

# Asia-Pacific Competition Update

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

## IN THIS ISSUE



Entry Point - Editorial Note p. 3



News from Asia-Pacific Competition Authorities p. 4-7



Competition in the Pharmaceutical Sector p. 8-10



Going after Bid-Rigging Cartels p. 11-12



OECD Competition Committee Meetings p. 13-14



Fighting Cartels in Public Procurement: Policy and Practice p. 15-18

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

As we advance into the last stretch of 2017, this is a particularly busy period for the OECD/KPC Competition Programme, with two workshops that will take place in October and November and the finalisation of our Guidebook of Competition Laws in Asia. This research publication will be launched in the meeting of the Asian Competition Authority leaders that will take place in Paris during the Global Competition Forum week. As to the OECD/KPC workshops, first up will be an event focused on practical issues in the cartel investigations that will take place in India and is co-hosted by the Competition Commission of India, then a workshop on market studies, a topic that the OECD has been working on over the last few years and where we will continue to develop in the years to come.

The Competition Committee and the Global Competition Forum of the OECD will be organising a week of meetings in December in Paris that will discuss numerous topics that are at the forefront of the discussions in antitrust across the OECD membership but also in many other jurisdictions across the globe. Certainly one of the most important competition events and usually has the presence of more than 90 jurisdictions. Of particular note for our readership will be the session on small and developing economies agencies, as well the peer review of the Viet Nam Competition Law and Policy. There will also be a session dedicated to the judicial perspectives on competition law and the role of competition in public markets. Naturally, our papers and the contributions received will in due time be placed online on our website: [www.oecd.org/competition](http://www.oecd.org/competition).

As to this edition of the newsletter, and as promised, this edition covers not only our usual items of news from across the Asia Pacific region as well as a description of the workshops that have taken place between May and

September this year, but also as a special feature an article on Bid Rigging. This is a type of cartel that is a priority for many jurisdictions in Asia as it directly affects the public purse by making products more costly for the government and ultimately the taxpayers. The OECD has done a lot of work in this area, issued guidelines and recommendations, as well has undertaken many different projects in several countries across the world, helping governments to ensure more competitive public procurement. Drawing upon all of these experiences I have asked Despina Pachnou my colleague at the OECD to share with us some of lessons we have learned from undertaking such projects. I hope this can serve jurisdictions across the Asia Pacific region to undertake their reviews of public procurement processes to make them better and more effective, either on their own or with the help of the OECD.

You can find out more about our Bid Rigging work at: <http://www.oecd.org/competition/fightingbidrigginginpublicprocurement.htm>



Have a great end of 2017!

**Ruben Maximiano**



# News from Asia-Pacific Competition Authorities\*

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

## HONG KONG



### Competition Commission Hong Kong Files Two Cases within 20 Months of Full Operation

Since the Competition Ordinance (Ordinance) came into full effect in Hong Kong on 14 December 2015, the Competition Commission (Commission) has officially entered the enforcement phase of its operation achieving a number of milestones over the last 20 months.

In March 2017, just 15 months after full commencement of the Ordinance, the Commission commenced its first proceedings in the Competition Tribunal (Tribunal) against five technology companies for alleged bid-rigging. The proceedings concern a tender related to the supply and installation of a new IT system for a social service organisation.

In August 2017, the Commission brought its second case to the Tribunal alleging that 10 construction and engineering companies have engaged in market sharing and price fixing practices in relation to the provision of renovation services of a public rental housing estate.

The Commission is seeking remedies including pecuniary penalties and a declaration that each party has contravened the First Conduct Rule of the Ordinance in both cases.

Apart from active enforcement actions, the Commission also published its first Block Exemption Order (Order) in August 2017 for vessel sharing agreements (VSAs) between liner shipping companies, subject to certain conditions. The Order was issued in light of the Commission's assessment of the economic efficiencies generated by VSAs and it has also taken account of the submissions received in the various consultations earlier. The Order does not cover voluntary discussion agreements (VDAs) as it was not demonstrated that the relevant VDA activities meet the terms of efficiency exclusion. The Order, which will remain in effect for five years, was issued in response to an application from the Hong Kong Liner Shipping Association submitted in December 2015. The Commission is granting a 6-month grace period to allow the parties concerned to make changes to their commercial arrangements.

## JAPAN



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

The Japan Fair Trade Commission (JFTC) has concluded a 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 (15 March 2017)

The JFTC issued a warning to the company dealing European government bonds (Deutsche Securities Inc.). In this case, the company was likely to be in violation of prohibition of the section 3 (unfair restraint of trade) of the Antimonopoly Act. The company exchanged with other companies 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 (25 April 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



### GORE Sanctioned by KFTC for Prohibiting Sales of Products Made of Gore-Tex at Large Retailers

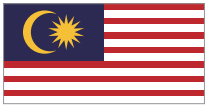
The Korea Fair Trade Commission (KFTC) decided to impose remedies and a fine of 3.67 billion won on GORE for prohibiting outdoor wear companies from selling products made of Gore-Tex at large retailers.

GORE has violated the Fair Trade Act by supplying Gore-Tex fabrics to domestic outdoor wear companies and preventing them from selling products made of Gore-Tex (clothing and shoes) at large retailers. (Duration of violation: March 2009 to December 2012)

The KFTC's decision is meaningful in that it corrected bad practices of GORE, the no.1 company in the fabric market, trying to control the sales of outdoor wear companies to their customers by using its dominant position.

It is expected that consumers will be able to purchase functional clothes at a lower price if outdoor wear companies sell Gore-Tex products which were mainly sold in department stores at large retailers.

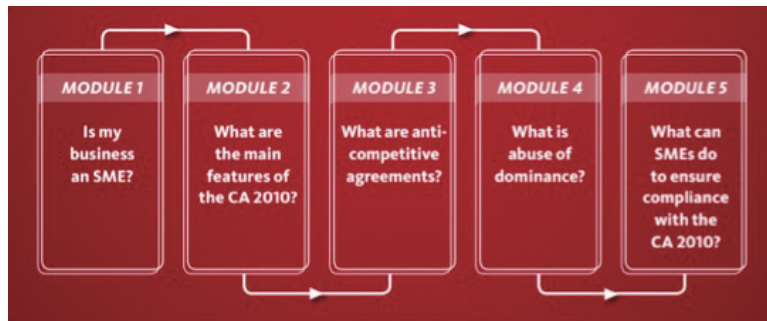
## MALAYSIA



### MyCC Introduced an E-Learning System for SMEs

In accordance with the establishment of the MyCC, one of its functions is to raise awareness among the general public of the importance of the Competition Act 2010 (CA 2010) to consumers and its benefits as a whole to the nation's economy. In line with this vision, MyCC has developed an "e-Learning system on Competition Compliance Programme (CCP) for Small and Medium-Sized Enterprise (SME)" to explain the importance of complying with the CA 2010. It contains 5 modules which covers all the bases of the CA 2010.

A certificate will be issued upon completion of all modules. The goal for this e-Learning system is to increase competition compliance as well as awareness amongst SMEs by 2020. The portal can be accessed through <http://elearning.myc.gov.my> ;



E-Learning System on CCP for SME

### MyCC Extends the Liner Shipping Block Exemption

The MyCC has extended the block exemption for liner shipping agreements in respect of Vessel Sharing Agreements (VSA) and Voluntary Discussion Agreements (VDA) made within Malaysia or which have an effect on liner shipping services in Malaysia subject to the condition that no element of price fixing, price recommendation or tariff imposition by any person on transport users.

The Block Exemption Order (BEO) has commenced on 7 July 2017 for a period of two years or until the same is cancelled by the MyCC. The decision was made upon consideration of the feedback from public, stakeholders of the industry and relevant government ministries over the past 30 days starting from 11 May 2017. The application for the renewal of block exemption for VSA and VDA in respect of liner shipping services was submitted by the Malaysia Shipowners Association (MASA) and the Shipping Association of Malaysia (SAM) on 6 March 2017. Previously, the MyCC had granted a three year block exemption for liner shipping agreements which has expired on 6 July 2017.

The BEO does not exempt or provide immunity in respect of any abuse of a dominant position under the section 10 of the Act. Therefore, parties to a liner shipping agreement can still be found liable for an infringement if they are found abusing their dominant positions in the liner shipping market. The BEO does not cover inland carriage of goods and warehousing of goods. In addition, the BEO allows liner shipping operators to offer, on the basis of individual confidential contracting, their own service arrangements, upon certain conditions.

## MONGOLIA



### Cartel Investigation on Price Fixing between Magnai Trade LLC and Just Oil LLC

The relevant decision was taken as a result of the investigation launched in response to the AFCCP investigator's decision, in order to determine whether "Magnai Trade" LLC and "Just Oil" LLC violated article 11.1.1 of the Competition Law of Mongolia. Under Article 11.1, hard core cartels are prohibited.

Within the framework of the file, on 27 September 2013, "Magnai Trade" LLC and "Just Oil" LLC increased their retail prices for all kinds of petrol by 50 tugriks (3.5 US Cent as 2013 currency rate) per liter. As a result, the AFCCP commissioned a working group to make an investigation.

During the investigation, the working group detected that "Magnai Trade" LLC had bought "Just Oil" LLC's shares and then they made its president's son an executive director of "Just Oil" LLC.

As for the second claim of the file, which is the claim that these two companies' directors made a decision to increase retail prices of all kind of petrol by 50 tugriks for per liter at same day.

It was thus considered that the two companies' decision broke the article 11.1.1 of the Competition Law of Mongolia, "Mutually agreeing to fix prices is prohibited". It was decided that administrative fines of 2,368,047,972 tugriks (USD 1,691,463 as 2013 currency rate) and 941,932,927 tugriks (USD 672,809) should be imposed on "Magnai Trade" LLC and "Just Oil" LLC, respectively, for a total of 3,3 billion tugriks (USD 2,364,272), at 1% of its gross annual revenue generated as of the end of the previous year.

Primary court's decision: The "Magnai Trade" LLC appealed against the investigator's decision and handed in petition to a primary court. The primary court refused their petition. The Supreme court has upheld the primary court's decision.

# Competition in the Pharmaceutical Sector

Sydney, 23-25 May 2017



In May 2017, the OECD/KPC annual sector workshop took place in Sydney, Australia. This year's event was devoted to the application of competition policy and rules to a very important sector in most societies: the pharma sector and where the role of competition agencies in many jurisdictions has increased in the last few years.

This was an event co-hosted and co-organised with the ACCC and its CLIP programme and was represented at top level by Mr. Roger Featherstone, Commissioner and Mr. Marcus Bezzi, Executive General Manager, Competition Enforcement of the ACCC and the number of the ACCC staff, as both presenters and attendees.

The event focused not only on enforcement actions but also undertook a wider view, examining the intersection between competition policy and the role of R&D and patents and other regulations. One of the initial sessions focused on the importance of Intellectual Property (IP) in these markets, as without IP margins on pharmaceutical products and the incentives for R&D investment would decline with imitators free riding on innovators' R&D efforts, leading to less investment and less new drugs over time. This is particularly relevant nowadays where the development of new pharmaceuticals is an increasingly lengthy and costly business fraught with significant risk – after years of testing and millions of dollars the vast majority of drugs are





found not to be safe or effective for human use and therefore never see the light of day in the marketplace. More generally, this is a sector where regulation is crucial to ensure that the market failures of patent induced market power, information asymmetry, and market accessibility are tackled, whilst at the same time competition plays a vital role as it is in the words of the World Health Organization “in the last instance the key tool to drive prices down and improve access to medicines.”<sup>1</sup>

For this workshop a wide array of experienced speakers with extensive experience in the sector were made available by the authorities of Korea (KFTC), EU Commission and the ACCC as well as two speakers from the OECD.

The event started with an examination by Mr. Ruben Maximiano of the OECD of main features of the pharma sector and of the main competition issues found across jurisdictions. This was followed by a session lead by Mr. Pedro Caro Sousa on the role of IP and antitrust in Pharma, and of their interplay and compatibility, namely with the role of competition to place limits on the permissible scope of exclusion based on IP. Mr. Caro Sousa also identified the main competition infringements that include attempts to manipulate the IP and the regulatory regime.

The afternoon sessions were devoted to analyzing more specific issues when dealing with enforcement cases, starting with market definition, in a session presented by Mr. Ruben Maximiano, that by examining a number of cases in a number

of different jurisdictions identified some common threads and principles that underwrite the identification of relevant markets in the pharmaceutical sector. The remaining sessions all dealt with anti-competitive agreements. First up was Mr. Paul Csiszar, Director at the European Commission, that shared the experience of the European Union in a session on horizontal agreements in the sector, including the sector inquiry undertaken in 2009 and then the recent pay for delay cases of Lundbeck, Fentanyl, Servier and Cephalon. Mr. Pedro Caro Sousa continued the theme of anti-competitive agreements by looking in depth at a number of cases of cartels and bid rigging cases in pharma that affected the public purse with the increase of the price of medicines sold to public hospitals. Ms. Sunjoeng Lim, Deputy Director of the KFTC then presented in detail the reverse payment agreement case between GSK and Dong-a Pharm in Korea. The final case study of the day was brought by Mr. Frans Adiatma Senior investigator of the KPPU on the Amlodipine Therapy case where two companies shared information about price and production planning and thus reduced or removed risks of competition between them.

The second day was dedicated to abuse of dominance cases, first by Mr. Csiszar examining the main aspects of abuse of dominance cases in pharma in the EU, and then analyzing the Servier and Astra Zeneca cases. The ACCC then presented on a case where it was alleged that Pfizer had a strategy to bundle offers prior to the expiry of the its patent over atorvastatin (Lipitor) – a cholesterol lowering product in the statin family of molecules, and thus attempt to delay the exposure of competition before suppliers of generic pharmaceuticals were able to enter

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1. WHO “Public health, innovation and intellectual property rights”, Report of the Commission on Intellectual Property Rights, Innovation and Public Health, Geneva, April 2006.



\* Commissioner Roger Featherstone leading a hypothetical case

the market. The following session was dedicated to an issue that has been again making its resurgence in certain jurisdictions and that is of great relevance to Asian jurisdictions: the issue of excessive pricing in pharmaceutical products. This session led by Mr. Caro Sousa looked at the difficulties in reaching a finding of prices being excessive and thus constituting an abuse of dominance, and then analysed some cases which had some particularities that allowed the UK (Pfizer and Flynn case) and Italy (Aspen case) in 2016 reach such findings. Two cases in the pharma sector were then shared by Mrs. Wu of the NDRC (allopurinol cartel) and Ms. Feiyini of SAIC (hospital and pharmacy case), respectively.

The day was closed with a Hypothetical case prepared by the ACCC and presented by Mr. Roger Featherstone, Commissioner of the ACCC and worked through a number of smaller teams.

The last day of the workshop served to set out the merger control issues in the Pharma sector, with presentations from Mr. Ruben Maximiano of the OECD as well as Mr. Stewart McKechnie, Assistant Director of the Mergers Investigations Branch of the ACCC. Mr. Tsai from Chinese Taipei then presented a merger

case that was analysed between Pfizer and Allergan and that involved the analysis of the miotics and anti-glaucoma markets. Finally Ms. Candice Lee from the Competition Commission of Singapore presented the GSK Trading services acquisition of UCB, which had anti-histamines, anti-epileptics as some of the areas of overlap requiring closer analysis.

The workshop's final session started with Mr. Ruben Maximiano making the case for the importance of the role that competition advocacy by the competition authority can play both in the design of regulation as in the public procurement of medicines. He was seconded by a presentation by Ms. Dian Retno Sari on the role that the KPPU has played in strengthening the role of the pharmacist with a recent policy recommendation it issued to the Ministry of Health in Indonesia. Mr. Marcus Bezzi also shared the experience in advocacy in the context of the sector in Australia and the role that the ACCC has had in shaping regulation.

This was an event that allowed participants to explore in depth a sector that has many specificities can be a rather daunting one for newer agencies in particular. Drawing upon some very experienced speakers it was possible to show that, where relevant, this is a sector where competition authorities may intervene effectively.



# Going after Bid-Rigging Cartels

Ulaan Baatar, 13 - 15 September 2017



The OECD/KPC teamed up with the Authority for Fair Competition and Consumer Protection of Mongolia (AFCCP) to host a meeting in Ulaan Baatar in September 2017 on the topic of “Going after Bid-Rigging Cartels”.

In total, 25 delegates from Mongolia’s AFCCP, the country’s judiciary and its legislature participated in the event along with another 25 delegates drawn from the staff and commissioners of competition authorities across Asia.

In opening the event, Chairman Byambasuren (AFCCP) and Ms. Yanjinsuren (Advisor to the Deputy Prime Minister of Mongolia) and Director General Yoon (OECD/KPC) spoke of the importance of cooperation between competition authorities in fighting cartels and bid rigging.

This is the first time that the OECD/KPC has held a meeting in Ulaan Baatar and, with a proposed law reform currently in the pipeline, it was an important time for Mongolia to host such an event.

The AFCCP and its predecessor have already been actively enforcing competition laws for approximately two decades. However, the initial law had very low maximum fines and, even when a revised law significantly increased the penalties, it did not provide the authority with the full “tool-box” of detection and investigatory powers such as a leniency policy. Hence, there is now a need for a further law reform to enable a fully effective system.

The event commenced with scene setting presentations by Mr. Antonio Capobianco (OECD) and Mr. Nick Taylor (Consultant to



the OECD) on the importance of fighting cartels and bid rigging and on detecting such practices.

Mr. Jinseok Park (KFTC) gave a presentation on Korea's experience with detecting and prosecuting bid rigging in a range of tenders for major public works projects. Mr. Masakazu Okumura (JFTC) and Ms. Sara Rodrigues (Portuguese Competition Authority) gave presentations on investigation techniques building a case.

On the final day, Ms. Rodrigues also presented on her agency's strategic plan for fighting bid rigging, Mr. Taylor presented on fines and sanctions and Mr. Capobianco gave a presentation

about the OECD's work concerning international cooperation between competition authorities.

Presentations on particular enforcement experiences from in their home countries were provided by Mr. Hong Wei Fu (CTFTC), Ms. Anudari Nyamdorj (AFCCP), Mr. Alok Tripathi (CCI), Mr. Abdul Hakim Pasaribu (KPPU), Mr. Shahzad Hussain (CCP).

In two hypothetical exercises, the delegates variously role-played cartelists seeking to conceal illegal behaviour, government procurement officials redesigning their procurement processes to avoid and detect bid rigging and competition authority investigators.



# OECD Competition Committee Meetings, 19 – 23 June 2017

## Hearing on Radical Innovation in the Electricity Sector

The OECD hosted a Hearing to explore the implications for competition agencies of radical innovation in the electricity sector. A variety of new business models are competing and that will lead to significant changes in the industry. An example is the sharing economy that offers the prospect of peer-to-peer energy trading between ‘pro-sumers’ (producer-consumers) using block-chain technology (Airbnb for the electricity market).

The Hearing looked at whether regulation is keeping pace with changes, particularly regulation of the grid, and how competition agencies might advocate to help ensure that competition between different business models (both old and new) works for consumers. It also looked at the ways in which incumbents (distributors or utilities) might respond and how competition agencies might distinguish between pro- and anti-competitive responses when using their enforcement powers.

**Link:** <http://www.oecd.org/daf/competition/radical-innovation-in-the-electricity-sector.htm>

## Guidelines to Help Ensure that the Public Procurement Process Remains Competitive

Delegates discussed the second draft of the Committee's contribution to the new OECD Procurement Toolbox developed by the Governance and Territorial Development Directorate (GOV). The revised guidance consists of two checklists to help public procurement officials keep procurement processes competitive when dealing with abnormally low bids or splitting contracts into lots.

## Roundtable on Methodologies for Conducting Market Studies

This session explored the various information collection and analytical methodologies used in market studies, as well as some common considerations regarding their selection and application. Information gathering methodologies include preliminary background research, surveys, stakeholder consultations and formal information requests. Analytical methodologies can be guided by an initial market structure mapping process, and include price analysis (such as price comparisons and profitability analysis), supplier-focused analyses (including an assessment of firm practices and barriers to entry), demand-focused analyses (for instance consumer preferences) and assessments of the competition impact of regulation in the sector(s).

**Link:** <http://www.oecd.org/daf/competition/market-study-methodologies-for-competition-authorities.htm>

## Monitoring the Implementation of the 1998 Hard Core Cartel Recommendation

This meeting discussed developments in the implementation of the 1998 Recommendation concerning Effective Action against Hard Core Cartels. This Recommendation calls upon jurisdictions to ensure that they provide for effective sanctions, agencies, enforcement procedures and investigative tools against hard core cartels. Anti-cartel enforcement has been a priority of competition law enforcement in OECD jurisdictions before and, particularly, after the adoption of the Recommendation.

The discussion benefited from a review of the replies to a questionnaire that was sent to delegates in March 2017.

## Roundtable on Competition Issues in Aftermarkets

The Competition Committee organised a Roundtable on Competition Issues in Aftermarkets. Aftermarkets are markets for the supply of products or services needed for or in connection with the use of a relatively long-lasting piece of equipment that has already been acquired.

The roundtable offered an opportunity to compare national approaches to questions that can arise under competition law when aftermarkets are involved, such as: (i) the economic and legal theories to support competition intervention in aftermarkets; (ii) the enforcement challenges that competition authorities face in aftermarkets cases; (iii) the policy rationale for competition in aftermarkets.

Delegates discussed also whether the relevant market for the competitive analysis consists of separate markets for primary and secondary products, or whether it is a market for “systems” consisting of both primary and secondary products; when, if at all, the supplier of the primary product has market power in the aftermarket and, if it has, what pricing and non-pricing conduct may amount to an abuse of dominance prohibited by competition laws and under what conditions; and what remedies exist to aftermarket monopolisation concerns under antitrust law and beyond.

**Link:** <http://www.oecd.org/daf/competition/aftermarkets-competition-issues.htm>

## Hearing on Rethinking the Use of Traditional Antitrust Enforcement Tools in Multi-sided Markets

As part of the strategic theme on Competition, Digital Economy and Innovation the Competition Committee hosted a Hearing to discuss the use of traditional antitrust enforcement tools in multi-sided markets. The Hearing looked at an important question that competition agencies face: are the tools to define markets,

to assess market power, the hypothetical monopolist test, etc. sufficient to address questions in multi-sided markets?

The Secretariat invited economists from academia and chief economists from agencies to present and discuss methodological proposals to deal with such recurring questions for many competition agencies. All the contributions will be collected in a publication by the Secretariat.

**Link:** <http://www.oecd.org/daf/competition/rethinking-antitrust-enforcement-tools-in-multi-sided-markets.htm>

## Roundtable on Algorithms and Collusion

The Roundtable on Algorithms and Collusion followed up on some of the themes emerged in the Hearing on Big Data from December 2016. There is an increasing tendency from firms to use pricing algorithms that speedily react to market conditions, such as the ones used by major airlines and online retailers. While there are few cases where agencies have looked at how pricing algorithms may facilitate collusion, there is an increasing body of literature looking at how the availability of large data sets combined with artificial intelligence might change business incentives and behaviours. This literature raises the question of whether antitrust agencies should revisit traditional antitrust concepts, such as the concepts of agreement, or reconsider the boundaries between tacit/explicit collusion, and their legality and whether any antitrust liability can be imposed on the algorithms’ creators and users.

The roundtable discussed how the combination of data with technologically advanced tools such as pricing algorithms, programming tools and machine learning technology may change the competitive landscape, by allowing firms to signal an attempt to coordinate strategies or to achieve collusive outcomes in novel ways that do not necessarily require formal agreements or even human interaction.

# Fighting Cartels in Public Procurement: Policy and Practice

Despina Pachnou, Competition Division, OECD

Governments regularly buy goods and services from the private sector, for projects ranging from complex building works to ordering office supplies. The sums involved are huge: public procurement represents approximately 12% of gross domestic product and 29% of general government expenditures in OECD countries<sup>1</sup>, and these numbers can be higher in developing countries. Governments, and public procurement agencies in them, are aware of the need to spend public money wisely. This awareness of the importance of doing more for less, and the role of competition in public procurement to achieve this goal has increased in the last few years. Can public buyers be sure that the private sector offers them value for money, and that companies bidding for public contracts really compete on price and quality, thus allowing public buyers to choose the best solutions that the market has to offer?

The enforcement records of competition authorities in OECD and non-OECD countries shows that there are good reasons to worry about the effectiveness of competition for public contracts: a significant share of cartel enforcement in many countries concerns cases of suppliers rigging their bids for public contracts<sup>2</sup>. Bid rigging consists in suppliers agreeing among themselves not to compete, and artificially raise the prices or lower the quality that they offer to the public sector; a successful bid rigging scheme results in suppliers getting paid more while delivering less. Studies show that bid rigging can

add very significant surcharges to prices (20% or more)<sup>3</sup>, costing billions of dollars every year in taxpayers' money, depriving the public sector of genuine opportunities to achieve value for money and damaging the outcomes and integrity of public procurement procedures.

Over the years, the OECD has developed extensive work to help governments, public procurement agencies and officials understand the risks, costs and forms of bid rigging, and prevent, detect and punish it.

## 1. Developing a Framework to Fight Bid Rigging in Public Procurement: The OECD Recommendation and Country Implementation Actions.

The OECD has researched and developed best practices on fighting cartels since 1998, when it adopted the Recommendation concerning Effective Action Against Hard Core Cartels<sup>4</sup>. The importance of fighting bid rigging in public procurement was such that over the years the OECD developed first Guidelines, and then, in 2012, a Recommendation on Fighting Bid Rigging in Public Procurement (the "Recommendation")<sup>5</sup>, which incorporates the Guidelines and consolidates OECD good practices to make public procurement processes competitive and free from collusion.

1 OECD (2017), Government at a Glance 2017, OECD Publishing, Paris, [http://dx.doi.org/10.1787/gov\\_glance-2017-en](http://dx.doi.org/10.1787/gov_glance-2017-en)

2 OECD (2013), Policy Roundtables: Ex officio cartel investigations and the use of screens to detect cartels, [www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf](http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf)

3 Smuda, F. (2015), Cartel Overcharges and the Deterrent Effect of EU Competition Law, Centre for European Economic Research Discussion Paper No. 12-050, <ftp://ftp.zew.de/pub/zew-docs/dp/dp12050.pdf>

4 [www.oecd.org/daf/competition/recommendationconcerningeffectiveactionagainstharcocartels.htm](http://www.oecd.org/daf/competition/recommendationconcerningeffectiveactionagainstharcocartels.htm)

5 [www.oecd.org/daf/competition/fightingbidrigginginpublicprocurement.htm](http://www.oecd.org/daf/competition/fightingbidrigginginpublicprocurement.htm)

The Recommendation identifies the following priority areas of action for countries:

- Assess public procurement laws and practices and how they affect collusion between bidders.
- Deter bid rigging at the front end of public procurement, by designing procurement regulations and public tenders which promote competition and reduce the risk of collusion.
- Ensure that public procurement officials are aware of market structures and bidding behaviour that may indicate collusion, so that suspicious activities can be detected, reported to competition authorities and investigated.
- Measure and monitor the impact of public procurement laws and regulations on competition over time.

National competition authorities provided their insights and inputs in developing the Recommendation and, following its adoption, played a crucial role in its dissemination and the consolidation of good practices in their countries. Recently, competition authorities reported to the OECD that the Recommendation helped inform and shape country activities and reforms, and is often relied on to develop national strategies on fighting bid rigging, design guidelines and training materials for public procurers on pro-competitive tender design, and develop bid rigging detection tools<sup>6</sup>. The Recommendation has been instrumental in helping several competition authorities launch advocacy programmes and raise awareness of bid rigging risks.

## 2. Carrying Out in-country Projects to Help Fight Bid Rigging

Policy guidance provided by the Recommendation is not always sufficient. Some countries, and the competition and procurement authorities in them, identified the need for specific OECD support

to raise awareness, screen public procurement rules and practices, recommend ways to prevent and detect bid rigging cartels in accordance with the Recommendation, and equip the procurement workforce with relevant knowledge and skills.

Between 2011 and 2017, at the request of domestic procurement entities, the OECD, in close co-operation with the national competition authority, carried out eight such projects in Mexico and Colombia, to help procurement agencies and their staff design better procurements, and detect cartels more easily<sup>7</sup>. The projects adapted to domestic requests and needs: they assessed procurement rules and practices at national level (e.g., for Colombia<sup>8</sup>) and subnational level (e.g., for the State of Mexico<sup>9</sup>), in the healthcare sector (e.g., for the Mexican Institute of Social Security -IMSS<sup>10</sup> and the State's Employees' Social Security and Social Services Institute in Mexico -ISSSTE<sup>11</sup>) and the energy sector (e.g., for the Mexican electricity utility Comisión Federal

6 OECD (2016), Fighting bid rigging in public procurement: Report on implementing the OECD Recommendation, [www.oecd.org/daf/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf](http://www.oecd.org/daf/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf)

7 [www.oecd.org/daf/competition/fightingbidrigginginpublicprocurement.htm](http://www.oecd.org/daf/competition/fightingbidrigginginpublicprocurement.htm)

8 OECD Competition Committee (2014), Fighting Bid Rigging in Public Procurement in Colombia, A Secretariat Report on Colombian Procurement Laws and Practices, at [www.oecd.org/daf/competition/Booklet\\_SIC%20Procurement%20Report\\_16X23\\_REV\\_web.pdf](http://www.oecd.org/daf/competition/Booklet_SIC%20Procurement%20Report_16X23_REV_web.pdf)

9 OECD (2012), Fighting Bid Rigging in Public Procurement in Mexico, A Secretariat Analytical Report on Procurement Legislation, Regulations and Practices in the State of Mexico, at [http://www.oecd.org/daf/competition/GEM\\_Report\\_2012\\_English.pdf](http://www.oecd.org/daf/competition/GEM_Report_2012_English.pdf)

10 OECD (2011), Fighting Bid Rigging in Public Procurement in Mexico, A Secretariat Report on IMSS' Procurement Regulations and Practices, at [www.oecd.org/daf/competition/abuse/49390114.pdf](http://www.oecd.org/daf/competition/abuse/49390114.pdf). The OECD is currently conducting an ex post evaluation of the implementation by IMSS of the 2011 OECD recommendations; the project will be completed in 2018.

11 OECD Competition Committee (2013), Fighting Bid Rigging in Public Procurement in Mexico, A Secretariat Analytical Report on Legislation, Regulations and Practices Relating to Procurement Undertaken by ISSSTE, at [www.oecd.org/daf/competition/MexicoISSTEBidRiggingENG.pdf](http://www.oecd.org/daf/competition/MexicoISSTEBidRiggingENG.pdf)



de Electricidad -CFE<sup>12</sup>, and the national oil company Petróleos Mexicanos -PEMEX<sup>13</sup>).

### Core Elements of OECD in-country Projects on Fighting Bid Rigging

The OECD in-country projects on fighting bid rigging have three main aspects:

(i) Review the relevant procurement regulatory framework and buying practices, and recommend reforms in light of the Recommendation, with inputs from the national competition agency.

(ii) Train, together with the national competition agency, the procurement decision-makers and operational workforce on designing tenders so as to reduce the risk of anti-competitive agreements, and detecting possible cases of bid rigging during the tender process through a system of red flags. This helps domestic officers implement the OECD recommendations, and provides them with expertise and skills which remain after the projects are over.

(iii) Enable the meeting of public procurement and competition communities, the exchange of ideas, and the building of channels to ask for advice (from the competition authorities) and report suspicions of collusion (to the competition authorities).

To carry out the projects, the OECD meets with public and private sector stakeholders, trains hundreds of procurement officials in the different institutions, and organises public events to raise awareness of the risks and costs of bid rigging, and what actions are necessary to fight it.

Each project analysis differs depending on the relevant procurement entity, the rules and practices that it follows, and the procurement workforce that it employs. However, the OECD identified several common concerns which may restrict public procurement agencies' ability to purchase at competitive terms. These include:

12 OECD (2015), Fighting Bid Rigging in Public Procurement in Mexico, A Secretariat Analytical Report on Compliance with OECD Standards of Procurement Legislation, Regulations and Practices in CFE, at [www.oecd.org/daf/competition/fighting-bid-rigging-mexico-cfe-report-2015.htm](http://www.oecd.org/daf/competition/fighting-bid-rigging-mexico-cfe-report-2015.htm). The OECD has reviewed the new procurement regime applicable to CFE in 2017, and will release a new report in January 2018.

13 OECD (2016), A Review of the Procurement Rules and Practices of PEMEX in Mexico, [www.oecd.org/mexico/fighting-bid-rigging-mexico-pemex-review-2016.htm](http://www.oecd.org/mexico/fighting-bid-rigging-mexico-pemex-review-2016.htm)

- Barriers to entry limiting bidders' participation in tenders, for example restricting participation to domestic bidders only, reduce the number of potential bidders, and allow easier coordination among the fewer remaining ones.
- Excessive and unjustified use of non-competitive procurement procedures like direct awards to suppliers without a tender remove competition and reduce the likelihood of obtaining commercially competitive offers.
- Certain transparency requirements, like disclosing the identity of bidders, reference prices and detailed procurement schedules, may facilitate collusion, as they make it easier for bidders to identify each other and attempt to collude, as well as, following their agreement, detect and punish deviations from their conspiracy.
- Regular procurement opportunities allow suppliers to share contracts and markets. If the distance in time between tenders is sufficiently long or irregular, and if the tender opportunities vary in size and content, firms have fewer incentives and opportunities to engage in successful collusion.

Likewise, though advice varies from one project to another, common recommendations have emerged.

### Common OECD Recommendations in in-country Projects on Fighting Bid Rigging

The risk of collusion can be reduced if certain actions are followed:

- Procurement agencies should collect detailed and up-to-date information on the demand (other procurers) and supply market before launching a tender. A specialised procurement market intelligence unit and robust databases on past procurements for benchmarking are key factors of success.
- Tenders should be carried out at irregular time intervals, and for dissimilar amounts and quantities, to make collusive agreements difficult to reach.
- Tenders should be open to as many suitable bidders as possible. Limitations to participation in tenders, like restricting the access of foreign suppliers or of smaller firms, should be justified and proportional and abolished if they are not.
- Bidders' identities and the terms of bids should not be disclosed.

- Bidders should not have opportunities to meet and communicate before and during the tender process.
- Fully developed electronic procurement systems should be used at all times.
- The procurement workforce should be regularly trained on how tenders can be better designed, and how collusion can be detected by identifying warning signs during the tender process.
- Co-operation, information sharing, and communication channels with the national competition authority is crucial.

Several OECD recommendations made in the context of projects were successfully implemented.

### Examples of Successful Implementation of Recommendations in OECD Projects

- The Mexican Social Security Institute IMSS reformed its procurement processes for medicines in accordance with OECD recommendations. In 2016, IMSS asked the OECD to conduct an ex post assessment of the implementation of the OECD recommendations. The OECD will estimate the impact of the implemented recommendations on IMSS procurement outcomes, carry out case studies in some products or services and will provide an action plan to help IMSS follow the recommendations that have not yet been adopted.
- The Colombian competition authority followed OECD recommendations to set up a special group against bid rigging, and launch a partnership with the Colombian national procurement agency to facilitate information exchange, study procurement issues with competition implications, and allow the early detection of cases.
- The Mexican electricity utility Comisión Federal de Electricidad CFE, following OECD recommendations, now requires bidders to submit as part of their offer a certificate of independent bid determination, i.e. a declaration by the bidder indicating that its bid is independent from others. Also, acknowledging that the publication of CFE's full annual procurement programme may provide information crucial for the formation of cartels, CFE now publishes a shorter version of the programme containing only general, non-confidential data.
- The Mexican Competition Commission (Comisión Federal de Competencia Económica, COFECE issued recommendations on promoting competition in public procurement which draw on and refer to the OECD Guidelines for Fighting Bid Rigging in Public Procurement.

Sources: [www.oecd.org/daf/competition/oecd-applauds-mexico-decision-on-reverse-auctions-for-medicines.htm](http://www.oecd.org/daf/competition/oecd-applauds-mexico-decision-on-reverse-auctions-for-medicines.htm); OECD (2016), Fighting bid rigging in public procurement: Report on implementing the OECD Recommendation, [www.oecd.org/daf/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf](http://www.oecd.org/daf/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf); OECD (2017), Fighting bid rigging at CFE: an overview of the new procurement regime (forthcoming); <https://www.cofece.mx/cofece/attachments/article/38/RecomendacionesContratacionPublica-v2.pdf>

Key aspects of success of the OECD fighting bid rigging projects are the openness and willingness of the procurement entities to co-operate with the OECD, share data and follow recommendations, the strong engagement of the domestic competition authorities, and the involvement of parts of the central government.

### Factors for Success for OECD Fighting Bid Rigging Projects

- Projects are requested by the procurement entities, and strongly supported by their senior management.
- Other agencies and the central government are regularly updated on the project, to ensure buy-in for required legal and institutional reforms.
- The OECD engages closely with the domestic competition authority, thus ensuring country-specific knowledge, enhancing the skills of the authority itself, and building trust.
- Several private sector stakeholders are consulted.
- Projects benefit from local teams and international experts who share their own experiences in this area.
- The project recommendations are launched in public events which help raise awareness of the benefits of better public procurement and stronger competition enforcement.

# OECD/KPC Competition Programme 2017

April 3-4

Philippines

## Bi-lateral Seminar: 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 Workshop: 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 Specific Workshop: 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

Mongolia

## In-country Workshop – Going after Bid-Rigging Cartels

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 24-26

India

## In-country Workshop – Best Practices in Cartel Procedures

The seminar could provide training on:

- Preparation and execution of dawn raids,
- Handling of evidence
- Forensic IT techniques and team work in complex cartel case investigations

November 14-16

Korea

## Regular Workshop: Market Studies

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@oecdkorea.org](mailto:jhoh@oecdkorea.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)
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- Twitter: OECD/KPC COMP

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