

Asia-Pacific Competition Update

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Competition Programme
OECD KOREA Policy Centre

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. 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

The year of 2015 brings another year of exciting activities for the OECD KOREA Policy Centre's Competition Programme.

Six events are planned for this year, in this 11th Year of the Programme - which vouches for its reputation and added value to authorities throughout the Asia Pacific Region. It also brings a number of other projects that we hope will serve to further increase the usefulness and prominence of the Centre.

Highlights of the Programme this year include two events outside Korea - in the Philippines and Singapore which has the significant advantage that more officials from each of these countries can attend our event - broadening our range of users and allowing the Centre to further cement its relationships with national authorities in the Region. In April the Philippines workshop will be on Fighting Bid Rigging and will target to a certain extent less experienced authorities. The Singapore workshop will take place in June and will have as its focus advocacy - in its various forms, from market studies, competition assessment and other actions used by competition authorities to raise the profile of competition policy and law enforcement. Given the topic we will have as speakers very high ranking officials of quite a number of different competition authorities.

Also once again the highly fruitful workshop dedicated for judges, takes place in Busan, Korea in October and will go in depth into the use of competition economics in the courtroom - a wish clearly expressed by judges who took part in previous editions.

Our remaining Programme includes a workshop in Jeju Island, Korea, which will be dedicated to practical aspects that competition agencies deal with when analysing mergers and an event on remedies and commitments in competition cases, which will take place in December. Finally, in September the sector event will be dedicated to telecommunications and electronic communications markets and will take place in Seoul, Korea. I invite you to take a look at the calendar.

So now to the ongoing and new projects. First, we will use social media tools such as Facebook and Twitter to disseminate key information to our participants but also to explore the networking possibilities in a job, like ours, where collaboration is key. A Facebook page will be created a few weeks before each event, and will post the agenda and other important information regarding the upcoming event. During the event, photographs will be posted of the event. It is an opportunity for members of the group to share some of their photographs during the days of the event. It will also be a place where material used by speakers during the event will be posted. Our Twitter account will alert to new events and newsletters as well as to interesting new articles linked to topics recently worked on in the Programme.

We have also developed a Video that will be used to promote the Centre and which includes interviews with past participants and officials at the OECD. A digital registration tool has been created making it easier for participants to register with our events and allowing us to collect some information that will also allow the content of our workshop to take into account their experience.

Other projects are in the pipeline, and as usual we count on the collaboration with the competition authorities in the Region to make our Programme more and more tailored to the needs of our constituents.

Of course, we are very happy to receive any comments and contributions, with ideas for future topics and on our work. We promise to respond to every email that comes in with great ideas!

On behalf of the OECD/KPC Competition Programme I would like to express how excited we are to be able to work with competition authorities across the Region this year and every year!

Ruben Maximiano



News from Asia-Pacific Competition Authorities*

Chinese Taipei amends competition rules



On February 4, 2015 Chinese Taipei amended its Fair Trade Act (FTA) – this is the most extensive revision since the Act's introduction in 1992. The amendments cover a wide range of provisions under the FTA and take into account the rapid economic change in Chinese Taipei's economy as well as the recent trends and development of international competition laws.

Regarding merger control, the Act now provides for broader coverage in the calculation of the turnover threshold of the notifying parties and a longer review period for further merger review, from 30 days to 60 days, if needed;

As for cartels, circumstantial evidence for concerted actions (cartels) and a general clause of cartel exemption have been introduced to take into account efficiencies such as technical innovation or operational efficiency. For non-horizontal agreements and resale price maintenance more in particular it is no longer considered per se illegal but the rule-of-reason standard is adopted;

Changes have also been introduced as regards the statute of limitations and penalties: differentiation of administrative penalties have been introduced and the penalties applicable to anti-competitive practices have been increased, whilst the statute of limitations periods for administrative penalties have been increased from 3 to 5 years.

Finally, according to the new rules the Fair Trade Commission (FTC) is now able to suspend investigations under certain conditions, whilst the FTC's decisions can now be appealed directly to the Administrative Courts.



* News items were provided by respective Competition Authorities.

Hong Kong gears up towards full implementation of the Competition Ordinance



Hong Kong's first cross-sector competition law, enacted in June 2012, is expected to come into full effect later this year OF 2015.

After a three-month long engagement exercise in mid-2014, the Competition Commission Hong Kong (the Commission) published a set of six draft guidelines under the Competition Ordinance (Ordinance) in October 2014 for public comment. Three of the guidelines were procedural dealing with Complaints, Investigations and Applications (for exemption). Three were substantive on the First Conduct Rule (anti-competitive agreements), Second Conduct Rule (abuse of substantial market power) and the Merger Rule. The Commission is currently reviewing the sixty-four submissions received from various businesses and organisations and revising the drafts before consulting with the Legislative Council as is required under the Ordinance.

While waiting for full implementation of the Ordinance, the Commission has started preliminary work on some of the sectors which raise competition concerns in Hong Kong, namely building maintenance and oil prices. The Commission is also undertaking other preparations including drafting policy documents on leniency and enforcement priorities, as well as enhancing its operational capability through international liaison and staff secondments to overseas competition agencies.

In the lead up to the full commencement of the Ordinance, the Commission is carrying on its advocacy programmes to engage with its key stakeholders through meetings and seminars. Educational materials and self-assessment tools are being prepared to assist businesses in understanding and complying with competition law. These will be supported by comprehensive media and promotional campaigns so that members of the public are aware of the benefits brought by the Ordinance while businesses will be ready, willing and able to comply with the new law before its full implementation.



ICN Merger Workshop was held in New Delhi

The Competition Commission of India (CCI) hosted a two day ICN Merger Workshop in New Delhi during December 1-2, 2014. The theme of the Workshop was “International Cooperation and Remedies in Merger Review”.



The ICN Merger Working Group organises these workshops on a regular basis. The CCI is one of the Co-chairs of the ICN Merger Working Group with the DG Competition (EC) and Canadian Competition Bureau, being the other Co-chairs.

The objective of the Workshop was to discuss and share experiences on various issues and challenges faced by the competition authorities world over in the area of international cooperation in case of multijurisdictional merger notifications and designing the non-conflicting remedies.

The Workshop was inaugurated by Mr Arun Jaitley, the Hon'ble Union Minister of Finance, Corporate affairs and Information and Broadcasting. The Workshop was attended by around 90 foreign delegates from various competition jurisdictions including the United States, EU, Canada, Brazil, South Africa and Australia amongst others, competition lawyers and economists, and academia. A large number of delegates including representatives from top law firms of India, regulatory bodies and the officials of CCI also attended the Workshop.

In his inaugural remarks, Mr. Arun Jaitley stressed the need for sharing of the global experiences in the field of mergers and acquisitions for better understanding and development of competition law and practice. On this occasion, Mr. Jaitley also released the “Competition Tracker”, a compilation of the orders issued by the CCI.

Mr. Ashok Chawla, the Chairperson of the CCI, delivered the welcome address and stated that the mergers and acquisitions (M&As) were globally recognized as enabling the growth of the markets, though some of the M&As could also adversely affect the competition and therefore, they required regulation competition authorities.

The two day Workshop consisted of four Plenary sessions, besides the inaugural, breakout sessions after Plenaries and the closing session. A Plenary session in the Workshop was dedicated to deliberation on a Hypothetical case study dealing with various practical aspects of international cooperation and designing of remedies in multijurisdictional filings. The Chairperson, Competition Appellate Tribunal Mr. Justice G.S. Singhvi, delivered the valedictory address during the closing session of the Workshop.

A 150 Billion Rupiah Fine to Tyre Cartel



In January, the Commission for the Supervision of Business Competition (“KPPU”) fined six tyre manufacturers for a price fixing cartel in the production and marketing of tyre in Indonesia.

The six undertakings, PT Bridgestone Tyre Indonesia, PT Sumi Rubber Indonesia, PT Gajah Tunggal Tbk, PT Goodyear Indonesia Tbk, PT Elang Perdana Tyre Industry and PT Industri Karet Deli, were each handed out administrative fines of IDR 25 billion (approximately EUR 1.75 million) - the highest fine that can be imposed under the Law No. 5/1999 (“Indonesian Competition Law”).

KPPU Commissioner Council, led by Mr. Kamser Lumbanradja, stated in its decision that its conclusions were made on the basis of evidence of a number of minutes of the Association of Indonesian Tyre Producers (APBI) between 2009 to 2012. The minutes of the Executive Committee meetings of the APBI set out their agreements to uphold their production and maintain their prices. Furthermore, in the Sales Director meeting of APBI on December 2008, the results of which would be submitted to the executive committee meeting on 21 January 2009, they clearly highlighted that “APBI members must not enter to a price war practice”. This statement was made by the Chair of APBI and undisputedly agreed by all members.

Meanwhile, in the Executive Committee meeting of 26 January 2010 at the Hotel Nikko (one of the five stars hotel in Jakarta business district), it was also requested “to all members of APBI, once again, to continue to control their distribution and maintain a conducive market condition according to their demand”. At the following meeting in 25 February 2010, they announced the minutes of Sales Director meeting to agree on maintaining market stability. Finally, at a meeting of 10 April 2010, they declared that “market monitoring by APBI will be reactivated from May 2010, and all members must control their tyre distribution to sustain this condition”.

In addition to the direct documentary evidence, KPPU also used the Harrington Model to corroborate and measure the existence of the cartel agreement. This model uses the error correlation analysis or residual regression using panel data between companies. Experts use this model to analyze behavioral pattern in the dedicated time frame and between samples.

Following this decision, KPPU will also recommend to the Minister of Industry to advise APBI that it should adhere to the fair competition principles rules set out under the Indonesian Competition Law.



KPPU plays Important Role in Indonesian National Development Plan for 2015-2019

ASEAN will initiate a new phase in 2016, as it will act as an economic community. The Indonesian market will become part of this ASEAN market that will have no economic borders. Doubtless, Indonesia will become an important target for foreign investors. Indonesia itself has fast become an open market moving to liberalize several sectors like the airport, port, train, water, and oil and gas sectors.

This leads to many opportunities but also some important challenges, not least as many Indonesian enterprises, are still, as regards some aspects, behind in term of their competitiveness. Not only will these companies have to increase productivity and efficiency, but there is a role for competition rules to ensure fair competition is taking place in the market place and that stronger companies may not entrench market power in a way that is detrimental to consumers and to the economy.

It is these challenges that have triggered the government to extend the role of the Competition Authority in the most recent National Development Plan for 2015-2019. Competition policy is set out in the Plan as one of the highest priority. Competition policy will act as an important policy tool to foster efficient and productive markets through innovation and to create incentives for investment and industrial growth - in this way also improving Indonesia's competitiveness.

According to the latest National Development Plan, for competition policy to become an integral part of the national economy and the of the cultural mindset the concept will introduced in the formal education system (higher education) and other official education. Fair competition principles will be fostered in the business regulatory environment, in order to create the conditions for healthy competitive markets. Furthermore, the amendment of Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, especially on several articles concerning institutional status of KPPU Secretariat, merger control, substantial matters that should be in line with economic principles, and policy harmonization. The changes of KPPU's institutional status will strengthen its legitimacy to implement the Competition Law. Finally, drafting of the Presidential Regulation concerning Second Amendment of Presidential Decree Number 75 Year 1999 on Komisi Pengawas Persaingan Usaha (KPPU), will strengthen KPPU's status to support its functions and duties – in particular in the implementation of fair competition policy and the internalization of competition values in society.

According to the KPPU, being part of the National Development Plan is an important development for competition policy in Indonesia and will increase competition culture across policy areas. In its view strong support for the role of the competition authority may lead to a stronger competition regime in Indonesia.

Workshop on Competition in the Retail Sector



Mr. Ruben Maximiano

Senior Competition Expert
OECD

In December 2014, the OECD/Korea Policy Centre held a workshop dedicated to the competition issues that arise in retail sector – a very important sector of the economy for most countries in the Asia Pacific Region.

Every year the Centre holds an event dedicated to a sector. Criteria of choice of the sector is the relevance for the economies of the Region as well as consideration of particular competition issues that are meaningful to explore given their degree of complexity and/or novelty. It is also a great opportunity for officials from regulators outside of the competition agencies to attend our workshops and become more familiar with competition policy and analysis. In prior years the workshops addressed sectors such as Aviation and in October 2015 this year's event will be dedicated to the analysis of the telecommunications and electronic communications industries.

This year's workshop addressed in detail some of the issues that arise in the context of the retail sector, in particular in the vertical relationships between manufacturers and retailers both in the bricks and mortar and online worlds.

The workshop comprised of both presentations by expert speakers, case studies presented by a number of countries as well as two hypothetical cases worked on in smaller groups by the attendees to put into practice the issues discussed during the expert sessions.

Before the workshop proper was started Mr. Marcus Pollard, manager of competition affairs at the Hong Kong Competition Commission, took the floor to offer an overview of the institution and the state of play in the introduction of the competition law in Hong Kong.

Mr. Ruben Maximiano of the OECD KOREA Policy Centre, then offered a comprehensive roadmap for the workshop as well as an outline and interconnection of the main issues that would be discussed during the three days as well as their critical importance in the context of competition policy implementation in the retail sector. The first technical presentation was made by Mr. Viktor Porubsky of the European Commission that

discussed the techniques to use when defining markets in the retail industry, exemplifying with a number of recent cases of the European Commission dealing with consumer goods (chocolates, deodorants and consumer electronics).

The remaining part of the first day of the workshop was dedicated to vertical agreements and restraints.

Firstly, an overview of vertical restraints in distribution agreements was provided by Mr. Ruben Maximiano. This included setting out the basic economic underlying concepts of the competition analysis of such agreements, including inter and intra brand competition and the differences and similarities in approach to such agreements from jurisdictions of OECD member countries such as Australia, European Union, Japan, Korea and the United States.

Secondly, Mr. Richard Bilodeau, of the Canadian Competition Bureau, provided an exploration of the more common types of vertical agreements - ranging from exclusive dealing to tied selling - and contextualizing these within the Canadian experience.

Thirdly, in the following session Mr. Richard Bilodeau dedicated particular attention to the very topical issue of Retail Price Maintenance and the recent change from a per se to a rule of reason approach recently adopted in Canada - explaining in detail the underlying reasons and consequences of the change. The Canadian experience was then juxtaposed to the European Union practice in the field by Mr. Ruben Maximiano.

To finish the first day of the workshop, the participants were divided into smaller groups of 5 persons, and worked in analyzing the issues and solving the problems set out in a hypothetical case put to them for their appreciation and determination and dealing with retail price maintenance type practices.

The second day was dedicated to furthering the analysis of vertical agreements, this time with attention being devoted to the online environment, in a detailed discussion on price relationship agreements conducted by Professor João Gata, Chief Economist of the Portuguese Competition Authority and with interventions by Mr. Richard Bilodeau, sharing the





Canadian experience. These sessions were followed by Chinese Taipei FTC's Jin-Hui TSAI setting out the CTFTC's practice with vertical restraints with a case involving exclusive dealing and the foreclosure of new department stores in a given city in Chinese Taipei. A second hypothetical case was discussed in smaller groups and explored how to identify and analyze the effects of a Most Favored Nation clause.

The final day of the workshop focused on merger analysis in retail markets, firstly with a presentation by Mr. Porubsky of the specific competition assessment issues to be considered in the consumer and retail markets and then by an in depth examination of a case in Korea by Mr. Sangmin Song. The case was the merger of two food retail chains in Korea and raised matters of geographic market definition as well as the use of economic data to analyze the competitive impacts of the merger. Ms. Loy Pwee Inn of the Competition Commission of Singapore presented a merger case involving aspects of buyer power and barriers to entry in food markets (in a merger between two ice cream producers). Some specificities of accepting appropriate and effective merger remedies in retail markets were then discussed by Mr. Porubsky. The final country case study was

brought by Ms. Dian Retno Mayang Sari of the Indonesian KPPU on a case of abuse of dominance in the food retail markets.

The final session was conducted by Professor Gata and was dedicated to the role of sector enquiries in the food distribution sector, offering an overview of the recent work done in this area by the EU Commission and a number of European countries. In this context, Professor Gata also explored the possible limits of Competition Law in dealing with issues that could arise in this sector.

Overall, this was a workshop with a lively participation in all of the sessions, with questions and a variety of comments made from participants from different jurisdictions.

Vertical Restraints Case Studies from Chinese Taipei

Ms. Jing-Hui Tsai

Specialist

Chinese Taipei Fair Trade Commission



The Chinese Taipei Fair Trade Commission (FTC) presented two cases at the Workshop on Competition Issues in the Retail Sector.

The first case originated with an anonymous complaint alleging that the Shin Kong Department Store had stated to the boutique shops contracting with it that should they establish a boutique in the newly-opened and competing Idee Department Store they would be penalized with the withdrawal of its boutique space in Shin Kong.

After an investigation, the Commission found that Shin Kong had a sales volume of NT\$8.6 billion, and a 33.34% market share of the department store industry in Taichung city. By threatening to terminate contracts, Shin Kong induced boutique operators to cut off their transactions with Idee. The evidence showed that Shin Kong impeded Idee from attracting boutique operators to its department store. The result was that it was forced out of the department store market in Taichung city. The Commission found that such actions constituted a violation of Article 19(i) of the Fair Trade Act, which provided that no enterprise shall cause another enterprise to discontinue supply, purchase, or other business transactions with a particular enterprise for the purpose of injuring such an enterprise, where it is likely to restrain competition or obstruct fair competition.

In the second case presented, Apple Asia required the telecommunication companies to submit their Apple cell phone prices to Apple Asia for approval before they could sell the products. In the investigation, the Commission found that, according to the distribution agreements between Apple and Chinese Taipei's three largest mobile telecom providers, all iPhone prices had to be approved by Apple before the cell phone rate plans could be promoted in the market. Emails between Apple Asia and the telecom companies indicated that Apple Asia had indeed requested that the telecom companies readjust the prices, subsidies and the price differences between new and old cell phones.

Therefore Apple's interference deprived the telecom companies of the freedom to determine prices according to their cost structure and market competition conditions. It limited both intra-brand and inter-brand competition and was in violation of Article 18 of the Fair Trade Act, which provided that where an enterprise supplies goods to its trading counterpart for resale to a third party or such third party makes further resale, the trading counterpart and the third party shall be allowed to decide their resale prices freely, thus any agreement contrary to this provision shall be void. Resale price maintenance was at the time a per se infringement in Chinese Taipei. This provision has since been amended (see article on amendments to Chinese Taipei Fair Trade Act).



Carrefour acquisition a Case Study from Indonesia

Ms. Dian Rento Mayang sari

Investigator
KPPU

Until 2011, the retail sector was the fourth largest contributor to Indonesia's GDP and the second largest employer in Indonesia. The Competition Authority, KPPU, has a mandate to enforce Law No. 5 year of 1999 (the "Indonesian Competition Law") and to establish fair competition in various sectors of the economy, including the retail sector. According to Article 17(1) of the Indonesian Competition Law, "Business actors shall be prohibited from controlling the production and or marketing of goods and or services which may result in monopolistic practices and or unfair business competition".

The latest case of the KPPU in the retail sector was the Alfa Acquisition by Carrefour in 2009. The relevant product market defined by the KPPU in this case concerned the modern retail stores of supermarkets and hypermarkets only. This definition excluded other retail outlets such as the grocery, minimarket, department store, specialty market and traditional markets. These were not included by the KPPU in the same market as supermarkets and hypermarkets for a number of reasons relating to differences in: (i) the selling space; (ii) the number of product items in the stores; (iii) the distribution of outlets, (iv) the trading terms, (v) the convenience and recreational values enjoyed by visitors. The KPPU considered that traditional retailers were therefore not in competition with some forms of the more modern retail stores.

As regards the geographic market, the whole of Indonesia was considered taking into account the national presence of the business actors (Carrefour was active in all of Indonesia), the national marketing strategies, outlet development strategies, consumer promotion and competition between the Carrefour and other national retailers (such as Hypermart, Giant, Hero, Indomaret, Alfamart, Ramayana, Makro, Circle K, etc).

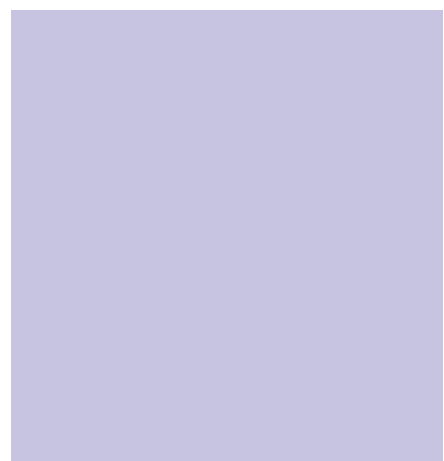
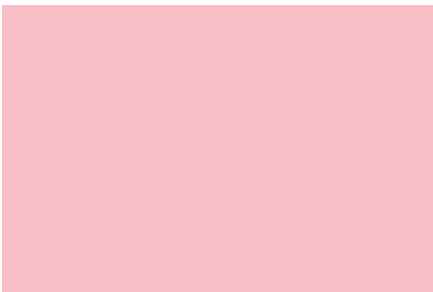
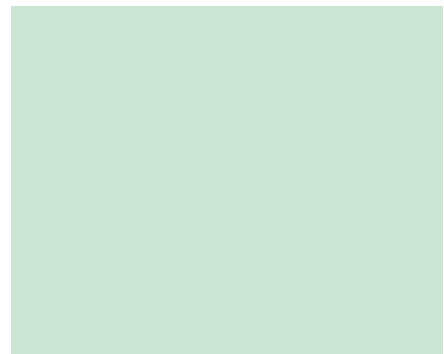
Based on the investigation undertaken by the KPPU, the evidence showed that after the Alfa acquisition the market share of the Carrefour had increased to 57,99% in 2008 from 46,30% in 2007 on the identified supermarket and hypermarket retail market. Thus, under the Law No. 5 year of 1999 the Carrefour's market share legally 'met' the qualification of Monopoly and the Dominant Position. Under the Indonesian Competition Law, one of the factors considered for a finding of a dominant position is when a business actor has 50% or more market shares in a relevant market.

Furthermore, according to the KPPU decision, Carrefour and Alfa undertook behaviours which it considered violated Law No. 5 year of 1999, Article 25, as they configured an Abuse of Dominant Position. According to the KPPU Carrefour was deemed to have misused its market power by imposing upon its suppliers various trading terms that configured forced tying and conditional rebates. The Article 25

Paragraph (1) sets out that “Business actors shall be prohibited from using dominant position either directly or indirectly to: (a) determine conditions of trading with the intention of preventing and or barring consumers from obtaining competitive goods and or services, both in terms of price and quality”.

The KPPU's decision considered that Carrefour infringed Article 17 paragraph (1) and Article 25 paragraph (1) of the Indonesian Competition Law and penalizing the Carrefour to pay penalty fine Rp.25,000,000,000.00 (approx. USD 2,000,000 or EUR 1,760,000).

On appeal, however, the Supreme Court overruled the KPPU's findings, defined the market differently to than that set out by the KPPU. The Supreme Court referred to the Presidential Decree and Regulation of Ministry of Trade on Retail which Modern Retail to consider that it includes not only supermarket and hypermarket only but also the grocery, minimarket and department store.





Ms. Pwee Inn Loy

Senior Assistant Director
Competition Commission of Singapore

In her presentation, Ms. Loy Pwee Inn of the Competition Commission of Singapore (“CCS”) shared with the participants details of the functioning of the merger regime in Singapore as well as CCS’s experience in clearing a merger in the food retail market.

The merger in question involved the acquisition by F&N Foods Pte Ltd (“F&N”) of King’s Creameries (S) Pte Ltd (“King”). The businesses of F&N Foods and King’s overlapped in the sale and distribution of industrial ice cream (i.e. ice cream produced for wide scale distribution), which may potentially lead to coordinated and non-coordinated effects that substantially lessen competition in this market. In defining the relevant product market, CCS considered if industrial ice cream should be further broken down into categories of impulse, take-home and catering ice cream. CCS concluded that catering ice cream is in a different market from the impulse/take-home market as the caterer often adds value to the ice cream by serving the same with beverages or food, which may enhance the taste and the appearance of the ice cream. Further, catering ice cream and impulse/take-home ice cream are unlikely to be substitutes, as catering ice cream is generally cheaper for catering customers while impulse/take-home ice cream customers are unlikely to purchase ice cream in bulk packaging for sale to end-consumers.

Ms. Loy explained that the supply of ice cream products in Singapore was fragmented with many existing competitors who competed on price, quality, product range and product innovation. In particular, innovation, product range and quality were important factors to customers. CCS’s assessment also revealed that the ability of retailers to decide whether to list the industrial ice-cream products puts them in a strong buyer position. In addition, customers in the catering ice cream market also appear to have some degree of buyer power to check price increases, given the availability of alternative suppliers. The presence of a strong competitor i.e. Unilever Singapore Pte Ltd at the material time and low barriers to entry would also constrain any exercise of market power post-merger and therefore the merger was cleared.



Workshop on Practical Aspects of Effective Merger Control

Mr. Ruben Maximiano

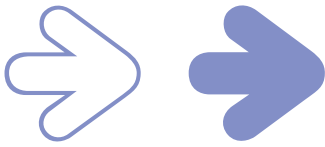
Senior Competition Expert
OECD



The first workshop of 2015 was devoted to merger control, exploring the practical aspects that make for an effective merger control policy.

Many merger control regimes operate under very strict time limits - one of the main distinguishing factors of merger laws in comparison to other areas of competition policy. The main objective of the workshop was therefore to help agencies ensure that these strict deadlines under which they operate are being used to the best possible effect in order to reach a "right" decision based on a cogent and full body of evidence. For this task the workshop counted with five speakers kindly made available by the KFTC, JFTC, US DOJ and the OECD, respectively. Throughout the three days these experts shared their experience - both formally during the dedicated sessions as well as informally - with all participants.





Given the nature of the event it covered both theoretical content and two practical case solving discussions to stimulate active learning of the participants. The latter allowed participants to put into live practice and dialogue the topics discussed during the expert speaker sessions. For these exercises the participants were divided into three groups - each managed by some of our expert speakers for the event.

The introductory presentation to the workshop was made by Mr. Ruben Maximiano of the OECD KOREA Policy Centre. This session offered an overview of the main issues that competition authorities have to deal with under their merger control practice, drawing mainly from the consolidated practice of the member countries of the OECD. This was then followed by a roadmap of all the expert sessions, the issues that would be discussed and how they fit together to ensure that a merger control regime is taking into account all aspects that should be considered.

The workshop continued with two sessions dedicated to the main principles that drive competition assessment in the merger control context - market definition and the possible theories of harm that can be applied. These sessions were both conducted by Mr. John Davies, an economist, Head of the Competition Division of the OECD. Both theory and practical cases were discussed in depth in



these two sessions, drawing from Mr. Davies' experience as Chief Economist of the UK Competition Commission. These sessions provided a solid foundation for the remaining part of the workshop, as a thorough understanding of these aspects is crucial for a better targeting of investigation efforts that agencies' may need to undertake in order to uncover facts and data on which to base their decisions.

The final expert session of the first day of the workshop was dedicated to case team planning and was offered to the group by Ms. Tracy Fisher, of the US DOJ. Ms. Fisher shared the wide ranging experience of the DOJ in organising and implementing investigations in the merger arena as well as providing some guidelines and tips to make sure the team that is to examine a merger is ready and focused on what is needed to undertake a successful investigation.

At this point in the day, the participants discussed in three smaller groups a hypothetical case put to them for their appreciation. The fictional case used would be same for the first and second days, but with the group focusing on different aspects of the case. The merger being assessed was based upon a notification of an acquisition by a player active in offering mobile communications





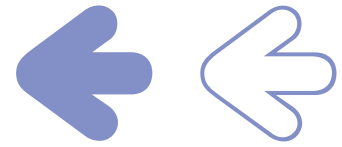
services of one of its closest competitors. This first hypothetical case session was focused exclusively on the identification of possible issues of market definition and the theories of harm that could be considered – both horizontal non-coordinated and coordinated theories as well as also vertical foreclosure theories.

The second day saw Ms. Fisher go more into detail regarding the investigative techniques that may be used, both for more simple as well as more complex cases – a session that was very popular with participants as it was very practical in nature. Mr. Woo Chul Jeon of the KFTC then provided in depth analysis of a case study in the retail market Korea focusing exclusively on the issues of market definition and how they were investigated and decided by the KFTC.

The second hypothetical case session discussed in small groups explored how the main issues and questions analysed under the first session could be translated into an effective investigative plan, including assessment of the types of data and information that would need to be obtained, as well as from whom such information could be obtained.

On the last day of the workshop Mr. John Davies explored the economic tools that are available in the toolbox of the competition agencies when analysing mergers in their jurisdictions, looking at the advantages and disadvantages of the main tools as well as the types of economic data that are needed for their successful application. This was complemented by Mr. Hashimoto of the JFTC that brought to life the application as well as some of the





limitations of certain of the economic tools discussed by Mr. Davies by discussing in some depth two recent cases of the JFTC.

Two case studies were then presented: one by MOFCOM, of China, regarding market definition issues in the tourism sector, raising interesting issues namely as regards the possible impact of the internet in market definition; another case was presented by the Competition Commission of Singapore on the failing firm defence and the evidentiary burden that is required to bring such a case - which is exceptional in application, in Singapore as in many other jurisdictions.

Finally, the afternoon saw the discussion of the importance of procedural fairness and of transparency in making better, more informed and robust decisions. The following session drew upon the experience of the OECD member countries to look at the practical aspects of choosing appropriate remedies to mergers

that raise competition concerns. Both of these sessions were run by Mr. Maximiano, of the OECD. Indonesia's KPPU then presented a merger case it had recently examined in the telecoms sector and where the Indonesian competition agency applied remedies for the first time.

Overall, this was a workshop with a lively involvement and the fruitful sharing of experiences of the participants during the sessions as well as during the more informal settings provided during the three days the group was together - showing the relevance of the topics under discussion for competition agencies when analysing mergers.

Market Definition of Tourism Case

Mr. Jianhui Yang

Director
MOFCOM



Mr. Yang Jianhui presented the Anti-Monopoly Bureau (AMB) of Ministry of Commerce(MOFCOM) of China, the agency in charge of merger review. The more recent activity of AMB was explained, namely that in 2014, 262 transactions were submitted to the AMB for notification. Comparing with the number in 2013, it increased by 17%. 246 cases were filed, and 245 cases were finished. Compared with 2013, the number of analysed cases increased by 18%. 236 cases were unconditionally approved, which account for 96% of all notified cases. 4 cases were approved with conditions, accounting for 2%. AMB blocked 1 case in 2014, accounting for 0.4%. Notifications were withdrawn in 4 cases, which was 2%.

Mr. Yang Jianhui then made a brief presentation on a tourism case raising mainly issues of market definition. Following is general information about the case: A company purchased 100% stock rights of B company, both of whom provide tourism service in China. The outbound destination of A's services mainly are Europe (15%) and Asia (25%), whilst B only provides Asia outbound tourism, which accounts for 15% market share. In City a and b, A and B are the largest outbound tourism service provider, whose total market shares are 50%.

This is a typical case where the definition of product market and geographic market in tourism service determines the result of review of this case. According to the prior practice, tourism service should be divided into domestic tourism, inbound tourism, outbound tourism. From the consideration of demand substitution and supply substitution, outbound tourism service can be defined as an independent product market.

The Geographic scope of the market in the case is very relevant. In City a and b, A and B have a total market share of 50%. But the situation is changed considerably should internet travel agencies be taken into consideration. Internet travel companies break through geographic restrictions and compete across geographic areas. In China, there are many internet travel companies such as tuniu.com and ctrip.com. These kinds of companies attract more and more consumers, especially the younger consumers. Even though Company A and B occupy a large market shares in City a and b, considering the competition from the internet travel companies, we consider that such a transaction would not lead to a competition problem.



Failing Firm Defence

Ms. Yeo Hui Chuan

Senior Assistant Director
Competition Commission of Singapore

The CCS presentation, during the OECD/KPC Competition Workshop conducted in Jeju from 24 to 26 March 2015, dealt with merger review and investigation techniques. The presentation provided a brief overview of the merger regime in Singapore and examined CCS's information gathering and investigative powers, before focussing on a recent merger review conducted by CCS: the "Proposed Acquisition by Singapore Airlines Limited ("SIA") of Tiger Airways Holdings Limited ("Tigerair Holdings") ("the SIA/Tigerair Holdings Case"). This case study was used to illustrate how the information gathering process assists case officers in assessing the various aspects of a merger.

In the SIA/Tigerair Holdings Case, SIA proposed to acquire additional shares in Tigerair Holdings. This, together with other measures, would allow SIA to obtain the ability to exercise decisive influence over the activities of Tigerair Holdings ("the Proposed Transaction"). The Proposed Transaction raised competition issues as the notifying parties operate overlapping origin-destination pairs.

The notifying parties submitted that Tigerair Holdings was likely to exit its operations in the absence of the Proposed Transaction. In assessing the notifying parties' claims, CCS scrutinised the evidence and found that the three limbs of the failing firm defence as stipulated in CCS Merger Guidelines have been established:

- (a) The firm must be in such a dire state that without the merger, the firm and its assets would exit the market in the near future;
- (b) The firm must be unable to meet its financial obligations in the near future and there must be no serious prospect of re-organising the business; and
- (c) There are no less anti-competitive alternative to the merger, for example where there are no other alternative buyers.

CCS then considered whether allowing Tigerair Holdings to fail would be less anti-competitive than allowing the merger. On balance, CCS was of the view that the loss of competition as a result of the merger is not greater than the loss of competition if Tigerair Holdings exits the market. Consequently, the merger was cleared by CCS.

Acquisition in Cellular Telecommunication Service Industry

Ms. Diana Yosefa Laode Aksah

Investigator
KPPU



Article 29 of Law No 5 of 1999 (“Indonesian Competition Law”) requires mergers, consolidations or acquisitions that meet certain thresholds to be notified to the Business Competition Supervisory Commission (KPPU). Government Regulation No 57 of 2010 stipulates that KPPU can object to mergers, consolidations or acquisitions that cause monopolistic practices or unfair business competition and impose conditions on such transactions.

Since 2011, KPPU had received almost 300 notifications. Of these reviews, almost all notifications made to KPPU have been cleared unconditionally. But there have been some mergers that have been approval with notes (remedies). One of them is a recent acquisition in the telecommunications industry. This was a merger between the second and the third biggest telecommunication operators in Indonesia.

At 1st August 2013, XL submitted a consultation to KPPU on their plans to purchase 95% of Axis's shares. The Indonesian Competition Law adopts a post-notification regime. However, KPPU provides an opportunity for parties to voluntarily notify prior to closing a merger, acquisition or consolidation. That was a simultaneous consultation whilst they were commencing the legal steps to complete the transaction planned for March 2014. XL announced the acquisition on September 2013. In 18 February 2014, KPPU published its opinion on the acquisition.

KPPU found that the transaction would lead to a high concentrated market (Hirschman-Herfindahl Index before and after acquisition above 1800) in the market where the parties overlapped. The transaction would further increase market concentration in the markets of telecommunication service defined by number of subscribers and Base Transmitter Station (BTS) ownership. According to KPPU's guidelines on mergers and acquisitions, KPPU proceeded to a comprehensive assessment by reviewing of factors such as: entry barriers, likelihood of anti-competitive conduct, efficiency analysis and failing firm defense. This type of analysis is performed should the post-transaction concentration ratios exceed certain thresholds. KPPU concluded that there are high regulatory and structural barriers to entry in this industry.

After the comprehensive assessment, KPPU issued an opinion allowing the transaction with certain conditions. Considering that the market share of three businesses actors in the telecommunications services (Telkom, Indosat, dan XL) were reaching 89,05%, KPPU required XL to provide report on market development, product, and prices charged every 3 (three) months for the following 3 (three) years. This opinion also considered XL's commitment to remain as a market pioneer offering competitive rates in the provision of mobile telecommunications services.

OECD Competition Committee Meetings

15 – 18 December 2014

Hearing on Auctions and Tenders

In this Hearing, Working Party No. 2 discussed how to design auctions and tenders to ensure efficient outcomes and provide the winners with the appropriate incentives to deliver high quality, cost-efficient services and to invest to maintain and improve the assets. The focus was on auctions and tenders for public procurement and concession awards. The mere use of tenders does not ensure an efficient allocation of rights, and their design and implementation play a major role in determining the outcome. The challenge of ensuring quality and incentives to invest adds complexity to tenders and auctions design. Furthermore, it often entails trade-offs with price and competition. In the case of concessions, there is an added problem of ensuring that investments receive an adequate return, particularly when there is asset specificity. The discussion also included the ex-post renegotiation risk, how it relates to the degree of complexity of the project and how it can be minimised.

Link: <http://www.oecd.org/daf/competition/tenders-and-auctions.htm>

Roundtable on the Use of Markers in Leniency Programmes

The roundtable discussed the purpose and benefits of marker systems in leniency programmes for both enforcement agencies and leniency applicants. The roundtable discussion also touched upon the principal components of markers and the existing differences in various national regimes.

Many competition authorities rely on leniency policies to detect, investigate and prosecute hard-core cartels. To encourage leniency

applicants to come forward as early as possible, many authorities have adopted “marker” systems. Marker systems allow a prospective leniency applicant to approach the authority with some initial information about their participation in a cartel in exchange for a commitment by the authority to hold the applicant’s ‘place in line’ for amnesty/leniency (i.e. grant a “marker”), for a finite period of time, while the applicant gathers additional information to complete its amnesty/leniency application. Markers can therefore be seen as a mechanism to spur the race for leniency by reducing the initial barriers to entry into the leniency programme and by providing transparency and predictability to parties regarding their leniency status (first-in, second-in, etc.). At the same time, commentators have noted that there are differences in marker policies across jurisdictions with respect to their availability, the information requirements, timing, and scope, which may disincentivise companies engaged in international hard-core cartels from using the leniency programmes.

Link: <http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>

Report/Inventory on Provisions Contained in Existing International Co-operation Agreements

On 16 September 2014, the OECD Council adopted the Recommendation concerning International Co-operation on Competition Investigations and Proceedings, which instructs the Competition Committee to consider developing model bilateral/multilateral agreements on international co-operation. To date, a considerable number of co-operation agreements have already been concluded to promote co-operation between competition

enforcers. As part of the ongoing work on International Co-operation, WP3 delegates discussed an inventory of the main provisions in existing international co-operation agreements between competition authorities. The discussion focused in particular on provisions which are common to many existing co-operation agreements, as well as provisions which are more innovative and/or atypical. The session aimed at starting the process for considering a possible model co-operation agreement that would provide useful inputs to member countries when they negotiate bilateral or multilateral co-operation agreements with their counterparts, and would contribute to greater convergence among the various agreements.

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

Hearing on IP and Standard Setting

Standard setting, the process of determining a common set of characteristics for a good or service, often promotes competition to the benefit of consumers. Standards are particularly important in the Information and Communication Technologies (ICT) sector because they allow products to interoperate and therefore make networks more valuable. However, ICT standards also raise challenges because they often rely on patented technologies. A tension arises because patents protect the owner's exclusionary right to exploit an innovation, while standards are intended for widespread use. In particular, anti-competitive harm can arise when the holder of a patent that is essential to implement a standard (SEP) excludes implementers from accessing the patented technology (e.g., by refusing to license, by refusing to license on "reasonable" terms, or by seeking an injunction). This has led many standards bodies to require SEP holders to disclose their SEPs and commit to licensing them on fair, reasonable and non-discriminatory (FRAND) terms during the standard setting process. Nevertheless, disputes may arise ex post as to the meaning of FRAND.

This Hearing provided an opportunity for delegates to engage with experts on recent competition issues raised by standards in the ICT sector, in particular on issues related to SEPs, FRAND commitments, and the use of injunctions.

Link: <http://www.oecd.org/daf/competition/competition-intellectual-property-standard-setting.htm>

Roundtable on Changes in Institutional Design

Institutional design is a critical component of competition law and policy. Well written and comprehensive competition laws are meaningless without well-designed institutions to enforce them. At the same time, working out the optimal institutional design is complex because the menu is vast; many agencies have found success with very different designs; and what works well in one jurisdiction may not always work well in another. Against this backdrop, many jurisdictions have recently made, or have considered making, changes to their institutional design, which may provide useful insights. For example, a number of jurisdictions have created new multifunction agencies by merging the competition agency with the authorities responsible for other economic policy functions, such as consumer protection, sector regulation or public procurement control. Other jurisdictions have made changes designed to enhance the independence of the competition authority from government.

This roundtable provided an opportunity for delegates to discuss issues which triggered recent changes in institutional design, to review the pros and cons of various options, and to share experience on how those changes have worked out.

Link: <http://www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm>

Calander of Event 2015

Jeju, Korea

24 to 26
March

Practical Aspects of Effective Merger Control

- Case shaping
- Development of theories of harm (unilateral and coordinated effects)
- Investigations and collecting evidence
- Basic economic tools and instruments

Manila,
Philippines

20 to 22
April

In-country Event – Philippines

Fighting Bid Rigging

- Introduction to bid rigging
- Detecting and investigating bid rigging
- Cooperation with procurement officials
- Leniency and sanctions in bid rigging cases

Singapore

24 to 26
June

In-country Event –Singapore

Advocacy

- OECD competition assessment toolkit
- The role of market studies
- Identifying barriers to competition and regulation
- Measuring impacts

Seoul, Korea

15 to 17
September

Sectorial Workshop – Telecommunications and Electronic Communications

- The role of competition in the sector
- Competition and regulation
- Market definition
- Dominance issues, such as margin squeeze, bundling, etc..
- Mergers

Busan, Korea

13 to 15
October

Competition Law Workshop for Judges _ Use of Competition Economics

- Introductory competition economics for judges
- Focus on dominance and merger cases
- Considering economic evidence and expert witnesses

Jeju, Korea

1 to 3
December

Remedies and Commitments in Competition Cases

Theoretical and Practical Aspects of:

- Merger remedies
- Commitments in abuse of dominance cases
- model texts for commitments',
- use of trustees, at monitoring and at ex-post evaluation of commitments and remedies



Photo Gallery



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 ajahn@oecdkorea.org.

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