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Competition work at the OECD

Frank Maier-Rigaud and Nick Taylor present a retrospective and outlook for the competition work of the Organisation for Economic Co-operation and Development

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COMPETITION WORK AT THE OECD

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Competition law and policy is a high priority for many countries around the world. However, different countries do not always apply the laws and policy in the same way. Governments and competition authorities put considerable effort into learning from each other and seeking to converge towards best practices.

The International Competition Network (ICN), UNCTAD and the OECD each have roles to play. The OECD has some distinctive features which mean that it tends to take the lead in certain areas of international co-operation.

The Competition Committee fits within a broader OECD framework. At the OECD, it is the governments of the 34 leading industrialised countries, a number of "observer" countries and the European Commission who address a wide range of economic and social policies. The private sector is represented by the Business and Industry Advisory Committee (BIAC) and there is a standing secretariat, the Competition Division, of approximately 20 people dedicated to supporting the Committee and its Working Parties and conducting outreach work. At the Committee's Global Forum on Competition, consumer groups and other international organisations also participate. The Committee's main objective based on the mandate received from its members is to:

> *protect and promote competition as an organising principle of modern economies, based on the knowledge that vigorous market competition boosts growth and employment and makes economies more flexible and innovative.*

The topics best suited to the OECD are complex technical topics or topics where other aspects of government policy where the OECD also has expertise interact with competition issues. All topics are primarily addressed within the roundtables of the Competition Committee, the Working Party on Competition and Regulation (WP2) and the Working Party on Enforcement and Co-operation (WP3) that meet three times a year.

The OECD work on competition assessment of laws and regulations can play an important role in microeconomic reform programmes

The discussions vary in format depending on the topic but are typically based on a detailed research paper prepared by the secretariat, and oral or written contributions prepared by experts, country delegations, the European Commission and BIAC. The roundtable discussions themselves are closed to the public but the outputs are published on the OECD's website (www.oecd.org/competition). These outputs contain summaries of policy considerations, the approaches used in different countries and the attached country submissions provide a wealth of case summaries.

In policy areas where close commonality between countries exists, the OECD occasionally adopts multilateral instruments with various degrees of legal effect. In the area of competition, the OECD has adopted recommendations and a number of best practices. These cover, for example, international co-operation on anticompetitive practices affecting trade, effective action against hard core cartels and information exchange in cartel investigations, bid rigging in public procurement, merger review procedures, structural separation in regulated industries and competition assessments in the context of government regulations and policies that can affect business.

An example of how these recommendations influence competition law is the recommendation concerning hard core cartels. The Australian and New Zealand governments each relied upon the recommendation to distinguish hard core cartel conduct warranting criminal jail sentences from lesser forms of horizontal conduct that should only attract civil fines.

The OECD also engages closely with emerging and developing countries. The Global Forum on Competition, which celebrated its tenth meeting in 2011, brings together some 90 economies, international and regional organisations, as well as representatives from the business and consumer communities. Its policy discussions focus on the interface between competition and development issues. The Latin American Competition Forum, which will celebrate its tenth anniversary

meeting in 2012, allows for a dialogue, consensus building and networking in the region.

The OECD also delivers structured capacity building programmes for competition authorities and judges through the OECD's regional centres located in Seoul (Korea) and Budapest (Hungary) supporting countries in Asia and Central, Eastern and South Eastern Europe. Additionally, the OECD can provide assistance and capacity building to individual countries, on specific issues relevant to their competition enforcement and policy activities. An increased emphasis on co-operation with other international/regional organisations and networks has extended the OECD's outreach capacities: across Asia in collaboration with the Association of Southeast Asian Nations (ASEAN) and the Asian Development Bank, respectively; in Africa with the new African Competition Forum; and throughout Latin America with the Inter-American Development Bank. These initiatives play an important role in the implementation of regional programmes and dialogues.

The OECD also conducts in-depth country reviews of national competition laws and policies, with the aim of strengthening institutions and improving economic performance. Recent reviews and reports on competition frameworks include Egypt (publication forthcoming) and Honduras (publication forthcoming).

Finally, the OECD can help countries implement best practices and adopt reforms. Experts from the OECD's Competition Division have been assisting the Mexican government with economic reforms, working closely in partnership with Mexico's Federal Commission for Competition (CFC). This work has long had a focus on fighting bid-rigging in public procurement, and in 2011 the OECD assisted a large state owned enterprise to review and improve its procurement practices, and started work to do the same for a regional government. Together with the CFC, the OECD is also carrying out a competition assessment of laws and regulations in key sectors such as airlines, telecommunications and broadcasting. The OECD has also been involved as a partner and adviser in the context of the new Mexican competition law that substantially increased the powers and effectiveness of the CFC.

This article reviews some of the work in the competition law and policy area undertaken by the OECD in 2011 and what is in store for 2012.

THE YEAR 2011

In 2011 the Committee and its Working Parties discussed questions ranging from abuse of dominance or monopolisation to cartels and mergers including topical issues such as the quantification of harm in antitrust cases and competition issues arising in the digital economy as well as procedural topics such as procedural fairness or the regulated conduct defence. Delegates also considered specific sectors as illustrated by a roundtable on **ports and port services** (OECD (2011a)) focussing on issues such as the relevant market definition, regulatory reforms and antitrust enforcement.

In a roundtable on **economic evidence in merger analysis** (publication forthcoming), delegates agreed that sound economic evidence should be based on a clear testable economic theory subjected to a transparent test leading to replicable results. It was emphasised that economic evidence should not be viewed in isolation but as a complement to qualitative evidence, and the fact that it is an intrinsically imperfect approximation of reality should be recognised.

The Committee also held a roundtable on the **quantification of harm** (OECD (2011b)) from two different perspectives: the economy as a whole, and the perspective of individual victims who suffered financial losses. With respect to the latter, the economic tools for quantifying damages, particularly in a court context, imply making appropriate tradeoffs between accuracy and practicality. All approaches rely on a (constructed) counterfactual market in which the anticompetitive conduct would not have occurred.

Of relevance to major ongoing cases were the hearings conducted on **network neutrality** and on the **digital economy**. Both topics are of tremendous importance to competition authorities. The discussion on network neutrality emphasised the distinction between the problem of peak demand in wired and wireless networks that is similar to the classic congestion problems in car traffic management and the problem of blocking access to content and services.

Concerns are likely to arise when network operators have significant market power and own rivalling content as these are the necessary ingredients for exclusionary conduct to be profit maximising. In such cases network operators would no longer discriminate, for example between premium and basic service, to manage peak traffic loads, but use the measures to exploit market power in anticompetitive ways ultimately detrimental to consumers (Maier-Rigaud (2011)).

The digital economy hearing showed that competition authorities face many unsettled questions about how to apply competition law in internet-related markets, such as how to know when the time is right for intervening, how to define relevant markets given that competitive challenges in the digital economy can come unexpectedly from completely different platforms, and how to fix competition problems without undermining innovation.

Through the OECD, among other ways, competition authorities learn from each other and seek to converge towards best practices

Despite being one of the most controversial topics in antitrust, **excessive prices** (OECD (2011c)) associated with monopoly power remains the textbook justification for intervention due both to the allocative inefficiency associated with the deadweight loss and to the associated consumer harm. While high prices often fulfil the important role of signalling scarcity and attracting entry or expansion, circumstances exist where the market will not be self-correcting and where a role for intervention by a regulator or competition authority exists. Factors that may contribute to the lack of self-correction and legitimise intervention are, among others, high and non-transitory entry barriers, a quasi-monopoly position or that the firm has attained (or in some cases inherited) its dominant position through other means than competition on the merits.

The Global Forum on Competition reflected on two enforcement areas that are particularly challenging for competition authorities in both developed and developing countries. The first, **cross-border merger control** (publication forthcoming) raises significant challenges for competition authorities in an increasingly globalised economy. To avoid inconsistent reviews and to increase effectiveness of the enforcement action across countries, participants, particularly from developing countries, called for more and better co-operation between reviewing authorities, through either bilateral or multilateral relationships. Co-ordination in the design, enforcement and monitoring of cross-border merger remedies was considered among the most challenging aspects.

The second topic dealt with **crisis cartels** (OECD (2011d)). Past severe economic downturns have prompted cartelisation in some instances and governments have sometimes even played a role in creating or encouraging so-called crisis cartels in others. During the recent financial and economic crisis, businesses appear to have been less inclined to seek, and governments have been less inclined to provide, exemptions or lenient treatment. Pertinent enforcement experiences and policies towards crisis cartels and general lessons learned in the aftermath of such crises were discussed in an effort to strengthen the evidence upon which competition authorities and governments can rely when formulating their policies towards cartels during adverse economic circumstances.

In addition to these, the topics covered by the Latin American Competition Forum included air transport (OECD (2011e)), trade associations (OECD (2011f)) and triple/quadruple play in telecommunications (OECD (2011g)), as well as a review of competition law and policy in Honduras.

Despite a high degree of commonality on substantive competition law issues such as cartel enforcement or mergers, there is not always agreement on procedural issues.

One of the OECD's working parties has held a series of discussions on different aspects of **procedural fairness** (publication forthcoming). All OECD countries share the notion that processes should be fair, transparent and efficient but the discussion showed that there are different legal mechanisms and administrative practices to achieve this. Most obviously there is the difference between the administrative and the adversarial model of enforcement but even within these two broad models there are important differences.

This year the OECD refreshed its previous work on **remedies in merger cases** (publication forthcoming). There was a broad consensus on the objectives and types of remedies available to authorities in merger cases. Although most authorities still expressed preference for structural remedies, in practice many authorities accept behavioural conduct remedies, particularly in combination with structural remedies. Authorities from small economies may experience difficulties with structural remedies where a suitable purchaser cannot be found, as the size of the market limits available options.

A further topic addressed concerned the disparate approaches that different countries adopt under the broad banner of the **regulated conduct defence** (OECD (2011h)). In some jurisdictions, a valid regulatory instrument that limits or distorts competition would exonerate businesses from competition law liability either through an express exemption or because

The history of the OECD

The origins of the OECD were in its predecessor, the Organisation for European Economic Co-operation (OEEC) that was founded in 1948 to administer aid under the Marshall Plan for the reconstruction of Europe after World War II. Having concluded that work in 1961, the members created the OECD, whose mission is to build strong economies in its member countries, by improving efficiency, advocating market systems, expanding free trade and contributing to development in industrialised as well as developing countries. The OECD has now grown to have 34 member countries and a staff size of 2,500. The OECD is in accession talks with Russia, and has enhanced engagement programmes with Brazil, China, India, Indonesia and South Africa.

The OECD is engaged in the G8 and G20 work streams and has official relations with other international organisations such as the International Monetary Fund, the World Bank and many UN bodies. The OECD is financed by all its members with the highest contributions stemming from the largest member economies: the United States, Japan, Germany and France. The OECD's headquarters are situated in Paris.

these regulatory instruments remove businesses' decision making autonomy. In other jurisdictions, competition laws effectively trump regulation and therefore invalidate regulatory instruments that purport to limit or distort competition. Members also discussed the question whether or not leniency should be afforded to business breaching competition laws at the request of another part of government.

The responsibilities of competition authorities are typically perceived narrowly, focussing only on anticompetitive conduct and merger control. Competition issues may, however, arise in a broader context such as the EU state aid control, competitive neutrality and efforts to curb bid rigging in public procurement (OECD (2009a)). The work on competition assessment of laws and regulations (OECD (2010)) is of particular relevance for microeconomic reform programmes aimed at increasing growth in the context of the current sovereign debt crisis.

Competition assessment of laws and regulations and ensuing **advocacy efforts** are of increasing importance in particular for those countries where unnecessary restrictions hamper growth and economic development (OECD (2009b)). The primary reason for this development is that harmful effects to the economy may not stem from anticompetitive market conduct but from unintended consequences of government policies. This has encouraged a range of countries to adopt competition assessment frameworks.

Competition assessment concerns existing and proposed laws and regulations with the aim of removing unnecessary impediments to competition. Competition advocacy, in this context, concerns the advocacy efforts and strategies used by competition authorities to also advocate competition within government, government authorities, regulators and ministries, i.e. regulatory advocacy. This is different from (traditional) enforcement advocacy efforts essentially aimed at raising awareness of competition law in the business community and society at large.

Similar to the competition assessment work, the OECD also dealt with the question of **structural separation in regulated industries**. While this work is relevant for remedy design in abuse of dominance cases, it mainly calls on governments to consider structural separation as a solution to conflicts of interest arising when a regulated firm is operating simultaneously in a non-competitive market and a potentially competitive complementary market. The third report (OECD (2011i)) resulted in a modification in the recommendation as the impact of structural separation (or the lack thereof) on corporate incentives to invest has become a prominent issue in network industries.

On the one hand the regulatory uncertainty resulting from the possibility that structural separation may be imposed (or after separation has been imposed, what the details of the regulatory treatment will be for new investments), has the potential to chill investments, continued vertical integration may on the other hand lead to strategic under-investment (Maier-Rigaud et al. (2011)). Structural separation measures may therefore have positive effects on investments when an infrastructure owner is subject to mandatory access requirements and may otherwise refrain from developing additional capacity on its network.

The impact of structural separation on investment incentives is important and was one of the key questions in the regulatory and competition debates surrounding the implementation of the third energy package in the EU and also in several recent EU antitrust cases in this sector.

OUTLOOK ON FUTURE WORK

The Committee has agreed a strategic focus on international co-operation among competition authorities and the evaluation of the impact of competition policy.

Additionally, the Committee is likely to propose a new recommendation on bid rigging and public procurement. The focus on public procurement echoes work by other OECD policy committees who have worked on other aspects of public procurement policy. Similarly, competition policy work will be undertaken on competition assessment, state owned enterprises and competitive neutrality which also has linkages with work being undertaken in other parts of the OECD.

International co-operation among competition authorities

Businesses often ask why there is not closer international co-operation between competition law authorities to remove inconsistencies and duplication.

In competition law, countries have in fact been prepared to take bilateral, regional and multilateral steps towards formal international co-operation. This may partly reflect political concerns, differences in process and substance or direct restrictions on their ability to co-operate, particularly concerning the protection of confidential information

Since the adoption of the **Recommendation on Concerning Co-operation between Member countries on Anticompetitive Practices affecting International Trade** (OECD (1995)) more countries have implemented competition regimes. Global economic integration means an increased likelihood of cross-border implications for competition enforcement and policy developments. It is therefore timely for the OECD to reconsider the subject of international co-operation.

Impact evaluation of competition policy

Governments are increasingly interested in assessing the effectiveness of their policies and institutions. Impact evaluation can take many forms: from authorities' annual reporting of their activity, through authorities' own ex post studies of past cases, to studies of the broader effects of competition on growth, innovation and development. Across the range of policy, the OECD seeks to identify sources of growth and uses economic analysis to identify priority policy areas for each of its members – and competition should be part of that assessment. The OECD intends over the next few years to carry out projects in each of these areas, bringing together best practices and academic work.

In some areas, such as annual reporting of expected impact, it may be possible to move towards common standards. In others, the purpose could be to help authorities assess their own work, and to demonstrate the value of competition policy. This could involve recommendations or best practices, including actions to be taken on completion of cases to make subsequent evaluation of those cases easier.

Forthcoming individual topics

The forthcoming meeting of the Committee and its Working Parties will take place in February 2012, in the same week as the Global Forum on Competition.

The main topic in the Global Forum will be **commodity price volatility and competition**. Several countries have witnessed public protests in light of high costs of living. Sharp increases in food and mineral commodity prices prompted detailed work on commodity prices at the G20 to which the OECD has contributed. At the same time many competition authorities reported within the Committee that they had been confronted with demands from their governments or civil society to search for breaches of competition law in these markets. In other cases governments' faith in the ability of the market to deal with short term supply and demand imbalances has been shaken and a range of measures that hinder or restrict competition have been proposed. Usually, competition authorities have a responsibility to advise governments of the damage such policies can do and to propose alternatives.

Reviewing the recent history of commodity price volatility and the levels of prices in related consumer products is therefore important. The discussions will focus on the role law enforcement and competition policy advice can play. The aim is to distil a package of suggestions for competition authorities to better anticipate or address competition issues in relation to commodities and related consumer product markets.

In line with the new strategic focus, February's Global Forum on Competition will look into the evolution of **international co-operation in cartel investigations** since the last report in 2005 (OECD (2005)). The roundtable will also explore how international co-operation works in other fields, such as anti-corruption and tax and money laundering, to see if any practices can be extrapolated to cartel enforcement.

During the same week, the Competition Committee and its working parties will discuss **competition in hospital services** in close co-operation with the OECD Health Committee, the **unilateral exchange of information with anticompetitive effects** and continue the debate on competition in the **digital economy**. ■

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