

Asia-Pacific Competition Update

October 2020, Issue 26



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

It has been an odd year the one of 2020 so far with Covid-19 disrupting all of our lives. We have not been able to see each other face to face and have had to transform our presentational events and workshops with remote, virtual zoom meetings. This meant that the first part of the year was one of adaptation and we held fewer events then, leading to most of the events being undertaken in the second part of the year.

It also meant a good solid look at the challenges raised by Covid-19 induced recession on our economies and those specifically of the competition authorities. The OECD did a lot of work on this, which I co-ordinated and you can find all that work here:

<https://www.oecd.org/competition/competition-policy-responses-to-covid-19.htm>.

You will find many resources at your disposal, from policy notes on the crisis to videos from world renowned experts.

We also held a debate of the issues of dealing with the immediate fall-out of the crisis in a Special meeting of the OECD High Level Representatives of Asia Pacific Competition Authorities in July 2020, which you will find also detailed in this edition.

This newsletter also discusses three recent webinar workshops held by the OECD/KPC – on the health care sector as well as competition economics course

in two webinars for ASEAN competition authorities held together with the Asia Development Bank and the Philippines Competition Commission. You may read more about their content in the pages that follow.

The competition economics webinar was a particular highlight given that it was a new format that was used, with two world renowned professors of economics – Prof Massimo Motta and Prof Chiara Fumagalli, providing 8 days of webinars on Merger control economics and abuse of dominance economics.

Stay safe everyone and I look forward to seeing you at one of our upcoming events!



Ruben Maximiano



News from Asia-Pacific Competition Authorities*

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

CHINA



The SAMR gave full play to its anti-monopoly function and responded to the challenges arising from CoVID-19

In the first half of 2020, SAMR released Notice on Adjusting the Way of Reception During the Epidemic Prevention and Control Period and Notice on Supporting the Prevention and Control of CoVID-19 Epidemic and The Resumption of Work and Production in a timely manner. A series of policies and measures have been rolled out in terms of anti- law enforcement, fair competition review and corporate compliance support, so as to better respond to the challenges posed by the epidemic and ensure fair market competition.

First, the efficiency of merger case review has been further improved. The online application and acceptance system for merger cases and green review channel has been established, which has sped up the review process, reduced transaction costs and ensured the smooth progress of mergers and acquisitions. In the first half of 2020, 217 merger case notification were received, 215 were filed and 219 were concluded, up by 2.8%, 6.4% and 11.2% year on year respectively. The average review time was 14.5% shorter than that of last year.

Second, more efforts have been made in the anti-monopoly law enforcement in the areas of epidemic prevention and control and people's livelihood. A total of 62 monopoly cases were investigated and punished and the penalty amounted to 350 million RMB yuan. A campaign was organized in the fields of active pharmaceutical ingredients (APIs), public utilities and building materials, and six cases of monopoly agreements and four cases of abuse of dominant market position were investigated and dealt with, so as to effectively safeguard the interests of consumers. The monopoly case of calcium gluconate active pharmaceutical ingredients (APIs) was investigated and punished, and 325.5 million RMB yuan was confiscated to ensure the normal supply of active pharmaceutical ingredients (APIs). 43 cases of abuse of administrative power was corrected to eliminate or constrain competition in the pharmaceutical, transportation and other fields to maintain the unified national market in China.

Third, the anti-monopoly law system has been improved. After soliciting extensive opinions and comprehensive research and demonstration, SAMR formulated a draft amendment to the Anti-monopoly Law. SAMR has also formulated *the Interim Provisions on the Review of Concentration of Undertakings*, and drafted *the Anti-Monopoly Compliance Guide for Undertakings and the Anti-monopoly Guide for Active Pharmaceutical Ingredients (APIs)*.

INDONESIA



The ICC sanctions Grab and TPI

The Indonesian Competition Commission (ICC) has handed down a sanction for the violation of Article 14 and Article 19 (d) of Law No. 5/1999 on PT Solusi Transportation Indonesia (GRAB) and PT Teknologi Pengangkutan Indonesia (TPI) in special rental transportation services relating to the provision of Grab App software applications operated in the Greater Jakarta areas (Jakarta, Bogor, Depok, Tangerang, and Bekasi), Makassar, Medan, and Surabaya. Based on such violations, GRAB is subject to a fine of IDR7.5 billion for violating Article 14 and IDR22.5 billion for violating Article 19 (d), meanwhile TPI is subject to a fine of IDR4 billion and IDR15 billion for violating the two articles.

In the hearing proceedings, the Commission Panel presided over by Dinni Melanie, S.H., M.E. as the Head of the Panel, along with Dr. Guntur S. Saragih, M.S.M., and Dr. M. Afif Hasbullah S.H. M.Hum., as Members of the Panel, respectively, judged that the cooperation agreement for the provision of services by GRAB as an application provider company and TPI as a company engaged in the field of special transportation rental services, aimed at controlling service products for the provision of special technology-based rental service transportation applications in Indonesia and resulting in a decline of the percentage of the number of partners and the decrease in the number of orders from non TPI partner drivers.

The Panel valued that there had been a discriminatory practice being perpetrated by GRAB and TPI against individual partners as compared to the TPI partners, such as, the granting of priority orders, suspension periods, and other facilities. Such practice has resulted in the occurrence of a monopolistic practice and unfair business competition for non TPI partners and individual partners.

The Commission Panel has also given recommendations specifically to ICC in order to give recommendations and considerations to the Ministry of Transportation to conduct an evaluation with regard to the implementation of the special rental transportation quota policy with due observance of the principles of fair business competition; and to the Ministry of MSMEs and Cooperatives to provide advocacy for drivers categorized as MSMEs with regard to the implementation of the agreement between the drivers and the application provider company and the agreement between the drivers and the special rental transportation company.

PHILIPPINES



The PCC pushes for pro-competitive government response to Covid-19

The Philippine Competition Commission (PCC) made the case for continued implementation of competition law and policy during the COVID-19 crisis, underscoring the importance of keeping competition in check as the pandemic poses potential risk of anti-competitive conduct.

The PCC recently released guidelines for the exemption from compulsory notification of unsolicited public-private partnership (PPP) projects. These new rules complement the exemption rules for solicited PPP projects issued last year, in line with the government's strategy to accelerate the development of needed infrastructure.

The agency also continued its enforcement activities, monitoring market developments and initiating several investigations on reported cases of anti-competitive conduct and abuses of dominance, including those involving medical equipment essential to pandemic response.

As the economy restarts, the PCC is also pushing for a pro-competitive government response to the economic issues brought about by the health crisis. The agency recommended that economic stimulus legislation should advocate a level playing field and ensure that no market participant would have undue advantage. The PCC noted that measures should include provisions defining appropriate standards on determining beneficiaries of interventions (e.g., defining "critically impacted"), instituting transparency obligations in the grant of incentives for the manufacture or importation of critical equipment or supplies; and preventing price distortions in the procurement of medical products, among others.

THAILAND



Thailand report Launched – an important milestone of the ASEAN Project

On 16 September 2020, the OECD co-hosted together with the Office of Trade Competition Commission (OTCC) the launch event of two OECD reports on Thailand, namely a Competition Assessment Review of regulations in the logistics sector and a Competitive Neutrality Review of the small-package delivery services sector. The reports on Thailand are the first to be completed as part of the competition assessment and neutrality work under the Fostering Competition in ASEAN project.

Mr. Frédéric Jenny, Chairman of the OECD Competition Committee, and Mr. Antonio Gomes, Deputy Director of Financial and Enterprise Affairs of the OECD, provided key remarks on the importance of competition and of the OECD recommendations for improving the regulatory framework in the logistic sector and promoting a more level playing field. Other keynotes were from Mr. Sansern Samalapa, Vice-Minister for Commerce, Prof. Sakon Varanyuwatana, chairperson of the OTCC, H.E. Brian Davidson, British Ambassador to Thailand, and finally, Mr. Looi Teck Kheong, Head of the Competition, Consumer Protection and IPR Division (CCPID) of the ASEAN.

The main findings of two reports were presented by Ms. Federica Maiorano, Mr. Wouter Meester, Mr. Matteo Giangaspero and Mr. Gaetano Lapenta, all from the OECD Competition Division. Finally, Mr. Alexander Bohmer (GRS, OECD), Prof. Sakon Varanyuwatana and Mr. Antonio Capobianco, Acting Head of the OECD Competition Division, closed the event.

The launch event took place both physically in Bangkok and online via Zoom. It saw a large participation of Thai regulators and private stakeholders as well as representatives of ASEAN competition authorities, with whom the OECD is currently co-operating. More than 2.5k views have been registered for the facebook and youtube feeds.

In the upcoming months, the OECD team will continue working with ASEAN in order to complete the individual country reports, before the final launch of the regional report end March 2021.

Summary of the Special Meeting of AP Heads



Summary of the Special Meeting of High Level Representatives of Asia Pacific Competition Authorities 15 July 2020

The first virtual OECD meeting of the High Level Representatives of Asia-Pacific Competition Authorities took place via Zoom in the morning of 15 July 2020. Mr. Frédéric Jenny, the Chairman of the Competition Committee, chaired the meeting. There were 15 jurisdictions in attendance, most of which were represented by either Chairpersons or Commissioners of their respective authorities.

The OECD High Level Representatives of Asia Pacific is a forum for the Heads of Agencies and Senior Management to discuss topics that are of common interest to the competition authorities in the region, using the policy viewpoints and experiences of the OECD to support the region as it continues to develop its competition policy and enforcement.

The meeting was specially organised to discuss the developments in competition policy in Asia Pacific in the time of COVID-19, focusing on the strategies put in place by competition authorities in Asia Pacific to face the extraordinarily challenges posed by the COVID-19 pandemic.

Setting the tone of the meeting, Mr. Ruben Maximiano, Senior Competition Expert of OECD, briefly updated the participants about OECD's Policy Brief on Competition Policy Responses to COVID-19, which highlighted the competition authorities' role in assisting governments in designing and implementing state interventions that ensure competitive neutrality and minimise competition restrictions and distortions.

Mr. Allan Fels, former Chairperson of the Australian Competition and Consumer Commission (ACCC) delivered the keynote on the state interventions in Asia Pacific. Considering the many specific competition policy issues during Covid-19, Mr. Fels explained that governments should not view competition policy as a "luxury good" during the pandemic. He urged competition authorities to seek to be involved in the government's decision-making on



economic, financial, and health policies, with necessary awareness of the hazards in such involvement.

There were presentations and interventions by Ms. Reiko Aoki, Commissioner, Japan Fair Trade Commission, Mr. Arsenio Balisacan, Chairperson, Philippine Competition Commission, Ms. SIA Aik Kor, Chief Executive Officer, Competition and Consumer Commission of Singapore, Mr. Rasul Butt, Senior Executive Director, Hong Kong Competition Commission, Mr. Tsai-Lung Hong, Commissioner, Chinese Taipei Fair Trade Commission, Mr. Jamie Smith, Senior Economist, Fiji Competition and Consumer Commission, Mr. GM Saleh Uddin, Member, Bangladesh Competition Commission, Ms. Yang Berhormat Nik Hafimi, Chairperson, Competition Commission Brunei Darussalam, Ms. Madeline Berma, Member, Malaysia Competition Commission, Mr. Moon, Jae Ho, Senior Director of Cartel Policy Division, Korea Fair Trade Commission, Mr. Sakon Varanyuwatana, Chairman, Thailand Office of Trade Competition Commission, Mr. John Small, Commissioner, New Zealand Competition Commission, and Mr. Marcus Bezzi, Executive General Manager, ACCC.

The discussions covered a broad range of strategies from the competition authorities, including advocacy efforts with governments on the emergency measures (regulatory as well as state support measures), flexible treatment for M&A notifications, formal and informal guidance to businesses and consumers, and special studies on and enforcement activities in sectors that the pandemic immediately affected.

The high number of jurisdictions represented, the comments received during the meeting as well as subsequent communications and comments made to the Secretariat acknowledged the success of the meeting and the desire of many of the delegations for the OECD to continue to hold such meetings.

The next meeting of OECD High Level Representatives of Asia Pacific, scheduled in December 2020, will focus on the competition authorities' involvement in building back economies in a speedy and sustainable manner after the pandemic.

Covid-19 and Competition Responses in the first Phase of the Crisis

This article summarises some of the main findings and discussion items of the policy notes you can find here: <https://www.oecd.org/competition/competition-policy-responses-to-covid-19.htm>

The Covid-19 pandemic has led an unprecedented crisis affecting the whole world, with sharp increases in demand for certain products and difficulties in production or distribution of essential products and to short run market failures from supply and demand disconnects.

The question is then what does this mean for competition policy and competition authorities and what can they do to help?

Past experience tells us two things:

- The first: There is evidence that during periods of recession, there is an increased tendency for companies to enter into collusive agreements. Business people might be faced with the risk of losing job or becoming insolvent and this, in turn, might increase the willingness to explore a broader range of options to guarantee profitability, including price fixing.
- The second to make is that the policies in the great depression that effectively suspended cartel enforcement in the US New Deal in the 1930s impeding adjustments, have been shown empirically to have delayed recovery by a number of years.

Competition policy has flexible analytical frameworks that can incorporate the economic facts in a way that allows it to be part of the solution.

The question is how? The OECD has tried to provide part of that solution by our analytical pieces organised by the OECD Competition Task-Force together with a Roundtable discussion with Heads of Agencies we held in June, a number of webinars with nearly 400 case handlers from more than 75 competition authorities. A roundtable discussing the recovery phase will be held in December with Chiara Criscuolo, Kovacic, and Philip Lowe as well as a Panel of Heads of agencies that will include Chairman Balisacan of the Philippines Competition Commission.

A set of notes were published in April/May 2020 by the OECD. I would like to highlight 5 of them (above).

OECD competition policy responses to COVID-19 27/04/2020

This policy brief discusses how competition policy can help address the immediate challenges raised by the COVID crisis while preparing for the post-pandemic future.

COVID-19: Competition policy actions for governments and competition authorities 30/04/2020

This short note outlines actions that governments and competition authorities can consider to help address the immediate challenges raised by the crisis whilst looking to the post-pandemic future.

COVID-19: Managing operational challenges and enforcement risks for competition authorities 30/04/2020

This note looks at the operational challenges and enforcement risks for competition authorities arising from the crisis and the confinement measures and provides some guidance to authorities.

COVID-19: Competition and emergency procurement 30/04/2020

This note examines the conditions when direct awards may be necessary for emergency reasons and provides guidance for procurement and competition authorities for when departing from competitive tenders may be justified.

Merger control in the time of COVID-19 25/05/2020

In the context of COVID-19, this note analyses some key challenges related to merger control that competition authorities will face in the following months and presents open issues that require further discussion to ensure consistency across jurisdictions.

Exploitative pricing in the time of COVID-19 26/05/2020

This note analyses the role of competition agencies facing high prices caused by the Covid-19 crisis. It discusses the circumstances under which competition enforcement may be justified, how to overcome the difficulties that competition authorities pursuing such a course are likely to face, and available regulatory alternatives to address high prices during a pandemic.

Co-operation between competitors in the time of COVID-19 26/05/2020

This note identifies some of the criteria that competition authorities may consider when assessing co-operation between competitors in the context of the Covid-19 pandemic, and presents solutions to some of the challenges raised by their analysis. Some potential issues are highlighted to prompt further discussion.

What to do about excessive pricing allegations?

One of the effects of the COVID 19 crisis was the scarcity of several essential products (masks, alcohol-gel, protective equipment, etc.), whether due to increased demand or difficulties in production / distribution associated with confinement. Many products have experienced sudden price increases.

This may have led to potential exploitation behavior in terms of price and there is sometimes an expectation in society that competition authorities should intervene to assess whether or not these practices are legitimate.

Price increases are usually a signal for companies to increase production or to stimulate the entry of new companies, including by reallocating their productive assets.

As John Vickers said at our OECD meeting of the Competition Committee dedicated to the Covid crisis, there is sometimes a tendency to think that when prices go up, we are facing excessive prices, when prices go down, we are facing predatory prices, and when prices do not change, we have collusion.

Now, before making one of these statements, it is necessary to carefully analyse the concrete circumstances. These situations can be the result of normal market forces, such as the significant changes in supply or demand, or difficulties for companies to normally access the necessary inputs for their activity, suffering cost increases that are reflected in price increases.

But, in certain circumstances, companies in a dominant position may abuse their power with excessive pricing practices. However, we know that even in normal times it is not easy to assess this type of abuse, with very few examples of this type of case, especially because they are interventions of last resort, in very particular circumstances.

On the other hand, we must not forget that price increases are an essential signal for companies to increase production or to stimulate the entry of new companies. It is this incentive that will lead to the shortage of supply of a good or service being met in the medium term, leading to a reduction in the price level.

In the European Union, courts have interpreted that excessive prices will be prohibited, as an abuse of a dominant position, in case the price has no reasonable relationship with the economic value of the asset. Such will be the case when: (i) the price-cost margin is excessive and (iii) when the imposed price is not fair or equitable in itself or when compared with competing products.

Competition law in jurisdictions such as the United States, Australia, Canada or Mexico, on the other hand, do not prohibit excessive pricing. High prices are seen as mere indicators of underlying competitive problems, which should eventually be resolved, rather than intervening directly on price.

However, these jurisdictions typically have other mechanisms for dealing with exploitative pricing practices, such as price gouging or restrictive trading practices. For example, in the United States, there are state laws against price gouging that prohibit the excessive price of some goods during periods of abnormal supply disruption, with the application of civil or criminal penalties.

Despite the difficulties, several competition authorities have announced investigations for excessive prices. Spain, in funeral services, in the alcohol-gel market and in financial loans. Greece and Romania, in medical products (masks, gel, gloves). Italy, in the prices charged by a laboratory and health group in carrying out serological tests. Among several other countries.

Other authorities have issued warnings, such as in the case of ECN's joint statement mentioned earlier, warning that competition authorities would not hesitate to intervene if they found evidence of a breach of competition law, and similar initiatives by the UK and Norwegian competition authorities, which stated they were ready to intervene.

Before starting an overpriced case, competition authorities should consider whether such an intervention is necessary, proportionate and effective. They must also assess whether there will be better alternatives to deal with the problem, such as consumer protection, price gouging rules (speculative prices) - which aim to protect vulnerable consumers of companies that take advantage of situations of temporary market power or situations of need - or even temporary regulation of prices (or margins). These are often faster tools and thus more effective in what may be very difficult cases to run from a competition policy viewpoint.

Co-operation may be required to resolve market failures

We recognise in our note that co-operation between firms may be one of the ways to address the short-run market failure characterising this crisis.

Cooperation between firms may effectively help overcome shortages of essential products and fix disruptions of supply or logistics chains.

In addition to overcoming demand and supply shocks, co-operation may allow the private sector to temporarily pool resources and to join investment efforts for research & development (R&D) projects in the health industry to develop a new vaccine, new treatment or medical equipment to treat severe and urgent cases.

Both of these kinds of agreements have the potential to yield significant benefits for consumers, which would be lost if, in fear of falling foul of competition provisions, companies would refrain from entering into such efficient co-operation agreements.

To avoid any possibility of such a chilling effect and to increase legal certainty for business, many jurisdictions have provided guidance on the types of co-operation that take place between actual or potential competitors, either by stating their general understanding on the matter, or by issuing specific clearances in concrete cases. While wishing to promote a wider range of efficiencies that such agreements may generate, competition authorities remain watchful that such co-operation does not spill over into hard-core restrictions, such as price fixing cartels.

This means that more serious infringements in essence hard core restrictions continue to be by object or per se offences, and this framework remains valid throughout the COVID-19 crisis. Many competition authorities have stated that co-operation involving co-ordination or discussion on future prices, costs and wages are unlikely to be lawful or justified by pro-competitive effects.

In all other cases and where efficiencies outweigh anti-competitive effects resulting from the co-operation agreement, these may be considered.

The results from using this analytical framework may significantly be different depending on whether we are looking at co-operation as a response to the crisis or as innovative co-operation.

The competition authorities need to verify that the agreements between competitors are indeed necessary to help solve the crisis, proportionate to the objective they are pursuing and limited in time to impede the reduction of competition beyond the crisis period. These common criteria may represent quite significant challenges.

From the point of view of merger control, the first question that arises in times of crisis is whether competition authorities should relax the exercise of merger control in response to the difficulties of business and the economy.

This will not be the solution. Competition authorities **must continue** their important task of ensuring that competition in the market is **not** weakened by mergers.

This is because a merger will change the structure of the market forever. There is no going back, if you lose competition you will lose it forever. This is especially true if the industry is one with important barriers to entry – like in a sector in decline.

(ii) Firms in crisis may downsize, restructure, and become efficient again. If you allow a merger, you will prevent this possibility.

(iii) While the restructuring process takes place, firms compete in the market and buyers (ultimately consumers) will benefit of lower prices and availability of products (which may instead disappear with the merger)

Competition authorities will face several types of challenges: the uncertainty and instability of the markets, which must be considered in their analysis and which affect the counterfactual to be considered; difficulties in the design and implementation of remedies; the probable increase in cases in which the failing firm defence is presented, as well as requests for exemption from the obligations to suspend the implementation of the operation.

But competition authorities, in general, are prepared to face these challenges. In the past, they have already analyzed mergers in sectors in decline, constantly changing or with rapid innovation. They have already analyzed cases of claims by a failing firm company.

Finally, government intervention in markets affected by the crisis is necessary and legitimate to overcome the crisis and measures are thus needed in the short term to prop up the economy as well to then stimulate the economy for recovery in a way that guarantees it is also more resilient, inclusive and more climate friendly.

This may require reviewing some of the traditional analytical frameworks of competition policy, including increased consideration of dynamic efficiencies. Policymakers may have to consider the trade-off between efficiency and resilience so that economies are better prepared to face different types of crises, addressing supply chain challenges, promoting social cohesion and environmental outcomes. To achieve these legitimate policy goals, policymakers should assess the different available policy alternatives, undertake a cost-benefit analysis, and select the policy option that minimises competition restrictions and distortions.

A broad reflection on an intelligent industrial policy that can help reallocate resources to certain key sectors of the economy (e.g. health) that at the same does not distort competition between firms can also help to lay the ground for a resilient and sustainable economy in the long term. Restoring effective competition in the medium to long term is very important to ensure that the recovery is also fast and consistent, ensuring vibrant economic activity in the future.



Ruben Maximiano

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Directorate for Financial and Enterprise Affairs, OECD

OECD KPC Events

OECD/KPC Workshop on the Health Sector (July 2020)

This workshop of 12 hours focused on some of the main competition issues in the health sector, a sector particularly important in these times of Covid-19. The discussion focused on four main aspects: (i) bid-rigging, cartels and cooperation agreements; (ii) merger issues, (iii) abuse of dominance, and (iv) the role for competition advocacy in the sector. More than 70 participants were present throughout the four days of the webinar.

Presentations were made by the OECD, the Portuguese Competition Authority, JFTC, KPC, ACCC, US FTC, MyCC and CMA. A keynote address was provided by Allan Fels, former chairman of the ACCC.

There were multiple questions throughout the four days with lively discussions and debates of cases from various jurisdictions.

OECD/KPC Webinars on Competition Economics : Mergers and Abuse of Dominance (October 2020)

With our partners the Asian Development Bank and the Philippines Competition Commission the OECD/KPC provided a Competition Economics 24 hour long mini-course on Mergers and Abuse of Dominance with two world-class professors of competition economics: Prof. Massimo Motta and Prof. Chiara Fumagalli. This comprised one workshop on Merger Economics and another on Abuse of Dominance Economics. This mini-course was meant for economics and non-economists. More than 100 participants from ASEAN competition authorities took part in the workshops.

All over the world there are increasing concerns of growing industrial concentration and market power by firms, and several voices have been calling for antitrust authorities to be stricter when they vet mergers, whereas others defend the current standards. The merger workshop gave participants a thorough understanding of the competition economics of merger control, through the analysis of established and new economic theories on mergers, insights on the relevant empirical methods, and discussions on recent high-profile merger cases.

Abuse of dominance is one of the most debated area in competition policy. Often the difference between a behaviour that is efficient or anti-competitive can be difficult to discern and that is where the economic analysis can play a role. The abuse of dominance workshop provided the participants with a thorough understanding of the most recent economic theories of abuse of dominance, help them apply these concepts in practice, and review actual cases in the light of an economic approach.

In particular, the discussions focused on:

1. The established and recent economic theories of abuse and merger through a largely non-formal exposition also accessible to non-economists.
2. The distinguishing economic features of possible types of abuse, including price and non-price conduct.
3. The possible theories of harm in abuse and merger cases.
4. The core elements of an effects-based approach for the assessment of unilateral conduct.
5. The main traits of the relevant empirical methods used in merger control.
6. Some of the important recent merger and abuse cases in various sectors.

Recording

Two-tier approach

1. Is there enough market power for recoupment?
 - *If predator is dominant, go to 2. Else, dismiss case.*
2. Is there sacrifice of profits? *
 - $P > \text{Average Total Cost (ATC/LRAIC)}$: always lawful
 - $P < \text{Average Variable Cost (AVC/AAC/SRAIC)}$: presumed unlawful (burden of proof on defendant)
 - $AVC < P < ATC$: presumed lawful (burden on plaintiff)

*See Appendix 2 for a discussion on cost benchmarks

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OECD Webinars



ICN/OECD Webinar on 'Competition Investigations during the COVID-19 Crisis' - 05/05/2020 -

As part of a broader project aiming to improve international co-operation on enforcement, the OECD and the ICN held a joint webinar for competition authorities to discuss investigations during the COVID-19 crisis. Frédéric Jenny (Chair of the Competition Committee) and Andreas Mundt (Steering Group Chair of the ICN and President of the Bundeskartellamt) opened the event. Interveners from the competition authorities of Australia, Brazil, the Caribbean, Canada, Chinese Taipei, the European Commission, Lithuania, South Africa, US and the UK gave their perspectives on the issues they have tackled.

The webinar allowed authorities to share information that was timely and relevant to the operational decisions they were making at the time.

Webinars on Merger Control in times of crisis - 26/05/2020 -

Merger control will have an important role to play in the following months and years as a result of the COVID crisis. The pandemic raises a number of substantive challenges that authorities will need to deal with, including how to assess competitive effects of mergers in time of uncertainty and the role for the failing firm defence.

In attendance were over 220 participants from competition authorities of more than 60 jurisdictions. Expert speakers included Massimo Motta (ICREA Research Professor, Universitat Pompeu Fabra and Barcelona Graduate School of Economics) and Peter Alexiadis (Visiting Professor at King's College and Partner at Gibson, Dunn & Crutcher) in one webinar and Diana Moss (President, American Antitrust Institute) and Mark Powell (Partner, White & Case) in the second webinar. In addition, 16 authorities presented their experiences

and views during the discussion. Both webinars were chaired by Ruben Maximiano (OECD).

Materials available on the webpage: Agenda of the morning session // Agenda of the afternoon session // Videos summarising their presentations by Massimo Mota, Peter Alexiadis, Mark Powell and Diana Moss

Antitrust in times of Crisis - 28/05/2020 -

Over 230 participants from 65 jurisdictions attended two webinars on Antitrust in times of Crisis where experts and agency representatives discussed the challenges from the COVID-19 crisis for **enforcement activities against anticompetitive agreements and excessive pricing**.

Expert speaker Richard Whish (King's College London) presented on competitor collaboration and gave his thoughts on the flexibility of the existing legal frameworks, while John Davies (Compass Lexecon) provided his thoughts as an economist on how to deal with prices spikes. In addition, 16 other jurisdictions presented their experiences over during the discussion. Both webinars were chaired by Sabine Zigelski (OECD).

Materials available on the webpage: Morning session agenda / Afternoon session agenda / Video summarising their presentations by Richard Whish/ John Davies

Roundtable on Competition Policy in the Time of Covid-19 - 15/06/2020 -

Around 180 participants attended a virtual roundtable by the Competition Committee on co-operation between competition authorities and other public policy makers in times of crisis, and in particular, during the present Covid-19 crisis. OECD Secretary General Angel Gurría opened the discussions (see his speech) followed by remarks by two keynote speakers (Sir John Stuart Vickers and Professor Janusz Ordover). These initial presentations were followed by a panel discussion where heads of competition authorities shared the experience of their agency on the topic.

The session provided an opportunity to reflect on lessons learned, particularly, but not only, the financial crisis of 2008, and discussed practical solutions on how to best interact with governments in a way that preserves well-functioning and competitive markets in this crisis.

Read the SG's speech

<https://www.oecd.org/about/secretary-general/competition-policy-in-time-of-covid-19-june-2020.htm>

Literature Digest

This Literature Digest for this issue of the Newsletter reviews papers on the role of competition law in addressing the Covid-19 crisis. These have been reviewed by Pedro Caro Sousa, a competition expert of the OECD. A more detailed review of the papers discussed below – together with those of other academic papers – can be found at www.antitrustdigest.net.



Frederic Jenny 'Economic Resilience, Globalization and Market Governance: Facing the Covid-19 Test'

This paper by the chair of the OECD Competition Committee thinks widely about the implications of this pandemic for the economic architecture underpinning globalisation.

From a competition perspective, the main issue to be confronted in the short term is the brutal disruption the crisis provoked in value chains, leading to insufficient production or difficulties in product distribution. In such circumstances, cooperation between suppliers (and/or government intervention) may be necessary to ensure an adequate supply of essential goods and services. Second, consumers need to be protected against abuses resulting in price gouging of products in short supply or high demand. This requires competition authorities to take a more nuanced approach with respect to cooperation among competitors and to focus on exploitative abuses of market power.

In the medium run, our economies will be depressed, with the risk of a large number of bankruptcy of firms either directly hit hard by the Covid-19 epidemic or affected by the disruption of their supply chains, rising unemployment and dwindling demand. Massive amounts of state aid, tax deductions or deferments and subsidies of various kinds, or even the nationalisation of entire economic sectors, will become necessary. This policy response will create a tension between the need to prevent a large number of firms going bankrupt in the short run, and competition law's focus on ensuring that the competitive process guides the allocation of resources to maximise consumer welfare in competitive markets in the short run.

The author concludes that, in this environment, the promotion of competition may not be as central an economic preoccupation as it was during the first two decades of the century. At the very least, it is likely that competition authorities will have to take a longer and more dynamic view of the process of competition than they have until now; and adapt their reasoning with respect to state aid, crisis cartels or mergers in circumstances of economic disequilibrium caused by an exogenous shock to the economic system.

Francisco Costa-Cabral, Leigh Hancher, Giorgio Monti and Alexandre Ruiz Feases 'EU Competition Law and Covid-19'

This paper by members of the competition department of Tilburg University explores how EU competition law enforcement might be affected by the COVID-19 pandemic.

The authors recommend that competition authorities be watchful of excessive prices and price discrimination, and rely on interim measures if necessary. Collusion should remain an enforcement priority, but a procedural pathway to review agreements that may be in the public interest during the crisis should be adopted. In merger control, the Commission's strict interpretation of the failing firm defence is appropriate but a more sceptical attitude towards mergers may nonetheless be warranted during this period. Advocacy will play a key role: competition agencies can both point to existing regulations that limit competition, and monitor proposed emergency legislation that would harm competition for no good reason.

Particularly as regards state aid, the authors recognise that these are not normal times but still argue in favour of applying existing instruments and principles inasmuch as possible, coupled with a sceptical approach to claims that mergers are necessary to keep struggling companies afloat. While such a statement of principle must be endorsed, the magnitude of the crisis and political imperatives to protect employment may make it hard to uphold in practice.

Jorge Padilla and Nicolas Petit on 'Competition policy and the Covid-19 opportunity' (2020) Concurrences 2 1

In countries around the world, massive amounts of state aid have been injected into the economy with the goal of saving companies and jobs. While such policies deserve praise in their concern for the protection of jobs, recessions have a "cleansing effect" which is desirable and can be dampened by such interventions. Recessions facilitate the exit of zombie firms that crowd out growth opportunities for more efficient competitors, and delay the diffusion of technological innovations.

The authors argue that the current recession might be a source of opportunities for the EU economy, long trapped in a cycle of weak productivity, low economic dynamism, and a conspicuous absence of superstar firm creation. Competition law and state can play a role in this, by letting inefficient firms leave the market or merge with more efficient firms; and by denying inefficient firms the benefit of State aid when it prevents efficient industry reorganisation or liquidation.

From this perspective, economy-wide State aid measures may be too lenient and rescue zombie companies with problems that predate the Covid-19 crisis. At the same time, the increasing scepticism of competition authorities about the pro-competitive effects of mergers may deter the restructuring of sectors of the economy. Concerns about lax merger policy could be allayed by adopting a competitive assessment that discriminates between acquisitions by frontier firms and by technology laggards. The receipt of past or ongoing subsidies, as well as state-ownership, should be adversely accounted for in the competitive assessments of mergers.

This important paper pushes a number of controversial ideas. While it is important for zombie firms to leave the market during recessions, and state aid and merger control should ideally be applied accordingly, Covid-19 is a brutal exogenous shock that will lead to the market exit of any company that does not have the cash reserves to survive an unexpected shutdown of the economy. Given this, the risk of economic shock, mass insolvencies and unemployment, and long-term economic hysteresis may overwhelm all other considerations in practice, including those connected to promoting long-term productivity and protecting competitive neutrality.

OECD Competition Committee Meetings

8-16 June 2020

Working Party No. 2 on Competition and Regulation

Hearing on Line of Business Restrictions

Line of business restrictions can limit the range and type of activities that a firm can conduct. They can consist in structural prohibitions for a firm to engage in a certain line of business or in a behavioural restriction, for example by limiting a firm's ability to organise its lines of business.

During the discussion and through presentations by experts, as well as by the EU, UK, US, New Zealand and the BRICS, the OECD explored how effective different types of restrictions have been in the utility industries in which they were often applied, and tried to understand whether similar issues arise in relation to self-preferencing by digital platforms.

Link: <http://www.oecd.org/daf/competition/line-of-business-restrictions-as-a-solution-to-competition-concerns.htm>

Presentations on Competition in Audit Markets

Working Party No. 2 also held a series of presentations on its recent work on competition in audit markets. It explored how recent EU reforms mandating rotation had increased competition between the “big four”, but had not led to any firm breaking through and gaining market share from them. Delegates heard about the difficulty in recreating competitive pressure that had been lost as a result of past merger decisions, and countries' examples of cases and remedies to address these problems.

Working Party No. 3 on Competition and Regulation

Roundtable on criminalisation of cartels and bid rigging conspiracies

Sanctions against cartels can vary across jurisdictions. Some of them have monetary fines against legal persons, other criminal sanctions, including custodial sentences, against individuals. As noted in the OECD background paper, in the last years, there has been an increase in the adoption of criminal enforcement regimes.

While criminal sanctions can send a strong message of enforcement and deterrence and competition authorities have remained vigilant when it comes to bid rigging, an effective criminal enforcement requires time, significant resources and a strategic commitment. Moreover, in jurisdictions where the competition authorities are not in charge of investigating and prosecuting criminal antitrust offences, there is an increased need to co-operate with public prosecutors and other authorities.

Link: <http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

Competition Committee

Competition policy in times of COVID-19

Given the impact of the current pandemic on markets and on national economies, the OECD Competition Committee encouraged competition authorities to share experiences on the strategies put in place to face the extraordinary challenges posed by the COVID-19 emergency, in terms of enforcement and advocacy activities.

The Secretary General opened this session and stressed the role of competition authorities in supporting governments in designing rescue packages and informing governments' exit strategies and building more resilient, inclusive and sustainable economies.

The expert speakers, Prof. Janusz Ordover and Prof. John Vickers, noted that the current competition law regimes are well-suited to deal with most of the consequences stemming from the pandemic.

A panel of heads of competition authorities (Japan, US, Australia, European Commission, UK) discussed the co-operation with governmental bodies during the crisis. Various countries provided insights on their co-operation with governments and advocacy activities in relation to short to medium-term measures adopted to respond to this COVID-19 crisis and to accelerate post-pandemic economic recovery.

More on competition policy responses to COVID-19

Roundtable on Conglomerate effects of mergers

Conglomerate effects arise when a merger has an effect on competition, but the merging firms' products are not in the same product market, nor are they inputs or outputs of one another. Mergers exhibiting conglomerate effects have taken on a new prominence in the digital era, as the largest technology companies use acquisitions as a key part of their product development, expansion and recruitment strategies.

The Committee explored whether competition problems emerge when firms that are not direct competitors, or in a supply relationship, merge.

The discussion highlighted that new risks are emerging in digital markets, particularly within platform ecosystems, but that competition authorities need to proceed carefully before intervening.

Indeed, investigating conglomerate effects can be particularly difficult, as it is not straightforward to identify when they are likely to arise. Information gathering, addressing uncertainty in the development of the market, and assessing remedies for conglomerate effects are some of the key challenges faced by competition authorities in these cases. Given the expected increasing importance of these mergers in the digital sector, competition authorities have identified strategies to facilitate their review, including a reliance on internal firm strategy documents.

Link: <http://www.oecd.org/daf/competition/conglomerate-effects-of-mergers.htm>

Roundtable on Start-ups, killer acquisitions and merger control thresholds

In recent times, the competition community has extensively discussed the competitive effects of the acquisition of nascent firms by dominant incumbents. One of the most discussed theories of harm in such mergers has been the risk of so-called killer acquisitions, where firms acquire competitors only to discontinue their innovation projects and so avoid the emergence of new competitors.

The Committee heard academic research identifying that in the recent past more than 50 anti-competitive mergers each year in the pharmaceutical sector went unchallenged by competition agencies. However, there has been a significant upturn in the investigation of such acquisitions and there is an increasing number of cases that are being challenged, not only in pharma but also in other innovative markets. For instance, a recent acquisition of a nascent firm with just a 2-3% market share was blocked in both the US and the UK. In light of the research, numerous agencies have announced reforms to their merger review processes to enable them to investigate such acquisitions.

Link: <http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control.htm>

Consumer Data Rights and Impact on Competition

Consumer Data Rights include fundamental rights to privacy; requirements around consumer consent to have their data collected, stored and used by businesses and governments; and regulations around how consumers can access, share and delete their data.

Since more and more consumers rely on services offered in the digital economy, such consumer data rights are gaining more attention across the globe.

The roundtable explored issues associated with how competition authorities should assess competition cases involving such consumer data, remedies in such cases, and policy responses for issues spanning competition and data protection issues. The discussion highlighted that, while there is broad agreement that competition and data protection policies and laws are intertwined and will only become more so in the digital economy, there are differences in how jurisdictions are addressing this.

Link: <http://www.oecd.org/daf/competition/consumer-data-rights-and-competition.htm>



Asia-Pacific Competition Update

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