# COMPETITION POLICY IN ASIA

News from the OECD-Korea Policy Centre Competition Programme

March 2011, Issue 3

IN THIS ISSUE



## 2011 ASIA COMPETITION PROGRAMME

The jurisdictions for whom the competition programme of the OECD-Korea Policy Centre is designed include China, countries on the Indian sub-continent, ASEAN countries, other neighbouring jurisdictions in Asia and Pacific countries.

In the Centre's first five years of operation, many jurisdictions were in the process of adopting competition law or had had it for only a short period. Therefore, the Centre's workshops were predominantly of an introductory nature.

Increasingly, there are competition agencies who now have a degree of experience in competition law. The issues that they are confronting are more sophisticated and their capacity building needs are changing.

At the same time, there continue to be a number of jurisdictions within the region who are only now adopting competition law for the first time and their capacity building needs continue to be at a more introductory nature. However, a common feature of jurisdictions that are still adopting general competition laws is that they often have a specific competition regime for the telecommunications sector that is well developed.

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

### Greetings from the Director General of the Competition Progamme

I am very happy to have been appointed in early 2011 to work with the OECD Korea Policy Centre as Director General for the Competition Programme.

I've wanted to have an opportunity to contribute to the Centre for a long time before while working in the Korea Fair Trade Commission.

It is my understanding that sharing the experiences of competition law enforcement of the OECD countries with the non-OECD economies is of great worth and importance in the era of economic globalization.

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*Mr. Jay Young Kang, Competition Programme, Director General OECD-Korea Policy Centre*

**2011 COMPETITION PROGRAMME continued…**

Therefore the 2011 programme seeks to find topics that can be of use to jurisdictions with a variety of levels of experience while still covering all three core areas of competition law: mergers, cartels and abuse of dominance.

Two sessions are designed to appeal directly to jurisdictions which are relatively new to competition law: *merger fundamentals* in April and *abuse of dominance fundamentals* in December. While these sessions are designed to appeal to countries that are newer to competition law, they will still be of interest to all jurisdictions for a number of reasons. In several cases jurisdictions with longer standing competition laws have not yet decided a merger case or an abuse of dominance case. In other cases, the sessions will provide an opportunity to train newer staff or for more experienced staff to practice sharing their experience with others.

In the past the Centre has focused on competition law enforcement. However, competition policy has a very much more extensive reach because it also concerns advice to government on how to better design laws and regulations so as not to unnecessarily reduce competition and also how infrastructure industries should be organised and regulated to maximise competitive access. Indeed these other aspects of competition policy often contribute more to a country's wealth than competition law enforcement. For the first time in June this year the Centre will conduct a session on advocacy in government and competition assessments.

**Greetings continued…**

We continue to be dedicated to holding competition law seminars and workshops for the countries in the Asia-Pacific region as the Centre has done since it started. However, as the authorities in the region become more experienced, we will also develop advanced topics such as sector-specific competition issues including finance, telecommunication, healthcare/medicine, and distribution industries. This will include dealing with the issues that arise with over-laps between competition authorities and sector regulators.

We will also make efforts to strengthen the network system to share information among participants and experts via emails and SMS.

Additionally, we will continue to provide abundant information such as recent trends of law enforcement from the Asia-Pacific competition authorities. As a part of this effort, we plan to increase the number of publication of our newsletters.

We look forward to hearing from you including comments, opinions, and advice towards our seminars as well as this newsletter. Active contributions from readers will be a catalyst for more development of our activities.

Thank you.

**2011 Workshop Timetable**

| Date and Venue | Theme |
|---|---|
| 23-25 March<br>New Delhi | Abuse of Market Dominance |
| 27-29 April<br>Seoul | Merger Fundamentals |
| 1-2 June<br>Jeju | Competition Advocacy in the Government |
| First week of July<br>Seoul | Judicial Training |
| 28-30 September<br>Venue TBD | Legitimate Business Practices or Cartels in Disguise |
| 2-4 November<br>Korea | Telecommunications Sector |
| 7-9 December<br>Busan | Abuse of Dominance Fundamentals |

In November the Centre will hold a seminar specifically for the telecommunications sector. This will be the second seminar that the Centre has held which focuses on a particular industry and, as discussed above, focusing on the telecommunications should be of interest to all countries because even if general competition law is new, telecommunications regulation will usually have been in place for some time.

In September the Centre will hold an event on cartels which will focus on instances in which competitors may say that they are meeting together for legitimate reasons (for example to operate a joint venture or enter a supply agreement) but in fact there is a question as to whether they are engaged in illegal conduct. This session is targeted for those countries that have had competition law for some time but it should also be useful for newer agencies.

Finally, two other events are scheduled that are specifically for particular attendees: an event in India held with and for the Competition Commission of India and another in Seoul for judges that hear competition law cases.

Invitations will be send according to which agencies we consider will be most interested and who will benefit from the sessions but if there is a particular session that you are interested in, please ask your agency to express interest in that session by contacting us at ajahn@oecdkorea.org. ■

## COMPETITION INVESTIGATION TECHNIQUES

### OECD-Korea Policy Centre Workshop December 2010

Countries from throughout Asia shared their experiences and expertise in investigation techniques at the Centre's final seminar for 2010. The seminar started by comparing the different investigatory powers and practices of the following countries: China, Chinese Taipei, Fiji India, Indonesia, Japan, Korea, Mongolia, New Zealand, Pakistan, Papua New Guinea, Thailand and Vietnam.

Some themes were very similar to those found in OECD countries such as the usefulness of leniency policies. However, there were other themes that were a feature of more developing countries such as the problem of ensuring the personal security of competition agency staff conducting dawn raids or leniency applicants and the usefulness of bounties or cash rewards for cartel information. All these themes provided a good backdrop for discussions during the seminar.

Nick Taylor of the OECD presented a session on planning and managing an investigation and Barrie Sutton of the New Zealand Commerce Commission presented sessions on preparing document requests and interviewing witnesses.

Masunori Tsukada of the Japan Fair Trade Commission and Yong-Rae Ryu of the Korean Fair Trade Commission presented sessions on planning and executing dawn raids.

A particular feature of this final session of the year was that there were many case studies presented by participant countries who have not often presented case studies at the Programme's previous events. Aramsri Rupan of the Thai Trade Competition Bureau presented a case study on competition issues in book publishing, wholesaling and retailing. The case was interesting because the industry participants had made a series of claims and counterclaims covering alleged cartel conduct, abuse of dominance and anticompetitive exclusive dealing.

*Participants at the December 2010 workshop*

Nguyen Duc Minh of the Vietnamese Competition Authority presented a case study on a cartel in the auto insurance market. This case is very interesting because it is the first ever cartel case in Vietnam. It also revealed some of the difficulties that with putting into practice Vietnam's unusual cartel provisions in which a cartel is only illegal if it covers at least 30% of the trade in the relevant market.

Mr Shijirbaatar of the Mongolian Competition Authority introduced that country's new competition law and also an interesting cartel involving local and multi-national accounting firms. Helli Nurcahyo of Indonesia's KPPU presented a case study on an investigation in the telecommunications industry.

Hui-Wen Tsao and Hsing-Yuan Wang of the Chinese Taipei Fair Trade Commission each presented cases, the first concerning lawyers in the local bar associations boycotting a provider of a new channel for legal services and the other involving price fixing and other conduct by competing pharmacies.

This is the first of the Programme's events held in Busan, Korea's second biggest city. The city is both an impressive port – one of the biggest in the world – and also has beautiful beaches. ■

## ► CHINESE TAIPEI

### Drug manufacturing and supply cartel uncovered

In 2006, a drugstore submitted a videodisc to Chinese Taipei's Fair Trade Commission (FTC). The video showed regular meetings held by the members of the "Yung-Chien Advertised Drugs Association" (YCA). The complainant who provided the video alleged that the trade organization was involved in monopolizing the advertised drug market in Kao-Ping area by passing resolutions at meetings of the organization to restrain retail prices of drugs advertised on local radio stations.

Mr Hsing-Yuan Wang
Fair Trade Commission
Chinese Taipei

Once the FTC started its investigation, it also became apparent that upstream manufacturers of advertised drugs in Kao-Ping area also attended and took part in the YCA meetings. These companies formed another association, the "Advertised Drugs Manufacturers Association" (MA). The MA was suspected of being involved in restraining resale prices of products or other illegal acts.

In gathering the necessary evidence to make a decision, the FTC first interviewed the complainant of this case, and took the table of "Suggested Retail Prices" of advertised drugs. The table was produced by the YCA in 2004.

From watching the videodisc provided by the complainant, the FTC found out that two members of the YCA had failed to follow the YCA's so-called "3 Noes Plus 1" policy. The "3 Noes" means that members (1) cannot compete over prices, (2) cannot distribute goods without authorization, and (3) cannot recommend drugs of other brands to consumers. The "Plus 1" concerned a rule that the members were not to engage in certain types of printed advertising and instead only to use radio advertising.

If a member failed to follow the "3 Noes Plus 1" policy they were subjected to punishments determined by the YCA and the MA. The punishments included "fines" and being prohibited from receiving goods from suppliers.

As part of the investigation, the FTC also sent staff to act as consumers to collect evidence by buying a sample of different advertised drugs that appeared on the YCA's table of "Suggested Retail Prices" to find out whether members of the YCA did indeed comply with the no price competition resolution.

The FTC also interviewed all members of associations and the staff of restaurants where the YCA and MA had meetings so as to ensure the FTC had sufficient evidence that each individual member of the associations was indeed involved in the illegal conduct.

In 2008, the FTC determined that Article 14 of the Fair Trade Act, which concerns the prohibition of concerted action, had indeed been violated by the businesses involved. The FTC ordered these associations to immediately cease the illegal conduct that had been discovered and imposed administrative fines ranging from NT$ 100,000 to NT$ 6.5 million on 53 pharmacies and 16 drug suppliers respectively. The total amount of these administrative fines reached NT$ 101.95 million. ■

## ► CHINESE TAIPEI

### Drug manufacturing and supply cartel uncovered

Consumers in Chinese Taipei can sometimes be reluctant to approach a lawyer directly for advice, either because they do not know who to contact or they fear that the consultation may be too expensive. Responding to this reluctance, a company who eventually complained to the Fair Trade Commission, established a new legal services website or "platform" which advertised that it had a wide range of lawyers available to provide advice cheaply.

Ms. Hui-Wen Tsao
Fair Trade Commission
Chinese Taipei

The platform is a new model of legal consultation service which resulted from the social development of businesses and technology providing a solution to the need of the general public for legal consultations when carrying out legal actions. How the company running the platform answered its customers' requests for legal services was to seek out lawyers at "traditional" law firms who would provide the services through the platform.

The main association of lawyers in Chinese Taipei is the Bar Association (hereinafter referred to as the BA). It received a number of calls from its members who had joined the Complainant's platform to provide legal consultations who claimed that they were being exploited because they receiving only 25% of the amount paid by the public for each minute of their service fees.

The BA held a meeting and passed a resolution to issue a letter to all local bar associations requesting that they inform their bar members to be attentive to the rules set forth in the Attorneys' Code of Ethics which was drawn up by the BA pursuant to Article 15 of the Attorney Regulation Act.

In April 2009, the BA did indeed follow the resolution by its members and mailed a letter to all local bar associations requesting that they inform their members to withdraw from a legal consultation services platform provided by the Complainant. The consequences of the above resolution were that 23 lawyers withdrew from the Complainant's platform, and more than half of all the lawyers listed to provide services on the platform were in "idle mode" due to worries about any adverse consequence that might arise. The FTC investigation found that it was the letters received after the BA meeting that prompted some lawyers to cease providing services to avoid trouble and some lawyers waited for the dispute to be clarified. Ultimately, the platform had to cease operations in August 2009.

The BA includes 16 local bar associations and, according to related regulations, a lawyer cannot practice law unless he or she joins a bar association. Therefore, the BA and the bar associations has a big influence on the lawyers and the BA's resolution gave rise to anti-competitive effects for two types of parties within the legal services market: for lawyers, they tended to refrain from supplying services through the platform and for consumers, they had reduced choice of channels through which to purchase legal services.

The FTC also considered the status of the Attorneys' Code of Ethics and concluded that because it was not a law, regulation, or order enacted by an administrative agency, it was also to be governed by the Fair Trade Act and could not be exempt.

Consequently the FTC decided that the BA's acts were in violation of Article 14(1) of the Fair Trade Act that "No enterprise shall engage in any concerted action" and ordered the BA to cease the unlawful activities and pay a fine of NT$ 500,000. ■

## ► MONGOLIA

### New Competition Law

The first Mongolian competition law "Law on restricting unfair competition" was promulgated in 1993 to regulate restrictions state control over competition among private entities operating on the market, and prohibiting monopolistic and illegal activities, but no independent competition law enforcement institution was established at that time. . After the first competition law was passed, further enactments strengthened the law and established an independent enforcement authority. However, there was scope for further improvement.

A new, fully revised competition law was passed by Parliament in June 2010, and enacted on August 7, 2010. The key areas of improvements are:

1. Coverage of the law is expanded, to cover all types of legal and illegal entities running business activities.
2. The new competition law applies a test of whether a company really has market power rather than deeming companies to be monopolies where they have a one third market share.
3. The new law prohibits excessive pricing which the old law did not.
4. The new law requires mergers and acquisitions that pass certain thresholds to be submitted to the AFCCP for a competition assessment.
5. Under the new law, where a dominant firm persistently engages in monopolizing activity, the AFCCP can apply to a court for an order that the business be divided up or a division separated off.
6. The new competition law has provisions to prohibit agreements and contracts which may damage competition or the economy of the country.
7. The AFCCP is tasked with designing and proposing to the Government of Mongolia a "Leniency programme" adapted to the conditions of Mongolia.
8. There are improvements to the management and decision making framework for the AFCCP.
9. The penalties have been increased from the previous limit of about 200USD to the new limit of 6% of the relevant sales and confiscation of the illegally obtained income. Additionally business entities are can be fined up to 10-20 million MNT (approximately 10.000-20.000USD) and management/ administration officials may be fined an amount up to the 2.5 times the minimum wage rate.
10. The AFCCP has now been given responsibility for enforcing the public procurement law and law on advertising and the duration of AFCCP investigations has been extended to up to 3 months where previously it was 1 month.

### 43 auditing companies fined for price fixing

Mr. Odontuya Tsegmid
AFCCP
Mongolia

The AFCCP received a written complaint that The Mongolian Institute of Certified Public Accountants (MICPA) and the Association of Auditors facilitated and led to price fixing involving the directors of 43 auditing companies for a period of 4 years. Inspectors of the AFCCP co-operated with the whistleblowers and also smaller competitors, such as the accountants of some small and new auditing companies, that were forced to fix prices against their will.

The Inspectors gathered the following key documents despite the absence of inspection powers from whistleblowers and undercover informants: Rule of the MICPA, Code of Ethics of the MCPA, a copy of the minutes of the MICPA meetings, the signed price fixing agreement and some other documents. After this evidence was secured, the inspectors required MICPA and the cartel members to provide the evidence, showing the copies organized beforehand. The AFCCP won the case in the administrative court and imposed fines of 10 million tugrugs (about USD 10 000) in total on 43 companies. ■

## ► THAILAND

### Anticompetitive conduct alleged in media publishing

Ms. Aramsri Rupan
AFCCP
Thailand

In the greater Bangkok region, magazines and newspapers are generally produced and supplied through a chain of several different types of business. After publishers print the magazines and newspapers, 80% of them as sold on consignment to the 8 main wholesalers. The wholesalers typically sell the publications to one of approximately 100 sub-wholesalers each of whom has an allocated geographic territory. Each of these sub-wholesalers in turn, sell the publications to retailers in their area who make them available to the public.


There are several companies, however, that trade in magazines and newspapers a little differently. KS Company buys less than half its magazines and newspapers from traditional wholesalers and, using its wholesaling subsidiary World Off, it buys more than half of its magazines and newspapers directly from publishers (in other words, bypassing the other wholesalers).

SD Modern Bookstore is also different from most retailers because it is the largest chain in Bangkok with approximately 120 branches while other retailers are not part of substantial chains. SD buys products from a variety of sub-wholesalers. Approximately 44% of SD's magazines and newspapers are supplied by KS Company / World Off and the rest through the normal wholesalers/sub-wholesalers.

**The complaint** - The story of why this industry came to the attention of the Thai competition authority started when:

- As SD continued to grow, smaller retailers lost sales and it became more important for the sub-wholesalers to have a significant part of the sales to SD but SD was buying part of its requirements from KS Company instead; and
- KS Company also started to compete strongly to expand its sales and the sales of World Off.

Many of the sub-wholesalers who compete with KS Company responded to KS Company's increased competition for sales in a way that KS Company complained to the Thai competition authority was anticompetitive and illegal. KS Company informed the Thai competition authority that 64 other sub wholesalers formed a Club that, amongst other things, requested publishers and wholesalers to stop supplying products to KS Company.

The Club also decided that its members would require:

- Every SD branch in the up–country provinces to take products from the allocated sub wholesaler only.
- SD would have to pay a higher margins than previously to all members who send magazines to SD branches.

The Club claims that its actions are pro-competitive because they are part of defending the industry from becoming monopolized by SD as it grows.

**Behavior analysis** - Sub wholesalers club knew that they had the market power that if they act as a collective group, thus getting a higher benefit. They don't want to lose market power to SD. Hence they acted to cut every sources of input of magazines to SD. Each wholesaler would get more market share and did not need to compete with a new efficient competitor as World Off.

For those reasons the preliminary inquiry by the Thai competition authority has raised serious competition concerns both concerning agreements with a view to dominating or controlling the market (s27(3) of the Thai law) and as an unfair practice (s29 of the Thai law). The matter has been referred for a second stage assessment within the Thai competition authority. ■

## QUANTIFYING THE HARM OF ANTICOMPETITIVE CONDUCT

### OECD competition meetings, February 2011

The OECD's Competition Committee discussed methods and practices in quantifying the harm to competition and to private parties caused by anticompetitive conduct. There is little difference in the quantitative methods themselves, but there are differences of views about whether it is useful for competition agencies to engage in the exercise of quantifying harm. The discussion further showed that among the agencies that do engage in quantify harm, have multiple reasons for doing so, including advocacy, quality control, case prioritization, and fine setting.

An important distinction was identified between the quantification of harm to competition in general and the quantum of individual private damages caused by anticompetitive conduct. Harm to competition is a wider concept, encompassing detriment to the economy as a whole, whereas private damages are financial losses suffered by individual victims of the conduct.

The discussion showed that the economic methods for quantifying harm and damages are not controversial. All of them involve making tradeoffs between accuracy and practicality. All of them also involve finding or hypothetically constructing an alternate market in which the anticompetitive conduct did not occur, then comparing that market with what actually happened in the market when and where the conduct took place.

There is, however, substantial variation among competition authorities concerning the roles they play in the quantification process, the uses they make of such quantifications, and indeed whether they see any value in quantifying harm at all.

For example, some authorities are asked by their courts to intervene in private cases to assess the magnitude of the damages, other authorities never do that. Some authorities estimate harm to competition as a means of deciding whether to pursue a case, and others do it to see how much of a beneficial impact their work has on consumer welfare. Still others never quantify harm because their statutes do not require them to do so and they find the exercise too complex, resource intensive and difficult to be worthwhile.

The delegates benefitted from the view of two European judges who also – interestingly – had diverging views on some issues. The most important one involved what competition authorities could do to help them with the task of assessing damages. A current senior judge from one jurisdiction took the view that a competition authority could usefully act as *amici curiae* (filing "friend of the court" briefs) with respect to the law alone, but not the facts. A former senior judge from a different jurisdiction had the opposite view: He would consider it useful for agencies to help develop the facts but not comment on the law. ■

## ECONOMIC EVIDENCE IN MERGER CASES

### OECD competition meetings, February 2011

The OECD's Competition Working Party 3 discussed recent advances in the application of complex economic tools in merger analysis. The discussion showed the importance of sound economic analysis in merger enforcement but also showed that competition agencies must be aware of the limitations intrinsic in the use of complex economic tools.

Written contributions were received from 30 delegations before the meeting. The roundtable included presentations from an external expert (Dr Mike Walker) and from a number of Chief Economists from important delegations (EU, US, UK). A number of insights came out of the Roundtable. In particular, delegates concurred that the analytical economic framework for the assessment of mergers is largely uncontroversial, both for horizontal and vertical mergers.

More debatable are which economic tools should be best used to measure possible anti-competitive effects of mergers and their usefulness under the specific circumstances of a merger case. Nevertheless, delegations agreed on a several basic points: Good economic evidence should be based on clear economic theory; the economic theory should lead to testable propositions; these propositions should be tested in a transparent manner (including with respect to the sources and use of data as well as the mathematics and computer programming); and the results of the analysis should be replicable. When these principles are followed, even complex econometrics can become useful for the analysis of mergers.

A number of lessons could be drawn from the discussion of these tools and the analysis their application to merger cases. In particular, a number of delegates emphasized that it is important that the economic analysis:

(a) is tied to the facts of the case;

(b) is subject to a internal critique to ensure that it is sound;

(c) is viewed not in isolation but as a complement to other qualitative evidence, and it is informed by it; and

(d) is understood to be an imperfect approximation of reality and, as such, is used in light of its intrinsic limitations. ■

## REGULATED CONDUCT DEFENCE

### OECD competition meetings, February 2011

From time to time almost all competition authorities come across cases in which cartelists claim they were required or encouraged to enter the cartel by a government agency. This is even more common for competition authorities in Asia and countries where competition law is new.

In various countries, when cartelists can show that the cartel was prompted by the action of a government agency it may mean that there is no breech of the law or the sanctions may be different. These issues can were the subject of an OECD Competition Working Party 2 meeting on "regulated conduct defence".

The discussion highlighted relevant commonalities among and differences between jurisdictions. All jurisdictions appear to share the view that if a particular conduct is dictated or directly prescribed by regulation, it cannot be subject to antitrust law scrutiny. In some instances, however, especially in federal states and in the European Union, regulatory provisions leading firms to directly violate competition law may be sanctioned as competition law violations by competition authorities and/or judges. This takes place in very exceptional circumstances such as when the conditions of the state action doctrine are not met (U.S.) or in similar circumstances under the EU Treaty. Note that the sanction may lie against the government or its agency that introduced the requirement rather than against the businesses involved.

Differences concerning the possibility of successfully invoking the regulated conduct defence exist when firms exert a real autonomy in their behaviour. In some jurisdictions, especially in the EU, whenever firms are left with some discretion in abiding regulation, the conduct of the firms can be sanctioned by competition law irrespective of whether the conduct is embedded in a wider regulatory context or may be tolerated under or in line with the regulatory regime in place. Even in fully regulated markets and where the margin of discretion on the part of firms is extremely limited, antitrust authorities or judges have the possibility to intervene and identify violations of competition law.

In other jurisdictions and in particular in the United States, this is not the case. In these jurisdictions, antitrust violations cannot be found even if the conduct departs from the foreseen regulated conduct and would otherwise constitute an uncontroversial competition law infringement. This is the case in particular in regulated industries where firm behaviour is found in violation of regulatory provisions but was not to be found in violation of competition law by the Supreme Court. This is in fact the origin of the regulated conduct defence and very much relates to the asymmetry between regulatory offense damage claims and trebled antitrust damages.

In contrast to this, most other presentations and contributions emphasize the primacy of competition law whenever the conduct represents autonomous firm behaviour. While these differences between jurisdictions are fundamental, they seem to originate from differences in legal systems rather than from differences in the application of competition laws. ■

## OECD GLOBAL FORUM ON COMPETITION

Held in February 2011, the 10th anniversary meeting of the Global Forum focused on *Cross-Border Merger Control: Challenges for Developing and Emerging Economy* and *Crisis Cartels*.

Some 300 participants from 90 delegations attended including many delegations from the Asia-Pacific region. In the keynote address by the Vice President of The World Bank, Mr. Otaviano Canuto, he stressed the importance of making the benefits of competition more widely understood, addressing the political economy challenges to the effective implementation of competition law and policy in the public and private sectors and the need to scale up competition work, especially in developing countries.


*Left to right: Frédéric Jenny, GFC Chairman and Chairman of the OECD Competition Committee, Angel Gurría, OECD Secretary-General, Otaviano Canuto, World Bank Vice-President, Carolyn Ervin, Director of the OECD Finance and Enterprise Affairs Directorate*

### ► CROSS-BORDER MERGER CONTROL

A full day was devoted to the roundtable discussion on Cross Border Mergers. The Secretariat received 33 written contributions, indicating the importance of the topic, in particular to non-OECD members. A panel of six experts from competition agencies, private practice and academia gave presentations gave presentations and there was active discussion between the 90 delegations represented.

Challenges that developing countries raised included the conflict between developing countries trying to attract foreign direct investment and establishing a strong competition culture and the tensions between competition policy and other policies such as industrial policy.

The importance of international cooperation was emphasised, and the discussion illustrated the importance of links between competition agencies. Although a number of countries have formal bilateral agreements in place, it was felt informal contact was the key to successful cooperation. An issue that can complicate these sorts of interchange between competition authorities is that they often receive confidential information in large cross border mergers from the parties to the merger or from other interested parties. However, this issue can often be solved by the use of partial waivers permitting the agencies to share the confidential information between each other. Usually the parties who have supplied the information agree to these partial waivers either because they want the information to be put before each agency assessing the merger or because the parties who have provided the information have an interest in all agencies making informed decisions efficiently.

The compatibility, monitoring and enforcement of remedies was discussed, particularly the difficulty of providing a uniform approach when a number of different competition authorities are involved in a merger. An interesting case study was given in which conflicting remedies were administered by two countries. This situation could have been avoided had the same merger review timelines had been adopted by both authorities.

In his summary, the Chair referred to the importance of using tools such as the OECD Recommendation on Merger Control to assist in relation to a number of the issues discussed.

### ► CRISIS CARTELS

The discussion of crisis cartels comprised a plenary discussion in the morning and three breakout sessions in the afternoon. The morning session was chaired by Prem Narayan Parashar (Member, Competition Commission of India) with the more in-depth breakout sessions chaired by delegates from Jamaica, the Philippines, and Zambia. Two broad types of crisis cartel were discussed: on the one hand illegal cartels formed during crises and on the other hand exemptions from competition laws granted to proposed cartels formed to address crises.

The discussions revealed that while the reasons that triggered crisis cartel exemptions in the past may still be valid political concerns today, the consensus is that cartels, whether during a time of crisis or not, are not an appropriate response to sector or wider economic crises. It was emphasized that there are better alternatives to allowing crisis cartels including addressing the underlying reasons why cartels form including mergers to enable more efficient use of capacity and direct subsidies to generate the funds necessary for businesses to survive.

Alternatives were also suggested to the problems that occur once an illegal crisis cartel has been discovered – where prosecution might bring about the demise of a business, an alternative is still to enforce but to impose a lower or different sanction.

The plenary session was based on four themes, each animated by a different expert. The first theme concerned the historical lessons to be drawn from experiences with crisis cartels including the difficulties of setting up, monitoring and unwinding crisis cartels.

The second theme concerned the reallocation of resources, or more specifically the restructuring of declining industries. While there was agreement that economic conditions may exist that render individual firm capacity adjustments to declining demand difficult, it was also agreed that such conditions are rarely met. The risk of creating a cartel culture was highlighted and it was considered particularly problematic. Recently proposed crisis cartel cases were discussed, none of which received exemptions, ultimately. Conditions for exemptions were discussed and while there was a degree of acceptance that in theory it is conceivable that an exemption could be justified along the lines that appear in many countries' laws, it was felt that it is extremely rare that the necessary criteria would be met and even when they do, many practical difficulties arise.

The third theme focussed on the relationship between crisis cartels and price stability. Given the recent food price increases and price volatility in the food/agro sector, this topic received considerable attention from delegates and led to many delegates from developing countries.

The final theme fostered a discussion on the potential trade-off between development and efficiency with a particular focus on the financial and banking sector. The expert presentation and the participant delegates emphasized the systemic impacts and negative externalities for the economy of compromising on competition policy and the need for stronger competition law enforcement in this area. ■



# NEWS FROM ASIAN COMPETITION AUTHORITIES

## ► KOREA

### Korean President appoints new Chairman of the Korean Fair Trade Commission

Korean President Lee Myung-Bak appointed Dr. Kim, Dong-Su as the new head of KFTC at the end of 2010.

*Dr. Kim Dong-Su, Ph.D*
*Chairman*
*Korean Fair Trade Commission*

Dr. Kim obtained a doctorate in economics at University of Hawaii, USA and served his duties in the Ministry of Finance and Strategy going through major positions as Director of Consumer Policy Division, Director of Price Policy Division, and Director General of Economic Coordination Bureau, and, after serving as Vice Minister, left the Ministry. He served as Chairman of the Export-Import Bank of Korea for the last 2 years, achieving fruitful results.

In his inaugural address, the Chairman emphasised the role of KFTC to pay great attention to price increases which is one of the big issues in the Korean economy recently.

It is expected that KFTC will focus on monitoring abuse of market dominance and price cartels which work to increase prices and putting an effort into improving unreasonable distribution systems.

### Investigating items with unstable prices

KFTC set up a task force to monitor consumer items with unstable prices under the direction of Secretary General in January 2011 which is one of the hot issues in the government.

The task force is composed of representatives of the Market Structure Policy Bureau, the Cartel Investigation Bureau and the Consumer Policy Bureau and it will monitor on unfair transactions, cartels, and misrepresentation in labeling and advertising. The items covered are those which affect the daily lives of consumers such as food and beverage including flour, soybean milk and, of course, kimchi. The task force will select items of suspicious price bubbles and price spikes and then carry out an investigation on unfair transactions and improve the related systems at the same time.

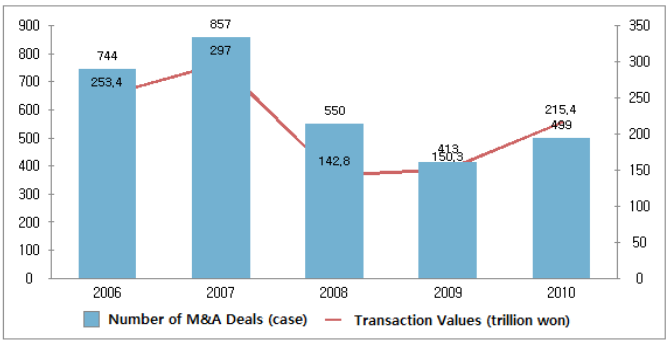
## Korean M&A trends in 2010

KFTC released a report on mergers and acquisitions subject to competition law in 2010.

According to the report, the number of subject M&A transactions that year stood at 499, showing a rise by 83 in the number of M&A deals compared to that of last year. The increase seems to be a result of economic recovery since 2009 boosting companies to secure growth engines through M&As.

The M&A transaction value increased by 43% to 215 trillion won (about USD 192.8 billion) compared to 150 trillion won (about USD 134.5 billion) of 2009. This is due to the increase of corporate mergers between foreign companies. The M&A deals made between foreign companies were valued at 184 trillion won (about USD 165 billion), up 51% from the previous year.

**M&A deals and values, 2006-2010**




By industries, the biggest number of M&As occurred in the service sector including banking and telecommunication accounting for 58% (288 deals), and by types, the biggest number of deals were in the form of conglomerate M&As (245 cases, 49.4%) followed by horizontal M&As (172 cases, 34.5%) and vertical M&As (82 cases, 16.5%). Vertical mergers which are carried out to promote business capability showed a sharp increase (10.3%->11.6%->16.5%). This indicates that M&A deals are aimed to cut costs and enhance efficiency in business operation by securing stability in supply of raw materials or distribution through vertical integration.

By type of combination, the analysis showed that the biggest number of deals were made by stock acquisitions (37.3%), followed by mergers (23.1%), and establishment of new companies (16.8%). As economy becomes stable, the types of deals have begun to change with the number of stock acquisitions to acquire other companies increasing in number.

## International investigation reveals cartel of color display tube producers

In January 2011, KFTC imposed a 26.2 billion won surcharge (approximately 23.5 million USD) on 5 Colur Display Tube (CDT) manufacturers after finding that they agreed to fix prices and reduce the quantity of CDTs produced. The agreement was implemented by the cartelists for almost 10 years from 1996 to 2006.

The KFTC decision resulted from a joint investigation with competition authorities from around the world including the United States Department of Justice and the European Commission in November 2007. KFTC initiated the investigation after receiving a leniency application.

*International cartel report: International Cartel Division at +82-2-2023-4474.

## Cable companies involved in collusion

In February 2011, KFTC imposed a surcharge of 56.5 billion won (approximately 50.7 million US dollars) on 13 cable companies who were involved in the following bid rigging cases.

- Price fixing by 5 cable manufacturers
- Bid rigging in optical fiber cable by 11 cable companies
- Bid rigging in construction cable in Korea's second biggest city, Busan, by 9 cable companies
- Bid rigging in subway cable by 6 cable companies ■

# ► MONGOLIA

## Meat market investigation

The Authority for Fair Competition and Consumer Protection of Mongolia (AFCCP), under the assistance of the USAID/Economic Policy Reform and Competitiveness Project has conducted a market study on meat in 2010. This market study is motivated by public concern about the increasing prices of meat in the capital city, Ulaanbaatar, during recent years, particularly during the spring/summer seasons. Indeed, price increases are expected to occur as demand expands (seasonal demand increases in the spring/summer season and the availability of cash benefits from the Government may boost this further) and supply suffers a reduction (for instance, due to harsh weather conditions that reduce the availability of livestock).

However, as price rises new entrepreneurs are expected to enter the market to take advantage of the opportunities to increase sales, and in this way supply should expand and help keeping prices at more stable levels.

In this market study, the AFCCP has examined the way in which markets within the meat sector work, by applying competition analysis according to international practices. By improving our understanding of the meat markets in this way and by identifying potential competition issues, we aim at developing more precise and effective policy actions to promote and protect competition in the meat sector.

The result of this market study was that we learned not a great deal about how the meat sector in Mongolia works and also we identified five competition issues / potential cases concerning:

- Information failure in the livestock market

- The association's activities in the wholesale market: facilitating conditions for collusion
- Anti competitive effects of State storage system
- Entry and network barriers
- Market power of market place administrators

It has been a first exercise in Mongolia conducting a market study by following internationally recognized good practices, to learn the method of analysis and to develop the necessary skills within the team. ■

## ► PAKISTAN

### Dawn raids at 2 industry associations

The Competition Commission of Pakistan (CCP) conducted search and inspection operations at the offices of the Pakistan Vanaspati Manufacturers Association (PVMA) and Pakistan Edible Oil Refiners Association (PEORA) in Islamabad and Karachi in February where documentary proofs of the Associations' alleged involvement in anti competitive practices were impounded.

CCP took notice of continuously rising ghee/cooking oil prices as reported in various media sources. Ghee (clarified butter) and cooking oil are very important commodities for Pakistani consumers and concerns have been raised that historic increase in prices may have been the result of possible anti competitive practices by the manufacturers. During the search and inspection important data was confiscated from the Associations' offices that will be analysed by the Commission's enquiry officers.

### Orders issued against cartelists

CCP achieved a major breakthrough in enforcement activities when a large business association admitted of operating as a cartel and requested the Commission to take lenient view in the imposition of penalty. Pakistan Jute Mills Association, and under its umbrella 10 jute mills, admitted before a two-member bench of CCP to being involved, albeit inadvertently, in collusive activities vis-à-vis production and supply of jute bags. In February, the two-member Bench of CCP while taking lenient view, imposed a total penalty of Rs 23 million (approximately US$270,000) on Pakistan Jute Mills Association and 10 jute mills for engaging in collusive activities vis-à-vis production and supply of jute bags.

### Conditions issued on fertilizer merger

CCP issued its conditional no objection to the bidding by Fauji Fertilizer Company Limited (FFC) for the proposed acquisition of 75% to 79.87% shares of Ms. Agritech Limited by FFC. FFC had submitted its pre-merger application in August, 2010 for the acquisition of 75% to 79.87% shares of Ms. Agritech Limited (formerly Pak American Fertilizers Limited). Ten days later the CCP informed the FFC that the CCP has decided to move the case to Phase 2 Review, with the view to determine whether the merger situation is likely to substantially prevent or lessen competition in the market and to ascertain the likelihood that the merged entity in the post-merger market will behave competitively or cooperatively. This was the first time in Pakistan that a pre-merger application was referred to phase II review.

The parties put forward efficiency claims and the Bench took the opportunity in this merger to provide guidance on such claims. It stated that while competition generally drives businesses to achieve internal efficiencies, the primary benefit of the mergers to the economy is their potential to deliver efficiencies more broadly by enhancing a firm's ability and incentive to compete. An efficiency claim should not be vague or speculative and should be verifiable by reasonable means.

CCP issued its conditional NOC for the proposed merger, importantly requiring FFC to file its commitment within four weeks from the date of the decision. The commitments include maintaining separate brands for a minimum period, limits on certain price increases, requirements for pricing transparency and the possibility of a divestiture after a further review in a year's time.

The Commission hopes that this decision will help achieving economies of scale in the fertilizer industry leading to decrease in consumer prices without substantially lessening competition. ■

## SEND US YOUR NEWS

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

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