

For Official Use**English - Or. English****6 August 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Draft Summary Record: 129th meeting of the Working Party No 3****4 June 2019**

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Draft Summary Record: 129th meeting of the Working Party No. 3 on Co-operation and Enforcement on 4 June 2019

1. Adoption of the draft agenda and the draft summary record of the last meeting

1. WP3 approved the draft agenda for its 129th meeting and the summary record of its 128th meeting of 26 November 2018.

2. Roundtable on the standard of review by courts in competition cases

2. The roundtable looked at standards of review by first-instance courts of competition decisions, whether the original decision was taken by a competition agency in an administrative system or a trial court in a judicial system.
3. The Secretariat presented its background paper. Three experts gave a presentation on the topic and participated in the discussion: Paul Crampton, Chief Justice of Canada's Federal Court; Ian Forrester, Judge at the General Court of the European Union; and Jonathan Jacobson, partner at Wilson Sonsini Goodrich & Rosati. There were 30 written contributions from delegations, most of which were discussed at the roundtable.
4. Delegates discussed the review of final decisions as well as of decisions taken as part of the investigative process, like requests for information, seizures and decisions qualifying information as confidential. Delegates discussed the different standards of review on the merits versus review of points of law, and the level of deference afforded to the legal conclusions and factual findings of the first-instance decision-maker, whether competition agencies or first-instance trial courts. The discussion covered aspects of review systems, such as review by administrative and commercial courts, review by courts of general jurisdiction and specialised competition tribunals, the participation of competition authorities in court proceedings when they are not a party to them and capacity-building for judges. Delegates mentioned that judicial delays have an impact on case handling, and the experts pointed out that delays may prompt more out-of-court settlements.
5. The delegates and experts agreed that review by a competent court or tribunal is a fundamental element of due process and supports the legitimacy of competition enforcement, and its credibility for parties and citizens. The whole enforcement process, from when a case starts to the issuance of the decision, can and should be reviewed. Without adequate review, parties, and in particular losing parties, would lose trust in the soundness and fairness of competition enforcement.

3. Transparency and Procedural Fairness

6. Christopher Yoo (Professor of Law at the University of Pennsylvania Law School) started the session with a presentation on his comparative research on due process in the US, EU and China.
7. The Secretariat presented a draft OECD Recommendation on transparency and procedural fairness in competition cases, based on a note on the topic that WP3 discussed at its last meeting on 26 November 2018.

8. Several delegations supported the draft. There was a request to have this Recommendation adopted by summer 2020, instead of end of 2020 as mentioned in the draft. Delegates also noted that there should be no discrepancies between the draft and the International Competition Network's (ICN) Framework on Competition Agency Procedures and the 2019 ICN Recommended Practices on Investigative Process.

9. The delegates agreed to send comments and suggestions on the draft by 31 July 2019, and, following clarifications, the Secretariat will circulate to WP3 a draft marking the changes.

4. Monitoring the implementation of the Recommendation concerning International Co-Operation on Competition Investigations and Proceedings

10. WP3 started monitoring the implementation of the Recommendation concerning International Co-Operation on Competition Investigations and Proceedings (the "Recommendation"), which instructs the Competition Committee to report to Council on its implementation in the 5th year following its adoption in 2014, i.e., in 2019.

11. To kick off the process, the Secretariat prepared and presented a note setting out some developments in Members as well as OECD's work on international co-operation since 2014. Delegates agreed that, to enable the monitoring of the implementation of the Recommendation, they would respond to a monitoring survey.

12. In 2012, the OECD conducted a joint survey on international enforcement co-operation with the ICN and published a report in 2013. That report contributed to the adoption of the 2014 Recommendation and, due to the breadth and quality of the data it contained, is still a useful reference document.

13. Delegates discussed whether the monitoring survey should be conducted together with the International Competition Network (ICN) or on a standalone basis, and agreed to a joint survey with the ICN, if possible. The questionnaire would be similar to the one used in 2012 with some wording improvements that the delegates would send to the Secretariat.

14. The delegates agreed that WP3 would prepare the first draft of the monitoring report for the Council in 2020. As a first step, the Secretariat will conduct the survey in the summer and autumn 2019 and present preliminary results in the December meeting of WP3.

15. The Secretariat pointed out the Recommendation instructed the Competition Committee to consider developing model information gateway provisions; model international enforcement co-operation agreements; and enhanced co-operation instruments and that, so far, the Committee had not developed any of these.

16. There was some support for developing model information gateway provisions. Some delegations proposed a roundtable on investigative assistance, including assistance in the context of regional co-operation frameworks. There was also a proposal for further work on competition chapters in free trade agreements and on so-called "third-generation" multilateral agreements that enable not only the exchange of confidential information but also investigative assistance.

17. Finally, the delegations agreed to assess whether the Recommendation should be revised or complemented after discussing the results of the survey.

5. Fighting Bid Rigging In Argentina

18. Following a request by Argentina's competition authority (Comisión Nacional de Defensa de la Competencia, the CNDC), the Secretariat conducted a project consisting in reviewing Argentina's federal rules for the procurement of public works against the Recommendation for Fighting Bid Rigging in Public Procurement, and providing recommendations for improvement as well as capacity building.

19. In this session, the Secretariat gave a brief overview of the steps of the project and of Argentina's procurement of public works, and presented identified challenges and certain key recommendations. The head of the CNDC presented their recent initiatives in fighting bid rigging, and delegations that provided capacity building to Argentine procurement offices in the context of the project also discussed good practices to prevent and detect bid rigging in public procurement.

6. Future topics

20. The next meeting of WP3 will take place on 2 December 2019. WP3 agreed to hold a roundtable on access to file and the protection of confidential information; discuss a new draft of the Recommendation on Transparency and Procedural Fairness; and continue the work on international co-operation.

21. Delegates were encouraged to send proposals for 2020.