

# Asia-Pacific Competition Update

December 2020, Issue 27



**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

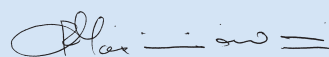
The previous newsletter looked had a number of articles about the reaction of competition authorities in the midst of the crisis in order to respond to it in the best possible manner. As we move forward in the pandemic and the economic recession, competition authorities not only still need to react to the crisis but need to prepare to support the economic recovery that will hopefully soon follow.

This edition therefore looks at some of the actions that competition authorities may need to take, in particular helping policymakers make well-informed trade-offs that include possible competition distortions when they are designing support measures. This is what will allow well-functioning market structures in the long-run to continue to deliver economic gains and ultimately economic growth.

This edition will also discuss some of the main findings of that work, as well as an article prepared Takuya Ohno of the OECD that looks at cooperation agreements in the age of covid-19 in the Asia-Pacific Region.

This newsletter also discusses a recent webinar workshop held by the OECD/KPC – on cartels, leniency and fines, prepared in a bilateral context for the Thai Competition Authority (OTCC). You may read more about the content in the pages that follow.

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



Ruben Maximiano

# OECD/KPC/OTCC – Building a Cartel Enforcement Regime

From 9-12 November the OECD/KPC organised a 4-day 12-hour webinar moderated by Ruben Maximiano and Wouter Meester. It explored the main issues that the Thai Competition authority – the OTCC, needs to consider in order to build an effective cartel regime. This was a capacity building programme also part of the OECD-Thailand Country Programme. The webinar included the main legal challenges as seen by a senior judge from the Supreme Court of Thailand, to screening and detecting, as well as designing an effective leniency regime. Finally, the role of sanctions was also explored. The webinar benefited from presentations from the OECD - from Ruben Maximiano, Wouter Meester, Sophie Flaherty, Gaetano Lapenta and Leni Papa, as well as from the Australian ACCC, European Commission, Korean KFTC, Portuguese Competition Authority, Singapore's CCCS.

**Case study: Vina Money Transfer**

- Joint investigation between ACCC and AFP
- In April 2019, criminal cartel charges laid against 5 individuals and Vina Money Transfer in relation to alleged price fixing

**ABC NEWS**  
**BREAKING NEWS**  
**Currency cartel accused of rigging Australian-Vietnamese exchange rates**  
By Business reporter David Clancy  
Updated on 17 Apr 2019 at 10:28pm

**acc.gov.au**

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Wouter Meester  
\_OECD\_Ruben Maxim...  
Hannah Nichols



# Competition policy and the Economic Recovery

| By Ruben Maximiano, OECD

Three key **points can be made about the role for competition policy and the economic recovery from the Covid-19 economic fallout**. One is that there are lessons to be learnt from previous crises. The second one is that this may require an increased focus on advocacy given the level of government interventions that can distort competition in markets. The last point relates to some of the Enforcement challenges.

**So first, what have we learnt?** Is this time different? We have had recessions before and what did that mean for the role of competition?

As Bernanke said, “Seismologists learn more from one large earthquake than from a dozen small tremors”.

Looking back at previous moments of big economic hardship, such as the Great Depression, the Japanese crisis of the 90s, Global Financial Crisis we learnt that lax cartel enforcement and merger control in times of crisis holds back recovery and does not improve resilience.

Advocacy becomes particularly important in these times. Changes done during these times can have lingering effects on competition for a very long time, perhaps even decades. An example, after strong lobbying, the aviation sector in the 1930s saw the imposition of restrictive regulation for new players until deregulation decades later in the 1970s.

Regarding the **second point**, which is on the increased role for advocacy. Structural change also means that governments may be ready to embrace reforms. Competition authorities therefore may wish to push for reforms.

Just as importantly is the role that competition authorities may have now and will continue to have in the design of all the government measures to address crisis and the recovery.

Competition must be taken into account in a wider policy agenda for recovery. Very few competition authorities



around the world have specific enforcement powers regarding state support, the EU being an example of one who does. However, virtually all competition authorities have advocacy powers, meaning the possibility of advising governments and providing opinions.

And whenever governments decide to subsidise or otherwise aid a firm this, may lead to competition distortions that can leave a long term legacy. It may force those firms who are perhaps more efficient to downsize or even exit.

So competition authorities may be called upon or decide to provide advice to help minimise those distortions. The alternative is to spend the following years trying to address the problems created with enforcement actions, when agencies already have stretched resources.

In the OECD background paper (<http://www.oecd.org/daf/competition/role-of-competition-policy-in-promoting-economic-recovery.htm>) we offer a number of economic principles that can provide pointers on how competition agencies can analyse a particular state support measure. There is no suggestion of being dogmatic. There may be very good reasons for state support.

Further, competition should inform the design of industrial policy measures, helping ensure that through the reduction of regulatory barriers to entry, for example, competition may be imbedded into wider industrial policy agendas.

The bottom line is that if governments decide to shape markets, competition agencies may help them ensure they do so by guaranteeing the principle of competition.

**The third point relates to enforcement.** Prioritisation becomes fundamental in order to support the economy. Competition authorities may have to redirect enforcement towards strategic markets and industries that may lie at the heart of the recovery process. This will depend on the specific jurisdiction and its economic make-up.



Agencies may also have to prioritise those sectors that had co-operation agreements to ensure they do not exceed their initial time and scope and do not end up degenerating into hard-core cartels.

There will be calls for crisis cartels. This should be met with extreme caution by competition authorities. And be considered only in very extreme circumstances where, in the absence of the agreement the competitive structure of the market would deteriorate to at least the same extent as **with** the agreement.

As regards abuse of dominance, In times of crisis many firms may exit, leading to increased market power for those that remain in the market. Others may have become financially weaker and those firms with deep pockets can take advantage of the fragility of competitors. This may lead to a heightened risk of exclusionary behaviours, such as predatory pricing and other exclusionary strategies.

Competition authorities need to be alert to exclusionary abuses and be prepared to move fast where appropriate, perhaps with interim measures to avoid irreparable harm.

As regards merger control we point to the need to continue to strictly apply it and the Failing firm defence. Even more so in circumstances where markets are expected to bounce back. We must bear in mind that mergers are forever. Firms often have the opportunity to restructure, downsize and become competitive again.

However, expedited reviews for failing firm defence cases might be envisaged. In particular where there seems to be a good case and the likely magnitude of the consumer harm low.

In conclusion, competition and competition authorities can play a key role in the recovery of our economies.

# Asia-Pacific: COVID-19 and co-operation between competitors

| By Takuya Ohno, OECD

The COVID-19 outbreak has been causing significant damages on the Asia-Pacific region although it has so far suffered less than other parts of the world. According to the World Bank, the East Asia and Pacific region is expected grow by only 0.9% in 2020, the lowest rate since 1967<sup>1</sup>). While numbers of reported COVID-19 cases remain stable or decreased in certain Asia-Pacific countries, some are facing potential second waves of COVID-19 infections.

The COVID-19 outbreak has caused severe disruptions of logistics and supply chains and casted multiple uncertainties over companies' businesses. This gave rise to a need for co-operation between competitors in order to tackle with the exceptional challenges brought about by the COVID-19 outbreak. Several competition authorities nevertheless recalled that antitrust rules remain fully applicable even in times of COVID-19. For instance, the ASEAN Experts Group Competition released a statement calling "*on all business sectors to continue to comply with competition law despite the current economic downturn*". At the same time, certain competition authorities in Asia-Pacific have expressly acknowledged that certain co-operation between competitors could prove to be necessary considering the exceptional circumstances caused by the outbreak.

## Soft-law instruments

Soft-law instruments. A number of competition authorities (e.g., Singapore, India, New Zealand and Japan) have clarified their antitrust rules in view of the COVID-19 outbreak by way of soft-law instruments (guidelines, guidance/advisory note, statements, etc.). These mainly pertain to co-operation the

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1. World Bank (2020), "From Containment to Recovery" East Asia and Pacific Economic Update (October).



purpose of which is to ensure a continued supply of essential goods and services such as food, utilities or medicines. For example, the Competition Commission of India advised businesses that they “*may need to coordinate certain activities, by way of sharing data on stock levels, timings of operation, sharing of distribution network and infrastructure, transport logistics, R&D, production etc. to ensure continued supply and fair distribution of products*”. It is worth noting that Competition and Consumer Commission of Singapore provides a list of 96 items that are considered as essential in its guidance note on collaboration between competitors in response to COVID-19. The list includes items from broad categories such as health and social services, food, energy, water, construction and legal services.

Analysis of these soft-law instruments suggest that the business co-operation in response to COVID-19 needs to satisfy at least the following conditions. First, the co-operation should be necessary to tackle with supply shortage. In this respect, co-operation in response to supply surplus (e.g., agreement to limit output to avoid price erosion) do not appear to be necessary in this context. Second, they need to be temporary given the (hopefully) temporary nature of the pandemic. Third, they should be proportionate to the achievement of the objective pursued.

### Ex-ante authorisation of co-operation

Ex-ante authorisation of co-operation. The soft-law instruments discussed above still require businesses to self-assess legal risks pertaining to their co-operation with competitors. In contrast, several competition authorities in Asia-Pacific (e.g., Australia, New Zealand) have a regime of voluntary notification of agreements whereby the businesses can seek formal authorisation of their co-operation with competitors in response to COVID-19.

The Australian Competition & Consumer Commission (ACCC) has been active

in the use of such ex-ante authorisation regime for COVID-19 related business co-operation and are “*authorising, or making legal, what would otherwise be anti-competitive activity*”<sup>2</sup>). For instance, last September, the ACCC granted conditional authorisation to enable the Australian Institute of Petroleum and its members (i.e., major oil refiners which collectively own 93% of the Australian wholesale petroleum market) to co-operate in order to improve the security of fuel supplies during the COVID-19 pandemic. It in particular allowed them to exchange information relating to their fuel import schedules, current available fuel levels, future refining intentions or other current and forward-looking types of operational information. The ACCC considered that, while such sharing of information may increase the risk of coordinated effects, these anti-competitive risks were low because the authorisation was limited to 6 months and subject to conditions (i.e., reporting of relevant meeting and provision of information to ACCC on request).

### Exceptional nature of exemptions

Exceptional nature of exemptions. Review of the temporary exemptions from or relaxations of antitrust rules suggest that these measures are considered in very limited circumstances solely to tackle with the exceptional challenges brought about by the COVID-19 outbreak. Competition agencies are indeed scrutinising conduct related to COVID-19 that goes beyond what is necessary to achieve this goal. For example, the Indonesian Competition Commission indicated that it would investigate alleged price-fixing in the sugar sector where the national sugar price could reach 240% – 260% higher as compared to the international prices in April and May 2020.

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2. Speech of Rod Sims, Chair of the ACCC, on 30 March 2020.

# OECD Competition Committee Meetings

## November/December 2020

### Working Party No. 2 on Competition and Regulation

#### Roundtable on Digital Advertising Markets

Working Party 2 held a roundtable on digital advertising markets on 30 November. The roundtable looked at how digital advertising markets work, potential competition issues in these markets, and potential competition and other policy remedies. There was agreement that there are issues around market power, a lack of transparency, and potentially a range of exclusionary and exploitative practices in these markets. Competition enforcement is underway in a range of jurisdictions, and competition law offers some solutions, though there are complexities involved in market definition among other things. Some jurisdictions, such as the UK, are looking at new regulatory powers to address competition concerns in digital advertising markets (and digital platform markets more broadly). The roundtable benefited from expert speakers including David S. Evans (Global Economics Group), and Fiona M. Scott Morton (Yale University School of Management), along with a background note by the Secretariat.

**Link:** <https://www.oecd.org/daf/competition/competition-in-digital-advertising-markets.htm>.

### Working Party No. 3 on Co-operation and Enforcement

#### Presentations on standard essential patents (SEP) in the era of the Internet of Things (IoT)

Standards, particularly voluntary consensus standards set by standards development organizations (SDOs), play a vital role in the economy. By allowing products designed and manufactured by many different firms to function together, interoperability standards can create enormous value for consumers and fuel the creation and utilization of new and innovative technologies to benefit consumers. As interoperability standards increasingly incorporate technologies covered by intellectual property rights, disputes between parties can arise, such as, for example, SEP holders with commitments to license on FRAND terms licensing only at the end-product level (so-called “access for all” policy), while end product and parts manufacturers often prefer SEP holders to license at the component level (so-called “license to all” policy).

Delegates heard about approaches from different jurisdictions and benefited from contributions by experts in the field, the Honourable Judge Paul R. Michel (Former Chief Judge, United States Court of Appeals for the Federal Circuit), Professor Ryushi Ito (Tokoha University Department of Law), and Jorge Padilla (Senior Managing Director and Head of Compass Lexecon Europe).

### **Discussion of the joint OECD/ICN Report on International Enforcement Co-operation**

In July 2020, the preliminary results of the joint OECD/International Competition Network survey on international co-operation were presented in two virtual sessions to the OECD and ICN membership. Delegates were asked to provide their written comments and observations to a draft version of the Report that they received in July 2020.

In this session, the final version of the 'OECD/ICN Report on International Enforcement Co-operation: Status Quo and Areas for Improvement' were presented and discussed, before publication of the Report by the Secretariat and the ICN.

As a next step, the Secretariat will prepare a draft Monitoring Report to the Council on the Recommendation, based on the OECD/ICN Report. The draft will be circulated to delegates in the first semester of 2021.

## **Competition Committee**

### **Hearing on Sustainability and Competition**

In a context where public and private entities are called upon to align their conduct and strategies with the United Nations Sustainable Development Goals, a potential conflict between various sustainability goals and the protection of competition may arise. This session offered the opportunity to address five primary questions associated with sustainability and competition law:

- i) What do we mean by “sustainability” and is competition law a suitable tool to take into account sustainability considerations?
- ii) In what circumstances can there be a conflict between competition and sustainability goals?
- iii) How is competition law enforced in cases that present sustainability issues, and how have competition authorities taken those into account within the existing analytical framework, either in their competitive assessment or in the analysis of efficiencies?
- iv) If positive impacts on sustainability can be considered as efficiencies, what categories of consumers should they be benefiting to be taken into account?
- v) Should harm and efficiencies relating to sustainability be quantifiable or is a qualitative assessment more appropriate?

The Hearing benefited from presentations by a panel of experts, including Suzanne Kingston (University College Dublin), Simon Holmes (UK Competition Appeal Tribunal), Martijn Snoep (ACM), Maarten Pieter Schinkel (University of Amsterdam), Maurits Dolmans (Cleary Gottlieb), Gianni De Stefano (Akzo Nobel), and from a Secretariat Background paper by Associate Prof. Julian Nowag (Lund University).

**Link:** <http://www.oecd.org/daf/competition/sustainability-and-competition.htm>

### **Roundtable on The Role of Competition Policy in Promoting Economic Recovery**

In times of crisis like the one we are currently living following the Covid-19 pandemic, competition policy can play a key role, alongside other governmental policies, in the recovery phase, helping governments to “build back better”. This roundtable addressed the ways in which competition authorities may contribute to speed up the recovery from the recession triggered by the global health crisis. The roundtable analysed and discussed i) the historical economic evidence on the role of competition law and policy in promoting the recovery from previous crises; and how competition authorities can (ii) enforce in a way that supports a swift economic recovery from the recession; iii) inform economic reforms, industrial policy and other governmental support measures (including equity acquisitions) in a way that safeguards competitive, resilient and sustainable markets in the medium/long-term.

The Roundtable benefited from presentations by a panel of experts including William E. Kovacic (Professor at George Washington University; Non-Executive Director of the UK Competition and Markets Authority), Philip Lowe (former Director General of DG Competition), Chiara Criscuolo (OECD) and from a Secretariat Background paper.

**Link:** <http://www.oecd.org/daf/competition/role-of-competition-policy-in-promoting-economic-recovery.htm>

### **Hearing on Competition Economics of Digital Ecosystems**

Competition in the digital economy is increasingly a competition between ecosystems. Hardware and software are increasingly integrated, Internet of Things devices connect to online services and a few large tech companies offer a very broad range of services often fairly integrated with one another. The most successful digital companies in recent years have increasingly been building their business model around large ecosystems of complementary products and services around their core service. Integration of a wide range of products and services can deliver efficiency savings, potentially reducing prices. They can also potentially improve the consumer experience overall, by offering demand-side synergies which increase the ease with which a range of different services are accessed. However, there may also be potential competition concerns regarding digital ecosystems.

This Hearing offered an opportunity for delegates to hear from experts on 1) how competition between ecosystems works and how it may differ from competition between traditional firms; 2) the economics of ecosystems and the role that ecosystems play today in digital markets; 3) what are their potential benefits and concerns for competition, and the reasons why some ecosystems succeed as opposed to other that fail; and 4) what are the consequences for enforcement of competition law from the proliferation of ecosystems.

The Hearing benefited from presentations by a panel of experts, including Marc Bourreau (Professor of Economics, Télécom ParisTech); Daniel Crane (Professor of Law, University of Michigan Law School); Amelia Fletcher (Professor of Competition Policy, University of East Anglia; Non-Executive Director of the UK Competition and Markets Authority CMA); Nicolas Petit (Professor of Law, European University Institute); Georgios Petropoulos (Research Fellow, MIT Sloan School of Management and Bruegel; Post-Doctoral Associate, MIT Initiative on the Digital Economy)

**Link:** <https://www.oecd.org/daf/competition/competition-economics-of-digital-ecosystems.htm>

# OECD/KPC Competition Programme 2021

<b>February</b>	<p><b>10<sup>th</sup> OECD/KPC Competition Law Seminar for Asia-Pacific Judges</b></p>
	<p>Market definition: an essential tool of competition analysis. And Launch of Competition Primer for ASEAN Judges.</p>
<b>March</b>	<p><b>Virtual Bilateral Workshop with Thailand on Merger Guidelines</b></p>
	<p>Development of an merger control regime including substantive issues and remedies. The workshop would focus on helping the the Thai Competition Authority (OTCC) to develop its own Guidelines for Mergers.</p>
<b>April</b>	<p><b>Virtual Workshop Competition in the Digital Economy:</b></p>
	<p>A workshop for competition authorities, sector regulators and legislators to develop their understanding of the competition issues and policy concerns in digital industries. This will include an introduction to the elements of digital services and common competition concerns in digital industries across the globe, as well as competition assessment considerations of laws and regulations.</p>
<b>June or July</b>	<p><b>11<sup>th</sup> Competition Law Seminar for Asia-Pacific Judges</b></p>
<b>September</b>	<p><b>Workshop Competitive Neutrality and Levelling the Playing Field</b></p>
	<p>A workshop to analyse and share experiences in the advocacy of competitive neutrality rules, to ensure a level playing field between competitors regardless of ownership, and to minimise competition distortions whenever there is state support to entities that are in competition with others. The workshop will also include analysis and sharing of experience of enforcement cases involving SOEs.</p>
<b>November</b>	<p><b>Competition Issues and Procurement</b></p>
	<p>Looking at bid-rigging cases and public procurement competition advocacy.</p>
<b>By December</b>	<p><b>Competition Trends in Asia-Pacific Report</b></p>
	<p>Data from the OECD and non-OECD jurisdictions in Asia-Pacific will be collected, analysed and reviewed, resulting in the description of enforcement trends in the Region.</p>

**Notes:** Dates are subject to change. Format may change according to the conditions.





# 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 [ajahn@oecdorea.org](mailto:ajahn@oecdorea.org).

## SNS

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

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

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