Asia-Pacific Competition Update

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Competition Programme
OECD KOREA Policy Centre

IN THIS ISSUE

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.

Entry Point - Editorial Note

This is the last newsletter of 2016 – a year that has proved especially busy for the OECD/KPC with 7 workshops, in 4 different countries (Vietnam, Indonesia, Cambodia and of course in Korea). It has also been very successful as feedback from participants to the workshops clearly show.

As promised this edition covers not only our usual items of news from across the Asia Pacific Region as well as a description of the workshops that have taken place between September and November this year, but we have decided to include two articles on the practical application of the OECD Competition Assessment Toolkit. Also, you may find the Programme for next year on page 23.

As mentioned in the previous edition, the OECD has recently been actively running projects across the world (Greece, Mexico Portugal, Romania), helping countries to undertake analysis of rules and regulations in several sectors and to ensure that regulations are not hindering competition unnecessarily.

I have asked the team managers of those projects, and my colleagues at the OECD Federica Maiorano and Michael Saller to share with us some of lessons they have learned from undertaking such wide sweeping reviews. I hope they can encourage jurisdictions across the Asia Pacific Region to undertake reviews of regulations to make them better and more effective, either on their own or with the help of the OECD.

You can find out more about the actual Competition Assessment projects mentioned above at: http://www.oecd.org/daf/competition/assessment-toolkit.htm

Have a great end of 2016 and an even better 2017!

Ruben Maximiano

News from Asia-Pacific Competition Authorities*

* News items were provided by respective Competition Authorities.

ACCC Sends Stern Warning Following First Criminal Cartel in Shipping Industry

The Australian Competition and Consumer Commission (ACCC) has recently litigated a number of important cartel matters.

On 14 July 2016, the Commonwealth Director of Public Prosecutions laid charges in Australia's first criminal cartel case against Nippon Yusen Kabushiki Kaisha (NYK), a global shipping company based in Japan. NYK has pleaded guilty to the conduct, with penalties yet to be decided by the courts.

The cartel conduct involved the transportation of vehicles, including cars, trucks, and buses, to Australia between July 2009 and September 2012. NYK is one of the world's largest shipping companies with offices across the globe and over 33,000 employees.

The ACCC commenced civil litigation alleging various cartel breaches against two suppliers and a major supermarket chain arising from the supply and pricing of laundry detergent products in Australia during 2008 and 2009. In April and June, the Federal Court of Australia ordered penalties of AUD18 million and AUD9 million against Colgate Palmolive and Woolworths respectively. A decision on our case against the second supplier, PZ Cussons Australia, has been reserved.

The ACCC also awaits the decision of the High Court of Australia on its hub and spoke cartel investigation into Flight Centre. Flight Centre is Australia's largest travel agent and the ACCC alleges it used a most favoured nation clause to induce airlines into fixing the prices of airline tickets to Australian consumers. The ACCC alleges Flight Centre did this to prevent airlines offering cheaper prices directly to consumers.

The ACCC stands tall in the face of vertical restraints

The Australian Competition and Consumer Commission (ACCC) has reached an agreement with Expedia and Booking.com in which both companies have agreed to amend price and availability parity clauses in their contracts with Australian hotels and accommodation providers.

The agreements extend to all large companies under the umbrella of either Booking.com or Expedia thereby covering the largest online travel sites used in Australia. The agreement will remove barriers to price competition between major online travel sites for hotel bookings.

The ACCC commenced an investigation after concerns were raised that parity clauses used by Booking.com and Expedia were anti-competitive and stopped consumers from getting different prices from competing online sites. Parity clauses generally require

accommodation providers to offer best price and availability to online travel sites. This guarantees the online travel site the accommodation provider's lowest rate and prevents competitors and consumers from negotiating better deals directly with the provider.

From 1 September 2016, Expedia and Booking.com have removed contractual requirements for Australian accommodation providers to:

- offer room rates that are equal to or lower than those offered by any other online travel agent
- offer room rates that are equal to or lower than those offered on an accommodation provider's offline channels
- make all remaining room inventory available
- offer the same number and same type of rooms offered to any other online travel agent.

These agreements pave the way for Australian accommodation providers to tailor their offers to better meet the needs of their customers and their own business requirements.

Accommodation providers will now be able to offer lower rates through telephone bookings and walk-ins, offer special rates and deals to customer loyalty groups, in addition to offering deals via Expedia and Booking.com.

The investigation makes use of work the ACCC has done in the ICN's Unilateral Conduct Working Group, including drafting of the issues paper on *Vertical Restraints – Options for Future Work.*

The Korea Fair Trade Commission Amended "Public Notification on Implementation of Leniency Program"

The amendment includes improvement of the leniency application procedure, clarifying the standard for amnesty plus, employing stricter conditions for order of rank succession and amendment of the judging criteria on repeated violations.

The amendment clarified leniency application procedure and the time of application. According to the old procedure, it was unclear if an applicant could submit the application indirectly. The amendment defines the leniency application method and the time of application.

In addition, the amendment delineated the standard for amnesty plus. The KFTC grants reduction of penalty surcharges to a person who missed an opportunity to apply for leniency, if that person files for leniency for 'another cartel activity'. The degree of reduction on the original cartel activity is determined by the scale of the other cartel activity. However, there were no specific criteria to compare the scale of cartel activities beyond two. With the amendment, the KFTC compares the combined scale of original cartel activity and combined scale of other cartel activities.

Moreover, stern conditions for order of rank succession are employed. In a case where the first or second applicant of leniency withdraws its application or is disqualified for leniency, the applicant in the next rank succeeds the rank of the disqualified applicant. With the amendment, the applicant in the next rank can succeed the higher rank only when he or she qualifies for the leniency requirements.

Moreover, a new provision that restricts the benefit of leniency when the beneficiary engages in a new cartel activity after the date of penalty reduction was added.

The following are the main contents of the amendment.

- First, the leniency application procedure and the time of application have become more specific.
- Second, the standard for amnesty plus is now clearly stated in the amended notification.
- Third, the conditions for order of rank asuccession have become more stringent.
- Lastly, amended notification specifies the judging criteria on repeated violations.

MyCC Holds Forum on Competition Law in Pharmaceutical Sector

The Malaysia Competition Commission (MyCC) organised a Forum on Competition Law in the Pharmaceutical Sector on 10 October 2016 in Kuala Lumpur.

The forum was held to increase the understanding of competition law issues and improvement of skills of regulators and businesses in identifying anti-competitive agreements and abuses of dominant position in the pharmaceutical sector. Another objective is to share best practices and knowledge on investigative powers.

The pharmaceutical industry plays an important role in the improvement of global healthcare system. Competition is important to provide quality goods and services at competitive prices. Hence, there is a need for coherence between competition policies and regulatory policies to enhance consumer welfare and economic efficiency.

Speakers and moderators for the sessions included, Director, MyCC's Enforcement Division, Iskandar Ismail, Principal Assistant Director MyCC; Dhaniah Ahmad, Member of the Commission; Prof Dato' Dr. S. Sothi Rachagan, Member of the Commission, Dato' Ahmad Hisham Kamaruddin, Deputy Director, Pharmaceutical Services Division, Ministry of Health Malaysia, Salbiah Mohd Salleh, Policy Analyst CUTS International India, Ujjwal Kumar, Advisory Public Aid and Draft Regulation Unit Advocacy Department, Spain's National Authority for Markets and Competition (CNMC), Jorge Nieto Rueda, Administrator, Pharma and Health Services, Directorate General for Competition, European Commission (EC), Harald Mische and Expert, Competition Division, Organisation for Economic Co-operation and Development (OECD), Pedro Caro de Sousa.

MyCC is currently conducting a market review on the pharmaceutical sector in accordance with section 11 of the Competition Act 2010, which will be finalised by the end of this year. The main objectives of this market review are to understand the market structure and supply chain of the pharmaceutical sector, identifying any anti-competitive practice among the industry players and promoting competition in the sector.

PNG ICCC Moves to Implement Compulsory Notification on Business Acquisitions

The Independent Consumer and Competition Commission Act (ICCC Act) has not been reviewed nor updated since its inception in 2002. Discussions around this have led to a Consumer and Competition Framework Review (CCF Review) that's nearing completion in early 2017. The Commission has however gone ahead to propose amendments to Part 6 of the ICCC Act, Competitive Market Conduct.

The benefits of effective competition have yet to be fully realized in PNG. Through amending selected areas of the Competitive Market Conduct provisions, the Commission hopes to tap into some of those benefits as a pro-active regulator. Sections 81 and 82 provide a *voluntary system of notification* where there is no requirement on a company to notify the Commission of a proposed acquisition. Past experience also confirmed that many companies are aware that notification is voluntary and so do not notify the Commission to assess and grant either clearance or authorization. If granted, clearance or authorization, exempts a company from being prosecuted for substantially lessening competition.

The Commission recently concluded public consultations on compulsory notification. The general response from stakeholders was on feasibility. If notification is compulsory for all proposed acquisitions, the Commission would no doubt be inundated with applications and would face staffing capacity issues. The answer lies in *threshold provisions*. These determine whether or not a company should apply for clearance or authorization. The OECD and KPC hosted a workshop on Remedies in Merger Cases in December 2015, this aided the Commission staff to better understand how threshold provisions work and the kind of remedies regulators can apply. The Commission has now designed its own threshold requirements, such as market share (post and pre-acquisition), value of transaction and net value of company post acquisition. The amendments will be passed in the next 3 to 6 months.

Workshop on Merger Control

In September 2016, the OECD/KOREA Policy Centre held a workshop in Seoul, Korea on merger control. The objective of the workshop was to help participant agencies identify and then investigate mergers which may be harmful to competition, and where appropriate apply remedies to mergers that are anti-competitive, as well as to understand the role and benefits of international cooperation in such cases. We were honoured to have a session chaired by Mr. John Pecman, head of the Competition Bureau of Canada (CBC) on international cooperation cases that involved the CBC.

Mr. Ruben Maximiano (OECD) started by providing the main aspects and structure of merger control, drawing upon international experiences, and then to introduce the main economic and legal concepts that would be then discussed in greater detail throughout the event.

The first substantive session was led by Ms. Lucrezia Busa from the European Commission (EU). This session established, defined and developed the concept of market definition in the context of the European Competition law, in its geographic and product dimensions. In doing so Ms. Busa provided a comprehensive overview of the principles and methodologies used for market definition, as well as looked at some of the main challenges when defining markets and how to use analytical tools such as UPP and Demand Simulations help with such issues where sufficient data is available. Ms. Busa used recent decisional practice of the European Commission in telecoms, office supplies and gas turbines markets to illustrate her presentation.

Mr. Sean Ennis, senior competition export, Competition Division of the OECD, then presented the main theories of harm that may be applied to mergers, mainly focusing on horizontal unilateral effects as one of the most common theories applied in the context of merger analysis, although also touching upon coordinated effects. Mr. Ennis then looked at the role of economic evidence with a focus on economic tools to assess economic effects. In the discussion, he examined elasticities, the use of critical loss analysis, price correlation [and stationarity], price-concentration analysis as well as for unilateral effects cases – diversion ratios, UPP and merger simulation. Mr. Ennis provided a basic understanding of how each of these tools can be used, whilst concluding that these should not

be seen as 'modelling' reality, that they are merely indicative and that a final decision should not be based on these methods alone. In particular he suggested that in many instances all the required data is not available and that even when such data does exist, an attempt should be made to confirm them by using several different ways, measures, techniques and assumptions to try and test the results obtained and make the findings more robust. Leading from this the Chinese Taipei delegation provided a case example where it used some economic data to analyse the effects in the Hon Hai vs Sharp merger.

The first day ended with the first of the 3 breakout sessions for a hypothetical case involving a merger between two beverage producers. The plenary broken up into 4 smaller teams of 9 persons, and in the first session the teams made a first analysis of the case to identify critical points and offer first indications of whether the case should merit a more in-depth review and then to draft a very preliminary investigation strategy.

The morning of the second day started with investigation techniques, in a session lead by Ms. Lucrezia Busa, looking at how to scope a market investigation and then prepare for it, offering detailed example of the European Commission's "investigation toolbox" and experience in concrete cases. Still on the topic of investigation of mergers, Mr. Savitri Kore and Ms. Sunaina Dutta of the Competition Commission of India shared with the participants how the CCI undertakes investigations, using the example of the recent Holcim and Lafarge and PVR Cinemas-DT Cinemas mergers.

The second breakout session followed with two groups being given the role of proposing to prohibit the merger and the other two to take over the part of the "devil's advocate", pointing out all the weaknesses of first groups' arguments.

The last two sessions of the day were devoted to mergers, first with Mr. Ruben Maximiano providing the framework drawing upon the OECD work as well as his experience with mergers at the Portuguese Competition Authority and European Commission, and then with Mr. Joong-kyu Sun of the KFTC, providing the experience of the KFTC with remedies in the AMAT-TEL case and the Microsoft Nokia case. The final session of the day was the last breakout session where a state of play meeting was simulated between the competition authority and the merging company's representatives to discuss the suitability and eventual acceptance or not of the remedies offered. A very lively discussion, very close to real life state of play's the author of these lines has attended!

The last day opened with Mr. John Pecman, Commissioner of Competition of the Competition Bureau in Canada, showing the importance of cooperation and of investing in building relationships with other agencies for the better outcome of cases and calling for improved information exchange and the move towards joint instead of parallel reviews in the future.

Pakistan's representative Ms. Syeda Amina Gilani then shared the CCP's experience in the GSK Novartis case, involving many different competition authorities from across the globe and how international cooperation was invaluable to obtain appropriate remedies and the best results in that case. The final presentation was offered by the Competition Commission of Singapore's Mr. Lim Wei Lu who provided a great example of an ex-post assessment of a case. Such exampes are very important as evaluating past decisions allow agencies to understand the impact of past interventions and find out whether the analytical framework can be improved. This in turn helps to enhance the agency's credibility to its stakeholders, while less positive results will also provide valuable lessons for the agency.

Finally, the wrap up discussion allowed participants to ask further questions and make comments on some of the sessions as well as the overall workshop.

Singapore Case Study: Ex-Post Evaluation of CCS's Merger Clearance in the Dialysis Market

contributed by Competition Commission of Singapore (CCS)

Mr. Wei Lu Lim

Assistant Director
Competition Commission of Singapore

The presentation by the Competition Commission of Singapore ("CCS") during the OECD-KPC Competition Workshop on Merger Control discussed the topic of ex-post evaluation for merger cases.

The presentation provided an overview of Singapore's merger regime and reasons for performing ex-post evaluation on merger cases, before focusing on the first ex-post evaluation conducted internally by CCS: "Evaluation of CCS's Merger Clearance in the Dialysis Market". The case study was used to illustrate the possible methods on how agencies can collect information, analyse and assess the effect of the clearance decision on the affected market.

On 26 December 2012, CCS cleared the proposed acquisition by Asia Renal Care (SEA) Pte. Ltd. of Orthe Pte. Ltd. on the basis that there would be no substantial lessening of competition ("SLC"). CCS monitored the development of the dialysis market for a period of 30 months after the merger to assess whether the merger has led to any adverse impact on the market.

CCS relied on both quantitative and qualitative analysis, and data from a variety of sources including government authorities, telephone surveys of the dialysis centres and desktop research.

The findings suggest that the acquisition has not led to a SLC in the market. In particular, existing players have expanded, and new players have entered into the market, suggesting that market barriers are indeed not high. These new centres have also performed well compared to existing centres owned by the Parties based on their average utilisation rates. In terms of prices, the average prices for dialysis services have not increased more than the average price of dental and medical treatments at the nationwide level. Comparing across regional markets within Singapore, CCS was not able to observe a significant increase in prices due to the merger.

In-Depth Merger Review of GSK-Novartis Global Merger

contributed by Competition Commission of Pakistan (CCP)

Ms. Speda Amina Gilani

Deputy Diector

Competiton Commission of Pakistan

Pakistan has the 10th largest Pharmaceutical market in Asia Pacific region that has been estimated at USD 1.8 Billion in 2015. The sector is a mix of a number of domestic and multinational firms. 2014 saw the global merger between the leading Pharmaceutical companies, GSK & Novartis. These global companies had strong presence in the Pakistani domestic market. The GSK &Novartis merger involved three separate transactions, one of which involved the global vaccine business (excluding Influenza business except in China) of Novartis by GSK.

In the Pakistani market, competition concerns were raised in the meningococcal vaccine market with two overlapping products i.e. Mancevax of GSK and Menveo of Novartis. Mancevax vaccine had 85.5% market share while Menveo vaccine had 14.5% market share in 2013. Post merger the combined market share of the Parties was the entire product market i.e., 100%! On the basis of these facts the case was moved to Phase II for an in-depth review.

In Phase II further data was collected which indicated a changing scenario. The Pakistani Meningococcal vaccine market had experienced a new market entry with inclusion of Sanofi Aventis's Menactra. The market data for 2014 depicted a changed scenario.

Stakeholders were identified and engaged in the investigation process. Interview and Questionnaire tools were used to collect information from hospitals, doctors and the Ministry of Religious Affairs (MORA) of the Government of Pakistan. MORA was found to be an important stakeholder as it purchased bulk quantities of Meningococcal vaccine to administer to the "Hajj" pilgrims. Administration of Meningococcal vaccine is a mandatory requirement by the Saudi Arabian Government for all Hajj pilgrims visiting the country. It was found out that the Meningococcal vaccine was of two types Polysaccharide Vaccines that included Mancevax of GSK and Conjugate Vaccine that comprised of Novartis's Menveo and the new entrant i.e. Sanofi's Menactra. There was a marked price difference between Polysaccharide vaccine and the Conjugate vaccine. Due to cost effectiveness, the Polysaccharide vaccine was procured extensively by MORA and in 2014 Turkey donated Meningococcal vaccine to Pakistan that explained the 2014 decline in the market share of Mancevax.

Other Competition Agencies were also consulted during the process namely, the European Commission, Fair Trade Commission, Japan Fair Trade Commission and Australian Competition & Consumer Commission.

After a thorough Merger Review the Commission imposed following remedies on GSK:

i. Ensure reliable availability of its vaccine (Mancevax) in Pakistan until 2018

ii. Divest its worldwide MenACWY vaccine(Meningococcal vaccine) business to a suitable purchaser, who will be an independent third-party vaccines supplier

iii. Divest its worldwide MenACWY vaccine(Meningococcal vaccine) business to a suitable purchaser, who will be an independent third-party vaccines supplier

iv. GSK will enter into an agreement with a third-party purchaser within a period of 6 months from the receipt of the EU clearance decision

v. An independent divesture trustee, who will be appointed by the European Commission, will have the mandate to set the Divestment Business price

vi. The purchaser must have an established presence in distribution channels used in the vaccine business in Pakistan.

The Commission required a compliance report by the Merger Parties every three months. CCP cleared the transaction subject to fulfillment of the conditions on 20th February 2015. GSK subsequently identified Pfizer as the potential buyer for its Meningococcal vaccine business. The Commission evaluated the buyer and found it to be a suitable one on the basis of its financial viability, presence in the distribution channels of Pakistan, strong foot hold in the domestic market and on being an independent third party. However, CCP will continue monitoring the market dynamics until 2018 to remain abreast with any further competition issues arising due to changing market dynamics.

Workshop for Judges: Use of Competition Economics in the Courtroom

In October 2016, the OECD/KOREA Policy Centre held in Seoul (Korea) the second in the series of workshops for judges dedicated to using competition economics in the courtroom. This event was attended exclusively by judges, with judges from Hong Kong, Indonesia, Malaysia, Pakistan, the Philippines and Thailand.

In the first workshop in this series, which took place in 2015, there were sessions discussing the use of economic evidence in the context of merger control and abuse of dominance cases. The 2016 event complemented this by looking at how courts may integrate economic evidence within cartel cases and other horizontal and vertical agreements, as well as how fines and damages may be calculated.

The first session was by Mr. Ruben Maximiano (OECD) who provided the back-drop for cartel enforcement across the world as well the main challenges that some of the more experienced jurisdictions have faced, which was then followed by a guided tour of all the sessions of the workshop.

The next session was by Mr. Frédéric Jenny, Chairman of the Competition Committee and former member of the Cour de Cassation in France, that developed in detail the main challenges for judges in competition cases, drawing upon a number of sessions undertaken in the OECD Competition Committee over the years. In particular, Mr. Jenny distinguished between antitrust and unfair competition laws, relevant in many Asian countries. He also focused on understanding the goal of competition law, as well as then establishing the elements of economic analysis useful to assess competition cases. In particular, the use of economic evidence for tacit cartels or cartels without direct proofs, as well as ways in which ways in which courts may bring and use economic expertise to their courtroom.

Once the main challenges had been clearly discussed and defined, Ms. Rhonda Smith, a reputed economist and Senior Lecturer of the University of Melbourne and former Lay Member of the High Court of New Zealand, analysed the central issues in any competition case: market definition, market shares and market power, followed by a session dedicated to the underlying economics of cartel formation and maintenance over time as well as their nefarious effects on society, looking at some cartels along the way such as the car parts and marine hose cases.

The afternoon was dedicated to types of evidence and its collection in the context of cartels: the first session on direct evidence and the second use of economics in cartel cases. The first session was offered by Mr. Ruben Maximiano, who started by framing the evidentiary standards used for hard core cartels (price fixing, reducing output, bid rigging, market allocation or sharing) in most jurisdictions where the probatory focus lies in demonstrating the existence of an agreement or concerted practice and not on the anti-competitive effects of the practice. This involves showing that there has been a “meeting of the minds” toward a common goal or result, or, in other words, some "conscious commitment to a common scheme.“ Direct evidence of cartels is therefore one which identifies a meeting or communication between the subjects and describes the substance of that agreement. Mr. Maximiano then looked at general issues with evidence in this context and the types of evidence that can be used.

However, proving the existence of a cartel agreement, whether formal or informal, poses special problems for the competition law enforcer as Cartels are usually formed and conducted in secret; their participants understand that their conduct is unlawful, and that their customers would object to the conduct if they knew about it, and so they take pains to conceal it and thus Mr. Jenny’s session on indirect or economic evidence. Drawing upon the OECD Competition Committee Roundtable Prosecuting Cartels without Direct Evidence (2006), Mr. Jenny discussed that given that special investigative tools and techniques may not be available for competition enforcers in newer jurisdictions, the competition law enforcer may be faced with the task of proving the existence of a cartel agreement without the benefit of direct evidence. This has the implication that it will have to rely more

heavily on circumstantial evidence. Drawing upon a number of real case examples where indirect evidence played a central role, Mr. Jenny identified two types of circumstantial evidence: communication evidence and economic evidence.

The last session of the first day was offered by Judge Jaeoh Cheong from the Busan High Court of Korea, analyzing a number of different cases where communication and economic evidence was evaluated and considered by the courts in Korea.

The second day opened with a session set to discuss a hypothetical case of possible cartel involving communications between doctors and their association. For this session, the plenary was broken up into 2 smaller groups where judges discussed amongst themselves the evidence brought before them.

This was followed by two sessions lead by Justice Denis Gascon of the Competition Tribunal of Canada who shared his experiences as a judge in Canada in integrating and analysing economic evidence and hearing economic witnesses. This session allowed for discussion of practical thoughts and tips based on experience at the Competition Tribunal, the different types of economic evidence judges faced with in competition cases, notably in horizontal and vertical agreements, as well as what convinces a judge and what doesn't, what is helpful to reach a decision as well as the tools and approaches developed by the Competition Tribunal to deal with economic evidence and then drawing upon lessons from recent cases. A very practical session that lead to a very lively discussion between judges keen to engage in the debate.

Finally, the day closed with two sessions lead by Mr. R. Ian McEwin, managing director of competition consulting Asia with wide experience of acting as expert witness in several courtrooms, on vertical agreements looking at economic concepts in such cases, and more particularly digging into Retail Price Maintenance, Most Favoured Nation clauses and internet sales.

The third day started with a session set to solve a hypothetical case of possible cartel between retail fuel companies. For this session, the plenary was broken up into 2 smaller groups where judges evaluated a stack of evidence presented to them for analysis. This was then complemented by a courtroom scenario where counsel for the alleged cartelists and the competition authority representatives put their case before the plenary of judges.

The last substantive session of the workshop was offered by Mr. R. Ian McEwin on quantifying antitrust harm and imposing optimal sanctions, looking at several methods to achieve this goal.

Overall, a very highly rated event where judges were very engaged in interesting discussions amongst themselves and with the panel members.

Workshop for Young Competition Agencies in ASEAN

In November 2016, the OECD/KOREA Policy Centre held a workshop co-hosted by the Ministry of Commerce (MoC) and co-sponsored by GIZ dedicated to institution building of new competition agencies in ASEAN. In attendance were many officials from Cambodian government, including two Secretaries of State of the Ministry of Commerce of Cambodia - H.E. KEM Sithan and H.E Mao Thora, as well as officials from Laos, Myanmar, the Philippines. In total there were more than 60 participants.

This was the third in-country event of 2016, this workshop having the objective of helping countries in ASEAN who have either yet to set up a competition agency or have only recently set one up, to better design their agencies as well as to facing the initial challenges of a new institution as effectively as possible, by learning the lessons of other examples from ASEAN and across the world. On the speaker roster were Mr. Daewon Hong, Mr. William Kovacic, Mr. Hassan Qaqaya, Mr. Ruben Maximiano, Ms. Shila Raj and Ms. Catherine Setiawan .

The keynote opening speech was offered by the H.E. KEM Sithan (Secretary of State, Ministry of Commerce, Cambodia). Following this keynote speech Director General Daewon Hong (OECD/KPC) welcomed all participants and offered the context for the workshop whilst Mr. Ruben Maximiano (OECD) provided a guided tour of all the sessions of the workshop and went into detail on the benefits of competition, in particular for developing economies as well as the main concepts that would be then discussed in greater detail throughout the event. The scene was

further set by the presentation by the ASEAN Secretariat's Ms. Catherine Setiawan of the current status of competition laws and practice in across ASEAN countries.

Mr. Hassan Qaqaya, former head of the UNCTAD Competition and Consumer Policies, then highlighted a number of key challenges for young competition agencies, particularly in the ASEAN region. He also addressed the institutional design and related questions of internal and external effectiveness in applying competition law, notably concerning the institutional set-up and agency effectiveness. The following session was lead by Mr. William Kovacic, former head of the US FTC and now non-executive member of the CMA, UK. His session was devoted to looking at the major options of design of an agency, drawing and comparing experience of a number of different agencies from around the globe.

With the main institutional design options discussed, the workshop benefited from the experience of Ms. Shila Raj as the first CEO of MyCC in Malaysia, with a candid and comprehensive sharing of the main issues that MyCC encountered in the first few months of existence. The last session of the day was used to break up the plenary into smaller groups to discuss the main challenges and issues facing each of the countries represented in the workshop, with short presentations from each country within each group, as had been organized before the workshop. This allowed for a lively discussion in each of the smaller groups, which lead to the discussion in the plenary that followed on some of the main issues raised, such as the importance of having an internal uniform understanding of the law, the importance of defining its role and managing expectations, the role of training of staff, amongst other issues.

The second day opened with a session lead by Mr. Kovacic, that built upon the previous two sessions and discussed the importance of the first steps of an agency. Topics detailed were the importance of selecting human resources and of setting out a conscious plan, to prioritise and to have a strategy to achieve them and to manage expectations. Mr. Kovacic has spent a significant amount of time thinking and writing about these issues over the last few years and this allowed him to draw upon the experience of different agencies from across the globe to stress the importance of the different tools that an agency should be using at an early stage, from enforcement to advocacy and research. Advocacy was the subject of the following session, where Mr. Qaqaya presented the importance of advocacy in creating a competition culture. This allows the competition authority to explain the benefits of competition and of its actions, as well as helps to promote compliance with competition rules. In essence, Mr. Qaqaya explained the importance of communicating to: public authorities, to help them clearly to delineate the boundaries of economic regulation and to legislate in a way that does not unnecessarily prevent competition; to business actors to not undertake anti-competitive actions; to judges and the public at large via the media, all of which are needed for an effective competition policy and to an economy with well functioning markets.

Building upon Mr. Qaqaya's session on advocacy the next two sessions discussed in particular the role for competition

authorities and for public authorities more generally to ensure that markets are competitive so that the benefits of competition can be harnessed: namely via undertaking a competition assessment of rules and regulations to ensure they are not unduly hindering competition in markets. The first session drew upon the significant work of the OECD in this field, with Mr. Ruben Maximiano discussing the Competition Assessment Toolkit and in particular the use of the check list to determine which regulations would require a closer analysis. The following session was lead by Mr. Hong of the KPC and KFTC who explained comprehensively the vast experience of Korea with competition assessment of rules and regulations, offering a wide range of differing examples.

The final session discussed the importance of measuring the effectiveness of competition agencies, not only to ensure that the wider public and public authorities are aware of the real benefits of competition and of the actions of the agency, but also to ensure that the competition authority is permanently vying to improve its internal processes and consequently its outputs (enforcement and advocacy).

Finally, the wrap up discussion allowed participants to ask further questions and make comments on all of the sessions as well as the overall workshop. Drawing upon the valuable work done during the workshop H.E Mao Thora, Secretary of State of the Ministry of Commerce showed his interest in Cambodia passing the competition law counting on the help of the OECD and GIZ, and other organisations to do so.

Overall, a very important event, that allowed for a detailed look at how best to design an agency but also the first organizational steps of a competition authority, which are crucial to achieving a competition culture and competitive markets. The passing of a competition law by itself is only a first step in ensuring the benefits of competition, the remaining steps are then to a significant extent in the hands of the competition authority and the courts.

Competition Assessment Toolkit: Practical tips for designing and managing a project

by Federica Maiorano and Matt Tavantzis, OECD Competition Division

Why a Competition Assessment project

The benefits of competition for the business environment, consumers and ultimately for the economy as a whole have been well documented; and include positive spill-over effects outside the industry or sector they primarily relate to.[6] The regulatory framework set out by national governments and regulatory bodies is important for setting the scene for market players. However, if this framework restricts competition it deprives the economy of those economic benefits. Competition Assessment tries to ensure that regulation is not overly (and, sometimes, inadvertently) restrictive. While it does not aim at relaxing all regulations, it tries to ensure that the objective of the policy maker is achieved in the least restrictive way.

A competition assessment can be performed at different stages of policy making. Ideally, it is embedded in the very process of developing new legislation and policies. An alternative or complementary practice is an *ex post* assessment, which analyses the legislation in force and can take account of the market outcomes resulting from the implementation of a given policy.

The OECD's Competition Assessment Toolkit (CAT) provides guidelines to conducting this exercise. The corresponding methodology is discussed elsewhere in this newsletter.[7] Building on the experience of three such projects in Greece, this short article sets out a few practical considerations when carrying out a competition assessment project ex post, namely the assembly of the project team, the way this team interacts with the public administration, and its broader benefits for better regulation.

Makeup of the project team

The review of the legislation conducted in the context of a CAT is a competition assessment, so the obvious background of the experts carrying out the review should clearly be in this field. A good understanding of competition law and/or its economic foundations is critical. Additional sector expertise can be built (to the extent required) during the project itself via research and contacts with the administration and stakeholders.[8] The nature of the work, which involves extensive review of legislation, makes experience in compliance or other regulatory work involving detailed review of legislation desirable.

Ensuring a mix of legal and economic expertise is also essential. The ideal setup, if resources permit, is for at least one lawyer and one economist to work on each sector under review. This allows for any issue that is identified in the course of the review to be analysed from different angles. Lawyers and economists bring different skills to the project, all needed for the successful completion of the project: Lawyers are likely to be more familiar with the legislation (be it sectoral or horizontal – for example company law); they will be closer to the sources and legal databases for primary and secondary legislation; and they will be able to offer the correct interpretation of legal texts. On the other

6 See, for instance: Aghion, P., Blundell, R., Griffith, R., Howitt, P. and S. Prantl (2004), "Entry and Productivity Growth: Evidence from Microlevel Panel Data", Journal of the European Economic Association, 2(2-3): 265-276. Égert, B. (2016), "Regulation, Institutions, and Productivity: New Macroeconomic Evidence from OECD Countries", American Economic Review, vol. 106(5), 109-13.

7 See *Managing a competition law assessment project: Need to engage stakeholders* on page.

8 This is of course dictated by the length of the project itself.

hand, economists are best placed to examine and understand the economic aspects of the sector itself; assess both the impact of potential restrictive legislation and the likely benefit of any recommendations; conduct quantitative analysis, where the available data permits; and draft the report without resorting to legal jargon.

Interaction with the public administration

An important element of the methodology of the CAT is to understand the policy objective of legislation and preserve this objective to the best degree when recommending that regulation be amended. This process of identifying the underlying objective usually requires input from the competent government ministries and authorities. In this context, it is both particularly important and challenging for the project team to identify the most relevant experts within the administration for each of the provisions examined. Those experts are most familiar with the sector (or area of the legislation) they oversee and can provide background knowledge and detail the project team may lack – in particular in early stages of the project. Moreover they will be able to outline the legislator's objective, even when this is not spelled out in the legislation. Appointing an expert from each authority to act as a contact point/co-ordinator is a way to make this process easier.

It is advisable to keep the process of communication with the administration interactive. The project team should be in constant and close contact with the experts from the public administration, and solicit feedback at each stage of the work. For example, it is important that the project team understands if and how the various provisions of the law are applied in practice, what the policy-making process is and how any amendments will/can be implemented. Close co-operation also helps to avoid late surprises and reduces resistance to change due to lack of a good understanding of the process and/or the ultimate goal. Finally, it increases the administration's sense of ownership of the process, further facilitating the adoption and the implementation of the project's recommendations.

A competition culture in policy making

Competition assessment is an important step towards better regulation. The CAT helps in achieving the dual outcome of (a) identifying and eventually lifting barriers to competition; and (b) instilling a competition culture in law making, so that restrictive regulation is avoided in the future and less restrictive ways are explored to achieve the same policy objective.

The interactions and day-to-day exchanges between the project team and public administration officials raise awareness and provide on-the-job training on how to take into account the effect of regulation on competition. In addition, it is advisable to provide more formal and structured training by organising regular workshops with experts from the administration, covering an introduction to competition policy and substantive training on the application of the OECD CAT.

China implements its Fair Competition Review Mechanism

In June 2016 China's State Council issued a notification on implementing the Fair Competition Review System, pushing for more open markets to boost the economy. Under the 'Opinions of the State Council on Establishing Fair Competition Review System during Building up the Market System', departments under the State Council and regional governments need, from July 2016, to incorporate a competition assessment into their policy drafting functions. It is therefore aimed at preventing state and regional governments from enforcing policies aimed at eliminating or restricting competition, as well as to gradually phase out anticompetitive regulations and practices.

Given its' work on competition assessment over the years the OECD has been invited to share its experiences and has been cooperating with the Chinese authorities as they develop work in this field. In that regard, the OECD participated in a two-day event in early September in Beijing with the NDRC.

Managing a Competition Assessment Project: Need to engage stakeholders

By Michael Saller, Senior Competition Expert, OECD

The OECD's **Competition Assessment Toolkit** (CAT) helps governments to eliminate barriers to competition by providing a method for identifying unnecessary restraints on market activities and developing alternative, less restrictive measures that still achieve government policy objectives. In recent years the OECD has performed various competition assessment projects throughout the world in which regulations in various sectors were systematically identified and considered one by one for any restrictions on competition.[1] Also, various national authorities have managed their own projects applying the CAT and following its methodology.[2]

The author of this article managed one of the recent OECD projects, a competition assessment in Romania in three sectors - construction, freight transport and food processing[3] - and is currently managing another similar project in Mexico, investigating provisions in the subsectors of medicines and meat along the vertical supply chain.[4] This article describes experiences from those projects and outlines a methodology. It also stresses the importance to engage the relevant stakeholders during every step of the process, to ask for their input and to get support as early as possible.

I. Sectors to be investigated and relevant stakeholders

At the beginning of every competition assessment project will be the selection of the sectors to be examined. The choice may be grounded on objective criteria, such as market volume or concentration level, but also political considerations, e.g. heightened interest of the public in one sector. The team performing the competition assessment should ideally consist of a mix of lawyers and economists, each having good knowledge of competition law. Additional experience in the relevant industries is definitely a plus – though much of that industry knowledge will be acquired by the competition experts during the course of the project. Relevant stakeholders tend to be the national competition authority, the ministries and authorities working with the provisions investigated, as well as the main business associations active in the industries.

1 For an overview of the recent projects in Greece, Mexico and Romania, please see https://www.oecd.org/competition/assessment-toolkit.htm.

2 For example, the Mexican Comisión Federal de Competencia Económica (COFECE) recently finished an extensive project evaluating restrictions at the state level in five sectors (public transport, urban development, agriculture, public procurement, exercise of the free professions), see https://www.cofece.mx/cofece/images/Promocion/Miscelanea_Estatal_210916.pdf

3 Romania: the **construction** sector investigated covered construction of buildings, civil engineering and specialised constructions, as well as building materials and provisions dealing with public procurement. **Freight transport** included transport of cargo by road, rail, inland waterways maritime as well as support activities for transport, such as warehousing. **Food processing** covered activities in which raw agricultural products undergo chemical, mechanical or physical transformation into new products suitable for human or animal consumption.

4 The **meat** (pork, cattle, chicken) subsectors investigated cover the vertical meat production and commercialisation value chain, including farm product raw material and farm supplies wholesale, slaughtering and meat processing activities, pet food manufacturing, and grocery wholesale and retail sales. Also included are support activities for the raising of livestock, such as logistics activities, warehousing and transport activities with regard to meat. The **medicines** subsectors cover the production and sale of medicines - patented medicines as well as generics -, wholesale and retail (mainly through pharmacies).

II. First Step: Defining the relevant sectors and collecting legislation

During first stage, the project team defines the scope of the investigated sector and collects all relevant legislation, such as laws, ministerial decisions or circulars which bind the authorities, by using legal databases. In addition, it is important to consult the relevant ministries and authorities working with the sector legislation for their practical experience because some provisions might not be published or difficult to access, while other legislation, though not having been officially revised, may no longer be applied in practice. It is also recommendable to discuss with business associations and actively ask them for legal provisions which they regard as problematic in their day-to-day business.

III. Second stage: Scanning of the legislation

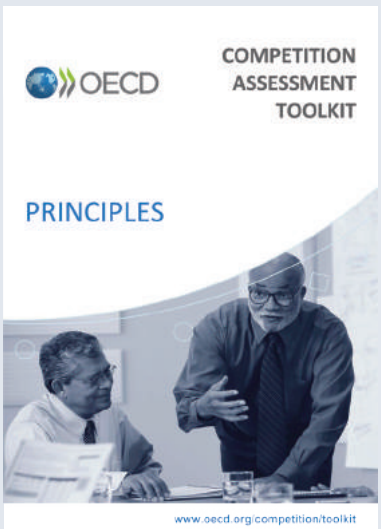
In the "scanning phase" the team will read the collected legislation - which usually will be thousands of pages of legal text. In the projects in Romanian and Mexico, at least two team members, a lawyer and an economist, scanned every piece of legislation ("four-eyes-principle"). To sort out those provisions which might require further evaluation within a reasonable time frame, the CAT offers a checklist, a series of simple questions to screen laws and regulations. The second stage requires a very precise and firm time management to perform the workload without unnecessary delays.

IV. In depth analysis of critical provisions: Input of stakeholders essential here

Next, the project team will investigate those provisions selected during the screening process in-depth, to understand not only if a provision restricts competition but also what the underlying objective or the idea behind every restriction is. Many restrictions are well founded on reasons such as consumer policy, environmental concerns or public safety, and those objectives might prevail over competition concerns. It is helpful to examine legal sources, such as explanatory notes, but also to discuss with the officials of the relevant authorities, namely with those people that work with the provisions on a daily basis. Also, the project team might interview experts in the respective field of law and perform an international comparison to see how similar problems are solved in different jurisdictions.[5]

V. Making recommendations – when theory meets practice

Finally, the project team will develop recommendations for those provisions which were found to restrict competition. Recommendations should ideally solve the competition problem, or at least be less restrictive, while still aiming at the initial objective of the policy maker. Again, stakeholder input – of government experts as well as the private sector - is of key importance to determine the feasibility of the recommendations and potential barriers to its implementation. A competition assessment project does not end with its final report! Recommendations need to be implemented: And in this implementation phase, the stakeholders will play the key role.



5 When investigation the transport sector in Romania, for example, the project team also conferred with various experts from the International Transport Forum of the OECD, see http://www.itf-oecd.org.

OECD/KPC Competition Programme 2017

March
Philippines

Bi-lateral meeting

Development of an enforcement regime for administrative fines and penalties, leniency, and remedies. The workshop would focus on helping the PCC to develop its own Guidelines for Fines and Penalties, Leniency, and Remedies

March
Philippines

Judge Event: Relevant markets and Significant Lessening of Competition test

This event will examine all the legal and economic aspects of a relevant product and geographic market as well as the legal test of significant lessening of competition (or similar) used in jurisdictions in Asia, all across competition law instruments (mergers, agreements and abuse of dominance). We will analyse:

- Law and economics of abuse of dominance
- Exclusionary practices
- Recent developments

May
TBD - OECD member country in Asia-Pacific region

Sector Event: Competition rules and the Pharmaceutical sector

This event will analyse the role of competition law in the pharmaceutical sector by looking at cases that deal with:

- Merger control
- Distribution agreements
- Pay for delay agreements
- The Role of IP and Regulation
- Relationship with government and other regulators

September 6-8
Mongolia

In-country event – Going after Bid Rigging

Public procurement is very important all over the world and in Asia, and the bid rigging can significantly increase prices of goods and services, diverting public money that could be best used in public services to the pockets of cartelists. Fighting Bid Rigging is therefore a top priority for many competition agencies. To equip agencies to better fight bid rigging, this workshop will focus on:

- Competition policy and economic development
- Detecting and investigating bid rigging
- Cooperation with procurement officials
- Leniency and sanctions in bid rigging cases

October 18-20
India

In-country event
TBD (Workshop on Best Practices in Cartel Procedures)

The seminar could provide training on:

- the preparation and execution of dawn raids,
- the handling of evidence
- forensic IT techniques and team work in complex cartel case investigations

November 15-17
Korea

Market studies workshop

These are studies used to gaining understanding of how sectors and markets work and identifies any competition issues and possible recommendations, advocacy and SOEs.
Emphasis of the workshop on

- designing and setting up market studies
- sharing international best practices

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FACEBOOK AND TWITTER

We use SNS to share the relevant articles and photos before and after a workshop. Please join us.

- Facebook: OECD-DAF/Competition Division (closed group, contact park.hyegyu@oecdkorea.org)
- Twitter: OECD/KPC COMP

CONTACT INFORMATION

Competition Programme

OECD/KOREA Policy Centre
9F Anguk Bldg, 33 Yulgongno, Jongno-gu, Seoul 03061, Korea

Daewon Hong, Director General
bushman@oecdkorea.org

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

Ju Eun Shim, Director
jeshim2@oecdkorea.org

Daniel Oh, Research Officer
jhoh@oecdkorea.org

Hye Kyoung Jun, Program Coordinator
hkjun@oecdkorea.org

Hailey Park, Communications Officer
park.hyegyu@oecdkorea.org

Sonheong Jang, Research Officer
sonheong.jang@oecdkorea.org