

Asia-Pacific Competition Update

News from the OECD/Korea Policy Centre Competition Programme

November 2014, Issue 12

IN THIS ISSUE

Competition Workshop

PAGES 1-14

- Workshop for Judges on Evidence in Cartel Proceedings
- Workshop for ASEAN Member States on Cartel Fundamentals
- Workshop on Merger Review Procedures and Joint Ventures
- Workshop on Evidentiary Issues in Establishing Abuse of Dominance

News from Asia-Pacific Competition Authorities

PAGES 15-17

OECD Competition Committee Meetings

PAGES 18-19

The Competition Programme of the OECD/Korea Policy Centre provides education and training to officials of Asia-Pacific competition authorities in the field of competition law and policy. This newsletter includes information about our work and the work of the OECD, as well as news, case studies and reports from competition authorities in the Asia-Pacific region.



Workshop for Judges on Evidence in Cartel Proceedings



In October 2014, the Centre held a workshop for judges on evidence in cartel proceedings. This is the fourth year that the Centre has held a workshop on competition law for judges.

The themes of previous workshops primarily addressed the interaction between law and economics either by considering the over-all policy rationale and design of competition laws or how to adjudicate cases where the application of an economic theory has to be proved. The main challenge for judges that these workshops explored was how to bring economic principles to life in applying the law.

This year's workshop was the first to address in detail the topic of cartels. The main challenge for judges in relation to cartels is to weigh up often conflicting, incomplete and deliberately concealed evidence to determine whether in fact there was coordinated conduct. Where such coordination between competitors is found to exist, a full economic analysis is not required.

There were 20 participants in the workshop with judges from countries across Asia, including Chinese Taipei, Hong Kong, India, Indonesia, Malaysia, Mongolia, Pakistan, the Philippines, Thailand and Vietnam.

A publication of the OECD/Korea Policy Centre Competition Programme. The Asia-Pacific Competition Update may be reproduced with appropriate source attribution. This Newsletter is provided for information purposes only. The views expressed do not necessarily represent the views of the OECD or the Korea Policy Centre. To subscribe, or cease subscribing to Asia-Pacific Competition Update, please send an email with your contact details to ajahn@oecd-korea.org. Further information about the Competition Programme at the OECD/Korea Policy Centre can be found at www.oecd-korea.org and www.oecd.org/competition/seoulrcc

Workshop for Judges on Evidence in Cartel Proceedings



Mr. Nick Taylor
Consultant to OECD,
Partner, Jones Day

The workshop comprised both presentations and a hypothetical case presented to the attendees for their adjudication. The introductory presentations commenced with private practice consultant to the OECD/Korea Policy Centre, Mr. Nicolas Taylor, presenting an overview of how the cartel prohibition fits into a modern competition law. President Carl Baudenbacher of the European Free Trade Association Court gave a presentation on the legal frameworks and models for cartel enforcement. Judge Douglas Ginsburg of the US Court of Appeals' Washington DC Circuit catalogued the different kinds of cartels and the evidentiary challenges that arise.

Three presentations concerned the evaluation of specific types of evidence: Mr. Ruben Maximiano of the OECD/Korea Policy Centre gave a presentation on obtaining direct evidence from dawn raids, leniency and forms of direct evidence. Mr. Taylor gave a presentation on indirect evidence based on the OECD's 2006 roundtable discussion that distinguishes between "communications" evidence and "economic" evidence. Dr. Rhonda Smith, Lay Member of the High Court of New Zealand and former Member of the Australian Copyright Tribunal, gave a presentation specifically on how to use economic evidence in cartel proceedings.

Seoul High Court Judge Jeong discussed a recent important Korean case which used a range of direct and indirect evidence, including economic and communications evidence.

At this point in the workshop there had been extensive conceptual discussion about the use of different kinds of evidence and the participant judges heard, discussed in small groups and determined a hypothetical case loosely based on an Australian petroleum products cartel. This was done, relying on extensive documentary evidence provided before the workshop by the OECD/KPC

(constituting the "court file") as well as on oral presentations given by Mr. Maximiano (representing the competition authority), Ms. Heeun Jeong (representing an alleged cartel member appealing on the basis that all the evidence against the company was illegally obtained) and Mr. Taylor (representing several companies who claimed to be "peripheral" to the cartel and denied being party to any agreement or coordinated action).

The final phase of the workshop moved to a discussion of the considerations that arise after it has been concluded that a party was involved in illegal cartel conduct. Judge Ginsburg and his colleague at the School of Law, George Mason University, Professor Bruce Kobayashi, gave a detailed presentation on remedies and sentencing ranging from the theoretical considerations when establishing the optimal level of fines and the practical challenges that courts face. The final presentation was provided by President Baudenbacher on granting (or refusing to grant) access to the competition authority's files to third party damages litigants.

This workshop marks the beginning of an important trend for future judges workshops held at the Centre. Although the over-all character of the workshops enables OECD member countries to share their many years of experience with competition law cases with Asian courts, who are still in the process of establishing a body of core precedents, all the participants demonstrate a rapidly gaining level of experience in competition law. This will increasingly enable the newer jurisdictions to participate as presenters at the workshops and also provide a richer opportunity for a two-way educational exchange between member and non-member OECD countries.

The first steps in the direction of greater participation by non-member country judges and towards a two-way exchange taken at this workshop were to invite a broader number of OECD member country participants and the inclusion of a hypothetical that involved all participants as active participants presenting their findings to each other in a fruitful and engaged manner.



Workshop for ASEAN Member States on Cartel Fundamentals



Mr. Eric Emch
 Consultant to OECD,
 Partner, Bates White

There has been a growing international consensus that fighting “hard core cartels” should be a top priority of competition enforcers, and increasing agreement on the best tools to do so. The OECD/Korea Policy Center’s workshop on “Cartel Fundamentals,” in Bangkok, Thailand on September 1-3, 2014, co-hosted by the Thailand Trade Competition Commission, provided a forum for Asian competition authorities to explore some of these tools of modern cartel enforcement and share their experiences.

Economic theory recognizes that there are high costs of cartels on consumer welfare with little compensating benefits. In countries without a history of competition enforcement, cartels can be prevalent. This means that for young competition authorities in particular, there can be a high payoff to focusing on cartel enforcement as an early priority to change the business culture and to demonstrate to consumers the benefits of competition laws. The question is: how does a young authority most effectively detect, prosecute, and deter cartels? Presentations and discussions in the workshop focused on the economic theory of cartels, common tools to detect and prosecute them, and various jurisdictions’ particular experiences with cartels. Participants also worked through as a group a case study relating to a hypothetical asphalt cartel.

After welcoming remarks on the first day from Mr. Kyeoung-Man Lee of the OECD/Korea Policy Centre and Mr. Santichai Santawanpas, Deputy Director General of the Department of Internal Trade in the host country of Thailand, the first day of the workshop focused on

Workshop for ASEAN Member States on Cartel Fundamentals

providing an overview of the economics of cartels, cartel detection and investigation methods. Mr. Eric Emch, an economist and competition expert leading the workshop for the OECD, began by discussing recent trends in cartel enforcement worldwide and the increasing importance of international coordination in fighting cartels. Ms. Alexandra Shepard of the United States Department of Justice gave an overview of deterrence and detection of cartels from the United States' perspective, noting that the combination of criminal penalties for cartels with leniency programs in the United States has proven particularly effective in gaining the cooperation of cartel participants to unravel cartels.

Mr. Seong Wook Yu of the Korean Fair Trade Commission (KFTC) and Mr. Wei Lu Lim of the Competition Commission of Singapore (CCS) then discussed methods that their authorities use to detect cartel behavior, including uses of reward systems and data analysis. Mr. Yu focused on several innovative methods the KFTC uses in detecting cartels, including a reward system for whistleblowers who report cartel behavior and a data analysis system used to detect bid rigging. Mr. Lim discussed the two-pronged approach used by the Competition Commission of Singapore to fight cartels: advocacy and enforcement. The two are intertwined, as advocacy can generate complaints or feedback from the government or the public that are the most common source of cartel cases. The CCS also makes use of a whistleblowing program and a leniency program, and has begun using data analysis to identify industries that might be susceptible to cartel.

Day 1 concluded with a discussion of investigative techniques by Mr. Noriaki Abe of the Japan Fair Trade Commission (JFTC) and an overview of the economics of cartels by Mr. Emch. Mr. Abe focused on "dawn raids," and walked step-by-step through the JFTC's approach, including pre-raid planning, briefing of the team, and the conduct of the raid itself. Mr. Emch discussed how economics of defection from a cartel agreement create an inherent instability to cartels, and how leniency programs can take advantage of that instability.

The second day of the workshop began with a discussion of cartel investigations in the Philippines by Mr. Geronimo

Sy, Assistant Secretary of the Office of Competition in the Philippines Department of Justice. Mr. Sy described sector studies that are being conducted by the Philippines DOJ to uncover possible anticompetitive behavior, and discussed the DOJ's findings as they related to a possible rice and garlic cartel.

The bulk of day 2 of the workshop was taken up by a hypothetical asphalt case led by experts from OECD member countries. Participants broke down into three groups and each "interviewed" cartel whistleblowers, firms in the industry, and customers (all played by competition experts from OECD member countries). Documents from a fictitious dawn raid informed the interviews and helped participants focus on key pieces of information they needed to obtain to reach a decision about whether and how to prosecute the fictional cartel. Each of two sessions concluded with the three groups describing what they learned from documents and interviews, gradually filling in the picture of a long-running agreement to anticompetitively rig bids for public procurement processes. Discussion focused on the specifics of the agreement and participation in the agreement, and the particular evidence that could be used to prosecute the hypothetical cartel.

The final day of the workshop focused on case studies from particular jurisdictions and delved into more detail on leniency programs. Ms. Shepard of the US DOJ discussed the international liquid crystal display (LCD) cartel and how the US and other jurisdictions coordinated their investigations, ultimately leading to fines of over \$1 billion in the US and significant prison time for a number of executives of the cartel firms. Mr. Abe discussed bid rigging in Japan that actually involved a government agency that was disbanded as a result of the JFTC investigation. Ms. Chantida Kalampakorn of the Thai Department of Internal Trade discussed the Thai Competition Act and its application to cartel investigations, while Ms. Wahyu Retno Dwi Sari and Ms. Lina Rahmawati of the Indonesian KPPU similarly described the structure of Indonesian cartel enforcement and how cases are handled. Mr. Emch discussed how cartel sanctions should be set to optimally deter cartels, and how sanctions vary

Workshop for ASEAN Member States on Cartel Fundamentals

in practice across jurisdictions.

Ms. Heeun Jeong of the OECD Korea Policy Center explained the leniency program operated by the KFTC, with the recent expansions of that program and related investigatory powers of the KFTC. The leniency program in Korea has been responsible for detection of long-running cartels in the sugar, flour, and polypropylene industries, among others, and has in some cases had a domino effect as an investigation in one industry has turned up evidence of cartels in related industries.

The workshop concluded with closing remarks by the OECD-KPC and the Thai Office of Trade Competition Commission. Close cooperation between these two institutions was central in bringing about the workshop and making it a success both from the perspective of the host country and all the participants.

Cartel Investigation: The Philippine Experience



Mr. Geronimo Sy
Assistant Secretary of
the Philippine DOJ

Mr. Geronimo Sy, Assistant Secretary of the Philippine Department of Justice (DOJ) and Head of the DOJ-Office for Competition In the Philippines presented the Philippines experience with cartel investigations starting with the view that Cartels – particularly hard core cartels – are considered to constitute the most serious violations of competition law. When competing firms band together and agree to not compete with each other, consumer welfare undoubtedly suffers.

Cartel investigations may start prompted by complaints from individuals, reports or referrals from other government offices, and/or motu proprio action by the Department of Justice – Office for Competition (OFC). The OFC was created by virtue of Executive Order No. 45 (s.2011), designating the Department of Justice (DOJ) as the Philippines' Competition Authority. The OFC has the duty and responsibility, among others, to investigate all cases involving violations of competition laws and prosecute violators to prevent, restrain and punish monopolization, cartels and combinations in restraint of trade.

In conducting cartel investigations, the OFC collects industry data from various sources and thereafter submits reports to the Secretary of Justice for the filing of appropriate cases and to the President for executive directives.

Among the challenges relating to the conduct of cartel investigations in the Philippines include access to primary data source and the need to harmonize enforcement agencies' parallel efforts. Despite these challenges, the OFC remains committed to fulfilling its mandate of achieving a genuine and effective economic justice for the Philippines, through competition policy and law.

Uncovering Cartel Conspiracy: The Singapore Way



Mr. Lim Wei Lu
Competition Analyst,
Competition
Commission of
Singapore

Workshop for ASEAN Member States on Cartel Fundamentals

Mr. Lim Wei Lu of the Competition Commission of Singapore (CCS) shared Singapore's experience in uncovering cartel conspiracies. Besides relying on the conventional channels such as complaints, news scanning, leniency programme and whistle-blowing scheme, CCS has increasingly delved into more proactive and data-analytic approaches such as the screening through microeconomic and industry data to detect cartels.

Mr. Lim shared that, similar to the experience of many antitrust authorities, complaints from the public and government agencies is the most traditional and direct source of intelligence on cartels in Singapore. Focusing on the importance of engaging government agencies, Mr. Lim shared CCS's experience on how feedback from a number of government agencies including the Land Transport Authority, the National Environment Agency, Singapore Civil Defence Force, Singapore Customs and Singapore Police force, had helped CCS to uncover a conspiracy amongst motor vehicle traders in Singapore to rig bids at public auctions of used motor vehicles. The rigging of bids affected about 700 motor vehicles over 53 auctions.

Referring to the example of price fixing among express bus companies in Singapore which was brought to CCS's

attention due to the bus association's price announcement in the newspapers, Mr. Lim opined that while the news will remain as a channel for CCS to uncover cartels, it may become a less important channel going forward as cartels grow in sophistication in avoiding detection by the authority.

Mr. Lim also shared CCS's success in the use of the leniency programme in Singapore. He highlighted that the first international cartel decision by the CCS involving four Japanese ball bearings companies was brought to CCS's attention through the leniency programme. The case attracted the highest level of financial penalties imposed by CCS thus far.

To complement the leniency programme, Mr. Lim presented the CCS's reward scheme for whistle blowing, and how CCS has improved the scheme to incentivise employees with insider knowledge to provide information on possible infringements that CCS has not commenced investigations on.

Last but not least, Mr. Lim shed some light on how CCS has established and structured its three internal detection units to focus on using data and industry information to proactively identify markets which are more likely or prone to anticompetitive agreements and conducts.



Workshop on Merger Review Procedures and Joint Ventures



Mr. Antonio Capobianco
Senior Competition
Expert, OECD

In June 2014, the Centre held a one day workshop in Beijing for MOFCOM on Merger control, with sessions dedicated to comparing review procedures across

jurisdictions and analysing the assessment of joint ventures.

After an introduction to the workshop conducted by Mr. Zhu Zhongliang (Director of Anti-Monopoly Bureau, MOFCOM) and Mr. Kyeoung Man Lee (Director-General of the OECD/Korea Policy Centre, Competition Programme) there was the first panel discussion on the comparison of procedures for merger review, moderated by Mr. Antonio Capobianco (OECD). Mr. Michael Albers (EU), Mr. Andrew Heimert (US FTC), Mr. Sun Miao (MOFCOM) and Mr. Sangmin Song (KFTC) presented experiences from their jurisdictions.

Mr. Capobianco started by setting out the main principles of merger review with the OECD's Recommendation on

Workshop on Merger Review Procedures and Joint Ventures

Merger Review and then the panel provided an overview of agencies' main transparency and fairness obligations towards merging parties. In particular, each one of the members of the panel provided the perspective of their own jurisdiction on a number of issues previously agreed in order to facilitate a fruitful and comprehensive discussion of the topics.

The presentations and discussions of the speakers in the first panel included a number of different issues on procedural rights and practices. In particular, discussions centered on the type of content provided by authorities during the process - ranging from the type of explanations to actual evidence shared. The stage in the procedure when competition concerns are shared with the merging parties, the practices regarding the publishing of merger decisions and finally the role and procedural rights of third parties (competitors and consumers) during the merger review were other topics extensively considered.

The second panel discussion took place during the afternoon and was moderated by Mr. Zhu Zhongliang (MOFCOM) and the speakers integrating the panel discussion were Mr. Michael Albers (EU), Mr. Andrew Heimert (US FTC), Mr. Yang Jianhui (MOFCOM) and Mr. Yongho Shin (KFTC).

The speakers presented the position of their jurisdictions regarding a number of different issues on the treatment of joint ventures. The issues under discussion were whether joint ventures were subject to either merger control or to other antitrust rules, the standard of review used for joint ventures and then both "structural" and "coordination" aspects to such transactions were considered.

This workshop resorted to a different format than those usually undertaken by the OECD/KPC competition programme, as a one day event, discussing in detail particular very specific issues with recourse to the different experiences of several jurisdictions.



Workshop on Evidentiary Issues in Establishing Abuse of Dominance



Mr. Eric Emch
 Consultant to OECD,
 Partner, Bates White

Abuse of dominance cases are among the most difficult for competition enforcers to investigate and prosecute. In part this is because many behaviors that might be deemed anticompetitive in some circumstances, for instance, low pricing or product bundling, are pro-competitive or competitively neutral in many other circumstances. The interests of competitors who complain about such practices may or may not be aligned with those of consumers. For these reasons, evidentiary issues – what evidence is important to gather, where such evidence may come from, and how to evaluate evidence

that may on its face indicate pro- or anti-competitive behaviors – are quite complex in abuse of dominance cases.

The OECD/Korea Policy Center workshop in Jeju, Korea on June 3-5 on “Evidentiary Issues in Establishing Abuse of Dominance” brought these issues into focus. Participants included competition enforcers from countries across Asia, including China, Chinese Taipei, Hong Kong, India, Indonesia, Malaysia, Mongolia, Pakistan, the Philippines, Singapore, Thailand and Vietnam. Panelists included experts from the Korea Fair Trade Commission, the United States Department of Justice, and the European Commission.

The workshop opened with welcoming remarks from Director General Kyeoung Man Lee and Director Heeun Jeong of the OECD/Korea Policy Center. From there, the talks focused on giving an overview of evidentiary issues in abuse of dominance cases and case studies from particular jurisdictions’ perspectives. Mr. Eric Emch, a competition expert and consultant for the OECD who led the workshop, discussed issues in defining and detecting a dominant position or “monopoly power,” and possible tests for abuse of such a position.

Workshop on Evidentiary Issues in Establishing Abuse of Dominance

As Mr. Emch discussed, there is no unified test for abuse of dominance – instead, particular tests tend to depend on the exact offense alleged – such as price/cost tests for predatory pricing. That said, there are some common themes throughout all types of abuse of dominance cases, such as establishing harm to consumers and not just competitors, and finding that the abusive behavior tends to “raise rivals costs” and not just lower their profits. In addition, competition enforcers must be conscious of the need to preserve incentives to compete aggressively even if that harms competitors in the short run.

Mr. Ricardo Cardoso, for DG Competition at the European Commission, discussed the EU approach to abuse of dominance cases. Mr. Cardoso discussed market share screens as a first indicator but also other evidence that may indicate a dominant position – such as asymmetries in shares among market participants, stability of market share over time, evidence of responses to actions taken by competitors, and firm profitability. He also discussed the taxonomy of exclusionary abuse from the EU’s perspective – dividing such abusive behavior into four types, including direct and indirect foreclosure and input and customer foreclosure. Exploitative abuse investigations in the EU relating to high or discriminatory prices were also referred to. Such investigations are allowed by Article 102 of the EU Treaty but raise difficult issues of how to preserve incentives to compete and invest, and, as a practical matter, how to define whether a price is “unreasonably high.”

During the second half of the first day, Mr. Joong-Kyu Sun of the Korea Fair Trade Commission (KFTC), Mr. Scott Fitzgerald of the U.S. Department of Justice, and Ms. Hsiao-Yun Huang of the Chinese Taipei FTC each discussed major abuse of dominance investigations from their jurisdictions. Mr. Sun discussed the KFTC’s investigation of Intel, the evidence behind its findings that Intel abused a dominant position, and the corrective measures taken by the KFTC. Mr. Fitzgerald discussed the United Regional case in the United States: the exclusionary contracting behavior by a local hospital with its health insurers that the US DOJ sued to stop, and the settlement that was ultimately reached with the

hospital system. Ms. Huang described the Chinese Taipei FTC’s investigation into Taipei Gas and what it found to be exploitative abuse regarding sales of natural gas into homes.

During the second day of the workshop, participants broke into small groups to work through, in turn, two hypothetical cases of abuse of dominance: one involving false teeth (modeled after the Dentsply investigation in the United States) and one involving home water heaters (modeled after a case brought in Canada). In each case, the small groups identified key questions that a competition authority would need to investigate to determine if abuse had occurred, and how the answers to those questions could be woven into a complaint against the offending companies. Each group then shared its perspective with the others. A lively discussion followed – reflecting some variety in standards and burdens of proof across jurisdictions, but general agreement on the contours of a potential case.

The third day of the workshop featured further presentations of actual abuse of dominance cases from participating countries as well as an in-depth discussion of predatory pricing and accompanying price-cost tests.

Ms. Kishwar Khan of the Competition Commission of Pakistan and Mr. Terence Seah of the Competition Commission of Singapore (CCS) each gave overviews of their country’s abuse of dominance prosecution framework illustrated with specific recent examples. Ms. Khan discussed exclusionary and exploitative abuse from Pakistan’s perspective, as well as examples from the food and airline industries. Mr. Seah gave an overview of the Competition Act of Singapore and the two-step test for finding a violation in the case of abuse of dominance – the existence of a dominant position in the relevant market and behavior that is abusive. He illustrated these ideas with examples of CCS investigations into potential abuse in the pricing of exhibitions and in the credit card processing market.

Mr. Cardoso of the EC and Ms. Merba Waga of the Philippines Department of Justice each discussed issues relating to abuse of dominance in a regulated industry.

Workshop on Evidentiary Issues in Establishing Abuse of Dominance

Mr. Cardoso discussed a recent EC case in the French natural gas market, including difficult issues of market definition and defining the theory of harm, including what it means to be an “essential facility” in the context of abuse of dominance. In that case, remedies were particularly difficult because of the complexity of the underlying industry and the overhang of regulation. Ms. Waga discussed the recent experience of reform in the Philippines telecommunications sector and the role of competition enforcers in the wake of sector reform that did not always introduce competition in the way that was intended.

Finally, Mr. Emch discussed the various ways in which “cost” can be measured in a price-cost test for predation, including average variable cost, average “avoidable” cost, and average total cost. Mr. Emch illustrated these different tests with a discussion of the predatory pricing case brought in the United States against American Airlines in 2001. Mr. Fitzgerald discussed the application of price-cost tests in the United Regional case, and how the DOJ used a “discount attribution test” to determine that the offending contracts lacked a pro-competitive business justification.

CCP’s Experience in Establishing Abuse of Dominance Violations in Pakistan



Ms. Kishwar Khan
Director, Competition
Commission of Pakistan

1. Evolution of the Legal Framework in Pakistan

The Competition Commission of Pakistan (CCP) is an independent quasi-regulatory, quasi-judicial institution that helps ensure healthy competition for the benefit of the economy. The Commission reviews mergers, prohibits abuse of a dominant position, certain types of anti-competitive agreements, and deceptive marketing practices.

The CCP was established in 2007, under the Competition Ordinance, 2007, which was promulgated as an Act of Parliament in 2010. Prior to this, Pakistan had an anti-monopoly law namely ‘Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance’ (MRTPO) 1970. The Competition Act, 2010 (Act) considers the current economic realities as well as corrects the deficiencies of the MRTPO related to definitional aspects, coverage, penalties, and other procedural matters. The Act provides for free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behavior.

2. Abuse of Dominance

Section 3 of the Act prohibits ‘abuse of a dominant position’, which consists of practices that prevent, restrict, reduce or distort competition in the ‘relevant market’. It implies that being in a dominant position is not unlawful. For a contravention of the law, there must be an abuse. Thus, a dominant undertaking has a special responsibility not to allow its conduct to impair competition in the market.

Section 2 (1) (e) of the Act defines a dominant undertaking, which has the ability to behave to an appreciable extent independently of competitors, customers and suppliers. Also, an undertaking will be deemed to be dominant if its market share in the relevant market exceeds forty percent. The term “market” as used above in the context of dominance differs from its other uses. For example, it may be used while referring to the area where products are sold, or broadly for the industry or sector. However, for assessing abuse of dominance by

Workshop on Evidentiary Issues in Establishing Abuse of Dominance

competition agencies, market determination is a tool to identify the boundaries of competition between undertakings. This idea is explained below, as covered in the Act.

Section 2 (1) (k) defines the relevant ‘product market’ as the one that “comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products’ characteristics, prices and intended use.” The ‘geographic market’ “comprises the area in which the undertakings concerned are involved in the supply of products or services in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas.”

Some prohibited ‘exclusionary’ and ‘exploitative’ abuses of dominance in the Act are:

- a) Limiting production/ sales, and unreasonable increases in price or other unfair trading conditions, including tie-ins;
- b) Price discrimination in the absence of objective justifications;
- c) Making conclusion of contracts subject to acceptance by other parties of supplementary obligations, which by their nature or according to their commercial usage, have no connection with the subject of the contracts;
- d) Applying dissimilar conditions to equivalent transactions on other parties, placing them at a competitive disadvantage;
- e) Predatory pricing, preventing new entry, and monopolizing the market;
- f) Boycotting or excluding any other undertaking from the production, distribution or sale of any goods/ service; and refusing to deal.

3. Cases Dealt with by the CCP

The CCP has so far passed ‘orders’ for 15 cases of abuse

of dominance.¹ Below a gist of the selected cases is provided:

3.1 Bahria University Case



In 2008, Bahria University made it mandatory for freshmen students to purchase laptops it imported, regardless of whether the student needs one or not. Students were given the option to purchase on installments, which carried an interest rate more than the prevailing market rate, i.e. a forced loan on unfavorable terms.

The issue before the CCP was to determine whether the practice of compulsory purchase was tying the sale of laptops with the provision of educational services in the relevant market - undergraduate/graduate levels (business management, engineering and IT). Bahria University had a substantial market share of students in the programs it offered in the ‘geographic market’ of Islamabad. The CCP was able to determine a tie between two separate products, and ordered restitution. The university complied.

3.2 Refusal to Deal by Karachi Stock Exchange (KSE)

Islamabad Stock Exchange (ISE) was of the view that the best price for a particular security was generally available at the KSE only. Bids/ offers of investors entered into trading systems of ISE/Lahore Stock Exchange (LSE) could not be matched with those entered at KSE, even if the security being traded was listed at both the exchanges. So, members of ISE/ LSE had to

¹ These orders are available at: www.cc.gov.pk

Workshop on Evidentiary Issues in Establishing Abuse of Dominance

route many orders of their clients through KSE members, which meant higher out-of-pocket brokerage. ISE and LSE proposed KSE an integrated trading platform encompassing the three exchanges, which, the KSE refused.

Refusal to deal assessment in this case involved ‘essential facility doctrine’, where the defendant refused to provide other firms with access to something that is vitally important to competitive viability in a particular market. Under such circumstances owner of an essential facility has a duty to share it with others.

The ‘relevant market’ was securities market comprising the three stock exchanges. It was established after performing four-prong test of liability that the monopolist (KSE) controls the essential facility (trading platform); competitors’ (ISE/LSE) inability to practically/ reasonably duplicate the essential facility; denial to use the facility; and the feasibility of providing access.

Refusal to deal negatively affects competition through price disparity, and restricts price discovery for the investors that did not place orders at KSE. There was no objective justification for refusal on the part of KSE for sharing its trading platform, even for a reasonable fee. As structural relief, the CCP directed KSE to establish a unified trading system, within six months to ensure availability/ and access to the best price of commonly listed securities to all investors. In case of failure, the KSE would be liable to a penalty of PKR 50 million. KSE filed an appeal before the Supreme Court of Pakistan, which is sub judice.

3.3 Refusal to Deal by SIZA Food

Murree Brewery (MB) complained for refusal to deal by McDonald’s. MB contacted SIZA foods - a franchisee of McDonald’s International- to consider sale of its non-alcoholic beverages (Malt 79, Cindy, Lemon Malt, Original Lemonade and Big Apple) in its fast food outlets. The CCP’s found McDonald had a dominant position in the international fast food restaurants market. Also, McDonald’s had an exclusive dealing arrangement

with Coca-Cola. On the CCP’s intervention, SIZA volunteered to remove ‘entry barrier’, and agreed that in conformity with the requirements of its franchise agreement, other beverages will also be placed in its restaurants and at kiosks. The CCP’s order was a consent decree involving a behavioral remedy. Considering the cooperative behavior of company, no penalty was imposed.

3.4 Unreasonable Price Increase by Pakistan International Airlines (PIA)

PIA, the national air carrier having exclusive rights with Saudi Arabian Airlines to fly direct routes between Pakistan and Saudi Arabia, was already charging exorbitant Hajj (annual Islamic pilgrimage to Mecca) fares as compared to regular passengers between the two countries. In 2008, the rates were increased by almost 100%. As per Competition Law, this was abuse of dominance, the CCP ordered restitution for discrimination between regular and Hajj passengers. A token penalty of Rupees ten million (about USD 118,000) was also imposed on PIA. For excessive pricing, the CCP imposed a penalty of PKR ten million (USD 0.12 million). PIA appealed before the Supreme Court of Pakistan, and the matter is sub judice.

A ‘Policy Note’ was issued to the government to modify the Bilateral Air Services Agreement (BASA), i.e. a quota sharing agreement between PIA and Saudi Arabian Airline (through their respective governments). Consequently, the BASA was modified from single designation airline to two designations, which increased choices available to passengers. The fares declined during Hajj season, as shown in the Figure. For this effort, the CCP won the ‘World Bank’s 2013 Competition Advocacy Contest’ in the category of “Successfully promoting pro- competition market reforms, opening of markets, and infusion of competition principles in other sectoral policies.”

3.5. Refusal to Deal by Pakistan Steel Mills

In the case of Pakistan Steel Mill (PSM), the refusal to deal involved the refusal of PSM to supply the

Workshop on Evidentiary Issues in Establishing Abuse of Dominance

downstream purchaser of steel billets. This was termination of an existing relation rather than refusal to a new customer. The CCP held that there was sufficient evidence to show that PSM allocated steel billets only to one purchaser and refused to deal with all other purchasers of steel billets, despite its own admission that it was holding considerable raw material and finished goods. By doing so, PSM negatively affected competition, prevented and distorted competition in the downstream sectors, and therefore risked eliminating all competition from the market. The CCP in its order directed to maintain status quo ante. A penalty of PRK 25 million (USD 0.3 million) was also imposed. PSM appealed before the Supreme Court of Pakistan, and the case is sub judice.

Some Notes on the Singapore Experience with Abuse of Dominance Cases



Mr. Terence Seah
Senior Assistant Director,
Competition
Commission of
Singapore

While the Competition Commission of Singapore (CCS) has only issued one infringement decision against the abuse of a dominant position so far (and won on appeal) – against SISTIC.com for having exclusive agreements in the provision of ticketing services – CCS has conducted enquiries and/or investigations into many other alleged instances of abuse of dominant positions and currently have several cases still on-going. CCS's officers are therefore exposed to a myriad of different abuses and conducts and consequently different approaches to evidential gathering for these cases.

In relation to evidentiary issues in price and non-price abuse of dominance cases, the common issue between the two would be on the establishment of whether there is dominance by the company in any market. In this regard, common questions that would be raised include:

- What constitutes dominance?
- Is market share analysis sufficient and/or necessary?
- How about market shares over a period of time?
- Barriers to entry?
- Countervailing buyer power?

The above would all be relevant in the consideration of dominance.

For price related abuse of dominance cases, specifically predatory pricing cases, the main issues would be determining what constitutes predatory pricing and what measures of costs should be used for the comparison.

In one of the cases presented by CCS, the team had to rely on costs data provided by the complainant as a first line proxy as to whether the alleged dominant company was indeed price predating. Even with the information at hand, the team had to differentiate between fixed costs, variable costs and given that the complainant was in more than one market, the team had to allocate common costs between the different products as well. Ultimately, CCS found that the price charged by the alleged dominant company, even at a steep discount of 50%, does not appear to fall below the apportioned average total cost of the complainant (which was taken as a proxy) and thus not considered predatory. Even if in reality the company's costs are much higher than the complainant, the team notes that the complainant would not be foreclosed from the market as they would be able to compete effectively with the alleged dominant company.

The key takeaway from evidentiary issues arising from abuse of dominance cases is that often, there are no straight answers and the approach would have to be very case specific.

News from Asia-Pacific Competition Authorities

❖ CHINESE TAIPEI

Chinese Taipei hosts workshop on enhancing international cooperation in the fight against cartels

The Fair Trade Commission (FTC) hosted the “International Competition Network (ICN) Cartel Workshop” in Taipei on October 1-3, 2014. This event was the 11th Cartel Workshop under the ICN auspices, and it is the third time that ICN Cartel Workshop took place in Asia. The theme of this workshop was “Enhancing International Cooperation in the Fight against Cartels.”

During the three-day workshop, the discussions focused on effective strategies to investigate cartel conduct, and covered most projects in the 2014-2015 annual plans of Subgroups under the ICN Cartel Workshop, such as sanctioning cartels in the context of different legal regimes and updates on bid rigging in public procurement. Among these topics, one that particularly stood out as a major theme in this workshop was that of enhancing cooperation among competition agencies around the world to fight against cartels. Consequently, 165 participants in total from 41 jurisdictions, including officials of competition agencies and NGAs, participated in this activity.

Dr. Shiow-Ming WU, the chairperson of the FTC, emphasized that with economic globalization, the number of cross-border cartel cases has rapidly increased, posing serious challenges to the competition enforcement. By hosting the 2014 ICN Cartel Workshop, the FTC demonstrated its determination to cooperate closely with foreign counterparts to smash international cartels.

❖ INDONESIA

KPPU cracks down on bid rigging in road construction

In two separate decisions, the Indonesia’s Commission for the Supervision of Business Competition (KPPU) has continued to actively pursue and sanction bid rigging in

the road construction sector (see March 2014 newsletter).

In one case 7 companies together with the Procurement Committee were found guilty of bid rigging for the construction of the Bengkulu Roadway that was awarded in 2011. KPPU punished the companies with fines ranging from IDR 29 million to IDR 2 billion. Furthermore, KPPU urged the KPK (Commission for Corruption Eradication) to handle the corruption issue that was found during the investigation process of this case involving the procurement committee.

The other bid rigging decision issued by the KPPU also referred to the award for the contract for a national road, in 2012, for the West Sulawesi roadway, and found cross-shareholdings facilitating communication exchange with a view to coordinating bids, as well as the participation of several companies posing as participants in order to create an impression of a competitive bidding process. Based on those facts, the KPPU issued an infringement decision with of IDR 1 Billion to IDR 10 Billion.

KPPU issues recommendation to the Financial Services Authority on minimum insurance rate

In its role of advocacy of more competitive rules, in 25 August 2014 the KPPU issued a letter to the Financial Services Authority (OJK) recommending that it discontinue a rule setting minimum premiums for insurance products (Minimum Insurance Rate). The letter was the result of research undertaken by the KPPU in the sector, acting upon complaints of very significant increase in the premiums charged in the non-life insurance sector following the establishment of minimum insurance premiums by the OJK in 2013. The study undertaken concluded that almost all of the insurance companies set their premiums based on the OJK Minimum Insurance Rate.

According to the KPPU’s study the 2013 OJK issued the rule to prevent a “rate war” and the exit of insurance companies from the market. The KPPU stated that it stood ready to investigate and eliminate predatory pricing should this practice be taking place.

News from Asia-Pacific Competition Authorities

Moreover, in its research report, the KPPU also considered that the Minimum Insurance Rate could serve as an entry barrier to efficient insurance companies who could offer more competitive rates whilst also protecting less efficient insurance leading to consumer harm. Finally, the KPPU also recommended that the OJK publish a list of insurance companies based on their financial condition, so that the consumers could make more informed choices.

❖ KOREA

KFTC fines for bid-rigging for the construction of high speed railway

The KFTC has uncovered collusion in the bidding for the Honam High Speed Railway ordered by the Korea Rail Network Authority in 2009, and imposed penalty surcharges of 435.5 billion won together with corrective orders, filing an accusation of the 15 relevant corporations and 7 individuals with the prosecutors' office.

During the construction process for 13 zones of the Honam High Speed Railway, 28 domestic construction companies agreed in advance to share the zones, the roles of winners and runners up, and on their respective bidding prices. These companies participated in the bid as planned, and thirteen companies won each one of the different zones. In addition, in the construction process of 3 additional zones and train depots, they consulted in advance on bidding prices, and plans for participating in bidding by means of drawing winners and agreed beforehand on the successful bidders and runners up so that the companies slated for the successful bidders could be awarded the projects.

The bid-rigging was thus therefore on a large scale national construction project, produced serious harm to welfare, to the national budget and to the quality of the project. As such the fines imposed by the KFTC of 435.5 billion won are the highest amount that the KFTC has imposed on bid-rigging in the construction industry.

❖ PAKISTAN

Government implements CCP's recommendation advocating changes in fertilizer plant laws

The Competition Commission of Pakistan (CCP) had in June 2014 issued a recommendation that Gas Infrastructure Development Cess (GIDC) be charged at the same price to all fertilizer plants in order to create a level-playing field in the urea market. Taking note of the CCP's recommendation the government of Pakistan proceeded to amend Schedule II of the GIDC Act so that GIDC levies are the same for both new and old fertilizer plants.

Acting upon concerns raised by fertilizer companies, the CCP had reached the conclusion that the selective levy of GIDC that had been introduced on pre-2001 fertilizer plants distorts market conditions by placing the pre-2001 plants at a cost disadvantage and has restricted competition in the market of urea and thereby harmed consumers. It appears that the rationale behind setting a lower rate of gas price for post-2001 fertilizer plants was to compensate these companies for their project financing.

It was confirmed after review of the matter that despite the cost-savings for the post-2001 fertilizer plants (according to the CCP's findings feed gas is a major (80%) raw material used in the production of urea fertilizer), these sold urea in 2013 at the same rate as those sold by pre-2001 plants, resulting for the CCP in supra-normal profits for the post-2001 plants and supra-competitive price to the consumers (farmers). The selective imposition of GIDC was distorting market conditions resulting in high prices for farmers resulting in a windfall for selected players (according to the CCP of more than PKR 4 billion in just one quarter of 2014). There was a resultant multiplier effect of high prices for crops (staple food), a high cost impact on population living on poverty line and a cascading effect on every industry connected with agricultural produce.

❖ PHILIPPINES

Cooperation between SEC and DOJ-OFC establishes merger control regime

The Memorandum of Agreement (MOA) signed last July between the Securities and Exchange Commission (SEC) and the Office for Competition of the Department of Justice (DOJ-OFC) brings into effect a competition law merger control regime in the Philippines.

Under the Corporation Code of the Philippines, mergers

are to be approved by the SEC. With the signing of the MOA the two regulators provide the framework for their mutual cooperation in the context of merger review. The MOA defines the roles of both regulators whenever applications for merger or consolidation are submitted to the SEC, in particular, the MOA provides for the notification of merger applications, timelines and procedures to handle, assess and decide upon the competition law aspects in proposed mergers.

The accompanying Guidelines on Merger Regulation are currently undergoing public consultations.

DOJ-OFC delivers report on competition in the garlic industry

The DOJ-OFC released last September 2014 a report with the results of its investigation on the significant increase in prices of garlic in the Philippines and made several policy recommendations to restore a competitive marketplace.

The DOJ-OFC examined the underlying reasons for a more than 100% price increase from the average prices. In its Report, the DOJ-OFC found that there was adequate supply and stocks of garlic, but that the majority of import permits (imports represent 73% of supply) issued were granted to one group. The import permits were ostensibly for the purpose of checking the quality of garlic but was in fact leading to the ability of one group to obtain most of the import permits, corner the market and charge higher prices.

The DOJ-OFC report recommended a number of actions to be taken, including the abolition of a government-instituted action team that was deemed to contribute to the problem, the investigation and prosecution of certain individuals by the relevant authorities, and the establishment of a fair and transparent system that will allow for competition in the garlic industry, which includes the removal of the current import permit system.

◆ SINGAPORE

CCS imposes record fines in its first international cartel case

On 27 May 2014, the Competition Commission of

Singapore (CCS) issued an Infringement Decision relating to its first international cartel case involving four Japanese bearings manufacturers and their respective Singapore subsidiaries (JTEKT Corporation with Koyo Singapore Bearings (Pte) Ltd (Koyo), NSK Ltd with NSK Singapore (Private) Ltd., NTN Corporation with NTN Bearing-Singapore (Pte) Ltd, and Nachi-Fujikoshi Corp (Nachi) with Nachi Singapore Private Limited (Nachi Singapore)).

These companies were found to have contravened the Singapore Competition Act by engaging in anti-competitive agreements and unlawful exchanges of information in respect of the price and sale of ordinary-sized ball and roller bearings sold to aftermarket customers in Singapore.

Investigations revealed that the infringing parties met regularly at meetings both in Japan and Singapore where they exchanged information, discussed and agreed on sale prices for their respective aftermarket customers in Singapore, so as to maintain their market shares and to protect their profits and sales. The evidence revealed that the Singapore subsidiaries followed the instructions of their parent companies and did not have the freedom to determine their own market conduct and were found to be jointly and severally liable. CCS also considered the conduct of the infringing parties as a single overall infringement.

CCS imposed a total financial penalty of S\$9.3 million. This represents the largest penalty imposed in a single case in CCS's history and also a record penalty imposed on a single entity (S\$7.6million against Nachi with Nachi Singapore). As the first leniency applicant in this case, JTEKT Corporation and Koyo were given immunity from penalties. Nachi with Nachi Singapore have filed an appeal against the quantum of penalties imposed. The other parties have paid up their penalties.

Antitrust regulators in Europe, the United States, Japan, Australia and China have commenced investigations and issued financial penalties against similar price-fixing behaviour by various Japanese bearing manufacturers.

OECD Competition Committee Meetings 16 - 19 June 2014

Roundtable on Financing of Broadband Networks

This roundtable examined how governments are ensuring the deployment of the infrastructure necessary to ensure high speed broadband access across their territory. Since many countries have set very ambitious coverage objectives, investments by private telecom companies may not be enough to reach them, in particular in rural areas. Hence, national and local governments have been exploring alternative solutions to fund this infrastructure. Some are relying primarily on market forces, while others are fostering private investments by allowing joint ventures between competing telecom companies. Another way is the injection of funds into private ventures in exchange for open access, by setting up joint ventures with private partners, or by entering into PPPs. Some public authorities have even completely funded the roll-out of the fibre network in specific areas of their country. Differences in the approaches followed, clearly have strong implications on future competition.

Link:

<http://www.oecd.org/daf/competition/financing-of-roll-out-of-broadband-networks.htm>

Factsheet on Links between Competition and Productivity

The Secretariat presented the final version of a “factsheet” that outlines recent evidence about the effects of competition and competition policy on macro-variables, such as productivity, employment, and inequality. This note is based on the most

recent economic literature on this topic. Its aim is to provide competition agencies with useful references and ideas to use in advocating their role.

Link:

<http://www.oecd.org/daf/competition/productivity-growth-competition.htm>

Hearing on Public-Private Partnerships (PPPs)

A PPP involves a contract between a public authority (at national or local level) and a private party for the provision of a public service, or the development of an infrastructure, where the private party assumes substantial financial, technical and operational risk in the project. Hence, PPPs are very different from traditional public-private procurement contracts because they involve not just the provision of an infrastructure, but also its operation, and they lead to some form of sharing of the demand risk between the public procurer and the private provider. Usually PPPs are undertaken to exploit synergies between the various stages of the provision process, to provide incentives to the private partners to internalise operational and maintenance costs in their investment decisions, and to benefit from a private partners’ managerial capabilities, technical and sectorial know-how.

The hearing discussed:

- Why governments chose PPPs,
- The major benefits and the major drawbacks,
- How the private parties were selected and what institutional context favours an effective use of PPPs,

- To what extent the design of the contract had an impact on the quality and price of the services provided; and
- How to avoid that the PPPs may lead to profits above those that reward the investments undertaken and the risk assumed for the private parties.

Link:

<http://www.oecd.org/daf/competition/competitionissuesinpublic-privatepartnerships.htm>

Roundtable on Competition and Generic Pharmaceuticals

Entry by generic pharmaceuticals can enhance competition in the drug market by offering more choice and by lowering drug prices to the benefit of health customers (including all buyers of medicines, from hospitals to end users). At the same time, innovation in the pharmaceutical sector should be sustained, notably by allowing innovators to obtain and to enforce intellectual property rights on their originator drug. Competition concerns arise when originator companies use their intellectual property (“IP”) rights or develop new strategies to delay or to prevent generic entry. Since the 2009 roundtable, pharmaceutical companies have developed new potentially anticompetitive strategies; competition authorities and courts have studied and ruled on specific types of infringements, such as pay-for-delay agreements between originator and generic companies. The roundtable addressed these recent developments, identified the main competition issues and examined what role competition law enforcement has played and could play to promote competition in the pharmaceutical sector. The main focus of the discussion was on competition between originator and generic companies, especially the practices designed by pharmaceutical manufacturers (originator or generic) insofar as

they stifle competition to the detriment of end consumers.

Link:

<http://www.oecd.org/daf/competition/generic-pharmaceuticals-competition.htm>

Roundtable on Airline Competition

Air transport has radically evolved in the course of the last two decades as liberalisation and deregulation of the sector at both domestic and international level have facilitated the entry of new firms. This in turn has had a positive impact on competition, both in terms of price and the range of services offered to consumers. Many of the innovative business practices devised by airlines are evidence of healthy competitive behaviour; but some may actually be anti-competitive. It is therefore important to ensure that previously existing regulatory barriers are not replaced by anti-competitive mergers, alliances and agreements between airlines or by abusive behaviour by dominant carriers.

This roundtable discussed what the key features of the airline sector are (e.g. pricing models and loyalty schemes); the main competition issues arising in the airline (e.g. mergers and alliances, restrictive agreements and unilateral conduct); how these issues are dealt with by competition enforcement authorities; and ways to foster competition and to ensure that innovation and competitive entry continue to improve consumer welfare. It also examined the relationship between competition law and regulation in the air transport sector.

Link:

<http://www.oecd.org/daf/competition/airlinecompetition.htm>

OECD/Korea Policy Centre Competition Programme

SEND US YOUR NEWS

We publish news, case studies and articles received from competition authorities located throughout the Asia-Pacific region in our newsletter. If you have material that you wish to be considered for publication in this newsletter, please contact ajahn@oecdkorea.org.

CONTACT INFORMATION

Competition Programme

OECD/Korea Policy Centre
9F Anguk Bldg, 33 Yulgongno Jongno-gu, Seoul
110-734, Korea

Kyeoung Man Lee, Director General
wakenp@oecdkorea.org

Ruben Maximiano, Senior Competition Expert
ruben.maximiano@oecd.org

Heeeun Jeong, Director
heeeunjeong@oecdkorea.org

Michelle Ahn, Communications Officer
ajahn@oecdkorea.org

Daniel Oh, Research Officer
jhoh@oecdkorea.org

Hye Kyoung Jun, Program Coordinator
hkjun@oecdkorea.org

Yujin Park, Research Assistant
ywhoi5611@oecdkorea.org