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SUMMARY OF DISCUSSION OF THE WORKSHOP ON EX-POST EVALUATION OF COMPETITION AUTHORITIES' ENFORCEMENT DECISIONS

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This document prepared by the OECD Secretariat is a detailed summary of the discussion held during the the Ad-Hoc Seminar held on 22 April 2015 by Working Party No. 2.

More documents related to this discussion can be found at http://www.oecd.org/daf/competition/workshop-expost-evaluation-competition-enforcement-decisions.htm

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CAPACITY BUILDING WORKSHOP ON EX-POST EVALUATION OF COMPETITION AUTHORITIES' ENFORCEMENT DECISIONS

Summary of Discussion

1. The **Chair, Alberto Heimler**, opened the workshop by explaining that it is part of a three year program on evaluation conducted by the Competition Committee. This program has led to the publication of a "Guide for assessing the impact of competition authorities' activities"[1] and a "Factsheet on how competition policy affects macro-economic outcomes"[2]. The program will be completed in 2015 with the publication of a "Reference Guide on Ex-Post Evaluation of Competition Authorities' Enforcement Decisions". He then explained that the first part of the workshop would revolve around the presentation and discussion of 3 ex-post evaluations performed by the UK, Dutch and Mexican competition agencies, while the second part would discuss lesson learnt from ex-post evaluations more in general with short presentations from CMA, ACM, COFECE and FTC.

2. **The UK delegate** presented the ex-post evaluation of the Shell-Rontec merger. The examined transaction consisted in the sale of 253 Total-branded forecourts by Rontec to Shell. The OFT (now CMA) examined the deal once it had already gone through and identified realistic prospects of a substantial lessening of competition, but only in the markets for the retail supply of petrol and diesel and for the retail supply of auto-LPG in some geographic locations. Specifically, 12 local areas raised concerns: 6 for fuel (petrol and diesel) and 6 for auto-LPG. The OFT decided then to clear the merger subject to divestments in these 12 local areas.

3. The UK delegate explained that the objective of the evaluation was twofold: 1) assess whether the OFT had correctly identified the areas where the merger would cause an increase in prices and 2) determine whether the OFT's intervention was effective in restoring pre-merger levels of competition in the divested areas. The chosen methodology was a difference-in-differences (DiD) and Propensity Score Matching was used to select the control group among the areas where the merging parties did not overlap. Data on prices and forecourts characteristics were purchased from a commercial data provider. They were only bought for the matched forecourts to reduce the purchasing cost.

4. The UK delegate then went on to illustrate the results of the evaluation exercise. The study found that, in the forecourts were divestitures were required, both petrol and diesel prices increased following the merger. After the OFT's decision, petrol prices went down, but not diesel ones. At the same time, prices did not increase in potentially problematic areas (i.e. that had a high GUPPI[3]), but for which divestments were not required. Overall, the results suggested that the OFT was correct in identifying the areas where the merger would have caused a price increase, while the divestments had mixed effects: they seem to have worked for petrol but not for diesel.

1 http://www.oecd.org/competition/guide-impact-assessment-competition-activities.htm

2 http://www.oecd.org/competition/factsheet-macroeconomics-competition.htm

3. Gross Upward Pricing Pressure Index.

5. She also explained that the study had taken roughly one year and had involved (not full time) a senior and a junior economist.

6. An **EU delegate** asked how the study distinguished between the effect of the merger and the effect of the remedy, because they were very close in time. The UK delegate explained that the use of weekly data in a market in which prices change very frequently had allowed them to make this distinction. The same delegate asked whether the study had tested the sensitivity of results to the choice of the counterfactual by repeating the analysis using a different control group. The UK delegate replied that such control was not performed due to the cost of acquiring additional data.

7. One of the experts, **Tomaso Duso** (DIW Berlin and DICE) highlighted that petrol prices fluctuate not only during the week but also during the day, so if data are not collected at the same moment every week this could influence results. The UK delegate explained that the price data was composed of the average daily price of the good calculated for the same day of the week for all forecourts.

8. The delegate from Japan asked why the study assumed that there would not have been any positive effects from the merger. The UK delegate indicated, that as far as she was aware, the study did not look at possible efficiency gains because the parties did not claim that there would be any.

9. **Walter Beckert** (University of London) pointed out that, given the nature of the panel data (12 cross-sectional units but 180 time-series units), a time-series methodology would have been more appropriate. He also added that the coefficient on the lags in the regression was indeed high and significant. This indicated a risk of serial correlation, meaning that the estimated coefficients may be spurious. The UK delegate replied that such concerns were true, but they had tested for the presence of unit root.

10. The **delegate from the Netherlands** then presented the ex-post evaluation of six hospital mergers in the Netherlands. He first described the characteristics of the hospital industry in the Netherlands: health insurance is mandatory; consumers can choose between competing insurers and between competing hospitals; and for a selected group of diagnosis-treatment combinations the price is negotiated between insurers and hospitals.

11. Between 2004 and 2012, NMa (now ACM) assessed 14 hospitals mergers, all of which were approved unconditionally, except one which was approved conditional on behavioural commitments. The presented study examined the ex-post impact of six among these mergers due to limited data availability (no pre or post merger data) or because the merger was not consummated.

12. The assessment was based on the use of a DiD methodology and examined the effect of the mergers on the price of hip surgery. Data on price and quantities per treatment were obtained from the Dutch Healthcare Authority. Several control variables were taken into account, among which, hospital characteristics and insurer characteristics. The chosen control group was composed of all the other hospitals in the Netherlands that performed hip surgeries.

13. The analysis found a statistically significant price increase for hip surgery for seven of the twelve hospitals involved in the six mergers, while in three other hospitals it found a significant price decrease. This price rise could have been caused by increased market power, learning effect for hospitals in the negotiation process, and a relative improvement in quality. To check whether an increase in quality could explain the change in prices, the authors analysed the travelling behaviour of patients: the idea is that, if the price increase is related to a quality improvement, patients would be willing to travel longer on average. Results on travelling behaviour of patients were mixed and did not support this explanation.

14. An EU delegate asked why hospitals want to merge in the Netherlands. The delegate from the Netherlands explained that hospitals often claim that they need to merge to reach quality targets. Hospitals are mostly not for profit and the decision to merge is taken by hospitals themselves.

15. The **delegate from Japan** asked how the average price had been calculated. The delegate from the Netherlands replied that the price per hospital was the unweighted average across all the insurers.

16. Walter Beckert asked why costs had not been included in the model specification. The delegate from the Netherlands explained that such information, e.g. the salaries of the specialists, was not easily available. Walter Beckert underlined in response that, if the rationale for the mergers is to reduce costs, then excluding this factor from the equation could create a problem of endogeneity and generate biased estimates. The delegate from the Netherlands replied pointing out that some studies have found that hospitals in the Netherlands are already operating at the minimum efficient scale and that becoming even bigger may result in higher costs, so it was unlikely that the sole rationale behind the mergers could be cost efficiency.

17. The **Chair** invited the discussants to start the discussion on the two ex-post evaluations of mergers.

18. **Peter Ormosi** (UEA, Norwick) offered some comments on the Shell-Rontec ex-post study. The first remark concerned the identification of errors. In the case of a consummated merger, a difference-in-differences analysis typically uses the no-merger world as a counterfactual to determine the effect of the decision. In the case of remedied merger, this approach allows to identify Type II errors (when the competition authority did not intervene, but should have), but not Type I (when the competition authority intervened, but it should not have). : If a price increase is estimated, this is interpreted as a Type II error (failure to intervene). But if prices do not increase it is not possible to determine if a Type I error occurred, because it is not possible estimate a world with the merger but no remedy. The implication is that the choice of the DiD methodology restricts the type of conclusions one can obtain. But Peter Ormosi pointed out that there are exceptions where such an analysis is possible: the UK system, for example, where there is no pre-notification requirement for mergers and the remedies are often implemented after the merger is already completed, thus allowing to identify a world with the merger and no remedies; and, similarly, the US system, in cases when the FTC blocks a merger but the Courts overturn the decision. Outside these jurisdictions, the presence of Type I errors can only be tested using simulations with ex-post data but not with the DiD approach.

19. Peter Ormosi also commented on the selection of control markets for use in DiD analyses. Control markets are easy to identify when competition is at the local level, otherwise one may use competitors as a control group, though these will also be affected by the merger even if to a lesser extent. Foreign markets, instead, are very problematic as a counterfactual.

20. Tomaso Duso started by pointing out that that it was very good that the CMA study was examined by an external referee and that the Dutch study was published on a refereed journal, as these external reviews provide an additional guarantee of the quality of the studies.

21. Tomaso Duso also made some methodological remarks on the two studies. First the choice of the dependent variable in the Dutch case (insurer-hospital price for hip surgery) might disregard the composition effect due to the fact that the competitive segment significantly expanded over time and ignore the characteristics of the bargaining process between insurers and hospitals.

22. Second he also discussed the choice of the counterfactual. The study used all other hospitals in the Netherlands as the counterfactual, while controlling for some hospital characteristics. Some problems may arise from this choice: for example, the common trend assumption should be tested, the fact that demand is very local should be taken into account, and mixing several treated and non-treated hospitals (as all the mergers are considered together though they happened at different points in time) can lead to incorrect results.

23. In addition, according to Tomaso Duso, the time windows used in the analysis may not be long enough to capture the pre-merger trends and the post-merger effects, because for four hospitals only data from one year before the concentration is available, while for four hospitals only data for one year after is available.

24. The **delegate from Austria** asked whether an ex-post analysis should only look at price effects or should also try to assess welfare effects. He also asked whether it is possible to use reduced-form equations to evaluate welfare effect. Peter Ormosi replied that ideally one should also look at the welfare effect, but that this can only be done with a structural model. Walter Beckert agreed with this comment. Tomaso Duso added that welfare assessments are very difficult to perform because, often the necessary data is not available. The US delegate added that estimating demand is very difficult and one can obtain extremely different results depending on the assumptions used. He concluded that it is risky to evaluate welfare effects and it is better to limit the assessment to the price effects.

25. An EU delegate asked how the effect of remedies can be measured even in case like the Shell Rontec one, given that the likelihood of remedies being imposed could be internalized by the parties. The answer by Tomaso Duso was that in order to measure the impact of remedies you need high frequency of data plus a time difference between the decision and the remedy implementation, two conditions that are very difficult to meet.

26. The UK delegate underlined the importance of involving academic advisors, not just at the end of the study but also earlier, i.e. at the moment when the methodology is chosen. Tomaso Duso agreed on the value of collaborating with academics in ex-post evaluation studies.

27. Peter Ormosi added a further remark. There is evidence that mergers sometime happen when collusion breaks down. It may thus be that after a merger takes place in concentrated markets one finds no evidence of a price increase because there was already collusion before.

28. A **distant participant** asked if, when one finds a price increase in DiD analysis, she could then use structural estimation to identify how much demand and/or supply-side effects contributed to the increase. The question spurred a debate on the use of structural models vs. DiD estimations. Walter Beckert argued that, according to him, DiD is a very blunt methodology that should be used as a first screening tool, but one should be conscious of its limitations and of the type of conclusions that can be drawn from it. He concluded that in order to separate Type I errors and Type II errors and to understand the factors that have driven the results (e.g. the reasons that can explain a price increase), a sharper instrument, like a structural model, is needed. Tomaso Duso responded that structural models are certainly very powerful, but they required considerable time and data, which are not always available.

29. The **delegate from Mexico** presented the ex-post evaluation of a collusive practice in the freight truck transportation market in Mexico. Between September 2008 and June 2010, the National Chamber of Freight Truck Transportation (CANACAR) and its members colluded to transfer increases in fuel prices directly to customers through the so-called “Fuel Price Adjustment FEE”. On June 3, 2010 the COFECE ordered the suspension of the practice and fined the firms involved.

30. The first part of the ex-post analysis was aimed at establishing whether there was statistical evidence of a structural change in the evolution of the freight truck transportation price index around the time when the collusive scheme was in place. The assessment was carried out by modelling the relationship between the price of freight truck transportation and the price of the main inputs (all prices are expressed as indexes). The Chow test was then used to test whether this relationship changed during the collusive period with respect to the pre-cartel and the post-cartel period. From the results, the study argued that it can be affirmed with a certainty above 95% that such a structural change occurred.

31. The study also estimated what the prices would have been in the absence of the anticompetitive practice. The computations showed that the freight truck transportation price index was on average 5% higher than it would have been in the absence of collusion.

32. As a measure of the impact on welfare, the authors of the study also computed the difference between the inflation rate in the freight truck transportation industry observed during the period of the anticompetitive practice and the inflation rate expected in the absence of such behaviour (3.2% of annualized inflation), and the inflationary impact of the anticompetitive practice**.** They then applying this annualized inflation to revenue figures for the provision of services in the freight truck transportation sector and estimated that the anticompetitive agreement had generated extra revenues for 630 million USD.

33. The delegate from Mexico also explained that the study had been undertaken by an academic consultant, and it was developed in about 12 weeks. The data used came all from public sources.

34. At the end of the presentation, the **Chair** opened the floor for the discussion on the ex-post evaluation of the cartel.

35. Peter Ormosi suggested that in cases of the ex-post evaluation of cartels, there is a considerable the literature on estimating cartel damages that can be referred to. As in the case of mergers, both DiD estimations and simulations can be used, but it is more difficult to find a counterfactual. Identifying the cartel period can also be problematic, since pre-cartel prices might already reflect collusion and post-cartel prices might not drop immediately.

36. Specifically on the Mexican study, Peter Ormosi remarked that estimating the counterfactual based on price trends pre-cartel has two main drawbacks: it assumed that all uncontrolled shocks were due to the cartel (generating an upward bias since all the effects were attributed to the cartel) and it assumed that the start of the cartel was precisely known. Peter Ormosi added that the welfare analysis and the estimates of the impact of the cartel on food prices were interesting.

37. Tomaso Duso pointed out that the Mexican evaluation project was very ambitious. The use of public data had had the advantage of reducing the costs, but he also pointed out that public data are often only available at the aggregated level, which may require strong assumptions when they are used to make inferences.

38. According to Tomaso Duso, key issues again were the definition of the counterfactual and of the before-and-after periods. The entire Mexican analysis was based on the initial before-and-after estimate of the price effect, so that – he pointed out - a bias in the coefficient estimates in the very first exercise would affect all the following results. As an alternative, the study could have tried to identify a control group, e.g. a nearby country.

39. Tomaso Duso added then that it would have been useful to test the robustness of results by re-estimating the coefficients using different definition of the time period, for example by excluding some months around the cartel. As for the indirect impact of the cartel on the economy, Tomaso Duso said that the analysis is very interesting, although the calculation of the welfare effect is simplistic (there is no use of structural models), it is based on many assumptions that are not discussed and nor tested, and no robustness checks have been made.

40. Tomaso Duso concluded that a general lesson on ex-post evaluation one could derive from this case was that one should always keep in mind the need to be transparent about the assumptions used and the importance of robustness checks.

41. In response to the comments above, the delegate from Mexico clarified that COFECE knew exactly the dates in which the cartel started, because the firms signed an agreement and even published it. He agreed that it would have been useful to have an alternative counterfactual.

42. **Cristiana Vitale** (OECD Secretariat) raised a more general question: when we do ex-post evaluation of a merger, we try to assess whether the decision was the appropriate one by considering the impact it has had on the affected market, but in the case of cartels, the exercise is a bit different because we only look at what was the effect of the cartel. Should we not test whether the cartel enforcement decision was effective as the cartel may continue in one form or another. Given this, could this type of assessment be considered an ex-post evaluation? The question was left unanswered.

43. The **Chair** moved the discussion to an examination of lessons learnt by competition authorities from ex-post evaluations.

44. The **US delegate** presented some examples of the lessons learnt in the US from ex-post evaluation studies. He focused on the two largest series of ex-post evaluations conducted by FTC economists: one on hospital mergers and one on retail petroleum mergers.

45. The hospital sector was chosen because DOJ and FTC had not been not successful in challenging seven consecutive hospital mergers in the late 1990s. To understand why they had so many difficulties in convincing the courts of the anticompetitive effects of those hospital mergers and derive lessons for the future, in 2002, the FTC conducted retrospective analyses of four of these consummated mergers.

46. Three main methodological lessons were learnt from these ex-post evaluations: 1) the Elzinga - Hogarty test led to market definitions that were too large; 2) not-for-profit hospitals do exercise market power like for profit ones (while the courts had assumed they would act in the community interest); 3) the bargaining between hospitals and insurers is a complex and important relationship that affects prices and should also be appropriately modelled to understand how it can be affected by mergers. As a result of these lessons, the trend in court was reverted: right after the ex-post studies the FTC successfully challenged a consummated merger and the agency now has a very active prospective merger program.

47. In the gasoline sector, the purpose was to investigate whether the increased market concentration resulting from petroleum mergers in the late 1990s was responsible for increases in gasoline prices. The FTC economists conducted six studies of eight consummated mergers. They did not find systematic evidence that the studied mergers led to material increases in gasoline prices.

48. The UK delegate presented some examples of lessons learnt from ex-post evaluation studies in the UK.

49. One recent example was the evaluation of the OFT 2006 market study into the commercial use of public sector information - to be published in 2015. The study found that a number of key recommendations were not implemented and the impact was lower than it had been envisaged.

50. Another interesting example was the review of eight merger decisions, taken between 2004 and 2006, published in 2009. This study was based on quantitative and qualitative methodologies. It concluded that in some cases the agency had overstated the role of barriers to entry and that in a couple of cases different consideration of self-supply might have led to different decisions.

51. The **Chair** asked details about the reasons why the CMA undertakes ex-post evaluation. The UK delegate explained that, according to the UK legislation, CMA has to undertake 2 ex-post evaluations every year. He also mentioned that the CMA has a performance agreement according to which it must generated benefits that are 10 times their budget.

52. Tomaso Duso asked whether authorities have a dedicated budget for ex-post evaluations or whether the resources are shared with those dedicated to investigations. The delegate from the US explained that his agency has a budget dedicated to research projects, and ex-post evaluations compete for this budget with other research projects, but not with cases. The UK delegate clarified that the CMA has a similar system.

53. The **delegate from the Netherlands** presented some examples of lessons learnt in the Netherlands from their ex-post evaluation studies. He explained that following the ex-post evaluations of those hospital mergers discussed in the morning, ACM had learned that in hospital merger cases it should not confine interviews to some of the insurers affected, but should interview all of them and that ex-post assessments are useful for testing the predictive power of the ex-ante tools.

54. Important lessons were also gained with respect to the communication of results. The controversial results of the hospital merger review led to a thorough discussion of whether to publish or not the results of ex-post studies. In the case of this specific study, it was eventually decided to make it public to show that the Authority is committed to learning from its past experience. The choice proved correct, as there were some defensive reactions from the firms involved in the merger, but no negative outcomes

55. The Delegate from Mexico explained that in Mexico ex-post evaluations are powerful tools for advocacy and can provide relevant information that can be included in non-binding opinions. In the case of the ex-post evaluation on freight truck transportation market presented in the morning, the main lessons learnt concern the methodology. Among them, the fact that when there is no data to estimate the demand function it is still possible to use an alternative approach (for example price dynamics and structural change analysis). Another contribution is the development of a different methodology to estimate the "pass-through effect". Other ex-post evaluations on bid-rigging, cartels and mergers had shown the importance of monitoring and screening activity, as well as the need to carefully model market structure and firm behavior when structural simulations are used.

56. After this presentation, the **Chair** opened the final general discussion.

57. Peter Ormosi said that ex-post evaluations should measure both the price and non-price effects of enforcement decisions, such as those on entry/exit, innovation, investment and quality. He mentioned that most of the studies that so far tried to assess such effects had been done by the UK Competition Commission.

58. A delegate from the EU highlighted the importance of having good data in order to perform a valid ex-post analysis. She suggested that a solution could be for agencies to identify the cases that would be interesting to assess ex-post during the investigation phase. This would allow to start collecting the necessary data at this early stage.

59. The delegate from the Netherlands agreed with this comment and said that the ACM is indeed trying this approach. The US delegate explained that in the US most of the times they only use commercial data for ex-post evaluations, so they have to limit their analysis to the sectors for which commercial providers or other organizations are collecting data. The subpoena powers, which compel firms to provide information after the decision, is very rarely used for ex-post studies.

60. The EU delegate asked the 4 presenters to explain more in depth their views on the pros and cons of using internal vs. external resources in performing ex-post evaluations.

61. The US delegate explained that the FTC conducts the ex-post evaluations internally, sometimes with support from academics. He explained that they see this as a very useful development exercise for their economists. Tomaso Duso underlined that this is possible for the FTC because their staff includes 75 PhD economists. This is not the case for most of the other competition authorities in the world, who, as a consequence, need to rely on academics more often.

62. The **Chair** commented that conducting evaluations internally presents several advantages, in particular that the lessons thus learnt are better disseminated inside the authority and the decision-making process can be effectively improved.

63. The US delegate agreed with the Chair’s remark. He then added that conducting evaluations internally and having academics revising or collaborating on them helps building human capital for internal staff and keeps their skills and knowledge up to date.

64. Tomaso Duso concluded that the best option is probably to have a combination of internal staff and academics working together.

65. The UK delegate explained that they try exactly to do this by conducting the study internally and having it revised by external academic advisors.

66. The **delegate from Spain** underlined that internal evaluations may lack credibility because of the unavoidable conflict of interest when a competition agency evaluates its own work. This problem is particularly acute when the aim of the ex-post evaluation is to prove the quality of the Competition Authority’s work to the Government. This can also lead to a selection bias in the choice of the case to evaluate. The involvement of an external referee either in the ex-post evaluation or in the choice of the case could give more credibility to the evaluation exercise.

67. The **delegate from Korea** asked how the ex-post evaluations of hospital mergers in the Netherlands and in the US were received by the case-handlers who had originally taken the decisions that proved to be incorrect.

68. The US delegate clarified that in the case of the hospital mergers, the FTC had concluded that the mergers were anticompetitive and had subsequently lost the cases in court mainly because they were not able to convince the judges. As a consequence, the economic analysis of the mergers was not wrong and the case team had no issues with the results of the ex-post studies.

69. The delegate from the Netherlands explained that, since the ex-post analysis of the hospital mergers considered only one treatment, they did not try to generalize and to conclude that the entire ex-ante evaluation was wrong. Therefore there were no frictions with the case-handlers.

70. An EU delegate underlined that ex-post evaluations are not necessarily a good basis for judging the quality of the Competition Authority's work. One reason is, for example, that ex-post studies cannot disentangle the effects derived from applying the relevant legal framework from that of the quality of the CA's decision-making process.

71. Tomaso Duso made a short summary of the main issues that had emerged from the workshop.

72. The first issue he mentioned was: why do we undertake ex-post evaluation. He said that there was agreement among the participants on the usefulness of the ex-post evaluation exercise as a means to improve the decision-making process and to learn lessons on ex-ante analyses and on specific sectors, as well as to increase the transparency and accountability of Competition Authorities.

73. The second issue concerns differences in institutional set-ups. For some competition authorities is compulsory to undertake ex-post evaluations, while for others it is not. Some agencies have dedicated resources, so that ex-post evaluations do not compete with cases, while others do not. The pros and cons of performing studies internally or externally was also discussed, and there was consensus among participants on the usefulness of a peer review process by academics.

74. The third issue deals with methodologies. It emerged from the workshop that each methodology has its pros and cons. Researchers should consider them carefully when choosing the methodology to adopt. He pointed out that there is a wide body of literature showing how to address methodological problems and he strongly encouraged competition agencies to perform ex-post evaluations to contribute to this literature.

75. The fourth pillar to be kept in mind was that data is key: without good data one cannot obtain good results. This creates an unavoidable bias: most ex-post evaluations analyses are in markets for which data can be more easily obtained, such as retail markets, while intermediate markets are rarely examined. Choosing the cases to evaluate ex-post at the time of the decision could provide a partial solution, allowing Authorities to start collecting data from that moment.

76. Another issue that was raised during the discussion is the difference between cartel and abuse evaluations and merger evaluations. This was mostly due to the fact that merger control is the only ex-ante intervention in competition policy, while the others are ex-post. Both Peter Ormosi and Tomaso Duso thought that some of the methodologies and the ideas behind them (e.g. choice of the counterfactual, choice of the time windows) were also valid for abuse and cartel ex-post evaluations, but that this type of assessments were certainly more complicated.

77. A last point concerned what to do with the results, especially when negative. What emerged from the workshop was that most agencies understand that policy-making is a trial and error exercise, and therefore were not afraid of admitting that some results were not those expected and were willing to learn from ex-post evaluations.

78. An EU delegate and Cristiana Vitale (OECD Secretariat) pointed out two other important issues that were discussed during the workshop: how to tackle the evaluation of remedies and the importance of assessing non-price effects, respectively.