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Newsletter

COMPETITION PROGRAMME
OECD/KOREA POLICY CENTRE
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This is the Center's second issue of its Newsletter.
Reflecting the feedback from readers about the first issue, we continue to choose articles that we hope are particularly interesting to Asian competition authorities.

This issue covers:
* brief reports of OECD-Korea Policy Centre events which this year approximately 100 competition officials have attended;
* a report of the OECD's Competition Committee meetings in Paris assisted by leading academic experts concerning topical issues in competition law;
* case studies of participating countries such as Singapore, Chinese Taipei and Pakistan;
* country updates of Korea and other participating countries such as Indonesia, Vietnam and Singapore; and
* a plan of December seminar as OECD-KPC's future event.

Contents

Events at the OECD-KPC	1
Events at the OECD	4
Country Papers	6
KFTC News	11
News From participating countries	12
Future Events	15

Events at the OECD-KOREA Policy Centre

OECD-Korea Policy Centre Workshop on Abuse of Dominance on September 15th – 17th in Seoul, Korea

<By Nick Taylor>

The most common complaints that competition authorities typically receive concern prices. Consumers may complain that a large company over-charges. The competitors of a large company may complain that the large company's low prices are driving them out of business or, a range of trading partners may complain that a large company discriminates by charging different customers different prices.

In September, the Centre conducted a workshop on price related abuse of dominance to explore all these pricing issues. Attendees at the workshop also attended the Korean Fair Trade Commission's 6th Seoul International Competition Forum (see separate article in this issue).

The first topic addressed at the Centre's workshop on price related abuse of dominance was low or predatory pricing. Presentations on this topic were provided by Mr Nick Taylor of the Centre, Mr Willard Tom of the US Federal Trade Commission, Mr Geronimo Sy of the Philippines Department of Justice and Mr Tsung-Yung Tsai of the Chinese Taipei Fair Trade Commission.

Generally speaking the purpose of competition law is to promote efficient

OECD-Korea Policy Centre Workshop on Abuse of Dominance on September 15th – 17th in Seoul, Korea

OECD-Korea Policy Centre Workshop on Abuse of Dominance on September 15th – 17th in Seoul, Korea (Mr. Dong Kweon Shin)

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OECD-KPC Seminar on Competition in the Banking Industry on October 20th-22th in Seoul, Korea

markets. In ordinary market circumstances, low prices deliver such efficiency. Therefore, competition authorities need to be very wary of intervening against companies engaged in low pricing and, in fact, predatory pricing cases are very rare. In fact, the only true forms of predatory pricing involve pricing below an efficient and appropriate measure of costs where there is a long run effect of damaging competition and, as a result of that damage, excessive pricing after the damage has been done.

The second topic concerned excessive pricing. Presentations on this topic were provided by Nick Taylor and Ms Sarah Ahmad of the Competition Commission of Pakistan (the latter presentation also covered discriminatory pricing).

There are different approaches to the issue of excessive pricing around the world with, for example, European jurisdictions generally recognising that excessive pricing can in itself be illegal while the US and many other jurisdictions not doing so. Similarly, within Asia some countries do recognise excessive pricing as illegal while others do not. Even where excessive pricing is illegal, competition authorities are generally very cautious about taking action against excessive pricing. The key reason is that high prices are important for the efficient working of the market. Often, an ability to charge high prices is an important profit motive to encourage businesses to perform well and succeed. High prices also encourage entry of new competitors into a market. Nevertheless, particularly in economies in transition, there can be instances where excessive pricing can be proved to be an abuse of dominance and one that a competition authority can do well to pursue. The challenge is how to identify these, very rare, cases.

The third topic concerned price differences in prices. On this topic, presentations were provided by Nick Taylor, Mr Brice Allibert of the European Union, Mr Seungkyu Lee of the Korean Fair Trade Commission and Mr Timothy Chew of the Competition Commission of Singapore.

Two important points arising on this topic are, first, that not all price differences are discriminatory because they may simply reflect a difference in the costs of production, supply or consumption and, second, not all price discrimination is anti-competitive. The main ways in which discriminatory pricing can be anti-competitive is where the conduct has "first line" effects (in other words conduct by a company that significantly harms or prevents its competitors from supplying similar goods or services) or "second line effects" where a company that both produces a particular good or service and controls an input or a distribution chain, uses that vertical control to monopolise the market for the principal good or service.

Given that pricing complaints are so frequent and real cases of price related abuse so rare, Dr Stan Wong of the Irish Competition Authority made a presentation on the topics of prioritising the resources of competition authorities and managing the expectations of the public concerning what a competition authority can and should seek to achieve.

OECD-KPC Seminar on Competition in the Banking Industry on October 20th-22th in Seoul, Korea (Mr.Sung-kyu Lee)

OECD-KPC Seminar on Competition in the Banking Industry on October 20th–22th in Seoul, Korea

<By Nick Taylor>

For the first time the Centre conducted a seminar on a particular industry. The banking industry was chosen because it is topical globally and for many Asian competition authorities.

From a competition perspective, the banking industry is special in many ways. For example, an important function of the banks is to make and receive payments for their clients and for this to occur efficiently and effectively, competing banks have to work together to enable payments to be sent from one bank to another. Another interesting issue arises at times of crisis: because banks are so important to the working of the economy, it is sometimes argued that it is necessary for anticompetitive mergers to be approved to save a bank from failing.

OECD-KPC Seminar on Competition in the Banking Industry on October 20th-22th in Seoul, Korea

The seminar covered a wide range of issues. An introductory presentation by Mr Nick Taylor of the OECD outlined in detail the reasons why the banking industry is different or special from a competition viewpoint. Mr David Stallibrass of the UK Office of Fair Trading summarised the outcomes of his agency's "sector inquiries" into the banking industry. The UK's sector inquiries are an interesting power that many competition agencies do not have. The competition authority in the UK can make a formal, broad ranging study of a particular market or part of a market and make recommendations even if no breaches of competition law are found.

OECD-KPC Seminar on Competition in the Banking Industry on October 20th-22th in Seoul, Korea

Ms Vanessa Holliday from the ACCC presented on market definition in banking mergers and explained case studies of Australian banking industry merger cases both before and during the recent global financial crisis. David Stallibrass also presented a similar case study of a UK merger decision conducted during crisis. Ms Yuhn-Shan Chen of the Chinese Taipei FTC also presented case studies of merger cases considered by that agency.

Turning to banking cartels, Mr Dong-Wook Oh of the KFTC made a presentation on cartels in the banking industry (and related industries) and in particular the issues that can arise when other parts of government encourage the entry into an anticompetitive agreement or the cartelists claim that they have entered the agreement in response to 'guidance' from government agencies. Similarly, Ms Nadia Nabi of the Pakistan Competition Commission presented a case study of Pakistan's first ever cartel case under modern competition law which also involved a claim by the cartelists that their agreement was entered into in response to the actions of the central bank.

The final phase of the seminar focused on payments systems. Nick Taylor gave an over-view of how payments systems work and what is the language commonly used to describe the industry's activities. Mr Alexander Gee of the European Commission explained the different types of competition issue that can arise and provided detailed case studies on the European Commission's consideration of the Visa and MasterCard cases. Mr Chi Ho Fung of the Singapore Competition Commission made a 'state of play'

presentation on that Commission's ongoing process of considering Visa's application for approval for certain of its business arrangements under Singapore's Competition law.

Events at the OECD

OECD Competition Committee Meetings in October

<By Nick Taylor>

The OECD's Competition Committee and two working parties met in October to discuss four main themes: information sharing between competitors, green growth, arbitration in competition law matters and a stock take on structural reforms in the electricity sector.

The arbitration session was held as a 'hearing' in which experts presented their views and competition authorities mainly asked questions. The others were 'roundtable discussions' between competition authorities with introductory presentations and comments by experts.

Detailed reports of these meetings will be prepared and made available on the OECD's website and the Competition Division's soft copy compilation of publications which is released annually. The compilation is available to competition authorities on request.

Information Sharing between Competitors

The roundtable discussion benefitted from a record number of thirty country contributions, a Secretariat background note and two papers from experts. A panel of two economists and a lawyer provided stimulating thoughts for the discussion in one of the most difficult and complex areas of competition law. Drawing a line between pro and anti-competitive information exchanges is not easy, because transparency can promote more competitive behaviour but, at the same time, under specific circumstances, it can facilitate collusion among suppliers.

Policy guidance in this area is also complex as the risks of over-enforcement or under-enforcement are high. A number of agencies, however, have identified those information exchanges which are more likely to restrict competition and therefore should be scrutinised more closely. The debate as to whether these information exchanges should be viewed as per se illegal or as a restriction "by object" is still open.
Similarly, the roundtable discussed the use of formal or informal safe harbours for certain types of information schemes, which are more unlikely to have an effect on competition. Some competition authorities have adopted structural safe harbours for information exchanges between firms which have small market shares. Whether the exchange of historical information, aggregated information or public information exchanges should also benefit of a more lenient approach was also addressed.

Green Growth

The green growth theme involved three discussions. One roundtable discussed the interaction of competition policy with three main market-based policy instruments- taxation, subsidies, and tradable performance standards. The discussion showed not only that effective competition enforcement and advocacy can make such policies more effective, but that the policies themselves also have effects on competition. There was broad agreement that competition authorities have an important part to play in the design and implementation of market-based environmental policies. Some countries are further along than others in this regard, for example, by requiring policymakers to perform Impact Assessments, including a competition assessment, on proposed new mandatory standards before they are introduced. While taxes are generally more effective than subsidies in the environmental context, several competition authorities who have the power to review state subsidies (such as the European Commission) assess whether the subsidies have positive environmental effects without unnecessarily harming competition.

Another discussion concerned how competition law applies to horizontal agreements between competitors where they claim the agreements are for environmental reasons. For example,

there are commonly agreements between competitors which are connected with collecting waste and facilitating recycling; there are agreements on introducing charges for plastic bags in supermarkets; or agreements to withdraw environmentally damaging products from the market. Competition authorities presented a rich array of case studies in which some agreements had clearly been beneficial to the environment, others in which there had been environmental benefits but substantial unnecessary anti-competitive effects and even instances of agreements in which the environmental benefits were a sham. Most, but not all, of the delegates agreed that competition authorities can consider only the competition dimension of horizontal agreements and can take environmental concerns into account only if they coincide with competition goals. Indeed it is often preferable for regulation to impose the environmental standards rather than the standards being adopted by agreements between competitors and, in this regard, several competition authorities again noted that they have a role in advocating for forms of regulation that can achieve environmental goals without unduly impeding competition.

The third roundtable considered the competition issues concerning tradable emissions permits which are a very common policy response to greenhouse in many parts of the world. The following issues were considered:

- Can the methods of allocation of emission permits create distortions in competition?
- How is emission permit trading organised?
- Can market power be exercised in the market for emission permits?
- Can firms use the permit market to exercise market power in the output market, e.g. by manipulating the permit market in order to raise their rival's cost in the output market?

Stocktake on Structural Reform in Electricity and Railways

In 2001, the OECD Council (which is its highest governing body) adopted a Recommendation concerning Structural Separation in Regulated Industries. The Recommendation calls for periodic reviews of developments with respect to the recommendation. In recent years, a number of in structural separation in formerly vertically integrated infrastructure industries. The June session (see Issue 1 of the Newsletter) focused on two sectors: gas and telecommunications. The October session focused on electricity and railways. In the electricity sector, the discussions showed that structural separation which is often combined with the establishment of wholesale electricity pool markets, has created the possibility of a great deal of competition that could not have occurred previously and many benefits have flowed from this. However, these reforms have also created the possibility of a great deal of competition that could not have occurred previously and many benefits have flowed from this. However, these reforms have also created the possibility for companies to engage in behaviour that reduces or reverses these gains. In rail, the speed, degree and nature of structural separation varies a great deal between countries. For example, structural separation can occur at the level of the rails vs the train operators or, because the nature of the locomotives used affects the rails, in some countries competing rail freight service providers must use locomotives provided and operated by the incumbent. The meeting provided an opportunity for experts and the country representatives themselves to share this wide range of different experiences with each other.

Arbitration and competition law

The most visible way that competition law disputes are handled is by the competition authorities making decisions or public court processes. However, it is also often the case that private arbitration and other forms of alternative dispute resolution are used to resolve competition law disputes and for the first time the OECD's Working Party 2 considered this important part of the over-all competition law enforcement system.

Arbitration involves the parties to a dispute referring it not to a regulator or a court but instead to one or more persons (the "arbitrators") who consider the case using a more streamlined decision process that a court to reach a decision (known as an "award") and the parties to the dispute agree beforehand to be bound by that award. Usually the process and outcome

by that award. Usually the process and outcome is confidential to the parties involved and often the parties can decide the choice of law and where the "seat" (or location) of the arbitration will be.

In a competition law context, arbitration is most commonly used in three ways: (a) private parties (say a dominant firm and a party that claims to have been the victim of an abuse) refer a dispute to arbitration and the competition authority is not aware or involved in the process; (b) competition authorities accept merger remedies that involve arbitration as a dispute resolution mechanism (for example a remedy that involves obligations of the merged firm to provide access to a facility on fair commercial terms to any customers might contain a provision that arbitration will be used to resolve any
disputes over the terms of access); and (c) in competition law systems in which litigation is involved either between the competition authority and defendants or between private litigants, the Court will often encourage
the parties to the litigation (which as noted may include one or more competition authority) to agree to arbitration instead of taking up court time.

Additionally for readers of this Newsletter, it is worth noting that international companiesinvesting in developing countries will often agree with their trading counterparts to have competition law disputes settled by arbitration in their home country where they are familiar with the legal system rather than having the dispute heard in the country's own court system.

The discussion at the OECD meeting was lively, in part because there is a natural tension at play when arbitration is applied to competition law. Most arbitrated disputes, such as contract law disputes, are strictly private: only the parties have legal rights, all the evidence is held by the parties and only the parties are affected by the award. By contrast, competition law disputes usually have a market-wide dimension and the competition authority has a broad mandate. In some cases it appears that arbitration can very well address competition law issues without the involvement of the competition authority (for example in quantifying damages and at a tool in merger remedies) but in others cases this is less clear.

Update by KPPU on Indonesian Competition Law

In addition to the subject based roundtables discussed above, the KPPU provided an update on the state of competition law in Indonesia. This was an opportunity for the members to congratulate the KPPU on its long and successful enforcement record and also for the KPPU to outline key recent developments such as the coming into effect of the merger notification system and procedural reforms to enhance transparency and fairness in KPPU decision making.

Country Papers

The first abuse of dominance decision in Singapore

<Timothy Chew, September 2010>

CCS issued its first infringement decision relating to the abuse of a dominant position by SISTIC.com Pte Ltd in June 2010. This is a first for CCS, as well as for Competition Law in Singapore, on many fronts: it is the first time a company has been found to have infringed s47 of the Competition Act since this prohibition came into force in 2006, the first time that a Government-linked company has been found guilty of infringement, and the largest fine that CCS has meted out to a single company to-date as deterrence.

size and market position. CCS examines each abuse of dominance allegation carefully and rigorously, to ensure that we do not inadvertently dampen the incentives of large firms to strive to innovate and be more efficient in order to maintain their market position, which is the essence of competition. On the other hand, CCS does not hesitate to take quick, decisive and appropriate action to remedy a situation where a dominant firm is preventing its competitors from competing on a level playing field.

In the early days, despite clear provisions in the legislation that government-linked companies in Singapore are bounded by competition law, just like any other company, a certain degree of scepticism remained as to how CCS would act in practice. In this decision against SISTIC, CCS has demonstrated that government-linked companies are neither advantaged nor disadvantaged, but instead, are subject to the same set of rules.
The enforcement action taken against SISTIC is an important step towards liberating the ticketing services market in Singapore, which has been dominated by SISTIC over many years, to competition. It is envisaged that, with the exclusive agreements removed, existing and potential competitors, including SISTIC, will constantly challenge each other's position in this market, thus benefiting consumers in the form of more choices, higher service standards and lower prices.

"This decision marks the first time that CCS has issued an infringement decision against a company under section 47 of the Act, for abusing a dominant position. CCS has made a careful and considered decision, based on information obtained from many parties, and in-depth economic analysis. We believe that this enforcement action will allow for more competition in the ticketing services industry in Singapore, leading to more choices and lower prices for consumers."

(Mr Teo Eng Cheong,
Chief Executive, Competition Commission of Singapore)

Predatory pricing investigation in Chinese Taipei

<Tsung-Yung Tsai, September 2010>

In 2004, there were originally four LPG filling stations in Chiayi County and Chiayi City. The usual practice was to sell LPG to distributors who then on-sold the LPG directly to customers. In March 2007, a fifth LPG filling station entered the Chiayi City bottled gas market adopting the same business model. As a result, one of the original LPG filling stations (Long Hong Co., Ltd.) changed its approach in October 2007. In addition to preserving the business model of the LPG filling station selling to distributors, it concurrently adopted a pattern of selling bottled gas directly to customers at a low price (500 NT dollars per bottled gas container) in Chiayi City. Despite having a new filling station also competing to build up a customer base, Long Hong succeeded in increased its share of LPG bottled gas sales.

The question for the Chinese Taipei Fair Trade Commission was whether this new low price amounted to anticompetitive, predatory behaviour or not. The FTC undertook an investigation including an analysis of prices compared with costs, changes in market shares and the product offers of all the competitors.

Although the direct price of the bottled gas for its business customers was lower than the price at which Long Hong sold gas to other gas stores, it was nevertheless higher than the variable costs of bottled LPG and all five gas stores remained in the market selling gas at low price following Long Hong's price cutting, which showed that the low price was competitive.

Long Hong continued to engage in promoting price-cutting, which did not impede the fair competition in the Chiayi City bottled gas market. In addition, this behavior was beneficial to consumers, and the FTC did not have other evidence to indicate that the direct price of bottled gas charged by Long Hong was lower than the corresponding prices of bottled gas in Chiayi City's gas stores. Therefore, the evidence examined by the FTC did not support a finding that the behavior was in violation of the Fair Trade Law.

Excessive and discriminatory pricing: The Case of Pakistan International Airlines

<Sarah Amad, Pakistan, September 2010>

The Competition Commission of Pakistan took *suo moto* notice of unreasonable increase in Hajj fares by Pakistan International Airlines (PIA) – the national air carrier of Pakistan, which shares exclusive rights with Saudi Arabian Airlines to fly direct routes between Saudi Arabia and Pakistan – in Hajj season 2008.

Subsequent investigation highlighted two major issues:

· Excessive pricing: Whether the increase in Hajj fares by PIA in Hajj season 2008 amounted to an unreasonable increase in price?

· Price discrimination: Whether the fares charged to pilgrim passengers travelling via regular scheduled flights of the short duration Hajj scheme amounted to unjustifiable price discrimination between pilgrim and non-pilgrim passengers?

It was found that PIA increased Hajj fares by more than 80% in Hajj season 2008 as compared to fares in Hajj season 2007. In addition, investigation revealed that passengers who paid the higher Hajj fare – almost twice the fare of a regular scheduled flight – owing to the chartered nature of flight as opposed to regular scheduled flights between points in Pakistan to Jeddah, were in fact carried to and fro through regular scheduled flights – thus discriminating between pilgrim passengers and regular passengers on scheduled flights who availed the same flight service. PIA was afforded due opportunity of being heard, after which the Commission found PIA guilty of violating section 3 of the Competition Ordinance, 2007 which prohibits abuse of dominance.

In its order, the Commission imposed a token penalty of PKR 10 million (USD 0.12 million) on PIA for excessive pricing, taking a lenient view "in line with the Commission's stance of promoting good business practices in the market rather than penalizing undertakings." Further, on account of discrimination between pilgrim passengers and regular passengers on scheduled flights, PIA was directed to work out an amount of refund to be paid back to the discriminated pilgrim passengers based on the difference of fare between regular passengers and Hajjis. PIA was also ordered to work out a mechanism to identify such pilgrim passengers and ensure that refund is made to all of them accordingly.

This was the third case of section 3 infringement, decided after a year of Ordinance's existence. PIA appealed the decision of the bench before the Supreme Court of Pakistan, where the matter is still pending. After this decision, the Commission issued a policy note to the Government of Pakistan recommending review and amendment of the Pakistan-Saudi Bilateral Air Services Agreement of 1972 to allow other airlines from both countries to operate direct scheduled services and Hajj flight services between the two countries to promote competition in the aviation sector and consequently increase consumer welfare.

Banking cartel in Pakistan

<Nadia Nabi, Pakistan, October 2010>

In November 2007, the Pakistan Banks' Association (PBA) made a public announcement by an advertisement in leading newspapers to introduce an Enhanced Saving Accounts (ESA) Scheme. The ESA Scheme, prima facie, suggested that the banks under the auspices of PBA decided to convert automatically Profit and Loss Saving accounts with an average balance of PKR 20,000(US 240) to the ESA, offer a 4 % interest rate for deposits of less than PKR 20,000, and impose a PKR 50 service charge on deposits having a balance of less than PKR 5,000.

The Competition Commission of Pakistan (CCP) took, *suo moto*, notice of the advertisement and issued Show Cause Notices to PBA and its member banks. With regard to the product in question, the ESA, CCP believed that the banks were acting in a cartel-like behavior by using the platform of PBA to collectively decide rates of profit and other terms and conditions regarding provision of services in violation of Section 4 of the Competition Act, 2010 (the "Act").

PBA and its member banks claimed that there was no cartel like agreement among them. In terms of market share of the product, the ESAs amounted to less than 2.25% of the deposit base of Pakistan. In remaining 97% all banks were competing vigorously for deposits. The public interest aspect was also highlighted in that the threshold deposit figure of PKR 20,000 for ESA Scheme targeted the lower income group in the country and was to provide them with a higher rate of return on their deposits.

After detailed consideration of the submissions made by the PBA and the member banks, the Single Member Bench of the CCP decided that the advertisement reflects the decision of PBA and the understanding reached upon between its members. The objective intention of the parties was to cap the interest payable by the members in a competitive environment and provide comfort to members that there would not be any competition in attracting deposit of small depositors. Such arrangement amounts to a hardcore horizontal cartel by fixing the price of provision of services - by its very nature restricts competition and so is prohibited *per se* regardless of effect in the market.

Order was challenged before the Appellate Bench of the CCP. The respondents claimed regulatory conduct defense as ESA scheme was introduced on behest of the State Bank of Pakistan (SBP). The Bench observed that the SBP, regulator of Banks, kept itself at a distance from the ESA Scheme. "Had the SBP required compulsory implementation of ESA, it should have issued a directive"

Other main objections before the Appellate Bench were that the Single Member Bench has erred in applying *per se* rule and has ignored public interest involved in the ESA Scheme. The Appellate Bench held that the Single Member Bench was right in declaring the agreement as *per se* illegal based on the nature of the agreement. Nevertheless, they applied the quick look approach. Out of 11,318,020 ESAs 5,798,441 accounts had balances less than PKR 5000. The amount of service charges that could be conceivably earned by the banks worked out to be PKR 3,479,064,600. On the other hand total amount in accounts with balances of PKR 20,000/- or less was PKR 76,066,000,000, therefore, the 4% interest payable worked out to be PKR 3,042,640,000. It follows that the banks by introducing the ESA, on 2007 statistics, made a profit of around PKR 436,424,600 without as much as investing a single penny into business activities. Appellate Bench further observed that "Prior to the ESA, many banks did not charge any service chargeon balances less than PKR 5,000. These depositors constitute

approximately 51% of the total small depositors. It goes without saying that at the very least a majority of the small deposit holders are worse off than before."

PBA was fined PKR 30 million for its lead role and banks (who actually implemented the ESA Scheme) were fined PKR 25 million each. Appeal is pending before the Supreme Court of Pakistan and the ESA Scheme is still in operation.

Banking Merger Case in Chinese Taipei

<Yuhn-Shan Chen, October 2010>

■ Background

In 2007, Citibank N.A., through a fully-owned subsidiary (Citibank Overseas Investment Corp.), established a new subsidiary (Citi Global Bank) in Chinese Taipei to merge with Bank of Overseas Chinese. Citi Global Bank is the surviving company after the merger, and Bank of Overseas Chinese is the dissolved company. This merger satisfied the definition of merger listed in Subparagraph 1, Paragraph 1, Article 6 of the Fair Trade Act;
the sales amount for the preceding fiscal year of Citi Taiwan or Bank of Overseas Chinese exceeded the threshold amount publicly announced by the FTC as stipulated in Subparagraph 3, Paragraph 1, Article 11 of Subparagraph 1, Paragraph 1, Article 6 of the Fair Trade Act; the sales amount for the preceding fiscal year of Citi Taiwan or Bank of Overseas Chinese exceeded the threshold amount publicly announced by the FTC as stipulated in Subparagraph 3, 11 of Paragraph 1, Article.

■ Competition Analysis

According to **the Merger Guidelines of the FTC**, when we consider how to define the market, there are two major dimensions that we have to define, one being the product market and the other the geographical market.

· **Product market**: the scope of goods or services that in terms of functionality, characteristics, purposes or prices, have a high degree of demand or supply substitutions.

· **Geographical market**: a region or scope in which the merging parties supply particular goods or services, and the trading counterpart can select or switch easily to other suppliers.

· In addition to considering the above-mentioned product market and geographical market, depending on the case, the effect of the duration of a merger on the relevant market is also examined.

Pursuant to data made available by the FSC, prior to the proposed merger there were 37 local banks and 32 foreign banks in Chinese Taipei. In this case, because each of the two parties operates savings, loan, credit card and trust business, after merging these markets will be affected. The product markets in this case are the savings market, loan market, credit card market and trust business market. The geographical market is national.

In order to estimate the degree of market concentration, the HHI index and CR4 are our criteria.
savings market: HHI=469, CR4=31.47%;
loan market: HHI=481, CR4=32.83%;
credit card market: HHI=659, CR4=41.88%;
trust business market: HHI=813, CR4=43.18%.
Because each market has a tiny market share, the domestic market for financial business has a low degree of concentration.

■ Variables affecting competition restraints

Because this case involved a horizontal merger, the FTC needed to consider the factors of Unilateral Effect, Coordinated Interaction, Extent of Entry and Countervailing Power when assessing the competition restraints.

· **Unilateral Effect**: After the merger, the structure of the market did not obviously change because the extent of the increases in market shares was limited. The services that merging enterprises offered were almost homogen homogeneous. Both of the enterprises participating in the merger were still restrained from market competition and thus they could not elevate the prices of services.

· **Coordinated Interaction**: As mentioned above, prior to the merger there were 37 domestic banks and 32 foreign banks in Chinese Taipei. After the merger, the change in the market structure was not obvious and the merging parties and their competitors still restricted business activities among themselves. It is not easy to take concerted actions in the domestic financial market.
Extent of Entry: In order to establish a new bank, a minimum paid-in capital of NT$ 10 billion is required and approval must also be received from the regulatory authority (i.e., the Financial Supervisory Commission). Furthermore, the conditions regarding the barriers to entry in the market have not changed or been corrected following this merger case.

· **Countervailing Power**: The trading counterparts or potential trading counterparts of the merging enterprises are individual consumers and small-scale companies that do not have the ability to prevent the merging parties from raising the prices of services. However, if they were large-scale firms, they would have the countervailing power to prevent the merging parties from raising their prices.

■ **The Outcome**

In its review, the FTC found that this merger did not have a large impact on the market share, that the merged enterprise still faced market competition and could not increase the prices of its goods or the remuneration for its services, that the impacts of the merger on the market structure were limited, and that the merger did not impede competition among existing enterprises. As a result, the merger did not significantly weaken competition in the relevant markets, but was instead beneficial to the economy as a whole. Therefore, it was not prohibited by the FTC.

KFTC News

KFTC closed review on Rio Tinto-BHP Billiton Joint Venture

The Korea Fair Trade Commission (KFTC) received notification in late 2009 on an agreement to establish a joint venture for co-production of iron ore between Rio Tinto and BHP Billiton, the world's second- and third-largest iron ore producers, and had since conducted merger review on the proposed joint venture.

- Notification filed on the Rio Tinto-BHP Billiton JV (Dec. 28, 2009)
- Supplementation of information by the concerned parties and collection of opinions from interested parties home and abroad (Feb.~ , 2010)
- Economic analysis on competitive effect of the proposed JV (Apr. ~ Jul., 2010)

The KFTC's examination found the proposed joint venture could cause anticompetitive effect in production and sales of iron ore lumps and fines in the worldwide seaborne market. On October 1, the case examiner submitted the Examination Report which included such finding to the KFTC's full committee and served it to the concerned companies with a request to present opinions on the Examination Report.

BHP Billiton and Rio Tinto announced their agreement to drop the joint venture plan on October 18 in a press release that says "it has become clear that this transaction is unlikely to obtain the necessary approvals to allow the deal to close and as a result both parties have reluctantly agreed to terminate the agreement" and on October 19, submitted an official request to the KFTC to withdraw the notification.

This case was reviewed also by the Australian Competition and Consumer Commission, European Commission, German Federal Cartel Office and Japan Fair Trade Commission. The KFTC examined this case successfully in close coordination with other competition authorities,

particularly with the Japanese and the European counterparts.

The 6th Seoul International Competition Forum & The 6th East Asia Competition Authority Chairman Conference

KFTC held "The 6th Seoul International Competition Forum" on September 15th in Seoul in which experts and highest ranking officials of major competition authority across the world participated to discuss current issues of competition policy

More than 100 high ranking officials from major competition authorities of the continents such as America, Europe, Asia, Oceania, and Africa and experts from international institutions such as OECD and UNCTAD discussed the issues grabbing the most attention of competition authorities in the world such as the direction of competition policy resulting from the development of IT technology, Expansion of Competition Law in Asia, regulations by industries and harmonization of competition policies, and Condition for Better Competition Authority.

Also, KFTC held "The 6th East Asia Competition Authority Chairman Conference" in which high ranking officials of 17 competition authorities from 13 countries in the East Asian Region including Korea, China, and Japan participated. The participants discussed the current state, expansion, and development plan of competition law in the East Asian region.

International cooperation with other countries

First, KFTC held "Competition Policy Workshop" for veteran working-level officials of National Development Reform Commission (NDRC) regulating cartel and abuse of market dominance and local competition authorities on November 1~3 in China

KFTC has invited those in charge of competition policy of developing countries and held "International Competition Policy Workshop" every year. This year's workshop was for officials of Chinese competition authority.

8 veteran working-level officials in charge of cartel and abuse of dominance at NDRC and 5 local authorities including Shanghai and hands-on officials at KFTC participated in the event. The participants discussed law enforcement on cartel and abuse of dominance

KFTC plans to have consistent cooperation with 2 other competition law enforcement authorities of China (MOFCOM and SAIC) and competition authorities in Asian region going forward

Also, KFTC conducted internship programme for 2 managerial-level officials of Indonesia competition authority from October 11 to November 5, followed by the internship for officials of Vietnam competition authority in 2008

The programme is a part of "tailored technology support" for Asian countries which KFTC has consistently pushed ahead and provides opportunities of field experience such as working at the KFTC office and visiting the KFTC tribunal and to talk on main topics with hands-on officials

4 weeks of internship at KFTC is expected to enhance the participants' understanding of competition law of Korea and cooperation between the countries

KFTC plans to consistently strengthen cooperation with developing countries in Asian region

NEWS from Participating Countries

Vietnam (VCA)

Vietnam's Competition Law was introduced in July 2005. According to the Law, there are two agencies with responsibilities under the law which are the Vietnam Competition Authority (VCA) and the Vietnam Competition Council (VCC). Both agencies have been established since January 2006.

The main duties of VCA are (i) to investigate competition cases concerning anti-competitive practices and unfair competitive practices; and (ii) to deal with and impose fines in respect of unfair competitive practices.. The main duty of VCC is to deal with and decide the penalty concerning with anti-competitive practices. Anti-competitive practices include anti-competitive agreements, abuse of monopoly and dominance, merger and acquisition.

Up to now, in the area of anti-competitive practices, two cases have completed VCA investigation and been referred to the VCC for formal hearing.

The first one was concerned with abuse of monopoly position. On 14th April 2009, in Hanoi, the adhoc committee under VCC organized an in-camera hearing concerning the case in which the Vietnam Air Petrol Company (VINAPCO) stopped supplying air fuel to Pacific Airline (PA) becasue PA disagreed with VINAPCO about whether PA should pay VINAPCO a new higher price for aviation fuel.

After the hearing, the adhoc committee analyzed the issues and determined that VINAPCO violated Provisions 2 & 3 of Article 14 of Vietnam Competition Law. The VCC determined that VINAPCO had imposed disadvantageous conditions on its customers and abused its monopoly position by seeking to unilaterally change a signed contract without legitimate reason.

The adhoc committee decided to fine VINAPCO an amount of VND 3.37 billion, equivalent to USD 188,000 and, importantly, to make suggestions to other relevant government agencies to manage VINAPCO and air petrol services to promote the healthy competition environment. For example, suggestions have been made to permit new competitors to sell aviation fuel at Vietnamese airports where previously they were not permitted to do so.

The second case was concerning with anti-competitive agreement. On 27-29 July 2010, in Hanoi, the adhoc committee under VCC organized an open public hearing concerning 19 non-life insurance enterprises who signed an agreement to fix the price of car insurance service. These 19 insurance enterprises have a combined market share of 99.79% of total relevant market within Vietnam, thus violating Provision 2 of Article 9 of Vietnam Competition Law. That provision of the law prohibits competition- restricting agreements where their combined market share is more than 30%. These 19 insurance enterprises have been penalized with the penalty of 1.7 billion VND, equivalent to USD 89,900.

The handling of the two cases concerning anti-competitive practices helps increase the realization and the enforcement of Competition Law, thus creating and sustaining a fair business environment in Vietnam.

Indonesia

Palm oil cartel case

The Commission for the Supervisory of Business Competition (KPPU) has investigated and has made a decision on alleged violation by 21 palm cooking oil suppliers against the law on the Prohibition of Monopolistic Practices and Unfair Business Competition.

The cooking oil industry is an oligopoly and, even though CPO is the main input to production, some cooking oil producers have not moved their prices in response to significant CPO price movements that occurred from 2007 to 2009. On the basis of this, the KPPU suspected that there may have been a violation of competition law, in particular (i) the prohibition against oligopoly businesses making contracts with each other to jointly control production or marketing that are monopolistic or unfair; (ii) prohibited price fixing; and (iii) prohibited cartel conduct concerning price or non-price monopolistic practices or unfair competition.

After considering a number of factors, the Commission concluded, based on extensive information about the usage and transport of different products and an analysis of pricing information (including information filed by the companies in their defence) that bulk cooking oil and branded cooking oil are not in the same

market and that the geographic dimension was Indonesia-wide.

Further, it was significant that amongst the 21 companies concerned, some were vertically integrated upstream and/or downstream (accounting for 68% of the market) and others were not (accounting for 32% of the market). There were also several companies who were part of a single corporate group or were affiliated with each other with five identifiable significant corporate groups supplying bulk oil and four supplying branded oil. Hence the conclusion that the markets are oligopolies.

The levels of concentration

	Bulk Cooking Oil – moderately concentrated		Branded Cooking Oil – Highly concentrated and increasing	
Year	CR4	HHI	CR4	HHI
2007	59.15%	1160.222	98%	3951.37
2008	60.13%	1400.921	97%	4190.62

As noted above, a key element of all three potential violations was the entry by the companies into an anticompetitive contract. Because there is no direct evidence (such as a statement by a friendly witness) available to prove such a contract existed, the KPPU examined indirect evidence of two types. First, there was
evidence of meetings and communications that the companies' cost structures, production volumes and prices were all extensively discussed and there was no satisfactory, legitimate explanation for such communications.

Second, the KPPU considered indirect economic evidence concerning behavior. In relation to structure the facts are summarized above. Tests of 'price parallelism' compares the variance of the price of each company to identify a pattern of price movements and assesses the probability of this occurring without coordination between the companies. In this case, at the 95% level of statistical confidence, price parallelism was found to be present.

Having concluded that there was a breach of the three provisions outlined above, the KPPU ordered very substantial fines. By comparing CPO input (and dispute production data being limited), trillion rupiah for bulk cooking oil products alone during the period April 2008 until December 2008.

Price fixing on fuel surcharge by Indonesian aviation companies

The KPPU concluded its examination and issued a Decision on alleged price fixing on fuel surcharges by nine competing aviation companies including the national flag carrier.

The parties had entered a written agreement on the determination of fuel surcharge prices on 4 May 2006 signed by senior executives of Indonesia Aviation Company Association (INACA), and nine aviation companies providing for the implementation of a fuel surcharge of 20,000 rupees per passenger (depending upon the duration of the flight). The excessive fuel surcharges were assessed to have caused a welfare loss to the consumer of between 5.1 and 13.8 trillion rupees between 2006 and 2009, and the KPPU imposed 80 billion rupees of fine.

Send information to ajahn@oecdkorea.org

We are planning to add major news from participating countries in our next newsletter so if you have any news including events or case studies that you would like to introduce to other countries, please send them to us.

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Future Events

Regional Anti-trust Workshop on Investigation Techniques organized by the OECD-KPC will be held on December 1th ~ 3th, 2010 in Busan, Korea.

In this workshop, we are going to deal with planning and managing the progress of an investigation; preparing document requests and conducting reviews of documents; planning and executing a dawn raid; interviewing witness.

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OECD-KPC Competition History

Conclusion of a Memorandum of understanding (MOU) between the OECD and the Korea Fair Trade Commission (KFTC) on the establishment of an OECD Regional Centre for Competition (December 26, 2003)

Enactment of the Prime Ministerial Ordinance for the Establishment and Operation as a legal foundation by the Korean government (February 20, 2004)

Opening of an OECD Asian Regional Centre for Competition (April 19, 2004)

Integrated into the OECD/KOREA Policy Centre (February 1, 2007)

Newletter

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SEMINAR SCHEDULE

YEAR 2010

DATE	Subject	Location
24-26 Mar	**Indonesian event:** Market Definition in Complex Matters & Detecting Cartels and Making Determinations Using Indirect Evidence	Jakarta, Indonesia
28-30 Apr	**Mergers:** Analysis and enforcement where there are vertical and conglomerate effects. Determining the appropriate remedies in complex mergers.	Seoul, Korea
2-4 Jun	**Cartels Enforcement**	Jeju, Korea
15-17 Sep	**Price Related Abuse of Dominance:** • The core tools required to analyse pricing conduct; • Predatory pricing / unfair low prices; • Excessive pricing / unfair high prices; • Price discrimination; and • Margin squeeze cases.	Seoul, Korea
20-22 Oct	**Competition law issues in the banking industry including:** • Merger assessments in the banking industry (taking prudential regulation into account in analysing competition; competition analysis of branch networks; failing firm defences) • Competition law treatment of payments systems matters and other two sided markets.	Seoul, Korea
1-3 Dec	**Investigation techniques using a cartel as an example:** • Planning and managing the progress of an investigation; • Preparing document requests and conducting reviews of documents; • Planning and executing a dawn raid; and • Interviewing witnesses.	Busan, Korea

The September anti-trust workshop was held in connection with the 6th Seoul International Competition Forum in the KFTC.