

Asia-Pacific Competition Update

September 2016, Issue 17



Competition Programme
OECD KOREA Policy Centre

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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.

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Entry point - Editorial Note

As we advance into the last trimester of the year, this is a particularly busy period for the OECD/KPC Competition Programme, with four workshops that will take place in the coming months. First up will be an event focused on practical issues in the merger control field, then a workshop for judges on the use of economics in the field of cartels and other agreements, followed by an event focusing on new agencies and their first steps and then finally on information exchange. All of these events will be chaired by myself with the exception of the latter workshop that will be chaired by Sabine Zigelski, the OECD responsible for our “sister” programme in the RCC in Budapest, and whom some readers will undoubtedly remember from last year’s merger remedies workshop.

The Competition Committee and the working parties of the OECD on competition will also be organising a week of meetings in November in Paris that will discuss numerous topics that are at the forefront of the discussions in antitrust across the OECD membership but also in many other jurisdictions across the globe. Of particular note will be: (i) the roundtable on Price Discrimination, focusing on non-exclusionary practices and also discussing the new challenges brought about by the new digital tools and data collection, (ii) on geographic market definition, as well as (iii) when merger remedies cannot be accepted and lead to a prohibition. Another important session will be a hearing on Big Data that will serve to kickstart our more long-term work in this field. That same week, there will be the Global Forum on Competition that will again look at a broader topic, this year the topic will be on Human Rights and Competition. Naturally, our papers and the contributions received will in due time be placed online on our website: www.oecd.org/competition.

Also noteworthy are the OECD projects this year on competition assessment in Romania (completed in June 2016), Greece (started in February 2016 and expected to be finalised by November 2016) and Portugal (to be started in September 2016). In these jurisdictions the OECD has carried out or is carrying out a thorough and independent policy assessment to identify rules and regulations that may hinder the efficient functioning of markets. In Greece, for instance, it is construction, media, wholesale trade, e-commerce and manufacturing sub-sectors (e.g. chemicals, pharmaceuticals), whilst in Romania the sectors were construction, freight transport and food processing – sectors that represented just over 12% of GDP and almost 10% of employment. These are normally projects that involve national authorities as well as significant OECD staff resources and produce results in 8-10 months time. Given the increasing importance of this sort of work across the OECD members we will provide more information as to how such projects function in one of our following newsletters. In the meantime if you want to know more: <http://www.oecd.org/daf/competition/assessment-toolkit.htm>

Finally, the guidebook is being finalised and another round of consultations will be made with all of the agencies in the Asia Region very soon. As always we count on your contribution to make this an important and useful work for all competition officials across the region.

Have a great end of 2016!

Ruben Maximiano



News from Asia-Pacific Competition Authorities*

* News items were provided by respective Competition Authorities.

ACCC Sends a Stern Warning Following First Criminal Cartel in the 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.

Holding International Conference on Strategies of Competition Policy under Globalization and Digitization



The Fair Trade Commission of Chinese Taipei held the "2016 Chinese Taipei International Conference on Competition Policy and Law-- Strategies of Competition Policy under Globalization and Digitization" on June 28 and 29, 2016.

The topics discussed in the conference are: (1)The Use of Leniency Policy in Cartel Cases, (2) Legal and Economic Issues of Vertical Restraints, (3)The Role of Economic Analysis in Competition Enforcement, (4)Technology Innovations and Competition Policy, and (5)International Cooperation on Competition Enforcement.

Dr. Frédéric Jenny was invited as the keynote speaker and delivered a speech "Disruptive Innovations and Two Sided Markets: Challenges for Competition Law." Many distinguished guests from foreign competition authorities were invited to speak in the

conference, including Mr. Bruno Lasserre, President of the French Competition Authority, Mr. John Pecman, Commissioner of Canadian Competition Bureau, Dr. Mark Berry, Chairman of New Zealand's Commerce Commission, Dr. Andras Toth, Vice President of Hungarian Competition Authority, and high level officials from US Federal Trade Commission, US Department of Justice, Australian Competition and Consumer Commission, Japan Fair Trade Commission, German Federal Cartel Office, Competition Commission of Singapore, and Indonesia's Commission for the Supervision of Business Competition (KPPU).

Hong Kong Competition Commission Rolls Out “Fighting Bid-rigging Cartels” Campaign



The Competition Commission (Commission) has launched a multi-pronged "Fighting Bid-rigging Cartels" Campaign (Campaign) as its first major advocacy initiative since the Competition Ordinance (Ordinance) came into full effect in Hong Kong last December.

The problem of bid-rigging in the residential building renovation and maintenance market has been a subject of grave public concern in Hong Kong. The Commission undertook a study into certain aspects of the market as it was prior to the Ordinance coming into full effect and published its findings in May 2016. The overall result of the study is consistent with the widespread concern that bid-manipulation practices were prevalent in the local residential building renovation and maintenance market in the recent past. The results also reinforced the Commission's need to advocate and educate the public on the topic.

With an aim to raise community awareness as well as to educate on how to detect and prevent bid-rigging, the Campaign was rolled out in May with a TV announcement and two brochures outlining common types of bid-rigging and tips for procurement officers to strengthen tendering process. A series of educational videos and radio programmes were produced and broadcast to facilitate easy understanding of these messages. The Campaign was also supported by extensive online and outdoor advertising to enhance public awareness. These materials are available on the Commission's website.

To further educate and reach out to the community, a Roving Exhibition on the topic was staged at four key locations in Hong Kong in May and June. In August, publicity posters of the Campaign were sent to the owners' corporation of over 15,000 residential and commercial properties in Hong Kong. Seminars on fighting bid-rigging cartels targeting different audiences including procurement practitioners, property management companies and property owners were held between June and September to spread the message.

On the enforcement front, the Commission has received complaints on suspected bid-rigging cases and is assessing each of them carefully. It is also working closely with other law enforcement agencies and public bodies to ensure a coordinated and effective approach to tackling bid-rigging cartels in all sectors of the Hong Kong economy.

Staple Food Cartels in Indonesia



Indonesia has put intensive efforts in dealing with competition in food commodities since 2015, following investigations in several sectors like garlic, shallot, and cattle and chicken meat. The attempt was broadened to 11 other food commodities: rice, soybean, corn, sugar, salt, poultry, cattle meat, cooking oil, chilli, shallot, and garlic.

Cooperation arrangements were made with relevant organizations, including National Police, Ministry of Farmer, and Coordinating Ministry for Economic Affairs.

Food price fluctuation is a routine occurrence in Indonesia. The current food price hike, which has been felt since early 2015, is relatively high amidst the low level of inflation (3.35 percent) and the plummeting of global commodities prices, including food.

In August 2016, the KPPU conducted a meeting with several business associations in foods commodity that led to a Joint Commitment for Anti-monopoly and Unfair Competition to promote fair competition in staple food sectors. The joint declaration contained provisions for the internalization of fair competition in each association, and the commitment not to do or facilitate any form of agreement or abuses which may lead to monopoly's practices and unfair competition. KPPU also promotes Compliance Guidelines to be adapted by each association.

These come in the wake of a recent Decision by KPPU of 22 April 2016 which found cartel behaviour in the cattle meat market that led to the doubling of the price of meat. In this case, KPPU sanctioned 32 Indonesian cattle importer and beef feedlot companies (including the local unit of Australia-based agribusiness giant, Elder) with a combined IDR 107 billion (approx. USD 8.1 million) in fines. These 32 companies have been found guilty of forming a cartel with the aim of controlling local beef prices, curtailing beef imports, and curtailing the distribution of beef at the expense of the Indonesian consumer, particularly in the Greater Jakarta area.

KPPU also viewed that such illegal actions are the result of weak government policy. The Indonesian government provides import quotas to a selection of companies that therefore are in a position to more-or-less determine the prices (because in terms of beef, Indonesia is still highly dependent on imports). In this situation it is very tempting for these companies to take advantage and curb the amount of imported beef.

The KPPU is currently investigating unusual fluctuations in the supply and price in other food sectors (such as rice, soybean, sugar, salt, and many more). This effort gained significant support from the President of Indonesia, Joko Widodo, who advised KPPU to abolish cartel behaviours in the food sector.

Following the Presidential request, KPPU along with other ministries (Ministry of Farming, Presidential Office, Coordinating Ministry for Economic Affairs, Ministry of State-owned Enterprises, Ministry of Industry, Ministry of Trade, and Ministry of Home Affairs) sat together to find suitable solutions to tackle the problems. The meeting later involved cross agency coordination by involving National Police across the country. The KPPU has sought these issues be tackled by market stabilization through several reforms like regulatory reforms (to remove unnecessary policies), shifting market structure (to remove unnecessary distribution channels and promote entrances), and monitoring of market behaviours (to prevent future infringement during the adjustment).

Conclusion of MOU between Foreign Competition Authorities and JFTC



The Japan Fair Trade Commission (JFTC) has engaged actively in corporation with competition authorities of many countries.

On April 11th, 2016, the JFTC concluded Memorandum on Cooperation (MOU) with the Ministry of Commerce (MOFCOM). Assistant Minister Mr. Tong Daochi of the MOFCOM and Chairman Mr. Kazuyuki Sugimoto signed the MOU.

Moreover, on June 9th, 2016, the JFTC concluded Memorandum on Cooperation (MOU) with the Competition Authority of Kenya(CAK). Chairman Mr David Ong'olo and Chairman Mr. Kazuyuki Sugimoto signed the MOU.

The purpose of these MOUs is to contribute to the effective enforcement of the competition laws of each country through the development of cooperative relationship between the competition authorities.

Partial Amendments of the “Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act”

On May 27th, 2016, the JFTC has conducted a review on the criteria or requisite as to so-called safe harbor in the “Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act” and concluded that the JFTC should revise the Distribution Guidelines - as to the safe harbour, it has been revised to 20 % from 10 % on the market share criteria and the market ranking criteria has been abolished.

The JFTC Issues Cease and Desist Order to the Coleman Japan Co., Ltd.

On June 15th, 2016, the JFTC issued the cease and desist order to the Coleman Japan Co., Ltd. (Coleman Japan). In this case, Coleman Japan had committed an act that violates the Resale Price Restriction provision (Article 19 (falling under the Item 4, Paragraph 9, Article 2) of AMA. Coleman Japan from 2010 at the least, around August every year, set the Sales Regulation applied to retailers to sell the Coleman’s camping equipment in the next season. It also made retailers sell the Coleman’s camping equipment in accordance with the Sales Regulation.

KFTC Drafted Amendment on Public Notification of Leniency Program



The Korea Fair Trade Commission (“KFTC”) drafted the amendment to the “Public Notification on Implementation of Leniency Program including Corrective Measures against Voluntary Confessors, etc. of Unfair Collaborative Acts”(hereinafter Public Notification of Leniency Program) with the public consultation period from July 25, 2016 to August 16, 2016. The amendment clarifies some provisions and reflects the March 29, 2016 amendment of the Monopoly Regulation and Fair Trade Act (hereinafter “the Act”) which shall be applied from September 30, 2016.

The main amendments are as follows:

Abolition of Judging Criteria on Repetitive Violations [Deletion of Article 6 (3)]

Following the amendment of the Act on March 29, 2016, it now provides for the judging criteria on repetitive violations and therefore, the KFTC decided to delete the relevant provision on the Public Notification of Leniency Program.

Clarifying the criteria to determine the time of filing leniency application [Article 10 (3)]

Currently, the KFTC determines the time of filing leniency application according to the ‘principle of arrival’ stipulated in the civil law. The KFTC decided to explicitly stipulate in the Public Notification of Leniency Program that the time of application is determined based on when it arrives at the KFTC in order to enhance the consistency of law enforcement. If the leniency applicant submits hardcopy by visiting the office, it will be determined by the time when the application arrives at the public official in charge. If the leniency applicant submits it via email/fax, it will be the time when the application arrives at the designated email address or fax.

However, in the case of verbal application of leniency, the time of filing application will be when the recording begins according to the 'dispatch rule' considering recording can take relatively longer time.

Improvement of Amnesty Plus [Article 13]

The KFTC operates amnesty plus to promote a serial detection of cartels. The KFTC grants reduction of penalty surcharges to a person who missed an opportunity to apply for leniency of the cartel activity that the KFTC has been investigating if that person additionally files for leniency for 'another cartel activity'. The degree of reduction on the original cartel activity is determined by the scale of another cartel activity.

[How additional reduction rate is determined]

Scale of another cartel activity		Reduction rate of original cartel activity penalty surcharge
If it is same or smaller than the original cartel activity		Reduction within 20% range
If bigger than the original cartel activity	Less than double	30%
	More than double, less than quadruple	50%
	More than quadruple	100%

However, if the original or other cartel activities are more than one, there is no specific criterion to compare the scale of the two. It is not clear whether the combined scale of cartel activities should be compared, or should individually be compared in order to decide the reduction rate.

Therefore, the KFTC decided to set more specific criteria for the cases where there are more than one original cartel activity ongoing or where one files for more than one cartel activity as amnesty plus. The amendment stipulates that the KFTC compares the combined scale of original cartel activity and combined scale of other cartel activities and decides the reduction rate, and the relevant reduction rate shall be evenly applied to all the original cartel activities.

Improvement of Succession of Leniency Applicant [Article 9 (4)]

Where the first or second applicant of leniency voluntarily withdraws its application or is disqualified for leniency, the applicant in the next rank succeeds the rank of the disqualified applicant. The KFTC improves it by clearly stating that the succeeding applicant has to be qualified of leniency requirements in order to receive leniency benefits.

Price Fixing Cases Amongst Real Estate Agencies



In 2015, the Commerce Commission of New Zealand filed proceedings in the Auckland High Court for alleged price fixing and anti-competitive behaviour by several real estate agencies across the country. This included 13 national and regional real estate agencies, a company owned by a number of national agencies, and 3 individuals. The Commission also issued warnings to an additional eight agencies for their role in the conduct.

The proceedings relate to alleged conduct in 2013 and 2014 by the national head offices of five major real estate companies, and separately by agencies in the regions of Hamilton and Manawatu. The alleged conduct occurred in response to Trade Me (a New Zealand

operated Internet-auction website) changing from a monthly subscription fee to a per-listing fee for properties advertised for sale on its website. The alleged response included parties agreeing to remove all listings from Trade Me, or agreeing that vendors would have to pay the listing fee to have their property advertised on Trade Me.

Several agencies admitted to conduct breaching the prohibition on price fixing in the Commerce Act 1986. Unique Realty Limited reached a settlement with the Commission prior to court proceedings being filed, and was ordered by the Auckland High Court to pay a \$1.25 million penalty. Bayleys Corporation Limited and Hamilton-based Success Realty Limited cooperated with the Commission's investigation at an early stage, and also reached a settlement. They were ordered to pay penalties of \$2.2 million and \$900,000 respectively following penalty hearings.

The Commission has now achieved penalties from an agency in each of the three separate national, Hamilton and Manawatu proceedings. The cases against the remaining 10 agencies, Property Page Limited and three individuals remain before the Court.

PCC Completes Its Implementing Rules and Undertakes Comprehensive Merger Reviews



After a 24-year wait in the Philippine Congress, the Philippine Competition Act (PCA) was finally signed into law on July 21, 2015 and took effect on August 8, 2015. The PCA is the Philippines' pioneering antitrust legislation intended to promote competitive markets, efficient marketplaces, and consumer welfare.

The PCA also mandated the creation of the Philippine Competition Commission (PCC), which was established in February 2016. Since then, the PCC completed the PCA's Implementing Rules and Regulations (IRR).

PCC Chair Arsenio Balisacan said, "We believe that engaging the public is one of the best ways to ensure that their welfare is the primary consideration in the exercise of our mandate." Hence, the IRR was partly informed by inputs from stakeholders collected in a series of public consultations conducted in May 2016 across the Philippines.

The IRR became effective on June 18, 2016. Some of its key features include:

- Setting rules for notifications of mergers and acquisitions and the thresholds for compulsory notifications; and
- Providing procedures and timelines for reviewing mergers and acquisitions.

Since then, the PCC has released its prescribed merger and acquisition (M&A) Notification Form and has been working on the development of guidelines and clarificatory notes.

The PCC is currently undertaking comprehensive reviews of M&A notifications, including a joint acquisition of telecommunication assets worth USD 1.5 Billion (PhP 69.1 Billion) by the Philippines' telecommunications companies, Globe Telecom and PLDT.

At the same time, the PCC is partnering with the National Economic Development Authority (NEDA) to conduct a comprehensive review of the country's competition policy landscape. The review will help inform the chapter on competition in the Philippine Development Plan (PDP) 2017-2022.

Workshop on Abuse of Dominance Fundamentals

Mr. Ruben Maximiano

Senior Competition Expert
OECD





In May 2016, the OECD/KOREA Policy Centre held a workshop co-hosted by the Indonesian Commission for the Supervision of Business Competition (KPPU) and co-sponsored by GIZ dedicated to the fundamentals of abuse of dominance and unilateral conduct.

In the second in-country event of 2016, Bali received nearly 50 participants from several jurisdictions in the Asia Region, as well as several speakers from across the OECD membership (Australia, Japan, Korea, and United States). The keynote opening speech was offered by the KPPU Chairman Dr. Muhammad Syarkawi RAUF, and he focused on sharing the work done over the years by the KPPU in bringing cases on abuse of dominance.

Following the keynote speech by Dr. Rauf, Mr. Ruben Maximiano (OECD) provided a guided tour of all the sessions of the workshop

as well as the main concepts that would be then discussed in greater detail throughout the event.

The first substantive session was led by Mr. Nicholas Franczyk from the Federal Trade Commission (US) that established, defined and developed the concept of dominance, and analyzed market definition, market shares and market power as well as ultimately how to establish proof of the existence of dominance. Mr. Nick Taylor (Jones Day, Australia) led the following session introducing, in general terms, the notion of abuse of dominance, with the following sessions being dedicated to looking at specific types of abuses: first up was a refusal to deal session dealt with by Mr. Ruben Maximiano, looking at refusal to supply, essential facilities as well as margin squeeze, examining a number of concrete



* KPPU and OECD/KPC held a joint press conference on competition advocacy.

cases from the US and EU. This was then followed by a case study presented by Ms. Min-Hui Pan of the CTFTC from Chinese Taipei, about price discrimination in the cargo handling market at the Port of Taichung (see p. 14 for more detail). The last two sessions were provided by Mr. Nick Taylor and looked at tying and bundling as well as excessive pricing cases. In the latter case, Mr. Nick Taylor looked at the different policy arguments for and against excessive pricing prohibitions as well as the practice in different jurisdictions on this rather controversial matter.

The second day opened with a session set to solve two hypothetical cases: one on an alleged abuse for excessive pricing in the pharmaceutical markets, the other on an alleged abuse for loyalty rebates in the food sector. For this session, the plenary was broken up into 4 smaller groups of 12 persons, and worked through the preparation for a public hearing and then the public hearing itself, with groups representing the competition agency and the defendant company. The morning of the second day was then completed with the sharing of experiences in abuse of dominance cases by Mr. Byungkun Lee from the KFTC

(Korea) and Mr. Osamu Igarashi (JFTC, Japan), and a case study presented by the CCP of Pakistan. After lunch, the group then had a short cultural tour of Bali.

The foundations having been firmly established in the first two days of the workshop, the last day focused on the more practical matters of building cases of abuse of dominance, first of all in a session dedicated to the first steps of an investigation and to case selection, and then to taking the case forward once a case has been selected for review – both sessions having been delivered by Mr. Nicholas Franczyk. The morning then built upon these, with a hypothetical case on exclusivity clauses and their potential effects in the biscuit market, in a case loosely inspired on Van den Bergh/Masterfoods case of the European Commission. The groups represented the competition authority, the defendant and the complainant, and there was a very lively discussion of the potential foreclosure effects and potential benefits of certain exclusivity arrangements between a producer with significant market power and its distributors.

The afternoon saw the discussion of the most appropriate sanctions (fines) as well as possible structural and behavioural





remedies in abuse of dominance cases by Mr. Nick Taylor. India's representative Mr. Nilotpal Bal then shared India's experience in a number of different cases recently brought, including in the real estate markets. This was followed by a presentation by Ms. Yang Jie of SAIC (China) looking at a recent abuse of dominance case in data packages in the telecoms sector. The last two sessions, looked at unfair trading laws and cases in Korea and Japan, in a session jointly held by Mr. Lee and Mr. Igarashi of the KFTC and JFTC, respectively. This session allowed the audience to understand the differences and some similarities that exist with the abuse of dominance prohibition. The last session was conducted by Mr. Ruben Maximiano and looked at the abuse of dominance concept and its relationship with the State, drawing upon work that has been recently undertaken by the OECD on

competitive neutrality – some of the aspects discussed related to the increased ability and incentives that state owned enterprises may in some instances have to engage in abusive conduct.

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.

Overall, a very important event, that allowed for a detailed look at many aspects of abuse of dominance cases. These are cases that are very important within the arsenal of a competition authority, that need to be considered carefully as not only are they resource intensive but also must be targeted carefully to avoid over use and the chilling effect that may have on pro-competitive conduct and incentives to innovate.



Chinese Taipei Case Study: Port of Taichung Case

contributed by Chinese Taipei Fair Trade Commission (CTFTC)



Ms. Min-Hui Pan

Officer
Chinese Taipei Fair Trade Commission

Port of Taichung, Taiwan International Ports Corporation Ltd., violated the Fair Trade Act by imposing discriminative warehouse rental rates on cargo handling businesses. According to the complainant, Port of Taichung continued to charge the rent on the basis of building costs of different warehouses. As a consequence, the complainant had to pay prices for warehouses rent that are different from those paid by Taichung Harbor Warehousing and Stevedoring Co., Ltd. (hereinafter referred to as THWS) and Tehlong Warehousing and Stevedoring Co., Ltd. (hereinafter referred to as TLWS).

After the CTFTC's investigation, the warehouses (built under collaboration between THWS and Port of Taichung in 1976) were rented to THWS and those (built under collaboration between TLWS and Port of Taichung in 1982) rented to TLWS. The warehouse rentals charged by Port of Taichung were divided into two types. The calculation formulas for the rent were established according to the warehouses construction type, building cost and risk management. However, when the complainant started its cargo handling operation in Port of Taichung in 2005, the rental-free period for THWS and TLWS had already expired (lasting for

17 to 18 years). Therefore, whether the warehouses had been constructed under collaboration, they belonged to TIPC.

In addition, the building partners had enjoyed 17 to 18 years of use of the warehouses without rentals and there is no further need to recover their investments and minimize business risks. It was no longer legitimate or necessary to give them better rent offers than other competing tenant. As a result, compared to its competitors the complainant had paid an extra of NT\$34.16 million. It was a rather considerable amount. Apparently, new entrants had to pay higher warehouse rents than existing competing tenants on the market. The adoption of such differentiated standards was likely to restrict competition or impede fair competition on the cargo handling market and this lead to and justified the CTFTC's intervention.



Pakistan Case Study: Pakistan's Experience on Exploitative Conduct contributed by Competition Commission of Pakistan (Pakistan)



Mr. Syed Umar Javed

Director of Cartels & Trade Abuses
Competition Commission of Pakistan

Exploitative abuse of dominance is a contentious area of competition law enforcement. A majority of competition experts, and most developed free market economies, generally do not favor enforcement actions for such conduct for several reasons ranging from outright denial of such a category of abuse down to practical difficulties in actual enforcement. It would be fair to say that anyone who has dealt with a case concerning exorbitant pricing can testify to the existence of theoretical and practical issues.

There is, however, a case to be made for limited enforcement action on selective exploitative abuse cases within a particular economic backdrop. CCP believes that enforcement action against glaring exploitative conduct seems justifiable, perhaps even required, in Pakistan for several reasons. While Pakistan's economy is developing, it is still not a fully functioning free market that can self-correct and protect vulnerable stakeholders. The state of Pakistan has till recent overly protected its industries by raising entry barriers, creating unwanted monopolies and super-dominant incumbents that yield virtually unchecked market power. These factors combined with undependable sector regulation and weak consumer protection laws make a strong argument for intervention by the competition authority into instances of exploitative abuse by dominant business undertakings.

CCP has dealt with several cases involving alleged abuse of dominance by exploitation. An important case was the sharp increase (almost 90%) in fertilizer prices, over a short period, by

two leading manufacturers citing production cuts due to natural gas (input raw material) shortages. The matter appeared just right for intervention: high barriers to entry due to non-availability of natural gas allocations for new players, no sector regulator, and heavily subsidized inputs to manufacturers. Both the cost plus (pre-tax profit, gross profit, and return on equity) and the comparative market tests returned results showing grossly uncompetitive prices. In the absence of any defensible justification for the increase and the realization that a downward trend in prices was unlikely, the Commission issued remedial directions which included a cost audit, diversion of subsidy from manufacturers to consumers, and a 10% penalty on last annual turnover.

While conducting investigations into possible exploitative conduct such as unreasonable or exorbitant prices or price hikes, competition authorities should, given unreliable data and inconsistent benchmarks, use all available economic models and not just rely on one; several models and tests giving the same result decreases the chances of false positives.

It is advisable that remedies in such cases should focus on improving conditions of competition rather than simply penalizing the undertakings. While penalties can deter incumbents from repeat performance, structural remedies such as lowering barriers to entry, strengthening regulatory frameworks, increasing transparency, and removing one-sided contracts can go a long way in actually remedying the situation.

Sector Workshop on Competition Rules in the Financial Sector



Mr. Ruben Maximiano

Senior Competition Expert
OECD





In June 2016, the OECD/KPC annual sector workshop took place in Seoul, Korea with this year's event devoted to the application of competition policy and rules to a very important sector in most economies: the financial sector.

With participants from both sector regulators (bank regulators and securities regulators) as well as competition authorities, the sector focused not only on enforcement actions but also undertook a wider viewpoint examining the intersection between competition policy and prudential and consumer protection regulations. This was the first part of the event, drawing on valuable work undertaken by the Korea Development Institute (KDI) as well as by the OECD. For this workshop a wide array of top notch speakers with extensive experience in the sector were made available by the authorities of Korea (KDI as well as KFTC), EU Commission and Department of Justice (US).

The event started with an examination by Dr. Sunjoo Hwang of the KDI of the relationship between competition and financial stability, with an analysis of this sometimes uneasy relationship and a review of the more recent economic literature on the matter, with more recently the increased recognition of the



positive role competition may play within the framework of adequate prudential regulations and oversight. This was followed by a session on consumer protection, switching and competition in retail banking, drawing upon the work done by the OECD in the last few years. This session was led by Mr. Ruben Maximiano (OECD) and focused on the importance of switching in increasing the incentives for banks to offer better deals to new and existing customers as well as some of the actions that can be taken to increase switching via increased transparency as well as the use of adequate remedies (considering also behavioural economics).

The afternoon sessions were devoted to competition enforcement tools of merger control and cartels. The first two presentations were provided by Mr. Sean Greenaway (EU Commission) and looked in-depth at merger control in banking, insurance as well as on trading and clearing platforms. In both instances the issues of market definition were analysed as was the competition assessment in a number of individual cases as well as some of the remedies applied in those cases. The proposed merger between Deutsche Borse and New York Stock Exchange was analysed in detail. The final part of the day introduced cartels



to the discussion: first with the case study by Competition Commission of Singapore's Cindy Chang on a cartel case in the Life insurance sector; secondly, in the first presentation by Mr. Benjamin Sirota of the DOJ who lead the session on the Libor, FX and other cartels in the financial sector.

The second day followed on cartels, with Mr. Benjamin Sirota leading a session on investigating a financial markets antitrust case, sharing his experience in running such investigations and how such cases differ from cases in other sectors. Vietnam then talked on a car insurance cartel it had sanctioned, involving 19 insurance companies. Other types of anticompetitive agreements in the insurance sector and in payment systems were then discussed by Mr. Sean Greenaway.

In the afternoon the groups were broken up into several smaller groups of 5 or 6 participants and discussed the next steps of a merger case involving two smaller national banks who were particularly strong on certain segments of the banking sector. This involved discussing relevant markets as well as factors to determine the competitive constraints imposed both upon each other as well as the marketplace, by the merging parties. This

was followed by a session co-chaired by Mr. Ruben Maximiano and Mr. Benjamin Sirota on the relationship between Financial Regulators and Competition Authorities. Whilst, on the one hand, Mr. Ruben Maximiano focused on a number of examples from across the OECD membership and on the role that competition authorities can play in seeking to increase competition, mainly via advocacy work and helping the relevant financial regulators. Mr. Benjamin Sirota, on the other hand, shared the rich experience of the working relationships between the DOJ and other financial regulators. The last presentation was offered by the Competition Commission of India's Ms. Praachi Misra, Deputy Director and Mr. Mukul Sharma, Deputy Director and focused on a case of abuse of dominance in the stock exchange services for exchange traded currency derivatives in India, in particular the waiver of fees relating to transaction and admission.

The third and last day had two sessions: one by Mr. Sean Greenaway on the recent practice of the EU on abuse of dominance in the financial sector, looking at the Clearstream, Reuters Instrument Codes and Standard and Poors, cases in the EU. Finally, Ms. Heeun Jeong of the KFTC (Korea) reviewed the relationship between the KFTC and the Financial Services Commission and then discussed a number of cartels in the insurance sector that have recently been investigated and decided in Korea.

This was an event that allowed participants to explore in depth a sector that has not always, in many jurisdictions, been subject to competition policy and which given its specificities can be a rather daunting one for newer agencies in particular. Drawing upon some very experienced speakers it was possible to show that, where relevant, this is a sector where competition authorities may intervene effectively.

Singapore Case Study: Withdrawal of Life Insurance Offer on Fundsupermart.com

contributed by Singapore Competition Commission (CCS)



Ms. Cindy Chang

Senior Assistant Director
Singapore Competition Commission

At the OECD/KPC Competition Law Workshop on Competition Rules in the Financial Sector, Ms. Cindy Chang from the Competition Commission of Singapore (“CCS”) provided an overview of CCS’s infringement decision relating to the distribution of life insurance products in Singapore issued in March 2016.

The decision was issued against ten financial advisers (collectively referred to as the “Parties” and members of the Association of Financial Advisors (“AFA”). The Parties were found to have infringed section 34 of the Competition Act (Cap.50B) (“the Act”) by engaging in an anti-competitive agreement to pressurise iFAST Financial Pte. Ltd. (“iFAST”) into withdrawing its offer of a 50% commission rebate on life insurance products purchased through its online platform, the Fundsupermart.com website (“Fundsupermart Offer”).¹

iFAST (not a member of AFA) distributes investment products such as unit trusts to investors through Fundsupermart.com. In addition, iFAST acts as an outsourced provider of certain IT and operational support for financial advisers. iFAST also had plans to use Fundsupermart.com to distribute life insurance products.

On 30 April 2013, iFAST launched its Fundsupermart Offer, which provided an opportunity for customers, who purchased certain life insurance policies through Fundsupermart.com, to enjoy cost savings from a 50% commission rebate. A few days later, on 3 May 2013, iFAST withdrew the offer.

The CCS commenced its investigation after noting media reports which suggested that iFAST withdrew its Fundsupermart Offer due to unhappiness in the industry. A complainant also surfaced one of the media reports to CCS.

¹ Section 34 of the Act prohibits “any... agreements and/or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore”. Under section 69 of the Act, financial penalties imposed for an infringement of section 34 may be up to 10% of the turnover of the business of the undertaking in Singapore, up to a maximum of 3 years.



CCS's investigation revealed that most of the Parties met at a Management Committee meeting of the AFA. During this meeting, the Fundsupermart Offer was discussed and Financial Alliance was appointed as their representative to contact and pressurise iFAST into withdrawing its Fundsupermart Offer.

From 2 May 2013 to 3 May 2013, iFAST was continually pressurised (mainly by the representative from Financial Alliance, who copied the other Parties into his emails) to remove the Fundsupermart Offer. iFAST replied acknowledging that the financial advisors had been iFAST's "key supporters all these years"; and offered to limit the Fundsupermart Offer to a one-month period in the early afternoon of 3 May 2013; but that proposal was rejected. During that time, the two other financial advisers, (who were copied in the communications), declared their support to Financial Alliance. They also contacted iFAST directly to support the efforts being made to have iFAST remove its Fundsupermart Offer.

The Parties' commercial relationship with iFAST in the distribution of unit trusts contributed significantly to iFAST's revenues and placed them in a position to exert pressure on iFAST. CCS found that the Parties' conduct prevented an innovative competitor

from providing a lower-cost offer to consumers; and that it restricted competition in the market.

The CCS concluded that the Parties had infringed section 34 of the Act by entering into an agreement which had the object of preventing, restricting or distorting competition in Singapore. Consequently, financial penalties totalling S\$909,302 were imposed on the Parties.

In determining the amount of financial penalties, CCS took into account the nature and circumstances of the infringement, the structure of the financial advisory industry, the duration of the infringement and its effects, aggravating and mitigating factors, as well as representations made by the Parties. All but one of the Parties have paid the financial penalties imposed on them. The remaining Party, IPP, is currently appealing to the Competition Appeal Board for a reduction of its financial penalties.



OECD Competition Committee Meetings

13 – 17 June 2016

Roundtable on Disruptive Innovations in Legal Services

Legal services in many jurisdictions are beginning to experience fundamental changes as a result of new innovations and business models. These changes are driven by increased online service delivery, the availability of ranking and review information, the unbundling of services and the automation of service delivery. This roundtable discussed the ways in which regulatory frameworks are being challenged by innovation in legal services, and the role competition authorities can play in this dynamic environment. The discussion focussed especially on the following subjects:

- a. Recent developments and innovations in legal services markets;
- b. Challenges to regulatory frameworks from recent innovations (specifically, exclusivity, qualitative entry restrictions, quantitative entry restrictions and self-regulation); and
- c. Recent competition authority involvement, and future competition advocacy opportunities, in legal services markets.

Link: <http://www.oecd.org/daf/competition/disruptive-innovations-in-legal-services.htm>

Presentation of the Mexico Market Examinations Manual

This session saw a presentation and a discussion of the new Mexican Manual for Market Examinations. The Manual was developed by the OECD Secretariat at the request of the Mexican

Ministry of the Economy, under the framework of the agreement signed by the Ministry and the OECD in December 2014 to make requests to the two Mexican competition institutions, COFECE and IFETEL, including to issue decisions on market conditions, on the granting of concessions; or to open a market study. The discussion focused on the way in which the Manual provides methodological and theoretical guidance for examining a market, a sector of the economy, or a particular cross-cutting issue present in various markets.

Link: to be added later

Roundtable on Public Interest Considerations in Merger Control

The roundtable discussed public interest considerations included in merger control rules ('public interest clauses'), how they are applied and by whom, and the relevant challenges that competition authorities face. The discussion also explored circumstances where merger assessment indirectly takes into account the public interest through factors like broad efficiency claims or failing firm defence. The discussion drew on a Background Paper by the Secretariat and country submissions.

Link: <http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm>

Roundtable on Jurisdictional Thresholds and Local Nexus in Merger Control

Given the increasing number of merger control regimes around the world and the limited resources of competition authorities, it is important that authorities only review those mergers that have a real impact in their jurisdiction. In order to ensure this, the OECD and the ICN have issued guidelines on notification thresholds and local nexus. This roundtable provided an overview of the merger control thresholds and local nexus criteria currently in place, and discussed legal changes in countries since 2005, when the OECD adopted the Recommendation on Merger Review.

Link: <http://www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm>

Roundtable on Fidelity Rebates

Fidelity rebates or loyalty discounts allow sellers to offer buyers a better price conditional on the buyer demonstrating loyalty in the purchases they make. They are often introduced as discounts on an existing price (rather than a way to introduce a higher penalty price for disloyal buyers), and can therefore stimulate demand for a seller's product in addition to achieving other goals. However, in some circumstances they can prevent rivals to a firm with market power from competing effectively. For example, they may increase the rivals' costs, increase the effective price that buyers pay for rival products, or reduce the firm's prices to a level at which equally efficient rivals cannot remain within the market. There have long been important differences in the way in which different agencies have assessed fidelity rebates and this Roundtable offered a timely opportunity to examine these different approaches and to look at the practice of agencies and courts.

Link: <http://www.oecd.org/daf/competition/fidelity-rebates.htm>

Roundtable on Commitment Decisions in Antitrust Cases

The Committee took stock of experiences with the use of commitments decisions in antitrust cases. These are a relatively new power for many competition authorities as the number of agencies which have obtained such powers has increased significantly in the last decade, in parallel with the number of commitment decisions adopted by such agencies. These are legally binding commitments that parties offer to a competition authority during an antitrust investigation to eliminate the grounds for the enforcement action to continue. By addressing the concerns that the agency has, commitment decisions allow investigations to be brought to a close more swiftly. Experiences in this area are still relatively recent and there are still a number of OECD countries which do not have such powers. The Roundtable offered an opportunity to take stock of agencies' experiences, to identify the different powers that agencies have and look at the different conditions that agencies must meet before they can rely on these powers.

Link: <http://www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm>



* OECD/KPC gave a presentation on its achievements and future plan during the Committee Meeting.

OECD/KPC Competition Programme 2016

Hanoi, Vietnam

March 30
–1 April

Workshop on Building Cartel Enforcement

- Overview of cartel enforcement, cartel harm and facilitating factors
- Running of a case and types of evidence upto and including court proceedings
- Effective sanctions

Bali, Indonesia

May 11–13

In-country event - Abuse of Dominance and Unilateral Conducts: Fundamentals

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

Seoul, Korea

June 22-24

Sector Event: Competition Rules and the Financial Sector

- Merger control, Abuse of dominance, Cartels
- Regulation

Seoul, Korea

September 5-7

Workshop on Merger Control

- Work through a case from beginning to end, focusing on:
- Economic issues
- Investigative techniques
- Procedural aspects

Seoul, Korea

October 5-7

Judge Event: Use of Competition Economics in the Courtroom

The second in our series on the Use of Competition Economics, in 2015 it focused on abuse of dominance and merger control. This year's workshop will have as its focus:

- Horizontal agreements
- Vertical agreements
- Damage actions

In-country Event
(TBD)

November 2-3

ASEAN - Seminar for New Agencies - Basic Concepts and Procedures in Competition Law – Co-hosted with GIZ

We will highlight:

- Prioritisation of cases
- Basic legal and economic theories, and investigation of: cartels, mergers and abuse of dominance

Seoul, Korea

December 6-8

Experienced Agencies Seminar – Information Exchange: Efficiency Enhancing or Cartel in Disguise?

- Different forms of information exchange: Formal and informal exchanges, direct and indirect exchanges and the unilateral disclosure of information and signalling.
- Information exchanges can be observed in horizontal and vertical relationships and in different organisational settings. We will investigate which forms of information exchange warrant closer scrutiny by competition authorities.



Asia-Pacific Competition Update

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 park.hyegyu@oecd-korea.org.

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@oecd-korea.org)
- Twitter: OECD/KPC COMP

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