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Competition Programme
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IN THIS ISSUE

The Competition Programme of the OECD/KOREA Policy Centre provides education and training to officials of Asia-Pacific competition authorities in the field of competition law and policy. This newsletter includes information about our work and the work of the OECD, as well as news, case studies and reports from competition authorities in the Asia-Pacific region.

Entry point - Editorial Note

This is the first newsletter of 2016 and it brings to life our two most recent workshops, one at the end of 2015 in December that took place in Jeju, Korea on remedies and another that took place in Hanoi, Vietnam in late March / early April on cartel enforcement. You may read more about their content in the pages that follow. Before you read on, I did want to highlight that the event in Hanoi resulted in a partnership with the Vietnam Competition Authority and CLIP of the Australia Competition and Consumer Commission.

This type of partnership is new to the Competition Programme, at least in this format, and it allowed the programme to expand its reach to more participants and benefit from more speakers. Talking of speakers, we had a host of fantastic speakers in the last two events, without them and the agencies to which they belong, the programme would not have as much success as it had. A special thank goes to the Chair of the OECD Competition Committee Mr. Frédéric Jenny who was our keynote speaker in Vietnam.

It was this extra reach these partnerships allow that was also behind our choice of topic for the Vietnam event, on the building of cartel enforcement. This is an area that is so crucial to competition policy and that should sit as one of the priorities of most competition agencies, new or old. The event delivered a wealth of information and sharing of practical experiences that will undoubtedly allow participants to take back crucial know-how to develop their agencies' cartel practice.

We hope to continue this partnership model in the future, the next event in 11-13 May being co-hosted by the KPPU and co-sponsored by GIZ of Germany, to bring more ASEAN participants to Indonesia for the abuse of dominance and unilateral conduct fundamentals workshop.

Finally, I am delighted to welcome and wish the best to the new leadership at the KOREA Policy Centre, the OECD partner in the Competition Programme: Director General Daewon Hong and Director Ju Eun Shim. I am very looking forward to this new partnership, following the excellent work undertaken by former Director General Jin Wook Chung and former Director Heeun Jeong, with whom it was a great pleasure to work. Their outstanding contribution helped elevate further the Competition Programme.

I look forward to seeing you at one of our upcoming events!

Ruben Maximiano

News from Asia-Pacific Competition Authorities*

* News items were provided by respective Competition Authorities.

Progress on SAIC's competition legislation and legal enforcement

During the year of 2015, a number of developments have taken place in the system of Administration for Industry and Commerce of the PRC ("AIC" or "AICs") both as regards legislation and legal enforcement of competition law.

With respect to legislation, firstly, the State Administration for Industry and Commerce of the PRC ("SAIC") issued the Provisions on the Prohibition of Abuse of Intellectual Property Rights to Exclude or Restrict Competition on 7 April 2015, which has come into force as of 1 August 2015. Secondly, SAIC has been drafting the guidance of prohibition on behaviours of abusing intellectual property to eliminate or restrict competition. Thirdly, SAIC is intending to revise the AIC's Provisions on Prohibition of Monopoly Agreements as well as AIC's Provisions on Procedures for Investigation on Cases of Monopoly Agreements and Abuse of Market Dominance.

With respect to legal enforcement, AICs (both SAIC and its local branches) have conducted investigations into a series of anti-monopoly cases in the industries close to people's livelihood, playing an active role in protection of market competition and consumers' rights. In the year of 2015, AICs filed twelve anti-monopoly cases, including four cases of monopoly agreements and eight cases of abuse of market dominance, involving industries of water and gas supply, salt, tobacco, telecommunication, medicine and health, broadcast television, insurance, etc,. In the meantime, AICs closed eight cases and suspended four cases. Until now, sixty anti-monopoly cases have been filed, twenty-eight cases have been closed and five cases have been suspended by AICs in total. During the whole process of investigation and penalty, AICs have been always pursuing fairness, equity and openness to its fullest extent by complying with the legal procedures strictly, respecting the legal rights of the parties and listening to the parties' opinions conscientiously. All the written decisions of administrative punishment of the closed anti-monopoly cases have been published on SAIC's official website.

Central Government revised threshold for notification of combinations

The statutory thresholds provided under the Act may be enhanced / reduced by the Central Government of india from time to time. On 4 March 2016, the Central Government (Ministry of Corporate Affairs) revised the thresholds for notification of combinations and also amended and extended the existing de minims exemption.

Regarding the asset and turnover based jurisdictional thresholds under the Competition Act these have been increased by 100% on the original thresholds (which had already been increased by 50% in 2011).

As to the de minimis exemption, this had originally been approved in March 2011 and sought to exempt transactions where the target enterprise either has Indian assets of less than INR 250 crores or Indian turnover of less than INR 750 crores from a merger control

notification requirement to the Competition Commission of India, for a period of five years. This has now been extended for another period of 5 years. The financial thresholds have also been increased so that where the target enterprise (whose shares, assets, voting rights or control are being acquired) either has Indian assets of less than INR 350 crores or Indian turnover of less than INR 100 crores will be exempt from the notification requirement, until 3 March 2021.

The KPPU begins its supervision and enforcement on partnerships agreement between MSME and large-sized enterprises

The Indonesian competition commission, KPPU, has issued two implementing regulations to carry out supervision and law enforcement on partnership agreements between micro, small, and medium-sized enterprises (MSMEs) and large-sized enterprises; and between micro and small-sized enterprises to medium-sized enterprises. The two regulations implement the orders of Law No. 20 of 2008 on Micro, Small and Medium Enterprises and its implementing regulation, the Government Regulation No. 17 Year 2013.

These regulations are similar in nature to what is found in to international practices on abuse of superior bargaining position and sub-contract act in Korea and Japan, and unfair competition in Chinese Taipei.

The types of agreements that may be subject to KPPUs powers include: contract farming, subcontracting, franchising, general trading, distribution and agency, profit sharing, operational cooperation, joint venture, outsourcing, and other forms of partnership.

Possible sanctions may be the cancellation of a license (through recommendations to the authorized agency for licensing), and the imposition of financial penalties. The fine varies between types of enterprises. The large-sized enterprises can be imposed up to IDR 10 billion, and IDR 5 billion for medium-sized enterprises. The financial penalties are lower than those of competition law enforcement that can reach IDR 25 billion.

Supreme Court upholds KPPU decision in SMS cartel case

The Supreme Court ruled on February 29, 2016 in favour of the KPPU decision regarding a price fixing cartel for off-net short messaging (between operators) involving five (5) telecom operators. This decision, which had been annulled on appeal, has now been reinstated by the Supreme Court.

In its decision, the KPPU had demonstrated that six operators had set tariffs for off-net text message (for IDR 350/message) from 2004 to 2007. For such behaviour, the KPPU fined a total of IDR 77 billion. KPPU's decision also underlined the existence of consumer loss reaching IDR 2.8 trillion as the cartel result.

Recent competition issues in Indonesian communication sector

KPPU advocacy actions I : transport services

The KPPU has been increasingly active in the communications and information sector (a sector that contributes 5.5% of national income/GDP) with a number of recent relevant actions in the industry in Indonesia.

The KPPU is at the forefront to support policy changes by the government that facilitate innovation. Hence, KPPU has had its role in encouraging the government to set up policy that is pro-competitive, namely in the interface between transport and communications. The KPPU considers that competition from application-based transport companies has yielded significant results to consumers, as various taxi companies began to reduce tariffs and to introduce similar applications in order to maintain their consumers. The KPPU has been incorporated in the process to establish the new tariff setting (note: basic transportation tariff is set by the Government).

KPPU advocacy actions II : MoU with Ministry of Communication

The KPPU and the Ministry of Communication and Information have signed a memorandum of understanding on 23 March 2016. This MoU emphasised the commitment of both parties to coordinate in overseeing communications sector, both at the policy as well as practical level. Thus, it is expected that any policy drafted shall be a policy that supports competition in the sector.

Competition Commission Hong Kong in full operation to enforce the city's first cross-sector competition law

Hong Kong's Competition Ordinance (Ordinance) finally came into full effect on 14 December 2015 after over a decade of policy debate and three years since the provisions forming the Competition Commission ("Commission) commenced.

In its early stage of enforcement of the Ordinance, the Commission aims to direct its resources to matters that provide the greatest overall benefit to competition and consumers in Hong Kong, and accord priority to cartel conduct, other agreements causing significant harm to competition in Hong Kong, and abuses of substantial market power involving exclusionary behaviour by incumbents.

Since the full implementation of the Ordinance, the Commission has received and responded to close to 1,000 enquiries and complaints in relation to potentially anti-competitive behaviour. The Commission is in full operational mode carrying out its enforcement functions focusing on identifying potential contraventions and gathering evidence, and considering a block exemption application in the liner shipping industry.

Apart from its law enforcement function, the Commission is in close liaison with various government authorities to ensure that the policy considerations at play in different industries in Hong Kong are pro-competitive. It is also conducting studies into the auto-fuel and building maintenance markets in the territory which will serve as a guide for future policy advice in these areas.

Having taken advantage of the two years prior to commencement to undertake education and engagement work to advocate the key elements and benefits of the Ordinance, the Commission is glad to see increased awareness in the community as well as concrete changes to the practices of some industries and trade associations. This is a solid proof that a compliance culture is taking shape. The Commission will continue to reinforce the key concepts and help the public recognise potential competition issues through publicity campaigns and engagement activities so as to create a more competitive Hong Kong and a level-playing field for all.

Publication of the "Guidelines on Administrative Investigation Procedures under the Antimonopoly Act"

The JFTC (Japan Fair Trade Commission) clarified the standard steps and key points to note in the JFTC's administrative investigation procedures in the "Guidelines on Administrative Investigation Procedures under the Antimonopoly Act." In order to enhance transparency of the JFTC's investigation procedures and contribute to the smooth implementation of the JFTC's case investigations, the JFTC decided to make the guidelines known to the public.

Criminal accusation on bid-rigging concerning the disaster restoration paving works for the Great East Japan Earthquake

The JFTC, investigated a bid-rigging case concerning the disaster restoration paving works for the Great East Japan Earthquake ordered

by the Tohoku Branch of East Nippon Expressway Company Ltd., and filed a criminal accusation with the Public Prosecutor-General against 10 companies including NIPPO Co., Ltd. and 11 individuals of the said 10 companies accused under Article 74 (1) of the Antimonopoly Act.

International Cooperation: preparatory work for an amendment to the agreement between EU and Japan on anticompetitive activities

At the regular bilateral meeting on competition policy between the competition authorities of Japan and the European Union (EU), confirming that cooperation between them in the competition policy area should be further strengthened, they have decided to commence preparatory works for negotiation on an amendment of "the Agreement between the Government of Japan and the European Community concerning Cooperation on Anticompetitive Activities" (concluded in 2003) in order to allow their competition authorities to facilitate the exchange of information obtained during the course of an investigation.

Cease and Desist Orders and Surcharge Payment Orders to the Manufacturers Selling Capacitors

The JFTC issued the cease and desist orders and the surcharge payment orders (JPY 6.7 billion in total) to the manufacturers selling aluminum electrolytic capacitor and tantalum electrolytic capacitor. For the violation of section 3 of the Antimonopoly Act.

New Guidelines for IP

There have been major amendments made to the "Review Guidelines on Unfair Exercise of Intellectual Property Rights" (hereinafter referred to as "IP Guidelines").

In March 2016, the Korea Fair Trade Commission finalised the amendments to the IP Guidelines and began the implementation of the new guidelines. The KFTC has rationalised its regulations on standard essential patents (hereinafter "SEP") and improved policies to better promote technology innovation by amending the IP Guidelines.

The amendment clarified the distinction between SEPs which are set by standard setting organisations (hereinafter "SSO") and de facto SEPs which have become widely used as a standard through market competition, thereby encouraging a just exercise of intellectual property rights.

The amendment was due to there being a concern that the previous IP Guidelines' regulations on "de facto SEPs" might excessively limit a fair exercise of patent rights. Considering that de facto SEPs are patents for technologies that are used like a standard in the relevant business area as a result of normal market competition, it was said that it was not proper to regulate de facto SEPs applying the same criteria for SEPs, which were adopted by SSOs on condition of the patent holder's voluntary FRAND commitment.

The new IP Guidelines have clearer criteria to judge the illegality of refusal to license, and some provisions that were deemed not so relevant to judging anti-competitive effect were modified.

The following are the main contents of the amendment.

First of all, definition of standard technologies and SEPs are changed and provisions on de facto SEPs are complemented.

Secondly, the IP Guidelines now clearly state that the purpose is to "promote free and fair competition."

Third, the amendment deleted the provisions on arbitration rules and organisation for the disputes on license terms, etc. as they have no direct relevance to anti-competitive effect.

Lastly, the amended guidelines specify with more clarity the criteria for judging the illegality of a refusal to grant a license by a patent holder.

Clearance of the Integration of Karachi Stock Exchange, Lahore Stock Exchange and Islamabad Stock Exchange Limited into the Pakistan Stock Exchange

In November 2015 Competition Commission of Pakistan approved the merger of the three stock exchanges, Karachi Stock exchange (KSE), Lahore Stock Exchange (LSE) and Islamabad Stock Exchange (ISE) operating in the country into one stock exchange called PAKISTAN STOCK EXCHANGE (PSX).

The Commission anticipated substantial competition concerns and abuse of dominance in the relevant market as a result of this horizontal merger. The relevant product market was 'the trading platform for the sale, purchase and exchange of listed securities' and as a result of the technological innovation and online trading practices the relevant geographic market was the whole of Pakistan. KSE was by far the dominant player in the relevant market both in terms of the share of trading volume and share of turnover. It had the highest market capitalisation and also offered more products than the other two stock exchanges. It was anticipated that, post-merger, PSE would become the sole dominant undertaking in the market with 100% market share and substantially lessen competition in the market. The transaction also appeared to have some elements of vertical integration as a result of the transaction's potential impact on brokers in the form of risk of foreclosure in the market.

After a second-phase review, the Commission came to the conclusion that since financial markets are carefully regulated, the same standards of regulatory oversight will apply to the PSX. Despite its dominance, the PSX would not be able to create any legal barriers for new entrants in the capital markets. The proposed merger would benefit the relevant market as there will be unification of trading, reduced fragmentation of the domestic capital market, and better liquidity of the merged entity. The PSX would also help eliminate "home bias" where investors were not willing to invest outside their geographic regions.

Brokers would benefit from all the market products, services, and facilities available that were available only to KSE Trading Right Entitlement Certificate (TREC) holders. One stock exchange would also allow Securities and Exchange Commission of Pakistan (SECP) to focus its regulatory resources more efficiently and therefore enhance the effectiveness and quality of supervision and it was also recommended that SECP must ensure vigilance as the sector regulator.

The Commission concluded that the benefits from the proposed merger in the form of increased efficiencies outweighed the anticipated anti-competitive effects. The merger of the three stock exchanges into one was thus approved subject to certain conditions.

Acquisition of Warid Telecom Limited by Mobilink approved with commitments

In December 2015, the Competition Commission of Pakistan received an application for the review and approval of the acquisition of Warid by Mobilink. In terms of customers, Mobilink is the largest and Warid is the fifth (and last) mobile network operator in Pakistan.

There were five mobile network operators in Pakistan's market – Mobilink, Telenor, Ufone, Zong, and Warid – that provide GSM, UMTS, and LTE services. Pakistan Telecommunications Authority (PTA) is the sector regulator. Mobilink is licensed by the PTA to provide GSM, NGMS and CVAS services in Pakistan and Warid is licensed to provide both GSM and LTE services in Pakistan.

Telecom mergers have generally raised competition concerns globally and Pakistan is no different, especially when a 5⟶4 scenario is envisioned. The Commission took the case to a second-phase review and conducted detailed competition analysis of the

telecommunication sector to access the upstream and downstream markets and also the vertical and horizontal effects of the proposed merger in the relevant market.

The Commission assessed the potential effects of the proposed merger on the price changes, reduction in output, quality, choice, innovation, and other influencing parameters of competition. The post-merger spectrum concentration, a key determinant of dominance in the relevant market, was extensively analysed by the Commission in consultation with the sector regulator along with various indicators of market power to see if Mobilink could behave independently of its competitors, customers, consumers, and suppliers. For this the pre-merger and post-merger market shares of the merging undertakings, economies of scale and scope, size and strength of their infrastructure, barriers to entry among other factors were analysed.

The Commission approved the acquisition, imposing behavioural remedies. For the Commission, an important consideration for allowing the merger was the efficiencies that were possible post-merger. It was concluded that the merger would bring efficiencies in the form of better network, increased number of sites available nationally, enhanced coverage, network stability, cost savings, and increased investment.

Financial advisers sanctioned for pressurising a competitor to withdraw offer

The Competition Commission of Singapore (CCS) on 17 March 2016 issued an Infringement Decision and imposed financial penalties of about S$900,000 (approximately USD 660,000) against ten financial advisers in Singapore in the life insurance area.

The ten financial advisers were found to have infringed the Competition Act by engaging in an anti-competitive agreement to pressurise their competitor, iFAST Financial Pte. Ltd. (iFAST) to withdraw its offer of competing life insurance products on the Fundsupermart.com website with a 50% commission rebate.

iFAST's offer was launched on 30 April 2013, and withdrew a few days later. CCS investigated following the release of media reports which suggested that iFAST withdrew the offer due to unhappiness in the industry. The investigation revealed that the financial advisers had met and agreed to pressurise iFAST into withdrawing its offer, and a number of them had contacted iFAST to do so. While the financial advisers' conduct did not fall under any of the four (4) hard core restrictions of competition by object i.e. price-fixing, bid-rigging, market sharing or output limitation, CCS found that nonetheless, the financial advisers' conduct to get iFAST to withdraw its innovative offer was injurious to the proper functioning of normal competition and hence, a restriction of competition by object. Instead of determining their own individual responses to iFAST's new and innovative entry, the financial advisers adopted a collective response to return the market to the position that existed before iFAST's offer.

In reaching this finding, CCS had regard to the content, objectives, and context of the agreement. The content and objective of the agreement was to pressurise a competitor into removing a competing offer. The relevant context was that iFAST was reaching out to a wide client base of over 50,000 through an established online platform, which saved on distribution costs and enabled iFAST to pass on these cost savings to customers through the commission rebate. Further, iFAST's offer was unlike the general industry practice of not providing commission rebates to customers. The financial advisers' commercial relationship with iFAST in its unit trust business contributed significantly to iFAST's revenues and placed them in a position to exert pressure on iFAST.

Shortly after CCS issued the Proposed Infringement Decision in August 2015, iFAST reintroduced a new offer for life insurance products on Fundsupermart.com.

Remedies in Merger Cases: Jeju, Korea, 2 – 4 December 2015

Ms. Sabine Zigelski

Senior Competition Expert
OECD

The OECD/KPC held a workshop on merger remedies. In many merger cases the proportionate answer to a competition problem is not a prohibition but a decision imposing remedies. Different types of remedies were discussed and remedy negotiations, the use of trustees and the value of international co-operation were highlighted.

The OECD/KOREA Policy Centre workshop in Jeju, Korea on 2-4 December on “Remedies in Merger Cases” brought these issues into focus. Participants included competition enforcers from jurisdictions across Asia, including China, Chinese Taipei, Hong Kong,

India, Indonesia, Mongolia, Pakistan, Papua New Guinea, the Philippines, Singapore, Thailand, and Vietnam. Panelists included experts from the Korea Fair Trade Commission, the United States Department of Justice, the Australian Consumer and Competition Commission, the Japanese Fair Trade Commission and the Hungarian Competition Authority GVH.

The workshop opened with welcoming remarks from Director General Jin Wook Chung and Director Heeeun Jeong of the OECD/KOREA Policy Centre. The substantive presentations of the first day started with a comprehensive overview of different kinds of remedies and terminology by Sabine Zigelski for the OECD. Ms Adelle Low for the Australian Consumer and Competition Commission continued the introductory part of the day by presenting on the general experience the ACCC had made over the years of enforcement and the most important learnings. Ms. Cindy Chang for the Singapore Competition Commission presented the first case study of the seminar, a merger between online recruitment services that was solved with a mix of behavioural and structural remedies.

The second part of the day was dedicated to a US beer merger case. Ms. Patricia Brink for the US Department of Justice presented the facts of the merger between the breweries ABI and Modelo and the initial remedy proposal given by the parties. Participants were then asked to work on this remedy proposal. They had to represent the competition authority, the merging parties and the intended acquirer and exchanged their views in a hearing that was staged at the end of the day.

The second day continued with Patricia Brink's presentation of the ABI/Modelo merger. She explained why the initial proposal had been rejected and which solution had been found in the end that fully satisfied the DoJ. Following this presentation Mr. Hyeon-Kyu Park for the Korean Fair Trade Commission gave insights into the Korean merger remedies practice and illustrated this with two recent case examples that also involved international co-operation in remedies. The day concluded with two case studies. Ms. Li-Ya Wu for the Chinese Taipei Fair Trade Commission reported a merger between two oil suppliers in the petrol retail market. Mr. Sachin Goyal for the Competition Commission of India lead through the merger of the pharmaceutical companies

Sun Pharma and Ranbaxy. He explained the arguments and difficulties the CCI encountered in dealing with its first merger remedies case (refer to p.13). The CCI solved this case with clear structural remedies and referred to the international practice for all the solutions they found in the end.

On the last day of the seminar Ms. Naoko Teranishi explained the role and instruments of international co-operation in merger investigations and remedies for the Japanese Fair Trade Commission. She referred to OECD Recommendations and ICN work products that help to facilitate and promote international co-operation. Ms. Aranka Nagy for the Hungarian Competition Authority continued the case studies of the seminar with an interesting Hungarian newspaper distribution merger case that was dealt with three times by the GVH and was based on a mostly behavioural remedy. The final presentation of the seminar was then held by Patricia Brink. She gave insights into the use of trustees for the implementation and enforcement of remedies. Different national experiences with trustees were discussed.

The seminar finished with another hypothetical case. The participants were asked to prepare a remedy negotiation and to represent the competition authority on one side and the merging parties on the other side on the basis of case scenario given to them. In the hearing that was then staged they had an opportunity to apply different negotiation strategies. The major result of the exercise was that the competition authority had been able to extract structural commitments from the parties because it clearly held the view that alternatively it would be confident to prohibit the merger. Concluding this exercise the experts shared their experiences with remedy negotiation strategies in a panel discussion.

Throughout the seminar differences but mostly parallel characteristics of remedies in merger and antitrust cases were pointed out by the experts. There was strong consent between the experts that remedies should always favour an opening of markets to competition instead of merely dealing with symptoms like prices.

Merger of Sun Pharma and Ranbaxy

contributed by the Competition Commission of India (CCI)

Mr. Sachin Goyal
Deputy Director
Competition Commission of India

Sun Pharmaceuticals Industries Limited (Sun Pharma) and Ranbaxy Laboratories Limited (Ranbaxy) gave a joint notice to the CCI on 6 May 2014 regarding the proposed merger of Ranbaxy into Sun Pharma. Pre-combination, Sun Pharma and Ranbaxy were the 2nd and 5th largest pharmaceutical companies in India. Post combination, Sun Pharma would become the largest pharma company in India and the 5th largest global generic pharma company.

CCI formed a prima facie opinion that the proposed combination was likely to cause appreciable adverse effect on competition (AAEC) in certain relevant markets in India and, thus, initiated detailed investigation in the combination. Subsequently, the CCI also invited comments/objections/ suggestions, in writing, from any person(s) adversely affected or likely to be affected by the proposed combination.

The CCI observed that both the parties are primarily generics manufacturers (i.e., producers of generic copies of originator drugs). The CCI further noted that various generic brands of a given molecule are chemical equivalents and are considered to be substitutable. Accordingly, the Commission considered it appropriate to define the relevant product market at the molecule level, i.e., medicines/formulations based on the same API.

On the basis of combined market share of the parties, incremental market share as a result of the proposed combination, market share of the competitors, number of significant players in the relevant market, entries in the recent past in the relevant market, regulatory barriers, etc., the Commission focussed its investigation on 49 relevant markets where the proposed combination was likely to have appreciable adverse effect on competition.

On the basis of its assessment, the CCI decided that the proposed combination is likely to result in appreciable adverse effect on the competition in India in relevant markets for seven (7) molecules; however such adverse effect can be eliminated by suitable modification.

The parties proposed behavioural remedies in the form of price and supply commitments. But, the CCI didn't accept these remedies and instead imposed structural remedies to allay the AAEC concerns. Accordingly, the parties were required to divest their products in the seven (7) identified relevant markets for formulations.

The CCI also decided that the combination would not be consummated till the time the buyer proposed by the parties for the divestment business is approved by it. In line with the international practice and work products of OECD and ICN, it was decided that the proposed buyer shall have proven expertise in the relevant therapeutic category, financial resources to fund the capital and operating expenses relating to divestment business, necessary manufacturing capability and incentives to maintain and develop the business as a competitive force with concrete business plans, independent and with no connection with the parties. The compliance in the said case was completed in March 2015.

Workshop on Building Cartel Enforcement: Hanoi, Vietnam 30 March – 1 April 2016

Mr. Ruben Maximiano

Senior Competition Expert
OECD

From the 30 March to 1 of April 2016, the Centre held a workshop in Hanoi, Vietnam dedicated to building capacity for cartel enforcement. This was an event co-hosted with the Vietnam Competition Authority (VCA) and co-sponsored by CLIP.[1]

Cartels have been considered by the OECD as "a principal focus of competition policy and enforcement" and the OECD Competition Committee has devoted significant efforts to hard-core cartel enforcement (refer to p.18). The goal of the Workshop was to set out the fundamentals needed to build a strong and effective cartel enforcement practice in agencies across the region.

[1] About CLIP: Through the Competition Law Implementation Program (CLIP), the ACCC is delivering assistance to ASEAN Member States to effectively introduce and implement national competition laws and policies. More information can be found here: https://www.accc.gov.au/about-us/international-relations . CLIP co-sponsored ASEAN participants accommodation during the event as well as the speakers from the ACCC Australia.

This workshop had nearly 80 participants from competition officials from a multiplicity of jurisdictions in the Asia Pacific Region (Bhutan, Cambodia, China, Chinese Taipei, Hong Kong, India, Indonesia, Lao PDR, Mongolia, Myanmar, Pakistan, the Philippines, Singapore, Thailand), including many participants from both Vietnamese competition agencies (VCA and Vietnam Competition Council) as well as government officials, judges and academics from Vietnam. On the other hand, panel members included experts from the Korea Fair Trade Commission (KFTC), the Australian Consumer and Competition Commission (ACCC), the Japanese Fair Trade Commission (JFTC).

The event opened with introductory speeches by Director General Dae-Won Hong of the Korea Policy Centre, Mr. Tran Anh Son (Deputy Director General of the VCA) and Mr. Frédéric Jenny (Chairman of the OECD Competition Committee and keynote speaker). Mr. Ruben Maximiano of the OECD then provided a road map of the three day workshop introducing the topic at a general level and putting it into the context of the toolbox at the disposal of competition agencies.

Mr. Jenny was also the first speaker in the substantive part of the workshop, sharing the importance of fighting cartels, with many examples of cartels from Vietnam and other jurisdictions as well as an explanation of how cartels function and how they can be fought effectively. The second session was led by Ms. Clare Nightingale, senior investigator at the ACCC) that dug deeper into a more specific looking at the different types of hard-core cartels, offering examples from Australia on cases on price fixing (Queensland pre-mixed concrete cartel), market sharing

(the Visy and Amcor packaging cartel), bid rigging (the Demolition Cover Pricing cartel) and output restrictions (the Tasmanian Atlantic Salmon Growers case).

The first case study session of the workshop was provided by Mr. Phung Van Thanh, Deputy Director of the VCA, who explained the Vietnamese legal regime and its particularities. Mr Van Thanh also provided detail on a recent cartel case between 19 insurance companies in the car insurance sector (refer to p.19).

The tools for detection were the subject of part of the afternoon sessions, with Ms. Songrim Koo, Deputy Director at the KFTC presenting the cartel detection tools used by the KFTC with particular focus on the functioning and operation of the BRIAS system for bid rigging as well as the reward system in place for reporting of cartels. Ms. Makiko Asami of the JFTC then led a session with in depth explanations on the operation of the leniency and complaints systems in Japan.

The first day of the workshop finished with an in-depth session lead by Mr. Jenny on the use of indirect evidence in cartel enforcement, sharing experiences from across the OECD membership and beyond, as well as the importance of fighting bid rigging and the respective guidelines of the OECD.

The second day started with the work done by the ACCC in its efforts to advocate for the prevention and combat of cartels, by building partnerships with other government entities such as anti-corruption and procurement agencies. Ms. Clare Nightingale also expanded on the work done more broadly on cartel

education for the business and wider community, culminating with the showing of the infamous Marker Video. The second case study was offered by Ms. Chichi Huang of the CTFTC of Chinese Taipei, firstly explaining how the Leniency programme operates and then providing analysis on a recent case involving aluminium and Tantalum capacitors used in electronic products such as PCs and mobile phones.

This was followed by a hypothetical case where the large assembly was divided into smaller groups of between 8 and 10 persons to discuss and try and solve a bid rigging case involving the possible operation of a cartel across regions. This lead to a lively participation by all the groups, and each was given the opportunity to share with the plenary an aspect of the case. The last two sessions of the day before the cultural tour of the beautiful Hanoi were the case study brought by Ms. JingJin of the NDRC (China) on a very recent bid rigging case in the shipping sector. Finally, the meeting chair Mr. Ruben Maximiano of the OECD closed the day's session by sharing the work that the OECD has done on the international cooperation in the context of cartel cases and investigations.

The third day was dedicated to more practical aspects of fighting cartel cases, in particular looking at how to investigate case and use of evidence. The first session of the day was led by Ms. Michelle Holmes, Assistant Director at the ACCC, who

worked through in detail the main steps when investigating and building a cartel case. This ranged from receiving a complaint or allegation, to the initial investigation and assessment to the management and planning of the in-depth investigation as well as to the evaluation of the evidence collected and the final recommendation to the decision makers. The next sessions were case studies offered by a number of participants: Ms. Rosanna Sarita an instructor at the KPPU who shared a case on the use of indirect evidence in the fuel surcharge markets, by Ms. Quianting Chen an officer at SAIC on a case of co-insurance, Ms. Serene Seet (Assistant Director at the CCS) with a close look at the Ball Bearing cartel, Ms. Sophia Khan of the Competition Commission of Pakistan and Mr. Jay Kishor Mishra Additional Director General of the Competition Commission of India presenting a number of recent cartel cases.

Before the second hypothetical of the workshop, Ms. Michelle Holmes led a session on executing a search and seizure operation, with many practical tips in all stages of the investigation as well as in the operation of dawn raids themselves. Allowing some of these techniques to be put into practice, in the second hypothetical case participants simulated the preparing of a dawn raid – a very lively exercise indeed!

The day ended with a presentation by Mr. Ruben Maximiano on the principles that should be considered by agencies, in particular those that are starting a cartel enforcement practice, when setting fines or sanctions; whilst the final session was a free discussion led by Mr. Ruben Maximiano on all of the aspects that had been analysed during the three days, with many participants asking questions and commenting on their practice in their respective jurisdictions.

Overall, this was a very successful event with many and enthusiastic participants showing great interest in ramping up their cartel enforcement know-how and practices.

Some OECD material on cartels used and referenced during the workshop:

- OECD Recommendation of the Council concerning Effective Action against Hard Core Cartels (1998)
- Prosecuting Cartels without Direct Evidence 2006
- Guidelines for Fighting bid rigging in Public Procurement (2009)
- OECD Recommendation on Fighting Bid Rigging in Public Procurement (2012)
- Ex-officio cartel investigations and the use of screens to detect cartels (2013)

CARTEL ENFORCEMENT IN VIETNAM

contributed by the Vietnam Competition Authority (VCA)

Mr. Phung Van Tranh

Deputy Director
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The Vietnam Competition Law (VCL) took effect from 1 July 2005. The main goals of the VCL are to protect competition, create and sustain a fair competitive environment. One of the advanced aspects is that this law applies to all types of enterprises including those producing, supplying products, providing public-utility services, enterprises operating in the State-monopolized sectors and domains, and foreign enterprises operating in Vietnam.

The control of competition restriction agreements is one of the very important parts of VCL which regulates cartels such as price fixing, market sharing, limiting output, bid rigging and other types of agreements. According to the VCL, bid rigging shall be prohibited as per se illegal. But price fixing, market sharing and limiting output are only prohibited when combined market share of participating enterprises makes up 30% or more in the relevant market. The sanction for cartel violators is the money fine of up to 10% of total turnover in the fiscal year preceding the year of violation. Regulated in VCL itself, the sanction is for enterprises or legal persons, not for individuals. But the good news for Vietnam is that the new criminal code of Vietnam enacted in 2015 provides for a “breaching the competition regulations” article which regulates criminal penalties for individuals for cartel behaviours for upto a 2 year maximum in prison.

In 10 years of enforcing the law, Vietnam competition agencies have detected and successfully investigated some cartel cases in some sensitive sectors such as insurance, construction, sea transportation industries. One of those cases is an insurance case which was initiated in 2008 by the VCA after receiving a notification that some insurance companies organised a meeting to fix insurance fees for vehicles by an agreement on coverage and calculation method for premium car insurance services. The collusive behaviour of insurance companies was concluded as agreement directly fixing price of goods and services which is regulated in article 8 and prohibited under article 9 of the VCL because the combined market share of participating enterprises was of more than 30% on the relevant market. Finally, the sanction of total money fine of 1.7 billion Vietnam Dong was made on the violators. This showed the will and effort of Vietnam competition agencies against cartels.

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