

Asia-Pacific Competition Update

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Competition Programme OECD/Korea Policy Centre

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Asia-Pacific Competition Update



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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, and OECD/KPC organises events for judges. 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

Hello,

I am pleased to welcome you to the second edition of 2018 of the OECD/KPC Asia-Pacific Competition Update – an edition that is released to coincide with the 8th OECD/KPC Competition Law Seminar for Judges.

Judges play a crucial role in competition law, as ultimately it is for the courts to decide what is the proper interpretation of the competition law that may be being applied. The OECD/ KPC therefore considers it is important to help judges in their quest for further knowledge of competition principles and experience sharing and organises these seminars every year. Such seminars engage exclusively with judges and judicial authorities, bringing in also judges and former judges from experienced agencies to act as main speakers. There are often also economists with rich experience of working with courts.

The Seminar this year will be held in Jakarta, Indonesia 10-12th October and will be on the role that circumstantial evidence can play in cartel cases. We are very pleased and would like to thank the Supreme Court of Indonesia for having taken such an active role in organising this seminar. Also to the ASEAN Secretariat and to CLIP for helping to fund some participant judges from ASEAN countries.

More broadly, the OECD has worked extensively with judges over the years. In 2017, for example, in the Global Forum on Competition provided a platform for judges to engage in a discussion on judicial perspectives on Competition Law. This roundtable discussion addressed various dimensions of the judicial adjudication of competition law. While recognising the differences that exist across jurisdictions, the discussion tried to elicit the main common challenges that judges face when applying competition law, and find ways to address those challenges. This has been the objective of the OECD in many of its events involving the judiciary. There have also been seminars organised by the sister OECD/GVH Centre, as well as in Mexico, amongst others.

It is this engagement with the judiciaries from OECD countries and beyond, as well as the recognition of their central role to competition law development and implementation, that has led the OECD to cooperate with the Federal Court of Australia in the Primers for Competition Law for ASEAN judges. These are meant to provide judges dealing with a competition case with an initial port of call, as an easy to understand short guides that may help judges in their complex task.

Of course, this edition of the newsletter also reports back on the event held for Chief and Senior Economists that was organised together with the ICN in May, and has our usual news items from the region, as well!

Until the next newsletter, I hope you will enjoy reading this issue!



Ruben Maximiano



News from Asia-Pacific Competition Authorities*

* News items were provided or sourced from the respective Competition Authorities and are their own responsibility

ASEAN



OECD Starts Project with ASEAN

As part of the implementation of the ASEAN Competition Action Plan (ACAP 2016-2025), the OECD is currently working in cooperation with the UK Government, the ASEAN Secretariat and the ASEAN Experts Group on Competition on a project in the logistics sector in ASEAN. The project has two components and it will be finalized by March 2021.

First, the OECD will undertake ten competition assessments of laws and regulations in the logistics sector in ASEAN (one assessment for each individual ASEAN Member State). These assessments will be largely based on the consolidated OECD Competition Assessment Toolkit. They will help ASEAN governments to identify shortcomings in the regulatory and policy environment that hinder the efficient functioning of markets and damage long-term growth. Moreover, the assessments may then lead to recommendations for procompetitive reforms to avoid unnecessary regulatory restrictions.

Second, the OECD will prepare a regional report on the impact of State Owned Enterprises (SOEs) and government-linked monopolies (GLMs) on competition in ASEAN. In this report, the OECD will undertake an assessment of special rights and privileges granted to SOEs and GLMs from a competition perspective. The report will help governments to detect special rights and privileges granted to SOEs and GLMs that may hinder the efficient functioning of the logistics sector and affect long-term growth and competitiveness. Moreover, it may lead to recommendations – including concerning regulatory reforms – on how to mitigate distortionary effects and promote fair competition whilst still achieving legitimate policy goals. (written by OECD)

AUSTRALIA



Recent Cartel Prosecutions by the ACCC

The Australian Competition and Consumer Commission (ACCC) has recently commenced and concluded proceedings in relation to a number of important cartel matters.

In July 2018, the ACCC instituted proceedings against Cryosite Limited (Cryosite) for alleged cartel conduct in relation to its entry into an asset sale agreement with Cell Care Australia Pty Ltd (Cell Care). The ACCC alleges this amounts to cartel conduct because it restricted or limited Cryosite's supply of cord blood and tissue banking services, and allocated potential customers from Cryosite to Cell Care.

The ACCC is concerned the alleged cartel conduct amounts to 'gun jumping', which occurs when merger or acquisition parties are competitors and they combine or coordinate their conduct before the actual completion of the transaction. This is the first court action the ACCC has taken in relation to 'gun jumping' conduct.

In June 2018, following a cartel investigation by the ACCC, the Commonwealth Director of Public Prosecutions laid criminal charges against ANZ, Deutsche Bank and Citigroup, as well as against six senior executives and former executives. The charges involve alleged cartel arrangements relating to trading in ANZ shares held by Deutsche Bank and Citigroup.

In June 2018, the Federal Court ordered Air New Zealand (Air NZ) to pay \$15 million in penalties after legal action by the ACCC against a global air cargo cartel. The Court found Air NZ made and gave effect to agreements with other airlines to fix the price of fuel and insurance surcharges on air freight services from Hong Kong, and insurance and security charges from Singapore, to various locations, including Australian airports, between 2002 and 2007.

In April 2018, the Full Federal Court of Australia ordered Flight Centre to pay penalties totalling \$12.5 million for attempting to induce three international airlines to enter into price-fixing arrangements between 2005 and 2009 (after being remitted from the High Court of Australia). Flight Centre sought to have each airline agree not to offer airfares on its own website that were lower than those offered by Flight Centre.

JAPAN



The JFTC Closes Its Investigation into Apple Inc. after Agreement to Amend Anti-Competitive Contract Clauses Relating to Subsidies

The Japan Fair Trade Commission (JFTC) has closed its investigation into Apple Inc. (Apple) in relation to its sales agreements with 3 mobile network operators (MNOs). The JFTC suspected that the agreements contained clauses which could have been deemed anti-competitive under the Antimonopoly Act (AMA). During the investigation, Apple proposed amendments to the agreements, which the JFTC concluded were sufficient.

Apple holds around 50% of the market share in the Japanese smartphone market. The suspected anti-competitive behaviour involved the conclusion of "iPhone Agreements" with 3 of Japan's MNOs. Importantly, the agreements contained clauses which obliged MNOs to provide subsidies to fixed-term users purchasing iPhones, in the form of discounts on telecommunication service fees. Consumers would face a smaller upfront cost in purchasing an iPhone but would pay higher monthly costs than if they had the option to pay more for the handset upfront. The JFTC was of the view that this obligation could reduce competition because of the lack of choice in the types of service plans offered by MNOs.

In response to the JFTC's concerns, Apple proposed a remedy which allows MNOs to offer two options, service plans without subsidies and service plans with subsidies, on the condition that users are fully informed of both options. The JFTC found that the proposed amendment would enable users to select the most optimal service plan, promoting competition amongst MNOs, which would be driven by consumer choice. The JFTC therefore decided to close the investigation.

The JFTC operates a Task Force focusing on IT/digital matters and has opened a hotline for the IT/digital sector to receive information regarding suspected violations.

The JFTC continuously monitors the IT/digital markets including the smartphone market, to ensure the promotion of free and fair competition.

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KOREA



The Korea Fair Trade Commission Hosted the 10th Seoul International Competition Forum on Sept. 13, 2018 at Shilla Hotel, Seoul

Since its launch in 2001, the Seoul International Competition Forum had been held biennially from 2002 to promote the KFTC across international competition law community and to discuss recent competition issues. This Forum had established itself as one of the most acclaimed and renowned competition forum in the Asian region.

This forum was attended and presented by global high-ranking officials from US FTC, DOJ, the EU, Japan, Russia, etc., international organizations such as the OECD, and competition experts from academic, legal circles and IT industry. The congratulatory remarks were given by Min Byung-doo, Chairman of National Policy Committee in the Korean National Assembly and Kazuyuki Sugimoto, Chairman of the JFTC.

The Forum consisted of the following three sessions:

First topic was Roles and Anti-competitiveness of Big Data in Digital Economy;

Second topic to be discussed was Implementation of Civil Means for Competition Enforcement and their Efficiency; and Last topic was Algorithms and Competition Enforcement.

This year, about 300 people from 25 countries made pre-registrations attracting many participants from all over the world. This wellillustrates the fact that the KFTC earned high international reputation and interest due to its active competition enforcement in the recent years.

Chairperson Kim Sang-Jo was quoted as saying, "in the era of 4th Industrial Revolution, businesses continuously bring about disruptive innovations, leading to decreases in production costs and increases in consumer welfare" in the welcoming remarks. He also added, "We should not overlook potential adverse effects. Due to the so-called network effect, the principle of winner-takes-all, in which the first mover monopolizes the market, may prevail". That is why he also emphasized, "Therefore, while we need supporting policies for the 4th Industrial Revolution to find the future growth engine, the competition authorities should play a pivotal role in creating a level playing field so that the potential and proper function of the 4th Industrial revolution can be fully realized".

The KFTC anticipates that its reputation would be enhanced as an advanced antitrust enforcer that leads discussions on global competition issues through successfully hosting the Forum.

Moreover, after selecting and discussing the recent competition issues such as big data, algorithms, etc., that represent the 4th Industrial Revolution, the KFTC will be able to guide a direction where every competition authority should be headed.

Lastly, as global companies influence more significantly on the global market, close cooperation among competition authorities is getting more critical. Thus, the KFTC looks forward to a having a closer cooperation with other foreign agencies across the globe through hosting this Forum.

INDONESIA



Garlic Cartel Penalties Upheld by the Supreme Court

On 25 April 2018, the Supreme Court affirmed the penalties imposed by the Commission for the Supervision of Business Competition (KPPU) on 19 garlic importers.

In 2013, the KPPU held that the parties in the Garlic Importation Cartel had violated Article 11, Article 19(c) and Article 24 of Law No.5 Year 1999, regarding Prohibition of Monopolistic Practices and Unfair Business Competition (Indonesian competition law). The KPPU held that the cartel was established by 3 related groups of garlic importers. Cartelists were accused of fixing prices and restricting output, leading to an increase in the price of garlic in Indonesia.

SINGAPORE



Grab-Uber Merger: CCCS Imposes Directions and Financial Penalties

On 24 September 2018, the Competition and Consumer Commission of Singapore (CCCS) issued an infringement decision against Grab and Uber under section 54 of the Competition Act. On 26 March 2018, Uber sold its Southeast

Asian business to Grab for a 27.5% stake in Grab. Grab and Uber had not notified the merger to the CCCS, and following an investigation the CCCS found the merger to be anti-competitive as it resulted in a substantial lessening of competition (SLC) in the ride-hailing platform market in Singapore. The CCCS has given directions to remedy the SLC and has imposed financial penalties amounting to over S\$13 million.

The merger between Grab and Uber raised competition concerns due to the 80% market share of the merged entity in the market for ridehailing platform services. Singaporean law does not require notification of mergers but parties are to conduct a self-assessment to determine whether notification is necessary. This is the case when a merger is likely to infringe the Competition Act because it will result in a substantial lessening of competition in the market. Grab and Uber failed to notify the merger.

The CCCS made two main findings in relation to the anticompetitive merger. Firstly, the merger removed Grab's main rival from the market, Uber, leading to an increase in market power. This resulted in increased prices to the detriment of both categories of users, riders and drivers. The CCCS found that the merger had resulted in a 10-15% increase in effective fares for riders and a decrease in commission earnt by drivers. Secondly, the CCCS found that the newly merged entity presented significant barriers to entry and expansion in the market due to strong network effects. The CCCS emphasised the impact of exclusivity agreements with taxi companies, car rental partners and some Grab drivers, which were deemed to prevent effective competition in the market.

The directions given by the CCCS address the removal of various exclusivity arrangements and implement pre-merger pricing, seeking to restore contestability to the market for ride-hailing platform services in Singapore. These include: (i) ensuring Grab drivers are free to use any ride-hailing platform and are not required to use Grab exclusively, (ii) removing Grab's exclusivity arrangements with any taxi fleet in Singapore, (iii) maintaining Grab's pre-merger pricing algorithm and driver commission rates, and (iv) requiring Uber to sell the vehicles of Lion City Rentals to any potential competitor who makes a reasonable offer based on fair market value, and preventing Uber from selling these vehicles to Grab without CCCS's prior approval.

VIETNAM



Towards a More Effects-Based Approach: the Recent Reform of Competition Law in Vietnam

On 12 June 2018, the National Assembly of Vietnam adopted a new Competition Law that will enter into force on 1 July 2019, thus replacing the current law of 2004. The new provisions significantly change the competition legal landscape in Vietnam.

From an institutional perspective, the two existing authorities in charge of competition matters (the Vietnam Competition Authority and the Vietnam Competition Council) will be merged into one single authority, the National Competition Committee (NCC). Pursuant to Article 46, the NCC will be an agency established under the Ministry of Industry and Trade. It will have a much broader jurisdiction, catching also foreign companies (when their activities or transactions have an impact on the Vietnamese market) and "public service units" such as hospitals and schools.

On a substantive level, similarly to the old provisions, the new law will govern competition-restraining agreements, abuses of dominance and economic concentrations, as well as unfair competition practices. However, compared to the previous legal framework, a more effects-based approach as opposed to the formalistic market share-based provisions seems to underpin the whole reform. This is consistent with the recommendations made by the OECD in the 2018 Peer Review of Vietnam's competition law and policy.

As regards anticompetitive agreements, the old criterion based on market-share thresholds has been replaced by an assessment of whether the practices "cause or threaten to restrict competition". In a similar vein, the NCC will be entitled to find a dominant position whenever the undertaking has "significant market power", following an assessment of a number of factors listed under Article 26 (e.g., market shares, financial strength and size of the undertaking, barriers to entry and expansion, and technological advantages). Finally, in addition to introducing new merger control thresholds, the new law provides that a concentration be prohibited whenever it has or may have significant competition-restrictive impact, although the NCC has now the power to clear a transaction subject to conditions.

(written by OECD)



OECD/KPC-ICN Workshop on Competition Economics for Chief and Senior Economists



In May 2018, the OECD/KPC organized with the ICN a Competition Economics workshop for chief and senior economists, that took place in Seoul, Korea. More than 80 participants from more than 38 jurisdictions from around the world attended the workshop, including many chief economists. Holding the event in the Region allowed many Asian competition authorities to be present and to help them to continue to develop and integrate further economic reasoning in their actions.

Unlike other ICN events where Non-Governmental Agencies take part - bringing undeniable value and different perspectives, in this event there were no private practioners. This was in order to allow for an open and frank discussions and sharing of experiences amongst the participant authorities facing similar issues and concerns. Participants were divided in two tracks: The first track, targeted at more experienced agencies, focused on more advanced and complex economics and tackled topics such as merger simulation, loyalty programmes, buyer power, big data, platforms and multi-sided markets. Each session was composed of an introductory lecture by a leading academic followed by case studies from one or two participating agencies. The floor was then open for discussion to all participants.

The second track, dedicated to younger agencies, explored the steps to increase the use of economic reasoning and economic tools in their case practice. Topics included: the fundamentals of industrial organisation, game theory, market definition and market power, economics of mergers and buyer power. This allowed for agencies with less experience to benefit from the



presence of world class academics and to build or reinforce the foundations of competition economics, that may then feed in to the analysis needed to support good decision making in enforcement cases.

A session on sharing experiences of how to organise economists in an agency was introduced and moderated by António Gomes, Head of Competition at the OECD. This provided a forum for four chief economists / head of economics from jurisdictions with different models to share their experiences and explore their differences as well as their similarities and common challenges. The jurisdictions involved were Belgium, Israel, Singapore and Portugal. Each presenter provided a description of the role and powers of the chief economist and the team or unit responsible for economics in their respective authorities, as well as how they fit into the organisation. Then the more specific role of the chief economist and/or team in enforcement cases was discussed, with some case examples.

This was an event that allowed participants to explore in depth some of the trending economic topics that many jurisdictions are dealing with. The format allowed for setting a theoretical base upon which then the practical cases brought were built upon which then allowed for open and informed discussions that were lively and always interesting.

Website link:

http://www.oecd.org/competition/competition-economicsworkshop-for-senior-chief-economists.htm

As speakers there was an impressive roster of leading academics, to which much contributed the Wharton School of the University of Pennsylvania and CRESSE.

There was Aviv Nevo, Professor, University of Pennsylvania, Tom Ross, UPS Foundation, Professor of Regulation and Competition Policy, University of British Columbia, Yannis Katsoulacos, Professor of Economics, Athens University of Economics and Business, Juan-Pablo Montero, Professor of Economics, Pontificia Universidad Católica de Chile, Sang-Seung Yi, Professor of Economics, Seoul National University, Zhiqi Chen, Professor of Economics, Carleton University, Ginger Jin, Professor of Economics, University of Maryland and Jacques Crémer, Research Professor, Toulouse School of Economics.



Primers on Competition Law for ASEAN Judges

The Federal Court of Australia has developed, in close cooperation with the OECD, a series of information sheets for members of the judiciary in Association of Southeast Asian Nation (ASEAN) member states. These sheets are designated as Primers on Competition Law for ASEAN Judges. They are meant to offer practical guidance to judges when analysing competition cases in their courts. This project is funded under the ASEAN-Australia and New Zealand Free Trade Agreement (AANZFTA) Competition Law Implementation Program. The OECD contribution took the form of review, comments and suggestions considering its international experience, in particular in the context of its work with judges.

The first set of Primers on Competition Law for ASEAN Judges are on: a) Economics for judges in the competition law context; b) Circumstantial evidence; c) Expert evidence; and d) Abuse of dominant position.

- The Primer on Economics for judges presents the most-used economic terms and concepts underlying competition law and the framework for assessing anticompetitive effects of agreements, unilateral conducts or mergers.
- The Primer on Circumstantial evidence sets outs the role that such evidence frequently plays in the competition law context and discusses the different types of evidence and their probative value.
- The Primer on Expert evidence discusses the role that such evidence can play in competition law cases and offers insights into the experience of judges in Australia. The complexity of economic analysis, and concerns about the impartiality of expert witnesses, create challenges for the management and assessment of expert evidence.
- The Primer on Abuse of Dominance discusses the concept of "substantial market power" and the types of evidence that may be used by judges to assess dominance and abuses.

The OECD and judges in competition cases

The OECD has undertaken a number of roundtables with judges in the context of both the Competition Committee and the Global Forum on Competition. In 2017, the Global Forum on Competition held a roundtable with judges from various jurisdictions that addressed various dimensions of the judicial adjudication of competition law. While recognising the differences that exist across jurisdictions, the discussion tried to elicit the main common challenges that judges face when applying competition law, and find ways to address those challenges. You may find the contributions to the discussion here: http://www.oecd.org/competition/judicial-perspectives-competition-law.htm

Other relevant Competition Committee roundtables include: *Presenting Complex Economic Theories to Judges*, 2008 and *Procedural Fairness: Competition Authorities, Courts and Recent Developments*, 2011.

The OECD has also published reports concerning the courts' role in the review of competition law cases such as, for instance, the 2016 report on *The resolution of competition cases by specialised and generalist courts: Stocktaking of international experiences.*

Global Forum on Competition

29-30 November 2018, Paris

Session I - Discussion on competition and Fair societies

The Global Forum on Competition will explore the concept of fairness, whether and how it can relate to competition and what fairness can mean in practical terms to competition enforcers. The session will be led by a panel of experts from different policy areas to debate the question and discuss with delegates in an interactive Q&A format.

The term "fairness" is referenced by many antitrust enforcers, although it does not have a universal definition, particularly in the competition context. Fairness, while innate to most individuals, is fluid, subject to the influence of many factors: culture, eduction, experience, society. Behaviourial scientists and psycologists have attempted to examine how fairness works and is defined in markets. While common tendencies may emerge, no consensus was observed. Concerns with fairness in societies may reflect a growing, and positive desire, to reduce societal inequalities, and ensure that opportunities are shared more broadly across society, whether amongst individuals or firm. Taken in this context, how can fairness be interpreted by competition authorities and judges without becoming moralistic or undermining the proven criteria that underpin competition enforcement.

SESSION II - THE RELATION BETWEEN GENDER AND COMPETITION

Competition policy usually is though in terms of consumers and firms, government and regulators. Traditionally, consumers have been considered only by their willingness to pay, their (rational) preferences, their ability to substitute between products offered by firms. Meanwhile, firms are treated as entities that are defined by the profit-maximising objectives of their owners, and only rarely seen as collections of people. Competition policy is therefore largely gender blind and prides itself on its objectivity. The Global Forum on Competition will hold a discussion on the topic to explore whether a gender lens might in fact help deliver a more objective competition policy by identifying additional relevant features of the market, and of the behaviour of consumers and firms. We will also discuss whether a competition perspective can help inform policymaking on gender equality.

SESSION III - BENEFITS AND CHALLENGES OF REGIONAL AGREEMENTS

Regional competition agreements (RCAs) hold great potential for both developed and developing jurisdictions by promoting convergence in competition laws and instruments, ensuring effective and efficient cross-border enforcement, and by supporting young authorities in their efforts to create a competition framework coherent with international standards. However, serious obstacles to the success of RCAs can undermine the harvesting of these benefits.

The roundtable discussion will explore the potential benefits, obstacles and challenges of Regional Competition Agreements. The different types of existing RCAs will be examined; the rational for developing or joining a RCA; and in what way these have affected competition law enforcement in member jurisdictions (both positively and negatively). The session will focus specifically on RCAs amongst jurisdictions that are located in the same geographical region. Such agreements are particularly relevant as economies are usually more integrated with other countries within the same region and may have similar levels of development, and even similar legal cultures, creating conditions conducive to co-operation. The session will be supported by an inventory of RCAs that will be developed by the OECD and shared before the session.

Session IV - Authorities' investigative Powers in practice

Competition authorities' mission requires intensive evidence and data gathering. To meet this end, competition authorities are armed with various investigative powers ranging from voluntary interviews to searches in non-business premises.

Participants will discuss practical issues and share best practices regarding the use of investigative powers through three breakout sessions. Breakout Session 1 will discuss challenges and best practices regarding unnannounced inspections in a world where information is mostly produced and stored digitally. Breakout Session 2, will explore requests for information, one of the most often used investigative powers, while Breakout Session 3 will be devoted to due process and the protection of rights of subjects and third parties without hindering effective investigations.

COMPETITION LAW AND STATE-OWNED ENTERPRISES

Like private firms, state-owned enterprises (SOEs) might seek to maximise profit, even if they ultimately re-invest the surplus that they earn. Alternatively, their objective might be to expand their output, or they may have another goal. Regardless of their objectives, there remains a risk that their actions, agreements and mergers may sometimes harm consumers, causing competition agencies to sometimes investigate their behaviour. However, in undertaking such investigations there will be particular challenges, some relating to the status of these organisations, some to their different objectives which may affect the analytical tools that an agency uses. This session will look at investigations into anticompetitive conduct, mergers, and agreements by SOEs, both those owned or controlled by a competition authority's own government, and those owned or controlled by other governments. In particular, it will examine the type of conduct that they have engaged in, the rationale for doing so, the key analytical questions that arose in these cases, and the way in which their status and objectives affected those investigations. In doing so, we aim to draw out the main challenges of enforcing competition law against SOEs and look for ways to address them.

2nd Meeting of OECD High Level Representatives of Asia-Pacific Competition Authorities

The day before the Global Forum on Competition, on 28th November, the OECD will hold the second Meeting of the of High Level Representatives of Asia-Pacific Competition Authorities that will bring together high-level representatives from the authorities of the Region as a forum to share experiences and discuss topics of common interest. The first meeting was an important success with 15 jurisdictions from Asia represented at high level.

We expect this second meeting to serve for jurisdictions to understand better certain aspects of other jurisdictions' laws, practices and policies and to help identify best practices amongst their regional peers. The main theme for this first meeting will be the role for competition advocacy in the context of SOEs. Other topics will include the capacity building needs for the region.

OECD/KPC Competition Programme 2018





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 **jhoh@oecdkorea.org**.

SNS

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

- OECD Network Environment: www.oecd.org/one
- Facebook: OECD-DAF/Competition Division (closed group, contact jhoh@oecdkorea.org)
- Twitter: OECD/KPC COMP

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