

Asia-Pacific Competition Update

News from the OECD/Korea Policy Centre Competition Programme

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The Competition Programme of the OECD/Korea Policy Centre provides education and training to officials and experts 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.



News from Asia-Pacific Competition Authorities

❖ KOREA

New KFTC Chairman

Mr Noh Dae-lae took office as the new Chairman of the Korea Fair Trade Commission (KFTC) on 21 April 2013, following his appointment by the new Korean President, Ms Park Geun-hye.

Mr Noh worked at Korea's Ministry of Finance for more than 30 years and most recently was head of Korea's Defence Acquisition Program Administration.

KFTC fines nine life insurers for fixing commission rates

The KFTC has fined nine life insurance companies a total of KRW 20,142 million (around US\$ 18 million) for engaging in price fixing. The companies were fixing the commission rates for GMDB (Guaranteed Minimum Death Benefits) and GMAB (Guaranteed Minimum Accumulation Benefits) life insurance policies as well as the ceiling of the separate account invested commission rates.

The KFTC found 4 life insurers - Samsung, Korea, Kyobo, and Prudential - had conspired with each other to fix the GMDB and GMAB commissions charged on their variable whole life policies in 2001.

Samsung, Korea, Kyobo, Shinhan, MetLife, ING, AIA, Prudential, and Allianz

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were also found to have manipulated the GMDB and GMAB commission rates put on their variable annuity policies in 2002.

Also Samsung, Korea, Kyobo and Allianz were found to have conspired to fix the separate account invested commission charged on all variable insurance policies in 2005.

❖ CHINA

NDRC fines LCD panel manufacturers and liquor manufacturers

In January, China's National Development and Reform Commission announced that it had imposed total fines of RMB 353 million (around US\$ 57 million) on six manufacturers of liquid crystal display (LCD) panels for price fixing. The companies in question were Samsung, LG, Chi Mei, AU Optronics, Chunghwa Picture Tubes, and Hann Star. This was the first time the NDRC has investigated and imposed fines on international companies.

In February, the NDRC imposed total fines of RMB449 million (around US\$72 million) on two state-owned liquor manufacturers (Kweichow Moutai Co., Ltd. and Wuliangye Group) for resale price maintenance in respect of their white spirits products.

❖ CHINESE TAIPEI

Record fine issued by Chinese Taipei Fair Trade Commission

In March, the Chinese Taipei Fair Trade Commission (FTC) imposed a record total fine of NT\$6.32 billion (around US\$237 million) on nine power companies for

price fixing. The FTC found that the nine independent power producers had reached a mutual understanding and jointly refused to adjust the price of power they sold to Taipower in the period from August 2008 to October 2012. The companies met on at least 20 occasions to discuss their pricing agreements with Taipower.

❖ INDONESIA

Enterprises must submit market shares of their competitors

Enterprises now must submit information on market shares of their competitors when making M&A notifications to, and consulting with, the KPPU. This requirement was introduced by the KPPU Decree No. 2/2013 on the amendment of KPPU Decree No. 13/2010 on M&A guidance, issued on 5 April 2013.

The previous decree only required limited information on M&A notification and consultation, such as legal information, assets and turnover, and structure of the affiliated companies. Now, it is necessary for the merged enterprises to submit two additional documents, which are (i) their business plans that contains policies of three years ahead and their industry (including existing competition) as a group; and (ii) documents on market structure of the industry where the parties conduct their business (including market share of the merging parties and the competitors).

The new decree regulates two steps of analysis by the KPPU, the completeness of documents and the assessment. The KPPU requires the two documents above as requirement to the need for an assessment. It means that if the documents are not provided, the assessment will not take place. During the clarification of documents' completeness, the KPPU will confirm the submitted market information of other parties like

competitors, governments, regulators, practitioners, or other corresponding parties.

Business plans will be used to assess and identify whether the impact of such merger will lead to monopolistic practices and unfair competition and or reduces economic efficiency. Documents on market share of the competitors are important information to effectively calculate market concentration for a precise, reliable, and timely M&A opinion.

To date, the KPPU has received eleven consultations and 103 notifications. This new decree is beneficial to foster the assessment process due to the increasing number of notifications experienced by the Commission. This year (until May 2013), the KPPU has received 21 notifications, a 60% increase from the same period in 2012.

◆ INDIA

CCI fines cricket governing body for abuse of dominant position

In February, the Competition Commission of India fined the Board of Control for Cricket in India (BCCI) 522 million rupees (around US\$9.8 million) for abusing its dominant position

BCCI is the regulator/custodian of the sport of cricket in India as well as an organiser of cricket events and associated activities such as media broadcasting. The CCI found that BCCI was dominant in the market for the organisation of private /professional cricket leagues and events in India and had abused its dominant position in the award of commercial contracts for the Indian Premier League (IPL) and more generally in the way in which it exercised its powers to sanction cricket in India. The CCI remarked in its decision that:

“Virtually, there is no other competitor in the market

nor was anyone allowed to emerge due to BCCI’s strategy of monopolizing the entire market. The policy of BCCI to keep out other competitors and to use their position as a defacto regulatory body has prevented many players who could have opted for the competitive league. The dependence of competitors on BCCI for sanctioning of the events and dependence of players and consumers for the same reason has been total. BCCI knowing this had foreclosed the competition by openly declaring that it was not going to sanction any other event.”

◆ SINGAPORE

Competition Appeal Board largely upholds CCS fines in model agency price fixing decision

Following the Competition Commission of Singapore’s (CCS) decision in 2011 to fine 11 modeling agencies for price fixing, five of those agencies appealed the decision to Singapore’s Competition Appeal Board (CAB). Those five agencies did not contest the finding of an infringement, only the level of the fines.

The CAB dismissed most of their grounds of appeal, but ordered a small reduction in fines based on two grounds. First, the fact that modeling agencies received a low margin as a large part of the turnover was paid to the models was considered to be a mitigating factor. Second, under the circumstances of this case, the involvement of directors and managers was not considered an aggravating factor in the determination of penalties.

News from Asia-Pacific Competition Authorities

❖ MALAYSIA

Nestle withdraws application to MyCC for individual exemption

In February, following a series of discussions with the Malaysia Competition Commission (MyCC), Nestle Sdn Bhd (Nestle) withdrew its application for individual exemption. Nestle had previously filed an individual exemption application to exclude its pricing policy called the “Brand Equity Protection Policy (BEPP)” from the Competition Act 2010 (CA2010).

Nestle’s pricing policy was a major concern for the MyCC as it had elements of resale price maintenance (RPM). The MyCC considered that the pricing policy in the BEPP was likely to infringe section 4 (1) of the CA2010 as it essentially constituted RPM.

The MyCC asked Nestle to dismantle the pricing policy in the BEPP and Nestle agreed to comply in dismantling the said pricing policy and issued notices to the trade on the same.

❖ PAKISTAN

CCP fines long distance telecoms operators for price fixing and market allocation

The Competition Commission of Pakistan (CCP) has annulled the International Clearing House (ICH) Agreement entered into between 14 long distance international (LDI) telecommunications operators in Pakistan and imposed a penalty of 7.5% of annual turnover on each company.

According to the order of the CCP, the LDI operators by entering into the ICH Agreement colluded to fix prices

of international incoming telephony, close down competing networks and divide revenues among themselves without any competition. This behaviour amounts to rent-seeking – more egregious than hard core cartelisation which is strictly prohibited under Section 4 of the Competition Act 2010.

❖ HONG KONG

First chairperson of Hong Kong Competition Commission named

Ms Anna Wu Hung-yuk has been appointed as the first chairperson of Hong Kong’s Competition Commission. Ms Wu is currently a non-official member of the Executive Council of Hong Kong, a management consultant and chairperson of the Equal Opportunities Commission. Her previous roles included serving as Chairperson of the Hong Kong Consumer Council.

OECD Competition Committee Meetings: 25-27 February 2013

Competition Assessment Recommendation

Changes to the OECD's 2009 Recommendation on Competition Assessment and the revised version of the implementation report were discussed and approved.

During the discussion held in October 2012, when the draft report on the implementation of the OECD 2009 Recommendation on Competition Assessment was presented, it was agreed that the Recommendation needed to be extended to include subsidies, state aid and competitive neutrality, and that the role envisaged for competition authorities in the process of competition impact assessment could be strengthened. The Secretariat therefore developed a new draft text and has slightly amended the implementation report.

Impact Assessment of Competition Authority's Activities

A Hearing on "Impact assessment of Competition Authorities' activities" was held.

This Hearing formed part of the long-term project on the evaluation of competition authorities' activities. It focused on how competition authorities regularly assess the expected impact on consumers of all their enforcement and advocacy activities (or of subsets of them, e.g. all cartel investigations). The discussion identified which methodologies, and in particular which assumptions and criteria, these assessments rely upon, why they are different across jurisdictions and how greater uniformity could be achieved. An expert paper by Prof. Stephen Davies (East Anglia University and ESCR Centre for Competition Policy at UEA) served as

a basis for the discussion. Some agencies, and the EU, reported on their experience in performing such assessments.

Licences for Local and Regional Transportation Services

A roundtable discussion was held on how contracts/licences for the provision of local and regional transportation services are allocated.

The roundtable started with a presentation by Prof. A. Fels (Dean of the Australia and New Zealand School of Government), who presented the outcome of an inquiry in the taxi industry that has just been completed in the state of Victoria (Australia). The rest of the discussion was aimed at understanding the tendering/allocation mechanisms used in different jurisdictions to ensure greater competition in the provision of local and regional bus services.

Key issues:

- What kind of allocation mechanisms are employed to allocate contracts?
- What are the key characteristics of these contracts? How they ensure price competition while preserving quality and safety?
- Who supervises the execution of contracts?
- What mechanisms are there in place for disciplining contractors that do not deliver the services as expected?
- Who provides and ensure the maintenance of the necessary infrastructure?
- What results (in terms of efficiency and quality) that have so far been obtained?

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The discussion was based on 15 country contributions and benefitted from the participation of Prof. Marco Ponti (Politecnico di Milano), Dr. Anne Yvrande-Billon (Université Sorbonne) and Ms Clare Kavanagh (Transport for London).

Discussion on International Co-operation

The ongoing international co-operation project was discussed. The session began with a presentation of the key results from the survey conducted by the OECD and International Competition Network. The subsequent discussion was based on a Secretariat note sketching possible avenues for future OECD work.

The five issues for consideration by delegates were:

- 1) Is there scope to improve co-operation within the current legal framework and existing constraints?
- 2) Would a system of mutual recognition of decisions of other antitrust enforcers make cross-border enforcement more efficient and less burdensome?
- 3) Are there ways in which agencies could increase the incentives of firms involved in mergers and cartel/unilateral investigations to grant confidentiality waivers?
- 4) What legal provisions exist in various jurisdictions allowing for the exchange of confidential information with other competition authorities? And how effective have these provisions been in ensuring co-operation in specific cases?
- 5) What are the differences in definitions of “confidential information” at national level? What are their common traits and differences?

In order to respond to the delegates’ interest to inform the above discussion with experiences from other policy areas, the Secretariat invited two experts to discuss international co-operation between enforcers in the fields of anti-bribery and consumer protection: Ms Petra Borst, public prosecutor from the Office of the National Public Prosecutor for Corruption in the Netherlands; and Mr Fernand Van Gansbeke, Director, DG Enforcement and Mediation, Belgian Ministry of Economy.

Competition Law and Policy Indicator

The Secretariat reported on the outcome of the work it has undertaken, with the support of the delegates, on the development of one or a set of competition law and policy indicators.

Following a number of conference calls and exchanges of comments on draft proposals on the possible structure and content of the indicators, the Secretariat presented to the Committee a list of questions that could be used to build a set of indicators. These questions covered all the main institutional and legal features of competition regimes that could be scored against an internationally agreed best practice and also included questions on their implementation. The discussion was based on a short note by the Secretariat.

Roundtable on Vertical Restraints for On-line Sales

The development of the internet and e-commerce is having a profound impact on firms’ business models, consumers’ behaviour and on the overall economy. It should improve competition among suppliers and yield higher consumer and social welfare. Yet the digital ecosystem presents its own competitive risks. The

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availability of information may allow firms to monitor each other and favour the adoption of collusive conduct; the existence of network externalities may lead to the creation of dominant players; consumers may be fooled by misleading and non-verifiable information. Moreover, manufacturers and distributors over the years have strived to set a distribution system that offers consumers pre-sale and post-sale services that enhances the consumers' evaluation of the goods and services they buy, increases their welfare and makes all market players better off. The diffusion of on-line sales may disrupt or jeopardise this system and in the medium/long-run harm firms and consumers as well.

Key issues:

- What pro-competitive effects have on-line sales brought about?
- What are the threats?
- Does the development of e-commerce call for specific rules to deal with vertical restraints in online sales? For an overall revision of existing related guidelines?
- Is the distinction between price and non price constraints useful for competition analysis in the context of online sales?
- Are there specific reasons why manufacturers might limit their online distributors' ability to compete on price?
- Is the distinction between active and passive sales valid for online sales to assess the competitive risk of customer or territorial restrictions?
- What are the competitive implications related to the three different types of trade (pure online sales, mixed sales/same format, mixed sales/different format)?

13 country contributions as well as notes by Dr Paolo Buccirossi (Lear consulting firm) and Professor Baye (Indiana University), provided the background for the discussion.

Papers relating to the above discussions can be found at <http://www.oecd.org/daf/competition/workinprogress.htm> and later at <http://www.oecd.org/daf/competition/roundtables.htm>

OECD Global Forum on Competition – 28 February and 1 March 2013

<http://www.oecd.org/competition/globalforum>

Competition and Poverty Reduction

This full day session built on discussions first held at the 2012 OECD-IDB Latin American Competition Forum on how competition can help lower the prices of essential goods and services for the poor and what competition authorities can do to help. The session examined how competition policy can help reduce poverty by stimulating employment, innovation and growth.

There has been significant progress against extreme poverty in recent years, but it remains one of the most important challenges that governments face. If the poverty benchmark is set at an income US\$2.00 per day, then nearly 45 percent of the world's population remains poor. Poverty also remains a key problem in developed countries, particularly in the aftermath of the 2008 global economic crisis. Governments are therefore looking in many policy areas, including competition policy, for answers that will help them to reduce poverty. To assist in that effort, this session of the Global Forum explored the impact of competition on the poor as both consumers and as small entrepreneurs or wage earners. The primary inquiry was whether

competition actually alleviates poverty or not.

The morning part of the session took the form of a hearing. In this format, the audience put questions to a panel of experts, the panellists responded, and all participants took part in a free-flowing discussion. The objective was for delegates to learn from the experts about the causes of poverty, the ways in which theory predicts that competition will affect the poor, the ways in which competition has affected poverty in practice, and the ways in which other policies and conditions may affect competition's ability to reduce poverty.

The panellists contributing to the discussion were: Eleanor Fox (Walter J. Derenberg Professor of Trade Regulation, New York University School of Law, US); Cécile Fruman (Manager, Private Participation in Infrastructure and Social Services, Investment Climate, The World Bank Group); David Lewis, the former Chair of South Africa's Competition Tribunal (Executive Director, Corruption Watch, South Africa); Susie Lonie, one of the creators of the M-PESA mobile payment service in Africa, (Mobile Payments Consultant, SJL Consulting Services Ltd, United Kingdom), Hassan Qaqaya (Head, Competition Law and Consumer Policies

Branch, International Trade Division, UNCTAD); and Alan Winters (Professor of Economics, University of Sussex, UK).

The afternoon part of the session was in the format of a traditional OECD roundtable, with the Chairman directing questions to delegates based on the written contributions. The panellists intervened from time to time with comments and questions of their own. The aim of this part of the meeting was for the delegates to learn from each other as they discuss experiences concerning the effects that competition law enforcement and advocacy have had on poverty in their countries.

Key issues:

- How should poverty be defined?
- What factors cause poverty to persist?
- How does theory predict that competition will affect poor consumers of essential goods and services?
- How does competition actually affect poor consumers in practice?
- How does theory predict that competition will affect poor entrepreneurs and wage earners?
- How does competition actually affect them in practice?
- Which yields better results in the fight against poverty: competitive markets or “pro-poor” interventions such as subsidies and trade barriers?

- Should competition authorities prioritise cases that are likely to benefit the poor? More generally, what actions should competition authorities take to help poor people?

Competition Issues in Television and Broadcasting

This session considered policy responses and regulatory and competition challenges in the television and broadcasting industry. Broadcasting lies at the intersection of both media and telecommunications, and therefore shares regulatory and competition issues with both. The on-going convergence of traditional broadcasting with new media poses new challenges for OECD and non OECD countries alike.

The following issues were addressed during the discussion:

- How has technological convergence and the development of new media services affected the market for television broadcasting?
- Where in the value chain is television broadcasting most vulnerable to the exercise of market power today and in the future?
- How do the geographical effects of the digital divide reduce opportunities for consumers to benefit from improved

and more competitive television broadcasting services?

- How should competition agencies take these factors into account when planning an investigation or considering the application of remedies?

The roundtable was chaired by Mr. Ashok Chawla (Chairperson, Competition Commission, India). During the course of the Roundtable four expert speakers shared their views: Agustín Díaz Pinés (Economist, Information, Communications and Consumer Policy Division, OECD Directorate for Science, Technology and Industry); Allan Fels (Professor of Government and Director International Advanced Leadership Programs, Australia and New Zealand School of Government); David Hyman (General Counsel, Netflix); and Christophe Roy (Deputy General Counsel, Distribution and Competition, Canal+ Group). The discussions were based on the panel presentations, a Secretariat background note and the 36 written contributions received from countries.

Key Findings of the OECD/ICN Survey on International Enforcement Co-operation

This session considered the key findings from the OECD Secretariat report on the OECD/ICN questionnaire on international co-operation that was launched last summer. This session was an

opportunity for delegations to discuss the status of international co-operation and possible ways forward for a more effective and efficient enforcement system at an international level. The results of the survey also inform decisions on future work that the OECD and the ICN will undertake to foster more and better international co-operation between enforcement agencies.

The session sought to:

- review the final results from the OECD/ICN questionnaire on international enforcement co-operation
- ensure that the draft Secretariat report reflects to the extent possible experiences from a wider set of countries
- consider ways in which competition agencies can improve their role in international co-operation, including promoting international co-operation among established and new agencies

Antonio Capobianco (OECD Secretariat) presented the findings of the report. Representatives from the ICN and Eleanor Fox (Walter J. Derenberg Professor of Trade Regulation, New York University School of Law, United States) then provided comments on the report's findings.

OECD/Korea Policy Centre Competition Programme



Workshop on Practice and Procedure in Competition Cases: Seoul, 6-8 March 2013



**Ms Simone
WARWICK**

Senior Competition
Expert, OECD

The OECD/Korea Policy Centre Competition Programme's first workshop of 2013 took place in Seoul from 6 to 8 March. The topic for the workshop was Practice and Procedure in Competition Cases.

Twenty participants from fifteen different agencies in the Asia-Pacific region joined us for this workshop. Unlike most of the workshops held as part of the Programme, this workshop did not focus on substantive competition issues. Rather, the focus of the workshop was solely on matters of practice and procedure including topics such as procedural fairness/due process, confidentiality in competition cases, transparency and the conduct of investigations.

To begin the part workshop, Ms Simone Warwick of the OECD/Korea Policy Centre gave an introductory presentation touching on the four key themes of the workshop – transparency, confidentiality, procedural fairness and the conduct of investigations. Following that introduction, Ms Jenny Stathis from the Australian Competition and Consumer Commission (ACCC) gave a presentation which looked in detail at the ACCC's approach to competition investigations, including investigation plans, use of investigative tools and the

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handling of evidence.

On the first afternoon, Ms Toshiko Igarashi of the Japan Fair Trade Commission (JFTC) gave a presentation on cartel investigation procedures in Japan. This presentation covered both the investigatory stage of cartel proceedings in Japan and also the decision making and appeal processes. Following this was another presentation from the JFTC, this time by Ms Naoko Indo who spoke about the International Competition Network's cartel enforcement manual.

Day two of the workshop started with a second presentation by Ms Jenny Stathis. This presentation looked in detail at the way in which the ACCC deals with and manages confidential information in its cases. The topics covered included circumstances in which confidential information can be disclosed, confidentiality in court proceedings and techniques for managing confidential information.

The morning included two presentations from participating countries, one by Ms Akali Konghay and Ms Bhawna Gulati of the Competition Commission of India and the other by Ms Ching-Yi Chen of the Chinese Taipei Fair Trade Commission.

Ms Simone Warwick also returned for a second presentation, this time covering the topics of transparency (including recent initiatives by the United Kingdom Office of Fair Trading), dispute resolution options for procedural issues and the use of internal review procedures.

Day three began with a presentation by Mr Sangmin Song of the Korea Fair Trade Commission (KFTC). Mr Song discussed the rules and regulations on case handling at the KFTC and the ways in which the KFTC seeks to enhance fairness and transparency in its case handling procedures.

This was followed by a series of presentations by participating countries on their own practices and procedures, including Mr Bobby Jitendra Maharaj of

the Fiji Commerce Commission, Ms Lynette Chua of the Competition Commission of Singapore, Mr Abdul Hakim Pasaribu of Indonesia's KPPU, Ms Zhang Huwai of China's Ministry of Commerce and Ms Yue Song of China's SAIC.

The final session of the workshop involved a practical exercise during which the participants discussed a range of real life procedural issues including the assessment of confidentiality claims and dealing with procedural fairness concerns. The participants discussed these issues in two groups before reporting back to the plenary session on their conclusions.

◆ INDIA

Practices and Procedures in Enforcement and Investigation: A Perspective from India



**Ms Akali Varengam
KONGHAY**

Deputy Director General,
Competition Commission
of India



Ms Bhawna GULATI

Deputy Director,
Competition Commission
of India

Section 36 of the Competition Act, 2002 empowers the Competition Commission of India (Commission) to regulate its own procedure. However, in the discharge of its functions, the Commission shall be guided by the

principles of natural justice. Accordingly, the Commission has framed the Competition Commission of India (General) Regulations, 2009 to lay down the procedure that needs to be followed in every case for carrying out the purposes of the Act.

Sub-section (2) of the same section also provides that the Commission shall have the same powers as are vested in a Civil Court while trying a suit, in respect of summoning and enforcing the attendance of any person and examining him on oath; requiring the discovery and production of documents; receiving evidence on affidavit; issuing commissions for the examination of witnesses or documents; requisitioning, etc. The Director General (DG) has also been given the same powers in the investigation of any contravention of the provisions of the Act or any rules/ regulations made thereunder.

Whenever information is filed with the Commission or the Commission *suo moto* takes cognizance of any violation and the Commission after having considered the case is of the opinion that there exists a *prima facie* case, it directs the DG to cause an investigation to be made into the matter. The DG office is the investigating arm of the Commission. However, to ensure fair investigation, the Commission does not interfere in the investigations of the DG. After the DG collects evidence and submits its report in a particular case, the Commission allows the parties to state their objections/ suggestions, if any, on the findings of the DG. After giving reasonable opportunity for the parties to be heard, the Commission formulates its decision on the matter. The Commission may impose penalties, issue a cease and desist order, direct the division of dominant undertakings etc. if contravention of the Act is found by it. Any party who is dissatisfied with the orders of the Commission may appeal before the Competition Appellate Tribunal established under the Act. Similarly, the orders of the Tribunal are appealable before the Supreme Court of India.

◆ CHINESE TAIPEI

Summary of Practice and Procedure in Chinese Taipei Competition Cases



Ms Ching-Yi CHEN
Specialist,
Fair Trade Commission

During the administrative litigation process, a common problem with regard to access to files that the CTFTC often faces is a conflict that exists between the principle of “Equality of Arms” and the protection of confidential information obtained from the parties. Under the investigation phase, the parties or interested third parties providing business secrets to the CTFTC often require that their business information shall be kept confidential. The CTFTC will, after examining the material in question, often keep it confidential. However, according to the principle of “Equality of Arms”, which requires the opportunity for each party to a trial to have knowledge of, and comment on, all evidence adduced or observations filed, some judges of the Administrative Courts require the CTFTC to disclose all relevant materials or files - which may contain confidential information - to protect the rights of defence. This may hinder the CTFTC’s investigations in the future as parties and interested parties may be reluctant to provide confidential information. It is very important for the CTFTC to create an environment which enables it to

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efficiently obtain confidential information especially because the CTFTC still does not have a ‘Dawn Raid’ power. But the courts’ opinions are not consistent, so the CTFTC’s practice is different from case to case.

In intellectual property-related actions, although they have the same problem above, there is a confidentiality preservation order which enables a balancing of the interests of all parties. Where litigation materials involve trade secrets, the Intellectual Property Case Adjudication Act empowers the Intellectual Property court to grant an order to preserve confidentiality, such as refusing access or otherwise only allowing limited reviews, transcription or videotaping of such litigation materials, and may impose penalties upon anyone who acts in a manner contrary to the order upon motion or on its own initiative. In addition, the Intellectual Property court can hold a closed (private) trial. How to protect confidential information in litigation is really a controversial issue for CTFTC to discuss further.

◆ INDONESIA

Practice and Procedure in Competition Cases in Indonesia



**Mr Abdul Hakim
PASRIBU**
Head of Makasar
Reprehensive Office,
KPPU

One of the purposes of enacting Law No. 5/1999 was to create a conducive business climate through the

stipulation of fair business competition in order to ensure equal business opportunity for large, middle, as well as small-scale business actors in Indonesia. The Law address four major issues:

- 1) Prohibited Agreements – such as cartels
- 2) Prohibited Activities – such as monopoly practices
- 3) Dominant Position
- 4) Mergers and Acquisitions

In order to create a conducive business climate, the KPPU has the authority to:

- 1) Receive reports from the public or conduct its own research regarding allegations of the existence of unfair business competition
- 2) Conduct investigations regarding allegations of the existence of unfair business competition
- 3) Conduct hearings of unfair business competition cases
- 4) Issue decisions in unfair business competition cases
- 5) Impose administrative sanctions
- 6) Provide advice and opinions concerning government policy

There are six stages/levels in the KPPU’s competition cases:

- 1) Handling the report from the public or conducting its own research
- 2) Investigation process
- 3) Filing case process
- 4) Preliminary hearing
- 5) Further hearing
- 6) Deliberation of Tribunal Commission.

Since 2000 KPPU has issued three guidelines which regulate competition case handling. The most recent guideline brought very significant changes in the hearing process of competition cases.

◆ CHINA

Practice & Procedures in Competition Cases

–MOFCOM’s Legislative Developments & Enforcement in Merger Control Review



Ms Huawei ZHANG
Deputy Director,
MOFCOM

China’s Anti-monopoly Law (“AML”) was promulgated on August 30th, 2007 and took effect on August 1st, 2008. Based on the AML, the Ministry of Commerce

(“MOFCOM”), the State Administration for Industry & Commerce (“SAIC”), and the National Development and Reform Commission (“NDRC”) all set up divisions to enforce the AML. In September 2008, MOFCOM’s Anti-monopoly Bureau (“AMB”) was established and tasked with the review of concentration of undertakings. In 2008, the State Council also established an AML Commission, which is responsible for coordinating the three enforcement agencies. In May 2011, the Commission opened its office within MOFCOM and its day-to-day business is run by MOFCOM staff.

Since the AML took effect, MOFCOM rolled out a number of implementing regulations. Based on enforcement experience, MOFCOM drafted legislative plans and issued regulations that clarify provisions in the AML and provide a legal basis for the review work. So far, 8 supplementary implementing regulations in Concentration of Undertakings Review have become into effect:

- 2008: Provision on the Notification Thresholds of the Concentration of Undertakings issued by the State Council (the “Provision”).
- 2009: Measures for Calculation of Business



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Turnovers for the Notification of Concentration of Undertakings in the Financial Sector.

- 2009: Guideline on Definition of Relevant Market (the “Guideline”).
- 2010: Measures on Notification of Concentration of Undertakings.
- 2010: Measures on Merger Review of Concentration of Undertakings.
- 2010: Interim Rule on Implementation of Divestiture of Assets or Shares.
- 2011: Interim Rule on Evaluation of Competitive Effects of Concentrations of Undertakings (“Evaluation Rule”).
- 2011: Interim Rule on Investigation and Handling of Concentration of Undertakings not Notified in accordance with the Law and Regulations.

Two more are coming:

- Regulation on Restrictive Conditions Imposed on Concentration of Undertakings, with a view to providing guidance for the proposing, assessing and monitoring of restrictive conditions.
- Interim Regulation on Simplified Procedure for Concentration of Undertakings. This regulation will provide a simplified procedure for non-issue merger and streamline the process.

As to the enforcement actions of MOFCOM, since 2008, the number of filings to MOFCOM has increased dramatically. As of December 31, 2012, MOFCOM received 642 filings, accepted 585 of them and closed 540 investigations. Among the closed investigations, 523 were unconditionally cleared, 16 with remedies and 1 blocked.

Regarding transparency in legislation and enforcement, MOFCOM solicited comments from different parties in drafting the AML and supplementary implementing rules and regulations by means of argumentation meetings, seminars, workshops, forums, written papers, drafts released online, etc. Many parties including government authorities, industry associations, law firms, upstream and

downstream, professionals and foreign agencies provided their comments during the drafting stage.

With regard to transparency in enforcement, the AML requires MOFCOM to publish decisions that block or conditionally clear transactions, but it is silent on the publication of unconditional clearance decisions. In practice, MOFCOM publishes, on its website, decisions that block or conditionally clear transactions, including the summary of the transaction, review process, assessment of competitive effects, MOFCOM conclusion and remedies. Notifying parties are informed by mail if the transaction is unconditionally cleared. To improve transparency on the review process, MOFCOM published the name and notifying parties of all 458 cases that it had reviewed between August 2008 and September 2012. In January 2013, we published the basic information of 59 transactions unconditionally cleared between October and December 2012. In addition to name and notifying parties, we also released the closing time of investigations. In the future, MOFCOM will release such information quarterly and improve transparency.

The procedures of MOFCOM’s merger control review are as follows:

- (1) Consultation before notification
- (2) Submit the draft filings as required
- (3) List of questions by MOFCOM
- (4) Updated filings with the answers to the questions
- (5) Formally accepted by MOFCOM
- (6) Preliminary review: 30 days
- (7) Further review: 90 days subject to extension for 60 days
- (8) Decision of the review

MOFCOM has been attaching great importance to the treatment of confidential information with the internal rules to discipline the case handlers and requirement of submission of both non-confidential and confidential documents for merger control review. Art. 41 of the AML and relevant articles in the supplementary rules and regulations stress the treatment of confidential

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information. For example, during remedy negotiations, the key information such as stages, measures, negotiation progress, feedback, comments, opinions and others will be strictly treated as confidential. All these disciplines and provisions of the law and regulations enable the parties to freely express their opinions and give comments.

❖ SINGAPORE

Investigation Procedure and Enforcement Priorities in Singapore



Ms Lynetto CHUA
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how CCS seeks to ensure that its processes withstand scrutiny on judicial review or appeal. Case studies were also presented to illustrate CCS' existing enforcement policies to enhance efficient market conduct and to eliminate or control practices that have adverse effects on competition in Singapore.

CCS' leniency program was highlighted in the concluding section of the presentation. It was noted that with increasing awareness by both legal and business communities in Singapore of considerable downsides that can arise from an infringement decision, CCS has been receiving an increasing number of leniency applications. A significant number of CCS' leniency cases involve international cartels.

The presentation focussed on CCS' enforcement priorities and investigation procedures, including



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OECD/Korea Policy Centre Competition Programme



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In April the OECD/Korea Policy Centre was delighted to hold a workshop in collaboration with the World Intellectual Property Organization (WIPO) on the topic

of IP and Competition Law. The workshop was held on Jeju Island from 17-19 April 2013.

This was the Programme's first workshop to focus exclusively on the issue of intellectual property and competition law. In order to foster an exchange of ideas and understanding, the workshop included participants from both competition agencies and intellectual property agencies. The mixed set of skills and knowledge at the workshop led to some very interesting discussions.

After introductions and welcomes from Mr Jay Young Kang, Director General of the OECD/Korea Policy Centre Competition Programme and Mr Giovanni Napolitano of WIPO, the substantive part of the workshop started with a presentation by Ms Simone Warwick of the OECD/Korea Policy Centre. This presentation looked at the purpose of the workshop and at the benefits to be achieved through cooperation between intellectual property and competition agencies.

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Mr Giovanni Napolitano of WIPO followed with a presentation looking at the interface between intellectual property and competition law. This presentation also included a discussion of the work that WIPO has been doing in the field of competition law and policy.

After lunch the workshop continued with a presentation by Ms Marieke Scholz of the European Commission (DG COMP). This presentation looked in depth at the intellectual property related issues that arose in the various European Commission cases against Microsoft. This was followed by a presentation from Mr Owen Kendler of the United States Department of Justice (DOJ). Mr Kendler's presentation looked to give participants a framework through which they could analyse intellectual property licensing practices to determine whether or not those practices raise competition concerns.

Day two began with a second presentation by Ms Marieke Scholz. This time Ms Scholz looked at standards and standard setting, FRAND commitments, patent ambushes and related topics with reference to the European Commission cases in this area.

This was followed by a presentation by Dr Satya Prakash and Ms Neha Raj of the Competition Commission of India (CCI). In their presentation they looked at a number of cases considered by the CCI with intellectual property considerations, as well as at some of the interesting recent developments in India in the area of compulsory licensing and the grant of patents for follow-on products.

Ms Ariunaa Bambajav of Mongolia's AFCCP then presented on the relevant laws and cases in Mongolia. To end the second day, Mr Giovanni Napolitano took the focus away from patent-related cases and looked at competition cases involving copyright and trademark issues.

On day three, Mr Owen Kendler started proceedings with his second presentation looking in depth at patent pools and cross-licensing agreements – including the pro- and potentially anti-competitive benefits of each. Mr Yuchuan Liu of the Chinese Taipei Fair Trade

Commission followed with a practical example of a case involving a patent pool relating to optical disc standards (Blu-ray, DVD, CD).

The final presentation in the morning session was given by Professor Hwang Lee of Korea University. Professor Lee shared his views on a number of Korean competition cases which have raised intellectual property issues and also looked forward to the future of antitrust enforcement in Asia.

The afternoon session began with a presentation by Ms Simone Warwick on the topic of intellectual property considerations in merger cases. This presentation looked not only at the importance of intellectual property issues in the substantive analysis of merger cases, but also at their importance during the remedies phase.

The seminar concluded with a selection of hypothetical cases studies which were considered by the participants in small groups before reporting back to the main group.

The OECD/Korea Policy Centre would like to thank the World Intellectual Property Organization for its generous contribution to this workshop.

❖ MONGOLIA

Competition Policy and IPR Issues in Mongolia



**Ms Ariunaa
BYAMBAJAV**

Advisor to the Chairman
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The Authority for Fair Competition and Consumer Protection (AFCCP) is responsible for implementing

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competition law, consumer protection law and advertisement law in Mongolia. The AFCCP operates under the direct supervision of the Deputy Prime Minister. The first competition law in Mongolia, the Law on Prohibition of Unfair Competition, was established in 1993 and since then there have been some changes to it. The main change was made in 2010 when the Law on Prohibition of Unfair Competition was replaced by the Law on Competition.

In Mongolia, there is an independent Intellectual Property Office. The Intellectual Property Office of Mongolia (IPOM) is an implementing agency of the Government of Mongolia, which is responsible for IP matters in Mongolia. The IPOM operates under the direct supervision of the Deputy Prime Minister of Mongolia (the same as the AFCCP). The main functions of the IPOM are prescribed by the Law on Patents, Law on Trademarks and Geographical Indications and Copyright Law.

There are several laws which are related to IP issues in Mongolia. For example: the Constitution of Mongolia, Law on Patents, the Law on Trademarks and Geographical Indications, Law on Competition, the Law on Technology Transfer, and the Law on Copyright and Related Rights.

The AFCCP has completed several cases related to IP issues. Last year, it has received more common cases relating to the use of other companies' logos. For example, the AFCCP carried out an inspection based on a complaint made by company "A" who imports a kind of champagne. The main content of the complaint was that company "B" used a similar product logo and therefore misled consumers.

The state inspector of the AFCCP considered that the company "B" violated articles 12.1.2 and 12.1.4 of the Law on Competition¹ and the article 10bis (3) (i) of the Paris

¹ 12.1.2: distributing false or contradictory information about own products or confusing others with distortion of the truth
12.1.4: using willfully the trademark, logos, name and product quality guarantees of other business entities and copying individual names and packaging of products)

Convention for the Protection of Industrial Property 2.

According to the Competition law, the state inspector imposed a fine of ten million MNT (around 7250 USD). Moreover the company was required to change its product label so that it will not mislead consumers, and until it has changed the product label, it is prohibited from selling the product.

◆ INDIA

Intellectual Property and Competition Law: Indian Perspective



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The Competition Act, 2002 (the Act) gives exclusive jurisdiction to the Competition Commission of India (the Commission) to entertain cases relating to anti-competitive agreements, abuse of dominant position and regulation of combinations by specifically barring the jurisdiction of all civil courts in such matters.

² Article 10bis (3): The following in particular shall be prohibited:
(i) all acts of such a nature as to create confusion by any mean whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor.

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Enforcement of intellectual property (IP) in India is being done under different statutes like Patents Act, 1970, the Copyright Act, 1957, the Trademarks Act, 1999 etc., through specifically-provided mechanisms thereunder.

Section 3(5) of the Act provides that nothing contained in section 3 relating to the prohibition of anti-competitive agreements shall restrict the right of any person to restrain any infringement of, or to impose reasonable conditions as may be necessary for protecting any of his rights, which have been or may be conferred upon him under the different IP Acts mentioned therein. It is clear from this provision that reasonable conditions imposed by IP holders for protecting their rights have not been forbidden. In other words, unreasonable conditions imposed by IP holders may be treated to be anti-competitive, if the same have appreciable adverse effect on competition in India. There is no mention in the Act of any exemption relating to IP rights in the provisions dealing with prohibition of abuse of dominant position (section 4) and regulation of combinations (sections 5 and 6). As such, IP rights are treated just

like any other asset and there is no presumption that they create any appreciable adverse effect or abuse in the markets due to their mere existence and involvement in the transactions.

For managing the inter-face between IP and competition law, sections 21 and 21(A) provide for a consultative process between the Commission and any statutory authority including IP authorities under different IP statutes.

Relevant cases dealt/being dealt with by the Commission:

FICCI – Multiplex Association of India vs. United Producers/Distributors Forum & Others

FICCI-Multiplex Association of India (Informant) alleged that members of UPDF & others (Opposite Parties), who were competitors controlling almost 100% of market of production and distribution of Hindi movies for exhibition in multiplexes in India (relevant market), were acting in concert to fix prices (revenue sharing) in contravention of section 3(3) (a), limiting/controlling supply of Hindi movies for exhibition in multiplexes



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in violation of section 3(3) (b) and boycotting the multiplexes against the provision of section 3(3) (c) of the Act.

The Opposite Parties, inter alia, took defence before the DG/Commission and the Bombay High Court on the basis that they have copyright in their Hindi movies and have the right to exploit their IP rights as per relevant law and the Commission has no jurisdiction in this case in view of the provisions of section 3(5) of the Act. The Commission found that IP rights are not excluded from scrutiny of the Commission if the IP holder puts unreasonable conditions through agreements, which cause appreciable adverse effect on competition in markets. Moreover, infringement of any IP and imposition of unreasonable conditions to protect such rights were not the subject-matters of the case. The Opposite Parties in this case have rather acted in concert to determine revenue-sharing ratio with members of the Informant association and to achieve this objective they have limited/controlled the supply of movies/films for the Informant. As such, any plea based on copyright was found wholly misplaced and the Opposite Parties were found to be in contravention of section (3) (a) and (b) of the Act for conduct of cartel.

Further, some issues relating to the inter-face of IP and competition law are also the subject-matter of some cases presently being handled by the Commission/DG at inquiry/investigation stage like the automobile cases, ATOS Worldline case, HT Media vs. Super Cassettes Industries etc. (relating to alleged anti-competitive agreements and abuse of dominant position) on which the Commission is yet to give its findings.

Other relevant cases

The following two cases relating to the grant of a compulsory license (Natco Pharma) and the rejection of a claim for a patent (Evergreening-Novartis A.G.) by IP authorities/courts, keeping in view the interest generated internationally are worth-mentioning developments in India.

A. Natco Pharma vs. Bayer Corporation

This is a case regarding the grant of a compulsory license by the Controller of Patents in respect of ‘Sorafenib Tosylate’, a compound patented by Bayer Corporation, USA. Bayer Corporation marketed this compound as ‘NEXAVAR’, which is used in the treatment of advanced stages of kidney and liver cancer. In March 2008, Bayer was granted a patent in India, besides the regulatory approval for importing and marketing this drug in India. In February 2010, Natco Pharma applied for a voluntary license for this drug with Bayer Corporation, who refused to grant the same to Natco in December 2010. Natco Pharma obtained a process patent for the manufacture of ‘Sorafenib Tosylate’, besides obtaining regulatory approval for manufacturing and marketing of the product ‘Sorafenib Tosylate’ in India in April 2011. In July 2011, Natco filed an application under section 84(1) of the Patents Act, 1970 before the Controller of Patents. On 9 March 2012, Controller of Patents assigned a compulsory license in favour of Natco Pharma on the following grounds:

- (1) Bayer was unable to provide ‘Nexavar’ to almost 98% of patients. As such, the patentee’s conduct of not making the drug available as per reasonable requirements of the public in India during the 4 years since the grant of patent, was not justifiable;
- (2) The drug in question was not available to public at a reasonably-affordable price. The term ‘reasonably-affordable price’ had to be construed predominantly with reference to the price to the public and not the patentee. The patented drug was sold at a huge cost to public i.e. at INR 2,80,482 per month – a price not reasonably affordable to the public, while Natco Pharma proposed to sell the drug at a low cost of INR 8,800 per month; and
- (3) The patentee launched product outside India in 2006 and got the license for import and

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marketing it in India in 2008. The drug was not imported at all in 2008, though the same was imported in 2009 and 2010, but in very small quantities. As such, Patent was not worked in the territory of India as the Patentee neither manufactured the drug in India nor granted the license. Moreover, the Patentee did not even take adequate or reasonable steps to start the working of the invention.

Bayer Corporation filed an appeal against the order of the Controller of Patents granting compulsory license in favour of Natco Pharma with the Intellectual Property Appellate Board (IPAB). On 3 March 2013, IPAB upheld the grant of compulsory license.

B. Novartis AG vs. Union of India & Ors.

In 2006, Novartis AG filed a patent application in India for ‘Imatinib Mesylate in Beta crystalline form’, which is also known as “Gleevec” or “Glivec”. The Patent

Office rejected the claim of Novartis A.G. in respect of Gleevec because the drug’s active ingredient, Imatinib Mesylate, was already known and therefore not an invention. Novartis AG appealed the decision arguing that the new beta crystal form was novel and made it viable as a cancer treatment. Ultimately Novartis challenged the decision before the Indian Supreme Court. The Supreme Court dismissed the petition in a decision on 1 April 2013 and upheld the order passed by Patent Office holding that Gleevec is not an invention. The Supreme Court interpreted ‘invention’ as something ‘new’ which must not have been anticipated, coming into being due to involvement of an ‘inventive step’ and capable of being made and used in an industry. It said Gleevec was not a new product and not the outcome of an invention beyond a ‘Zimmerman Patent’. According to the Supreme Court, it is only in tweaked form and not truly a new product. It did not satisfy the test of novelty and inventiveness and said there was no proof of enhanced or superior efficacy.



OECD/Korea Policy Centre Competition Programme

SEND US YOUR NEWS

We publish news, case studies and articles received from competition authorities located throughout the Asia-Pacific region in our newsletter. If you have material that you wish to be considered for publication in this newsletter, please contact jhoh@oecdkorea.org.

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