

# Asia-Pacific Competition Update

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**Competition Programme**  
**OECD KOREA Policy Centre**

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

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## Entry Point - Editorial Note

This first issue of our newsletter in 2017 presents our work since late 2016 and describes some key developments in our workshops as well as most relevant news items from across the Asia-Pacific region, brought to us from the competition authorities of the region .

The year of 2017 has started strong for the Competition Programme of the OECD/KPC with two events in April that have introduced novel elements to our workshops. Essentially these new features have reflected a demand we have identified to tailor our workshops, in some instances, to the particular needs of certain jurisdictions at key moments in their development. The success of these events, as measured by the feedback received from the participants, means that we will certainly look to do more of these events in the future.

These changes included organising a bilateral workshop with the Philippines Competition Commission (PCC) in early April 2017, in an event that was custom-made to the PCC's current ongoing drafting of guidelines on fines and on designing their leniency programme. The Philippines has a new competition law since 2015 and new competition agency in operation since March 2016 that is now ramping up its activity as the 2 year waiting period ends in August 2017. This has meant that the OECD/KPC's workshop was particularly timely as the agency has been hiring new staff that are avid to start implementing effectively the new competition rules. Should your authority wish to benefit from such tailored workshops please do be sure to let us know.

We also held the 7<sup>th</sup> Competition Workshops for Asia Pacific Judges in Manila, in cooperation with ASEAN and with GIZ which allowed to have many judges from the Philippines, as well as from all ASEAN countries to attend. This was one of the few judge events we have held outside of Korea and going to a particular jurisdiction that is currently having competition cases reaching its courts, certainly made for a very numerous, active and enthusiastic participation.

You will find more detail in the pages that follow on each of these two events.

On another note, I would like to share that the OECD has continued to work ever more closely with ASEAN in the last few months. The OECD was represented by the new Head of Competition Division, Mr. Antonio Gomes, in the ASEAN Competition Conference in Kuala Lumpur in Malaysia on 8<sup>th</sup> and 9<sup>th</sup> March themed "ASEAN@50, Managing Change in a Competitive ASEAN". The OECD has also been actively participating in the development of the capacity building roadmap, together with other development partners such as CLIP and GIZ.

### Exercise the mind – suggested readings

Given the constant requests I get for those avid to keep their reading on competition law and policy with a regional flavour, or at least with a link to what is more concretely going on in Asia, I would propose as some suggested reading this month the following two fascinating articles that you can find online but that will be part of the forthcoming book edited by B. Ong, "The Regionalisation of Competition Law and Policy in ASEAN, (Cambridge University Press).

The first is by Mr. Josef Drexel and is called the "Transplantability of the EU's competition law framework in the ASEAN region", which you may find here: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841161](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841161) . This is a well documented and argued article that examines whether and to what extent ASEAN members might wish to look to and attempt to transplant the more mature EU competition law framework in their road towards more ASEAN convergence in their competition laws and policy.

The second article is by Prof. Alison Jones, "Antitrust Appraisal of Vertical Agreements in the ASEAN Economic Community: Proposals for a More Harmonised Approach" and looks at the contentious area of vertical agreements. It draws upon the experience in the US and EU to consider whether, and if so how, the approach to vertical agreements under the competition law systems of the ASEAN member states should be reformed or developed to ensure a more coherent policy in their goal of harmonising competition law and policy. It looks for instance at whether ASEAN should follow the EU policy towards resale price maintenance and restraints on cross-border trade. You may access the paper here: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2867005](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2867005)

Ruben Maximiano



# News from Asia-Pacific Competition Authorities\*

\* News items were provided by respective Competition Authorities and their own responsibility

## AUSTRALIA



### Flight Centre Travel Group

In December 2016 the ACCC won a High Court appeal in relation to Flight Centre's attempt to induce three international airlines to enter into price-fixing arrangements between 2005 and 2009 in relation to air fares offered online by the airlines that were cheaper than those offered by Flight Centre. The High Court found the relevant market to be 'for the sale of international airline tickets', and importantly also found that Flight Centre and the airlines competed in that market. This was found to be the case notwithstanding that Flight Centre was an agent for each of the airlines. The outcome follows a decision made by the Federal Court in favour of the ACCC in December 2013, which Flight Centre successfully appealed in the Full Court of the Federal Court in July 2015. The ACCC then appealed to the High Court. The matter will return to the Full Federal Court in 2017 for the determination of the penalty appeal and cross-appeal brought by the parties.

### Australia and New Zealand Banking Group and Macquaries Bank Limited

In December 2016 the Federal Court imposed penalties on Australia and New Zealand Banking Group Limited (ANZ) and Macquarie Bank Ltd (Macquarie) for attempted cartel conduct after action by the ACCC. The court imposed penalties of \$9 million against ANZ in respect of its admission that it engaged in ten instances of attempted cartel conduct in contravention of the Competition and Consumer Act (CCA), and \$6 million against Macquarie in respect of its admission that it engaged in eight instances of attempted cartel conduct in contravention of the CCA. The banks were also ordered to contribute to the ACCC's costs. The ACCC estimates that the annual MYR NDF turnover in Australia was approximately \$9 to 10 billion.

## CHINESE TAIPEI



### The Fair Trade Commission is Under New Leadership

The FTC's new Chairperson, Dr. HUANG, Mei-Ying, and Vice Chairperson, Dr. PERNG, Shaw-Jiin, along with two new commissioners, Ms. KUO, Shu-Jen, and Dr. HONG, Tsai-Lung took office on February 1, 2017.

According to the Organic Act of the Fair Trade Commission, the FTC shall consist of seven full-time commissioners to be appointed by the Premier and approval of the Legislative Yuan for a four-year staggered term. Another three incumbent commissioners, Dr. YEN, Ting-Tung, Dr. CHANG, Hung-Hao and Dr. WEI, Hsin-Fang, were appointed on 1 February 2015.

Chairperson HUANG, Vice Chairperson PERNG, Commissioner KUO and Commissioner HONG have excellent academic contributions and rich experiences in legal practice and public services. This is the first time for the FTC to be led by a Chairperson with an economic background.

In her inauguration speech, Chairperson Huang emphasized that the FTC will improve cross-departmental coordination and collaboration with other government agencies to jointly maintain competition, and strengthen investigation power for more effective enforcement. The FTC will also closely study developments and potential competition issues in the digital economy industry, and continue to reinforce international cooperation with other competition authorities.

Before Chairperson HUANG's appointment, she previously served as Commissioner at the FTC from 2005 to 2010. Since 2000, she has taught econometrics, antitrust economics and industrial economics at the National Taipei University.

(Back row: Ms. Kuo, Shu-Jen, Dr. Wei, Hsin-Fang, Dr. Hong, Tsai-Lung.  
Front row: Dr. Yen, Ting-Tung, Chairperson, Dr. Hung, Mei-Ying, Vice-Chairperson,  
Dr. Perng, Shaw-Jiin, Dr. Chang, Hung-Hao)



## JAPAN



### Conclusion of Cooperation Arrangement with the Authority for Fair Competition and Consumer Protection of Mongolia (March 15, 2017)

The Japan Fair Trade Commission (JFTC) concluded Cooperation Arrangement with the Authority for Fair Competition and Consumer Protection (AFCCP) in Tokyo. Mr. Kazuyuki Sugimoto, the Chairman of the JFTC and Mr. Lkhagva Byambasuren, the Chairman of the AFCCP signed the arrangement. The purpose of the arrangement is to establish a framework for constructive cooperation between both competition authorities and provide for the details concerning the implementation of the Implementing Agreement pursuant to Agreement between Japan and Mongolia for an Economic Partnership.

## Warning to the Company Dealing European Government Bond (March 15, 2017)

The JFTC issued a warning to the company dealing European government bonds (Deutsche Securities Inc.). In this case, the company were likely to be in violation of prohibition of the section 3 (unfair restraint of trade) of the Antimonopoly Act. The company exchanged with other company information on the customer inquiries, price, etc. with regard to European government bonds, by using the chat function, etc. on the electronic trading platform. It also designated a successful bidder and enabling the bidder to win the bidding for the certain transaction of European government bonds.

## Release of the Report by the Study Group on the Antimonopoly Act (April 25, 2017)

The JFTC released the report which the Study Group (Study Group on the Antimonopoly Act) submitted. The Study Group is consisted of experts from various sectors, in order to reconsider the surcharge system from professional views and the Study Group has held 15 meetings since its first meeting in February 2016.

Based on the Study Group's report, the JFTC will consider specific proposals of system revisions including ones on the surcharge system. As a reference for its consideration, the JFTC launches a public consultation on the matters addressed in the Study Group's report to seek specific ideas and useful information from the various interested parties.

## KOREA



### Imposing a Penalty Surcharge (1.03 trillion KRW) on Qualcomm Incorporated

The Korea Fair Trade Commission has decided in the plenary session held on Wednesday, Dec.21.2016 to impose remedies along with a penalty surcharge amounts to 1.03 trillion KRW on Qualcomm Incorporated, QI and its two affiliated companies, which is a global modem chipset maker and patent-licensing operator for the abuse of market dominance.

Qualcomm is a Standard Essential Patents (SEP) holder that declared the FRAND commitment to SSOs such as ITU and ETSI regarding mobile communications standard technology such as CDMA, WCDMA and LTE. Qualcomm is also a vertically integrated monopolistic company that manufactures and sells modem chipsets.

The KFTC found that Qualcomm engaged in the following conducts in violation of the FRAND commitment:

First, notwithstanding requests from rival modem chipset makers, Qualcomm refused or restricted the licensing of mobile communications SEPs that are essential in manufacturing and selling the chipsets in market.

Secondly, Qualcomm coerced handset makers to sign unfair license agreements by linking the chipset supply with patent license agreements, using its market position as a leveraging tool in its negotiations and circumventing the FRAND commitment.

Third, Qualcomm only offered the comprehensive portfolio license to handset makers and forced unilaterally-decided licensing terms without undergoing a reasonable value assessment process. Also, it coerced handset makers to accept unfair agreements such as making them license their patents for free.

After completing the investigation on the illegal conduct described above, the KFTC sent an examination report to Qualcomm, and held a total of seven hearings including the two regarding the consent decree and conducted an in-depth review of the case since last July. Moreover, the KFTC reviewed the case from various angles by inviting not only Korean companies such as Samsung and LG but also other global ICT companies including Apple (US), Intel (US), Nvidia (US), Media Tek (Chinese Taipei), Huawei (China) and Ericsson (Sweden) to the hearings.

The measures are designed to turn ‘an exclusionary ecosystem that allows Qualcomm to be an exclusive beneficiary’ into ‘an open ecosystem where any industry player can enjoy the incentives of innovation that it has achieved’. It is expected that this imposing of measures serve as the trigger to restore the fair competition in the mobile communications industry.

## VIETNAM



### The Reform of the Competition Law in Vietnam

In July 2016, the National Assembly XIV of the Socialist Republic of Vietnam approved the Project on Competition Law (amended) in the 2017 Agenda on Law and Ordinance Construction.

Currently, the Ministry of Industry and Trade takes the lead in building the Draft Law with the following key amendments and supplements:

- Expand the governing scope of the law - the amended Competition Law shall also cover anticompetitive acts that are conducted outside the territory of Vietnam but shall or might have anticompetitive effects on Vietnam’s market.
- Expand the subjects of application which shall also cover domestic and foreign organizations and individuals including State agencies, public service institutions and industry associations in addition to business organizations and individuals.
- Apply “rule of reason” approach regarding anticompetitive agreements and inclusion of the leniency program to enhance detection, investigation and settlement of anticompetitive agreements.
- Supplement other criteria to assess market power of enterprises in addition to the current criterion – market share.
- Control economic concentrations based on assessing competitive impacts instead of a *per se* prohibition based on the combined market share threshold of involving parties (like the current law). At the same time, the amended law shall cover criteria to determine notification threshold in economic concentration cases including the criterion on the total revenue in Vietnam and the value of the economic concentration transactions.
- Remove the illegal multilevel sales act from the governing scope of unfair competition acts.
- Conduct institutional reform to enhance the legal status of the competition agency which shall be the National Competition Commission under the Government.

The Draft is now publicized on websites of the Government and the Ministry of Industry and Trade and available for comments and remarks from the business community as well as relevant agencies/organizations before refinement and submission to the Government for opinions this July.

# Workshop on Information Exchange: Efficiency Enhancing or Cartel in Disguise?

Seoul, Korea, 6 - 8 December



The OECD/KPC held a workshop on information exchanges. The workshop highlighted different forms of information exchange: formal and informal exchanges, direct and indirect exchanges and the unilateral disclosure of information. Information exchanges can be observed in horizontal and vertical relationships and in different organisational settings. We investigated which forms of information exchange warrant closer scrutiny by competition authorities.

The OECD/KPC workshop in Seoul, Korea on December 6 - 8 on "Information Exchange: Efficiency Enhancing or Cartel in Disguise" brought these issues into focus. Participants included

competition enforcers from countries across Asia, including Chinese Taipei, Hong Kong, India, Indonesia, Japan, Malaysia, Mongolia, Pakistan, the Philippines, Singapore, Thailand, and Vietnam. Panellists included experts from the Korea Fair Trade Commission, the Hanyang University School of Law, Korea, the U.S. Department of Justice, the UK Competition and Market Authority and the Japan Fair Trade Commission.

The workshop opened with welcoming remarks from Director General Daewon Hong of the OECD/KPC. The substantive presentations of the first day started with an introductory presentation by Ms. Sabine Zigeliski for the OECD. Ms. Kristen C.





Limarzi for US Department of Justice continued the introductory part of the day by presenting on the general experience the DOJ had made over the years of enforcement and the most important learnings.

The second part of the day started with a hypothetical case exercise, discussed in small groups. The case presented an information exchange and participants were asked to identify problematic parts of the exchange and to discuss possible steps in an investigation. Ms. Hui Chan Yeo for the Singapore Competition Commission presented the first country case study of the seminar. It introduced the legal framework in Singapore

and discussed an information exchange between ferry operators. The day ended with a comprehensive overview of the Korean experience. Mr. Choong-sik Yang of the KFTC and Prof. Ho Young Lee of the Hanyang University School of Law provided the legal background and the most prominent decisions and case law. They showed the difficulties a jurisdiction may face if the concept of a concerted practice is not included in the law and where information exchanges can only serve as indirect evidence for proving an agreement.

The second day opened with a presentation by Mr. Junichi Yanagita of the Japan Fair Trade Commission. He presented





the legal situation in Japan and leading cases. Following this presentation Mr. Arshad Javed for the Competition Commission of Pakistan gave insights into Pakistan's legal background and illustrated the enforcement practice with recent case examples. The UK experience was outlined with a case study by Ms. Francisca Mendia-Lara for the UK Competition and Market Authority. This case also illustrated the CMA's wide use of advocacy tools.

The afternoon started again with a hypothetical case exercise. The participants worked on a case scenario and were again asked to identify potential competition problems and investigative steps. As the case was based on a real European Case, the bananas case, Ms. Sabine Zigelski presented a summary of the relevant EU jurisprudence on information exchanges. The day concluded with another presentation by Ms. Kristen C. Limarzi on information exchange cases involving the buyer side, between intersellers and a TV case.

On the last day of the seminar Ms. Francisca Mendia-Lara presented the UK case law on indirect information exchanges between competitors, ABC or hub & spoke type infringements. She

outlined the standard of proof that UK courts have established and referenced enforcement cases.

The seminar finished with a third hypothetical case. The participants were asked to discuss a piece of evidence that clearly indicated some form of hub & spoke exchange intention. Ms. Sabine Zigelski finished this session with a short case presentation of a German case and illustrated why and how resale price maintenance cases can often be found in enforcement action against hub & spoke practices.

Throughout the seminar differences but mostly parallel characteristics of dealing with information exchange cases were pointed out by the experts. Participants were strongly reminded that information exchanges can have efficiency enhancing aspects and that any enforcement action needed to balance pro- and anticompetitive effects of the observed information exchanges.

Ms. Yeo Hui Chuan presented on information exchange and its implications during the OECD workshop on information exchange in Seoul in December 2016. She started off by explaining when the exchange of information is a concern, for example when information relating directly to prices charged is exchanged. She however highlighted that circulation of historical information is unlikely to have an appreciable adverse effect on competition, and also highlighted instances where exchange of information may enhance competition, for example in relation to new technologies.

## Presentation by CCS

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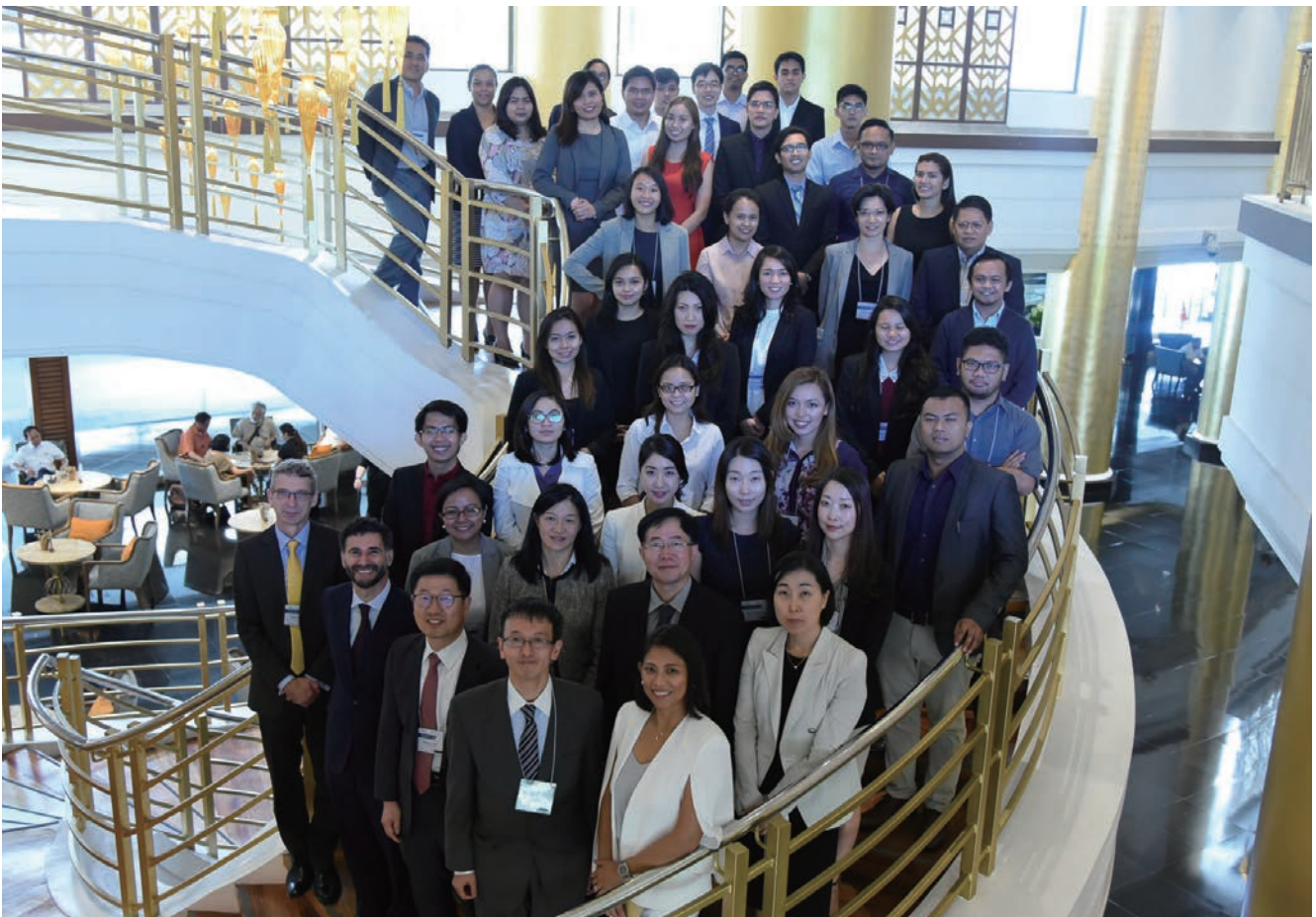
Ms. Yeo further explained the net economic benefits test under Singapore's competition law regime, and also briefly outlined the factors, set out in *CCS Section 34 Guidelines 2016*, which are taken into consideration when assessing the likelihood of appreciable adverse effect on competition. Ms. Yeo highlighted that unilateral disclosure may also constitute a concerted practice between undertakings to restrict competition unless the undertaking receiving the information responds with a clear statement that it does not wish to receive such information. It was noted that under *CCS Section 34 Guidelines 2016*, the circulation of purely historical information, or the collation of price trends is unlikely to have an appreciable effect on

competition, particularly if the exchange forms part of a scheme of inter-business comparisons which is intended to spread best business practice, or if the information is collected, aggregated and disseminated by an independent body to both consumers and businesses.

The presentation ended with Ms. Yeo going through the Ferry Operators cases, where two ferry operators engaged in the exchange and provision of sensitive and confidential pricing information related to ferry tickets sold to corporate clients and travel agents for two routes between Singapore and Indonesia. CCS found that the ferry operators has engaged in concerted practices that had the object of restricting or distorting competition within Singapore, and that the exchange of future pricing information which is not readily observable is particularly damaging to the competitive process between the ferry operators. The exchanges significantly reduced the uncertainty of each party's actions, and reduced the incentives to price competitively.

# Bilateral Workshop with Philippines Competition Commission

Manila, Philippines, 3 - 4 April 2017



On the 3<sup>rd</sup> and 4<sup>th</sup> of April 2017, the OECD/KPC Competition Programme held a workshop in Manila, the Philippines dedicated to providing capacity building to the recently created Philippines Competition Commission. Considering that the transitory period of two years following the adoption of the New Competition Act in 2015 will come to an end in August this year, the Philippines Competition Commission (PCC) is currently undertaking the

drafting of guidelines on Fines as well as designing its leniency programme. In that context, the OECD/KPC provided a workshop that was dedicated to these two topics with the view of providing valuable inputs into their drafting process.

To do so the OECD/KPC counted on the commitment and the kind participation of the Mr. Choong Soo Jeon of the Korea Fair Trade Commission (KFTC), Ms. Akari Yamamoto and Mr.



Hiroshi Nakazato of the Japan Fair Trade Commission (JFTC), Bruce Cooper of the Australia Consumer and Competition Commission (ACCC), and Winnie Ching of the Competition Commission of Singapore (CCS). All the agencies present and their representatives had solid backgrounds in the topics and this allowed for a wide diversity of views and a wealth of experience that was crucial for a very rich discussion.

This workshop had approximately 40 participants of competition officials from the Philippines, including all those involved in the PCC in the development and drafting of the guidelines. Before the event the PCC had sent drafts of their work to date as well as a number of questions to be discussed, which allowed the presentations of the speakers to be more targeted to the specific issues, questions and concerns of the PCC.

The event opened with introductory speeches by Director General Soohyun Yoon of the Korea Policy Centre, Ms. Stella Quimbo (Commissioner of the PCC) and Mr. Ruben Maximiano (Senior Competition Expert at the OECD). Entering into the substantive part of the discussions, both days had a similar organisation: an overview by the OECD of the international best practices, drawing upon the work of the OECD in the last few years, and presented by Mr. Maximiano, then sessions lead by each of the competition authorities present (KFTC, JFTC, ACCC, CCS), followed by a final open discussion and Q&A session.

The first day was dedicated to Leniency and presenters discussed the current functioning of their programmes, but also importantly discussed their practical experiences in applying them, sharing things that have worked well as well as those





that needed to be tweaked to improve results. This learning-by-doing sharing provided useful pointers for the PCC. Topics that were discussed during the individual sessions as well as during the final discussions included the meaning in practice of full and continuous co-operation, the links between leniency and criminal liability, and between leniency and private enforcement.

The second day was dedicated to fining and other sanctions, and after the OECD overview, the PCC made an excellent presentation on its current draft of the guidelines. All the sessions by each one of the visiting agencies as well as the final discussion reviewed the experiences in the method of calculating fines and the issue of relevant turnover and discretion of the agency, parental liability, inability to pay allegations, amongst others.

This was a novel workshop that worked very well indeed, the discussions were detailed and lively, with the PCC staff fully engaged. The work before the event was crucial to its

usefulness as it allowed the speakers to have an understanding of the ongoing work of the PCC and then to provide comments throughout the workshop.

#### Some OECD and ICN material on fines and leniency used and referenced during the workshop:

- OECD Recommendation of the Council concerning Effective Action against Hard Core Cartels (1998)
- OECD Sanctions in Antitrust Cases (2016)
- OECD Policy Roundtable 2012 – Leniency for Subsequent Applicants
- ICN Anti-Cartel Enforcement Manual Chapter 2 – drafting and implementing an effective leniency policy

# 7<sup>th</sup> OECD/KPC Competition Workshop for Asia-Pacific Judges

Manila, Philippines, 5-7 April 2017



In April 2017, the OECD/KPC held in Manila (the Philippines) a workshop for judges dedicated to understanding the economic principles underlying competition cases, the methods used by economists and their application in cases before the courts.

This event was organised in close contact with the ASEAN secretariat and as a contribution to one of the goals of the ASEAN Competition Action Plan 2016-2025, and was co-sponsored with GIZ. All of ASEAN Member States were present as well as judges from Hong Kong and Pakistan. The fact that the event took place

in the Philippines allowed for a wide participation of the Filipino judiciary, of which many were judges from the Philippines Court of Appeal, including Presiding Justice Andres Reyes.

The goals of the Workshop were to engage in a discussion amongst judges in the Asia - Pacific region and beyond as well as between judges and the experienced economists to allow judges to become more familiar with economic concepts and theories as well as to be more confident when presented with economic based arguments in the context of competition cases.



The panel of speakers in this event included judges from OECD member countries, a senior *référéndaire* (law clerk) from the EU and two experienced economists. The panel was composed of Justice Alan Robertson, of the Federal Court of Australia, Mr. Donghwan Shon, Presiding Judge at the Uiejongbu District Court of Korea and Mr. Vivien Terrien (*référéndaire* for Marc Jaeger, President of the General Court of the European Union). The two economists were Mr. Miguel de la Mano, former Deputy Chief Economist at the European Commission and now at Compass Lexicon, and Ms. Rhonda Smith, former Lay member of the High Court of New Zealand. These two well-known economists have ample familiarity with presenting and/or dealing with economic evidence in the context of court proceedings.

The workshop was structured so that the main economic concepts and principles were shared on the first day of the event. To start the day Mr. Ruben Maximiano of the OECD put Competition Law and Policy into the wider economic and business practices context. Mr. Maximiano analysed the mechanisms of competition and well functioning markets as well as its benefits not only for the specific markets but also for the wider economy. He then also considered anti-trust and restrictive trade and commercial practices, and the central role of market power as a distinguishing factor between anti-trust and such other laws, that are perhaps more familiar to judges in certain jurisdictions. This allowed for the introduction of the most important economic principles underlying competition law







which is the relevant market, market power and anti-competitive effects and efficiency benefits.

The rest of the day were for the two expert economists to expand on the introductory session and to dive deep into the concepts with four sessions: two on relevant markets followed by two further sessions on the concept of significant market power and dominance. These sessions were organised so that Ms. Rhonda Smith would give a theoretical back drop for the principles under discussion that were then complemented with practical application in the context of real cases, by Mr. Miguel de la Mano.

The second day started with the application and discussion of the concept of market definition with a hypothetical case scenario of a procurement process by hospitals of pharmaceutical products, in a case developed by Ms. Rhonda Smith. Participants were divided into small groups with each group having to develop arguments for the market definition, a session that developed into a lively discussion of some of the concepts discussed during the previous day's sessions. The last session on economics

was also driven by Mr. Miguel de la Mano that discussed the economics underlying merger control.

The second part of the workshop was dedicated to the more legal questions of integrating economic principles and evidence into the court decisions, first with two sessions dedicated to an in depth examination of the EU court's practice by Mr. Vivien Terrien, of the EU General Court. In a fascinating overview of how the EU courts have developed their review of the European Commission's decisions, starting with the standard of review in competition cases, and then discussing in detail the concepts of restriction by object and by effect and the role that economics and economists play. One of the takeaways from that session is that, whilst important as evidence, economics cannot take the place of legal assessment and adjudication.

This was a point also stressed clearly by Justice Robertson of the Federal Court of Australia in two captivating sessions where he gave





a very clear account and discussion of how economic evidence is taken into account in Australia, with many practical pointers and discussion of cases at the Federal Court in the last few years.

The last session of the second day was offered by Judge Mr. Donghwan Shon, Presiding Judge at the Uiejongbu District Court of Korea, analyzing a number of different cases where evidence was evaluated and considered by the courts in Korea in the context of abuse of dominance cases.

The last day opened with a session set to discuss a hypothetical merger decision by a Competition Authority. For this session, the plenary was broken up into 4 smaller groups where judges discussed amongst themselves the decision of the Competition Authority as well as written economic evidence that was brought before them. After analysing this evidence the judges were brought into a plenary session where they called upon an economic expert that was “hired” by the Court to offer advice and explanations on a number of economic issues and questions raised by all judges present. A very interactive and interesting sessions, allowing judges to simulate the questioning of an economic expert – a role that was well represented by Mr. Miguel de la Mano.

The final session was lead by Mr. Ruben Maixmiano of the OECD and consisted in a discussion on how judges learn, drawing upon the different experiences from the various countries present, both from OECD members and non-member jurisdictions. It became very clear from the discussion that judges are avid for more workshops on competition law and policy and that more work needs to be done to give judges access to such types of training and fora.

Overall, a very highly rated event where judges were very engaged in interesting discussions amongst themselves and with the panel members.



# OECD Competition Committee Meetings, 28 - 30 November 2016

## Roundtable on Innovations and Competition in Land Transport

Competition agencies are likely to face a number of challenges brought about by recent technological developments in land transport, in both passenger and freight markets. However, these developments also provide an opportunity for competition agencies to intervene through their enforcement and advocacy powers in order to promote greater competition and maximise consumer welfare. The roundtable discussion provided an overview of developments in these sectors, of the ways in which regulatory frameworks will have to adapt, and of the antitrust issues that competition authorities may have to face, and the role they may have able to play, in this environment.

**Link:** <http://www.oecd.org/daf/competition/competition-and-innovation-in-land-transport.htm>

## Competition Assessment: Using Empirical Evidence

This session discussed the use of empirical data in competition advocacy to improve the regulatory environment. The discussion benefitted from a presentation about a recent initiative by the Canadian Competition Bureau to provide guidance to regulators to ensure that legitimate policy objectives are met, while at the same time providing maximum scope for market forces to allow the benefits of competition to be achieved.

**Link:** <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04141.html>

## Roundtable on Geographic Market Definition

The Roundtable on Geographic Market Definition focused on the definition of geographic markets that are national, or broader, in scope. Defining the geographic scope of a market that may have national or broader borders can be challenging for competition agencies, especially in merger reviews and abuse of dominance cases. This topic is relevant in light of several long-term market trends, including globalisation, trade liberalisation and digitalisation. In addition, improvements in international shipping and door-to-door delivery networks for consumers are increasing the reach of suppliers at the retail and wholesale levels. These trends can be expected to increase the complexity of geographic market definition. The aim of the roundtable was to identify challenges faced by agencies with respect to delineating markets that may have national or broader borders, and discuss how those challenges are being overcome. The discussion also touched on current approaches in terms of evidence and analysis (e.g. pricing patterns and import data) as well as some areas of controversy, such as supply substitution.

**Link:** <http://www.oecd.org/daf/competition/geographic-market-definition.htm>

## Roundtable on Agency Decision Making in Merger Cases

The Roundtable discussed issues that arise when agencies are deciding whether to prohibit a merger which risks generating anti-competitive effects. In their decision making, competition agencies consider whether the extent of harm justifies prohibiting the transaction or whether a conditional clearance of the merger with remedies is sufficient to prevent the harm. Delegates explored when sufficient harm is established and a prohibition decision or the imposition of remedies is justified. The discussion aimed to provide insights into the factors that competition authorities consider when making their decision.

**Link:** <http://www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm>

## Hearing on Big Data

The use of “Big Data” by firms for the development of products, processes and forms of organisation has the potential to generate substantial efficiency and productivity gains, for instance by improving decision-making, forecasting and allowing for better consumer segmentation and targeting. However, acquiring the necessary size to benefit from economies of scale and scope and network effects related to Big Data may potentially lead to monopoly positions, further enhanced through acquisitions of new entrants with their own data sets, or providers of new services that do not at first glance appear to be in the same market. These issues throw up the question of the role for antitrust enforcers in these markets. This session discussed the implications on competition authorities' work and whether competition law is the appropriate tool for dealing with issues arising from the use Big Data.

**Link:** <http://www.oecd.org/daf/competition/big-data-bringing-competition-policy-to-the-digital-era.htm>

## Roundtable on Price Discrimination

Price discrimination is common in many different types of markets, whether online or offline, and even among firms with no market power; it usually reflects the competitive behaviour that competition policy seeks to promote (either by incentivising firms to serve more consumers, or by increasing the incentive to compete) and hence has no anti-competitive purpose or effect. However, price discrimination can sometimes be a concern, for example if it has exploitative, distortionary or exclusionary effects. In recent years, the scope for near perfect price discrimination in the digital economy appears to have grown, and there has been debate as to whether the rules and case law that apply to distortionary effects of price discrimination have an economic basis. This roundtable offered an opportunity to look at the practice of agencies and discuss how jurisdictions in which exploitative or distortionary price discrimination is an offence should respond to these developments.

**Link:** <http://www.oecd.org/daf/competition/price-discrimination.htm>

## Review of Policy Recommendations to Ukraine by OECD and other International Organisations

Delegates discussed the status of implementation of previous OECD, UNCTAD and EC recommendations on competition law and policy in Ukraine in the light of recent political, economic and social changes. Peer reviewers debated the progress in the implementation of such recommendations and the remaining open issues as well as discussed further implementation strategies and reform priorities with representatives of the Anti-Monopoly Committee of Ukraine.

# OECD Global Forum on Competition, 1 – 2 December 2016

## Promoting Competition; Promoting Human Rights

Competition law enforcement depends on an effective system of human rights, most obviously the right to property, the right to contract and rights to due legal process. Policies promoting competition between providers can also be effective in supporting human rights more broadly, for example through providing checks on the power of corporations, as well through helping fight corruption in government. However, economic competition itself is occasionally portrayed as harming human rights along with social values, for example through social dumping, or environmental damage. Furthermore, some policies intended to safeguard human rights depend on agreements between suppliers - agreements that might be in conflict with competition law (or which might at the least raise the risk or suspicion of being in such conflict). The growing importance of responsible business conduct further brings into question how business can act together to promote RBC principles while also respecting fundamental competition law and policies.

The session therefore brought together a cross-section of experts concerned with either different aspects of economic development, law or human rights into dialogue, to understand better the varying perspectives and to explore the ways in which any apparent conflicts between their objectives can be resolved.

**Link:** <http://www.oecd.org/competition/globalforum/promoting-competition-protecting-human-rights.htm>

## The Role of Market Studies as a Tool to Promote Competition

Market studies provide competition authorities with an in-depth understanding of how sectors or markets work, and are usually conducted whenever there are concerns about the functioning of markets. This tool is often used to identify problematic markets and to recommend areas of improvement. The use of market studies varies widely across jurisdictions and is characterised by significant conceptual and procedural differences. This session discussed the results of a recent survey by the OECD on market studies, summarising similarities across jurisdictions, significant differences as well as their pros and cons. It aims to identify practices that competition authorities can consider for use in future market studies.

**Link:** <http://www.oecd.org/competition/globalforum/the-role-of-market-studies-as-a-tool-to-promote-competition.htm>

## Independence of Competition Authorities

Agency independence is often taken to be a key element of effective enforcement of competition rules. However, given that national competition agencies (NCAs) face different sets of political, legal, administrative, economic and cultural conditions, there is no “one size fits all” model that can guarantee formal or informal independence and insulate all NCAs against political pressures. Nevertheless, it is widely recognised that some general

principles exist which could provide NCAs with a certain level of protection and freedom of manoeuvre. In addition to legal and structural safeguards, the session also highlighted the importance of effective enforcement and advocacy of an NCA to enhance independence. The session also examined more specific issues such as appointment and dismissal of top management, the status of the agency, resources, priority-setting and supervision, and objectives of competition law.

Link: <http://www.oecd.org/competition/globalforum/independence-of-competition-authorities.htm>

## Sanctions in Antitrust Cases

Competition law offenders are often subject to fines (civil, administrative or criminal). Fines impose a cost on those companies or individuals undertaking illegal anticompetitive conduct. Breaking competition laws is profitable if it goes

undetected. This full-day session looked at antitrust fines and other sanctions imposed in different jurisdictions. Antitrust fines play a role in deterrence by making anticompetitive conduct less profitable. The amount of fines has dramatically increased in recent years while competition authorities have adopted or revised their legislation or guidelines on fines. However, competition authorities often face several problems such as collecting fines and inability to pay when imposing them. In order to increase deterrence, some argue that higher fines are necessary while others maintain that there is a need to impose other forms of sanctions. Led by a panel of experts, this session provided an overview of how competition authorities impose antitrust fines and alternatives in order to achieve deterrence, punishment, compensation and other objectives, addressing the problems that can arise at different stages of imposing antitrust fines.

Link: <http://www.oecd.org/competition/globalforum/competition-and-sanctions-in-antitrust-cases.htm>



# OECD/KPC Competition Programme 2017

April 3-4

Philippines

## Bi-lateral Workshop: Fines and Leniency

Development of an enforcement regime for administrative fines and penalties, leniency, and remedies. The workshop would focus on helping the PCC to develop its own Guidelines for Fines and Penalties, Leniency, and Remedies

April 5-7

Philippines

## Judge Event: Market Definition and Significant Market Power as Cornerstones of Competition Law

This event will examine all the legal and economic aspects of a relevant product and geographic market as well as the legal test of significant lessening of competition (or similar) used in jurisdictions in Asia, all across competition law instruments (mergers, agreements and abuse of dominance). We will analyse:

- Law and economics of abuse of dominance
- Exclusionary practices
- Recent developments

May 23-25

Australia

## Sector Event: Competition Rules and the Pharmaceutical Sector

This event will analyse the role of competition law in the pharmaceutical sector by looking at cases that deal with:

- Merger control
- Distribution agreements
- Pay for delay agreements
- The Role of IP and Regulation
- Relationship with government and other regulators

September 13-15  
(TBD)

Mongolia

## In-country Event – Going after Bid Rigging

Public procurement is very important all over the world and in Asia, and the bid rigging can significantly increase prices of goods and services, diverting public money that could be best used in public services to the pockets of cartelists. Fighting Bid Rigging is therefore a top priority for many competition agencies. To equip agencies to better fight bid rigging, this workshop will focus on:

- Competition policy and economic development
- Detecting and investigating bid rigging
- Cooperation with procurement officials
- Leniency and sanctions in bid rigging cases

October 24-27  
(TBD)

India

## In-country Event

### TBD (Workshop on Best Practices in Cartel Procedures)

The seminar could provide training on:

- the preparation and execution of dawn raids,
- the handling of evidence
- forensic IT techniques and team work in complex cartel case investigations

November 14-15

Korea

## Market Studies Workshop

These are studies used to gaining understanding of how sectors and markets work and identifies any competition issues and possible recommendations, advocacy and SOEs.

Emphasis of the workshop on

- designing and setting up market studies
- sharing international best practices



# Asia-Pacific Competition Update

## SEND US YOUR NEWS

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

## SNS

We use SNS to share the relevant articles and photos before and after a workshop. Please join us.

- OECD Network Environment: [www.oecd.org/one](http://www.oecd.org/one)
- Facebook: OECD-DAF/Competition Division (closed group, contact [jhoh@oecd-korea.org](mailto:jhoh@oecd-korea.org).)
- Twitter: OECD/KPC COMP

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