

Asia-Pacific Competition Update

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Competition Programme
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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

As this is the first edition of 2019 of the OECD/KPC Asia Pacific Competition Update, we are very excited with the programme we have planned for this year. The full programme is towards the end of the newsletter but I will highlight one particular event for its novelty value. That is the second workshop organised in an OECD country in Asia Pacific with an event in Japan in November 2019.

There are also many other elements of great interest in this newsletter, including the summary of the 8th Competition Law Seminar for Judges of the Asia Pacific, the Bilateral Seminar organised for the Vietnam Competition and Consumer Authority. You will also find in-depth accounts of the 2nd OECD meeting of High Level Representatives of Asia-Pacific Competition Authorities and of the current ongoing project of the OECD funded by the UK government for ASEAN countries.

Given the importance of the meeting, I would like to just pull up a short highlight of the 2nd High Level Representatives meeting which took place in Paris on 28th November 2018. The meeting brought together representatives from 15 jurisdictions from the Region (most of them Chairpersons and Commissioners) and the President of CADE (Brazilian competition agency). The first session was a presentation of the OECD Secretariat Note on Priority Setting (a summary of which you will find in OECD/KPC April 2018 Newsletter Issue 22). This was followed by a debate on competitive neutrality and the role for competition authorities, with Professor Deborah Healey (University of New South Wales) as an invited guest speaker setting the framework for the discussion. Numerous participants voiced their support for the OECD to

continue to organise these meetings. I must say that what was particularly impressive for me were the sheer number of interventions and experience sharing from many delegates for what was a successful meeting!

Until the next newsletter, I hope you will enjoy reading this issue!



Ruben Maximiano



News from Asia-Pacific Competition Authorities*

* News items were provided or sourced from the respective Competition Authorities and are their own responsibility

Update on ASEAN/ OECD/ UK Project on Competition Assessment of Regulations and SOEs in ASEAN Member States

In September 2018, the OECD launched a project in the logistics sector involving all ASEAN Member States. The project is part of the implementation of the ASEAN Competition Action Plan 2016-2025 and will consist of an OECD's independent study carried out in cooperation with the UK Government, the ASEAN Secretariat and the ASEAN Experts Group on Competition.

As mentioned in our previous newsletter, the purpose of the project is to undertake ten competition assessments of laws and regulations in the logistics sector (one for each ASEAN Member State) as well as to prepare a regional report on the impact of State-owned enterprises and government-linked monopolies providing small package delivery services.

The OECD is currently working at full speed on the first batch of countries that includes Brunei, the Philippines and Thailand. Between November 2018 and January 2019, the project team had a mission to each of these countries where it had overall 40 meetings with public and private stakeholders and met approximately 80 people. The inputs obtained during the missions are extremely valuable for the analysis and the development of specific recommendations tailored to the practice and policy objectives on the ground. The preliminary findings and draft recommendations will then be shared and discussed with each relevant ASEAN Member State. Some of the final country assessments are expected to be launched by the end of 2019.

The second batch of countries for the project includes Malaysia, Myanmar and Vietnam where the OECD team will have a mission in the forthcoming weeks. The project team is currently analysing the legislation in force in these countries with the view to identifying shortcomings in the regulatory and policy environment that hinder the efficient functioning of the market and affect long-term growth and competitiveness.

HONG KONG



In September 2018, the Hong Kong Competition Commission (HKCC) has, for the first time, brought direct enforcement action against individuals who were involved in anti-competitive conduct. This is also the second case in which the HKCC has brought an action against a cartel targeting residents of public housing. These proceedings drive home the deterrent message that not only companies, but also individuals who engage in cartels may expect to face the full force of the law. The HKCC also took the opportunity to urge market participants in all sectors to steer clear of those anti-

competitive practices, while those already involved should consider approaching the Commission for leniency. Combating cartels has long been an enforcement priority for the HKCC since its establishment.

In October 2018, the HKCC published a decision finding that the city's Code of Banking Practice (Code) is not excluded from the first conduct (cartel prohibition) rule by the legal requirements exclusion in the Competition Ordinance. Being voluntary and non-statutory by nature, the Code is an industry code of practice jointly issued by two industry bodies and endorsed by the Hong Kong Monetary Authority. In the meantime, the HKCC has also confirmed that it has no current intention to pursue further investigative or enforcement action in respect of the present version of the Code. The HKCC recognises that the Code is intended to promote good banking practices towards customers, and may in fact benefit customers.

In November 2018, the HKCC held its very first international conference and received generous supports from many globally renowned academics, judges, practitioners and enforcers as well as business leaders who provided insights, not only from the Hong Kong standpoint, but also from regional and international perspectives. This two-day event discussed a wide range of important and trending topics, including adjudication of competition cases, the fostering of a competitive culture, a review of the HK competition regime and the development of China's Anti-monopoly Law. In keeping with the conference's mission to "Connect – Collaborate – Cultivate", the HKCC has also launched a brand new "Competition Exchange" platform (<https://protect2.fireeye.com/url?k=113cef6c-4d27a6e4-113cc4af-002590f45c88-3cca63755b9226a4&u=http://www.compex.org/>) – a dedicated website aiming to host the latest thinking and a pool of practical tools and resources across jurisdictions on various competition topics. One of the distinct features of this website is that – capitalizing on Hong Kong's unique edge as an international business and financial hub where the east and the west converge, it incorporates contributions from academics and practitioners from all over the world as well as Mainland China.

KOREA



KFTC Sanctions Abuse of Market Dominance by *Korean Re*

The Korea Fair Trade Commission (hereinafter referred to as KFTC) decided to impose remedies and approximately 7.6 billion won penalty surcharges* against Korean Reinsurance Co., (hereinafter referred to as '*Korean Re*') for blocking potential rivals from entering the market.

Korean Re has been monopolizing the relevant market and foreclosing potential competitors through the following conducts since 1999. *Korean Re* forced non-life insurers to apply premium rates determined by *Korean Re* when the insurers underwrite insurance policies and cede all of their reinsurance contracts to *Korean Re*. *Korean Re* interfered with the transactions between foreign reinsurers and domestic nonlife insurers by disadvantaging foreign reinsurers and insurance brokers which set up deals between foreign reinsurers and domestic non-life insurers.

Also, *Korean Re* signed an agreement with foreign reinsurers that are more likely to enter the Korean market so that the foreign reinsurers do business with Korean non-life insurers via *Korean Re*, not directly with domestic nonlife insurers.

With the KFTC's measures, it is anticipated that consumer welfare is to be enhanced by fostering competition in the domestic general aviation insurance market where premium rates, terms and conditions of *Korean Re* were uniformly applied, and by giving consumers opportunities to choose from more numerous variety of insurance products.

* This is provisional and is subject to change based on the recalculation of relevant turnover.

JAPAN



JFTC's Recent Technical Assistance

Japan Fair Trade Commission (JFTC) has been actively conducting technical assistance activities on competition law and policy for competition authorities in other jurisdiction.

One of the JFTC's major achievements in this regard is the establishment of East Asia Top Level Officials' Meeting on Competition Policy (EATOP), with an aim of contributing to the development of competition law and policy in the East Asia region.

On August 29-30, 2018, JFTC co-hosted the 14th EATOP and the 11th East Asia Conference on Competition Law and Policy (EAC) in Sydney, along with the Australian Competition and Consumer Commission (ACCC) and the Asian Development Bank Institute (ADBI).

Also, JFTC held the training course on Japanese competition law and investigative practice for the Indonesian competition authority (KPPU) in Tokyo, in cooperation with the Japan International Cooperation Agency (JICA), on October 16-19, 2018.

The training course took place to provide commissioners of the KPPU and other officials with the opportunity to learn about the Antimonopoly Act, and JFTC's investigation methods and their practical use.

Moreover, on January 2, 2019, JFTC and the ASEAN Expert Group on Competition (AEGC) have launched the technical assistance project (Phase2), of which proponent is the KPPU, under Japan-ASEAN Integration Fund (JAIF) for ASEAN Competition Authorities to strengthen competition law enforcement.

Under this project, JFTC and AEGC plan to implement following activities;

- Holding workshops or training courses in Japan or ASEAN member states (AMS),
- Staff exchanging amongst AMS competition authorities,
- The development of peer review guidance for AMS's competition law and conduct of one peer review,
- The study on recommended procedures for joint investigations and decisions on cross-border cases, and
- The development of survey methods and tools and the national surveys for the ASEAN Competition Business Perception Index.

This October, JFTC is planning to co-host a workshop in Tokyo with OECD-KPC for the first time. This workshop is also expected to contribute to technical assistance for authorities in Asian countries.

INDONESIA



Merger Reviews of KPPU

In KPPU, the Commission received 74 notifications of merger and acquisition transactions in 2018. Most of these notifications were share acquisition transactions (97.3%). The rest is a merger transaction (business entity merger). Most of the notified transactions are transactions carried out between domestic companies (67.70%). The rest is carried out by foreign companies (18.45%) and foreign companies that take over domestic companies (13.85%). Three countries, namely Japan, Singapore, and United States

are the countries that have the most reported transactions in mergers and acquisitions in Indonesia during 2018.

Most of notified merger and acquisition occur in the manufacturing industry (35.4%). The rest was from energy sector (17%) and property (14%). The value of notified transactions filed to the Commission last year exceeding IDR 1,000 trillion, including mega transactions such as PT Inalum's acquisition of PT Freeport Indonesia, Monsanto's acquisition by Kwa Investment Co. (Bayer Group), acquisition of PT Bank Danamon Tbk by MUFG Bank Ltd, and acquisition of TMF Orange Holding BV by Sapphire Bidco BV.

To date, the Commission has completed its analysis on 41 notifications, with 31 of them has been resolved through the assessment process. While the rest is not required for an assessment, since it does not meet the stipulated notification threshold. Based on the data, there were 11.54% of the filing did not required an assessment process. This shows that the level of knowledge of the business actor on the substance of notification has been quite satisfying.

In 2019, the Commission will prioritize its monitoring on various consolidations in the sector, as well as increase the portion of its law enforcement on merger and acquisition transactions which has not been submitted to the Commission, and impose changes in regulations on notification to accelerate the process of evaluating mergers and acquisitions at KPPU..

The PHILIPPINES



PCC Launches Leniency Program

In a bid to strengthen its enforcement mechanisms, the Philippine Competition Commission (PCC) recently launched its leniency program, with its rules taking effect on January 19, 2019.

This launch comes just over three years since the landmark enactment of the Philippine Competition Act (PCA) in 2015. The PCA is the Philippines' primary competition law, which defines, prohibits, and penalizes anti-competitive practices. The PCA also mandates the development of a leniency program.

The PCC leniency program offers either immunity from suit or reduction of administrative fines to an entity that was or is a participant in a price fixing, bid rigging, market allocation, or output restriction agreement, in exchange for the entity's voluntary disclosure of information regarding such agreement.

Under the rules, an entity applying for leniency may be granted immunity from administrative and criminal liability, as well as immunity from civil actions initiated by the PCC on behalf of affected parties and third parties. The PCC will issue separate guidelines on the amount of reduction of administrative fines and further clarifications on the procedure for application.

In June 2018, the PCC signed a memorandum of agreement with the Philippine Department of Justice to harmonize and streamline the implementation of the agencies' respective leniency programs. The agreement provides for mutual recognition of immunity granted by the agencies.

The leniency program is expected to benefit the PCC, a young agency still building its enforcement case portfolio, in exacting penalty and expediting the resolution of cartel-related cases.

The full text of the Rules of the Leniency Program of the PCC can be accessed at <https://phcc.gov.ph/leniency-application/>.

8th OECD/KPC Competition Law Seminar for Judges – Circumstantial Evidence and Cartel Cases –



In October 2018, the OECD/Korea Policy Centre held in Jakarta (Indonesia) a Seminar for judges dedicated to understanding the role of indirect evidence in cartel cases.

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 by CLIP. Most of ASEAN Member States were represented as well as judges from China, India and Chinese Taipei. The fact that the event took place in Indonesia allowed for a wide participation of the Indonesian judiciary, of which many were judges from the District Courts as well as from the Supreme Court.

The goals of the Seminar 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 Seminar was also the opportunity to launch the Primers for ASEAN Judges that can be found here: <http://www.oecd.org/daf/competition/asean-capacity-building-for-judges.htm>. Mr. Frédéric Jenny of the OECD and Justice Alan Robertson of the Federal Court of Australia presented the Primers. The Primers are short information sheets on foundational aspects of competition law,



in particular the economic aspects that Judges need to consider when approaching competition cases. It brings together the Federal Court of Australia's very rich technical knowledge and first-hand experience with the OECD's international experience working with judges and knowledge of the ASEAN region and laws. This also helps implement of the ambitious ASEAN Competition Action Plan (ACAP) 2016-2025.

The panel of speakers in this event included Mr. Frédéric Jenny, Justice Alan Robertson of the Federal Court of Australia, Justice of the Supreme Court of Indonesia Syamsul Maarif, Mr. Jeong Seo, Former Judge of the Seoul District Court of Korea and Mr. John Davies, former Competition Head at the OECD Senior and now at Compass Lexecon.

The Seminar was opened by Mr. Youngsoo Bae, Director General of the OECD/KPC Competition Programme, Mr. Jenny for the OECD and Justice of the Supreme Court Prof. Dr. Takdir Rahmadi. Following, Justice Maarif of Indonesia presented the rich experience in Indonesia with many cases reviewed and explained.

Mr. Jenny then offered his Keynote address on the key challenge faced by judges when dealing with evidence in cartel cases.



Obtaining direct evidence of a cartel agreement - evidence that identifies a meeting or communication between the subjects and describes the substance of their agreement - requires special investigative tools and techniques, which the authority, in particular in new jurisdictions, may lack. Thus, the competition law enforcer may be faced with the task of proving the existence of a cartel agreement without the benefit of direct evidence. In short, the competition agency could have relatively greater difficulty in generating direct evidence in its cartel cases, which would imply that it will have to rely more heavily on circumstantial evidence. At the same time, there are limits to the use of circumstantial evidence. Such evidence, especially economic evidence, can be ambiguous. Importantly, circumstantial evidence can be, and often is, used together with direct evidence. Mr. Jenny then looked at a number of cases from around the world where the use of circumstantial evidence played a relevant role.

The rest of the day was dedicated to the economics of cartels and to how it consists of a group of suppliers trying collectively to act as a monopolist. Mr. John Davies presented two sessions, looking first at how economic theory can describe how feasible collusion is, which factors facilitate collusion and how to distinguish collusion from competition. Mr. Davies provided an



economic back-drop, with reference to a number of real past cases.

The second day started with Mr. Jenny sharing lessons from the OECD Competition Committee regarding how to introduce economics into the court room, in particular at the methodological tools to improve the economic understanding of civil courts. Mr. Jenny analysed the Daubert criteria in the USA that relate to evidence and reliability to allow the judge to assess the quality of the expertise being provided. Mr. Jenny then shared the practice of several jurisdictions in how economic evidence is presented in courts. This session was followed by a hypothetical exercise led by Mr. Ruben Maximiano of the OECD, where participants were divided into small groups hearing an appeal on a bid rigging decision by a competition authority that did not rely on any direct evidence of the agreement being reached. The last session of the morning was led by Mr. Davies

which was dedicated to handling expert economic evidence on cartel damages.

The afternoon of the second day had two presentations, one from Justice Alan Robertson on the use of circumstantial evidence in Australia, which was followed by the session by Former Judge Mr. Jeong Son on Korean cases that used indirect evidence, in particular the Copy Paper, Air Cargo and LPG cases.

The last day was dedicated to a hypothetical cartel 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.

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



Bilateral Seminar in Viet Nam

– Competition Economics and Mergers –



In November 2018, the OECD/KPC's annual bilateral seminar took place in Ha Noi, Viet Nam for the Vietnamese Competition and Consumer Authority (VCCA).

After the OECD Peer Review of Viet Nam was released in March 2018, the new Competition Law was approved in Viet Nam, and will enter into force in July 2019. Following some of the main recommendations made in the Peer Review Report, Viet Nam has introduced an effects-based approach to its competition enforcement. To help the new Vietnamese competition authority to ramp up its knowledge of competition economics, the OECD/KPC Competition Programme ran a workshop for the authorities and local lawyers and academics.

The first day was dedicated to key economic concepts and abuse of dominance, whilst day 2 was fully dedicated to mergers and to the various theories of harm and economic tools. For this workshop the OECD KPC counted on a wide array of experienced speakers with extensive experience applying economic concepts to cases. Speakers were Mr. Ruben Maximiano (Senior Competition Expert at the OECD), Dr. Derek Ritzmann (former Chief Economist of the Hong Kong Competition Commission), Prof. Joao Gata (former Chief Economist of the Portuguese Competition Authority), and Mr. Jongbae Park (Head of the Busan office of the KFTC).

The first introductory presentation was offered by Mr. Ruben



Maximiano and set clear empirical evidence for the rise of economics in the context of competition law across jurisdictions. Indeed, recent decades have seen a significant shift in the role and prominence given to the assessment of economic evidence, information and data in competition law investigations in many jurisdictions in the OECD, but more broadly across jurisdictions, including in the Asia Pacific Region. An important aspect of this general shift has been a movement away from what has been described as a formalistic, per se type approach to competition enforcement based on a so-called 'more economic' approach, centred around 'effects-based' analysis. A context now joined also by Viet Nam. Now, few areas of laws draw more heavily, or more directly, on economics learning than competition or antitrust law.

The VCCA then presented a history of its law and enforcement as well as a look at some key elements of its new law, as regards the effects-based approach.

Dr. Derek Ritzmann explained the key economic principles, concepts and definitions that are fundamental in competition law analysis and practice. Starting with the basic functioning of markets and supply and demand curves, Dr. Ritzmann then went through how such simple models can help predict price changes

and then to differences in market outcomes depending on market structures (from competitive markets, to oligopolistic markets and monopoly).

In the afternoon, Mr. Ruben Maximiano looked at one of the most important issues in anti-trust – market definition. Even with all the economic developments and the economic tools that have been developed by industrial economics, market definition is still a valuable tool used far and wide by all competition law regimes. At the same time whether a market is defined too narrowly or broadly in a particular case has an impact on the analysis of the competitive effects of a given conduct or merger. The ultimate objective however should be to identify all the competitive constraints a firm faces as accurately as possible. The final session of the day was dedicated to market power, Dr. Ritzman looked at sources of market power, barriers to entry and to the concept of dominance, lying at the intersection of economics and law. The economic tests to evaluate some of the main exclusionary abuses were then described and explained.

The second day was dedicated mainly to merger control. Mr. Ruben Maximiano, presented first on the main theories of harm, focusing on horizontal theories of harm, unilateral and coordinated





effects. There was a particular focus on the role of market shares in an effects based assessment which is not always clear for newer jurisdictions tackling effects based analysis. For example in unilateral effects, high market shares mean the company may have incentives to compete less aggressively, and mean that a larger fraction of customers in the market will be directly affected. However, the effects of a merger depends to a significant extent on how much competitive pressure is lost, which is the greater if the parties are close competitors, where they exert a particularly strong constraint on the other. Dr. Ritzmann complemented this presentation by looking at the main economic tools used, from the Hypothetical Monopolist Test to Price Correlation Analysis, Shock Analysis and Natural Experiments, Critical Loss Analysis and UPP. This was done with

reference to case examples, mainly from the EU. Mr. Jongbae Park of the KFTC then presented a number of merger cases where economics was used in the KFTC practice. The final presentation was offered by Prof. Joao Gata on the economics of collusion, looking at game theory and a number of cases of the Portuguese Competition Authority where economic analysis was used, in particular for fine setting purposes.

This was an event that allowed participants from the VCCA, VCC, academics and lawyers to understand more the effects based analysis. Drawing upon some very experienced speakers, it was shown that it is possible to use institutions and some relatively simple economic tools to have a grasp of the effects arising from business conduct and from mergers.



Summary of 2nd Meeting of High Level Representatives of Asia-Pacific Competition Authorities

The 2nd OECD meeting of High Level Representatives of Asia-Pacific Competition Authorities took place in Paris for the whole afternoon of 28 November 2018. The meeting was chaired by Mr. Antonio Gomes and brought together representatives from 15 jurisdictions from the Region (most of them Chairpersons and Commissioners) and the President of CADE (Brazilian competition agency). Four sessions were held.



The first session was a presentation of the Secretariat Note on Priority Setting that was prepared in advance of this meeting. The note and presentation systematised the criteria for how competition authorities can set their priorities and what the priority setting practices in the Region are.

The second and main session was a debate on competitive neutrality and the role for competition authorities, with Professor Deborah Healey (University of New South Wales) as an invited guest speaker setting the framework for the discussion.

The third session consisted in the sharing of the capacity building plans from the various donors active in the Region and an expression of needs of the beneficiaries of the Region.



The last and final session discussed the possible format options for future such meetings and benefitted from a presentation from the President of CADE on the functioning and benefits to

participant countries of the Latin American and Caribbean Competition Forum. Numerous participants voiced their support for the OECD to continue to organise these meetings. Some participants put forward the possibility of every other year this be taken to the region back-to-back with other regional events. All the sessions benefited from numerous interventions and experience sharing from many delegates for what was a successful meeting.



OECD/KPC Competition Programme 2019

26-28 March

Busan,
Korea

Sector Specific Workshop

Competition Rules in the Transport Sector

27-28 May

Bangkok,
Thailand

Bilateral Seminar for Thai Competition Commission

Cartel Investigations

30-31 May

Bangkok,
Thailand

9th Competition Law Seminar for Asia-Pacific Judges

Main Challenges in Adjudicating Competition Law Cases

4-6 September

Ulaanbaatar,
Mongolia

In-country Event

Vertical Restraints

16-18 October

Tokyo,
Japan

In-country Event

Competition Issues in Light of Digitalisation

12-14 November

Seoul
(or Jeju),
Korea

Competition Workshop

Conducting Unannounced Inspections / Questionnaires Best Practices

Notes: Dates are subject to change after discussion with hosting jurisdictions



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.

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
- Facebook: OECD-DAF/Competition Division (closed group, contact jhoh@oecdkorea.org)
- Twitter: OECD/KPC COMP

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