under the radar screen of these tests for employment as the service providers operate at a distance from the platform and with no direct supervision.

Dr Steinbaum thinks though that this business model does raise antitrust questions, in particular in relation to whether the restraints dominant firms impose on the independent contractors reduce competition. This relates to the overall question of employer power, i.e whether the consumer welfare standard is overly restrictive in what constitutes harm to competition, and whether workers do not have sufficient outside options to guarantee these markets are competitive, and so we should understand restrictions placed by their dominant platforms as exercises of market power that may be anti-competitive.

Dr Steinbaum then gave background on how there has been drastically weakened antitrust enforcement against vertical restraints over the course of many decades, and this has opened up a legal grey area, particularly in relation to franchises. The background to this move to restrain the antitrust application to vertical restraints in the franchising context is essentially that the exercise of vertical control can be efficient. He said the reinterpretation of vertical restraints and the benignity for competition may be misplaced, as it only holds true when the firms in a vertical relationship have outside options and supplier lacks market power. This assumption, in many digital platform markets, seems not empirically correct.

With specific regard to digital platforms, Dr Steinbaum talked about their business models and the ways in which they could be considered as restraining competition. He said many of these platforms have sufficient data and information that they are not only involved in just price fixing but also price discrimination. They end up creating the greatest wedge between the prices paid on the consumer side and the wages or payments paid to service providers on other side of market. Also, the platforms operate by allocating particular customers to particular service providers and this could be viewed as market division or exclusion. The bonus-based pay example was given in relation to the ride-sharing context to demonstrate that it may tie individual service providers to one platform at least at the shift level and it could be interpreted as a market division type of activity.

Lastly, the mechanism for deactivating service providers is touched upon and how there is evidence that some drivers who forego gigs when they expect a surge later they want to be ready for, have been demoted as they have to keep acceptance percentage at a certain level.

The obvious defence of the potential anti-competitive behaviour by the gig economy labour platforms is that their business models end up benefiting consumers regardless of their effect on service providers and this shows the problematic nature of the consumer welfare standard for adjudicating harm to competition in labour markets.

Dr Steinbaum closed with final thoughts: these labour platforms have changed their business models from one of neutral matching between suppliers of a service and final consumers to one where they control the entire marketplace, which is not necessarily efficient. A solution could be to force a choice between employment classification that

would legalise restraints and the reduction of the freedom of service providers or the platforms losing control of pricing and service terms. A major part of the profit proposition represented by platforms is they have both control over service terms and do not have to fulfil requirements of an employer.

The Chair moved on to **Ireland** and asked them how they chose the designated professions that could be exempt to competition law and also about the mechanism whereby the labour union can ask for more exemptions for people in the grey zone.

Ireland explained how the choices hinged on the concept of an undertaking, on who is or is not allowed to engage in collective bargaining and also who is and is not allowed to go on strike. For a long time the Irish competition authority held the view that voiceover artists were self-employed, and thus undertakings subject to competition law. This raised a large debate, particularly considering that a number of categories like doctors, lawyers, opticians, and dentists offer free services to citizens under State regulatory frameworks but private services to paying customers.

The Competition Amendment Act of 2017 came into being which gave exemptions to voiceover actors, session musicians and freelance journalists – these types tend to be represented by unions which the Irish delegate noted was an important difference with many who operate in the gig economy. The Competition Amendment Act of 2017 also contains a definition of false and fully dependent self-employed workers and sets out the criteria to benefit from an additional exemption. Since the Act was passed there have been no applications for further exemptions, but this may be due to the fact that an application for an exemption has to be made by a trade union and many sectors, such as the gig workers, are not represented by these.

The Chair offered the floor for final thoughts.

Professor Hovenkamp said how surprising he found it how little thought had been given to these issues worldwide from the debate. He added how it is a competition area very much in the infancy, which requires much further study and analysis.

Professor Shapiro said there is much more to be done and we need to continue to apply the protecting competition standard in inputs as well as output markets. Professor Shapiro mentioned that some of the platforms business models are devised to ensure the level of coordination that needs to work for the consumers to benefit from the service.

Dr Marshall Steinbaum offered that the some of the main questions raised in the session have surfaced, in particular the rise in non-compete agreements and no poaching, because the deregulation of labour markets and reduced standardisation of employment relationships which gives the incentive to impose restrictions on workers. The split of the surplus is less enshrined in statute and in collectively bargained contracts than it used which allows employers to enter into agreements with one another to restrict workers.

The Chair gave the floor to the **Netherlands**. The Netherlands said the debate of self-employed persons is part of the public debate in the country. The Dutch delegated noted that various options to protect vulnerable false self-employed workers are being explored from the competition viewpoint and other areas of regulation. The role of competition law is particularly important, as it may represent an obstacle for vulnerable false self-employed persons who want to engage in collective bargaining.

Next, **Lithuania** took the floor. The Lithuanian representative remarked on the French case and the similarity of the German merger case Edeka/Tengelmann, originally prohibited by the Bundeskartellamt, but later allowed after ministerial intervention.

The Chair offered **Germany** a chance to answer. The German delegate commented that, as in France, a ministerial exemption to allow a merger on public interest grounds is rather the exception than the rule.

3. Concluding Remarks

The Chair then proceeded to round up noting that there are several easy ways to accommodate labour market considerations within the interpretation of the consumer surplus standard, without modifying the standard that we have. There may be technical challenges, particularly as regards balancing competitive impact of a conduct at the downstream and upstream level, but also how to apply competition law in the labour markets in the gig economy, and how to stop the proliferation of non-compete agreements in many countries.

Lastly, the Chair gave a big thanks to all the contributors and how thought will be given into how to come back to this important topic in the future.