

# Asia-Pacific Competition Update



## News from the OECD/Korea Policy Centre Competition Programme

June 2012, Issue 6

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The Competition Programme of the OECD/Korea Policy Centre provides education and training to officials and experts of Asia-Pacific competition authorities in the field of competition law and policy. 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.



ORGANISATION FOR ECONOMIC  
CO-OPERATION AND DEVELOPMENT

## Mr. Gurría, Secretary General of the OECD, highly praised the Centre as “the Hub of International Cooperation in the Asia-Pacific Region.”

### Opening Ceremony of a New Office OECD Korea Policy Centre



OECD Korea Policy Centre

27 April 2012



OECD Secretary General Angel Gurría (third from right) with Executive Secretary of the OECD/Korea Policy Centre Sangwoo Nam (from left), President of the KDI Ohseok Hyun, Minister of the Prime Minister's Office Jongyong Yim, Ambassador of Permanent Delegation of Korea to the OECD Kyungwook Hur and Chairman of the Steering Committee Yoonsik Hong in front of the new office building of the Centre

H.E. Angel Gurría, Secretary General of the OECD, participated in an opening ceremony of the OECD/Korea Policy Centre to celebrate its move into a new office building on April 27 (Fri.), 2012.

In the congratulatory remarks, Mr. Gurría spoke highly of Korea for its contribution to the OECD and expressed his gratitude to the Centre for playing an important role in outreach programmes for non-OECD member countries in the Asia-Pacific region.

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## News from Asia-Pacific Competition Authorities

### ❖ KOREA

#### Rules Issued on Operation of the Consent Decree

As a follow-up to the amendment of the Monopoly Regulation and Fair Trade Act, which introduced a consent decree system for antitrust cases in Korea, the Korea Fair Trade Commission (KFTC) issued “Rules on Operation and Procedure of the Consent Decree System” on April 1, 2012.

The Rules on Operation and Procedure of the Consent Decree System were developed with reference to similar rules in the U.S. and EU as well as the Korean Case Handling Procedure Rules. The consent decree system in Korea is, however, designed to operate under stricter conditions than those typically found in other countries.

The consent decree system is a procedure where an enterprise may voluntarily propose corrective measures to resolve certain antitrust cases being investigated by the KFTC. After the KFTC collects and reviews comments from relevant interested parties, it then decides whether such proposed corrective measures are appropriate. The consent decree system is not available for, among others, cartel cases and other cases where the violations are so severe and obvious that the KFTC needs to refer them to the Prosecutor’s Office for criminal sanctions.

#### Launch of ‘Smart Consumer’

On Jan. 11, the KFTC launched Smart Consumer (an online consumer information network), giving people an open platform on which to find accurate information and detailed reviews of products before making a purchase. The services provided include sources of information on products, price differences, safety, and consumer reviews.

The KFTC’s Smart Consumer web site has enabled consumers to have easy access to information. It draws together scattered consumer information by connecting 40 web sites from 22 organisations including the Ministry of Land, Transportation and Marine Affairs and the Korea Food and Drug Administration and by activating search functions.

The web site also provides a service called ‘K Consumer Report’, which publishes reviews and comparisons of consumer products and services based on results from its in-house testing. This customised information which compares the features and quality of different products such as hiking boots, variable annuities, and childrens’ drinks will help consumers to make a rational decision when purchasing products.

#### Cartel Crackdowns

##### Collective Instant Noodle Price

The KFTC decided to issue a remedial order to South Korean instant noodle manufacturers and fine them a total of KRW 135.4 billion for joining a cartel to collectively raise instant noodle prices.

Instant noodle manufacturers were sharing sensitive price information with each other and jointly raised the prices of their noodle products six times.

##### Price Fixing by Electronics Companies

The KFTC imposed surcharges of KRW 44.647 billion on two electronics companies for cartel conduct. The KFTC found out that the two electronics companies raised the retail prices of their washing machines, flat screen TVs and notebook PCs and they appeared to have formed a cartel due to high production costs and weak demand.

##### Collusion in the Chemical Fertiliser Sector

The KFTC concluded that 13 chemical firms had colluded in bidding for supply contracts for two Korean agricultural cooperatives, and imposed corrective orders along with about KRW 82.8 billion in fines. The case

was viewed by the KFTC as an opportunity to revive price competition in the chemical fertiliser sector, and thereby help to, among other things, relieve economic pressures on farmers.

## Corrective Order for a Foreign-Foreign Business Combination

The KFTC imposed a corrective order as part of a conditional approval for a foreign-foreign business combination. As a condition for the pending combination between Western Digital Corporation, the no. 2 maker of hard disk drive (HDD) devices worldwide, and Viviti Technology Ltd., holding company of no. 3 maker Hitachi Global Storage Technologies (Hitachi GST), the KFTC ordered the sale of significant assets as a “structural” corrective measure, namely the disposal of the combined companies’ 3.5 inch HDD business.

The KFTC’s order is the first instance in which it has imposed such corrective measures for an all-offshore business combination applying the regulations against M&A between offshore companies on the Article 7 of the Monopoly Regulation and Fair Trade Act

## Hidden Story about High-Priced North Face Outdoor Products

The KFTC uncovered a violation by GOLDWIN KOREA – which had been setting the prices of “North Face” products in specialty stores in advance and forcing the stores not to sell the products at retail prices below the set prices between November 1997 and January 2012 -- and imposed a penalty surcharge of KRW 5.248 billion on the company.

These actions were specifically designed to strictly sanction minimum resale price maintenance by North Face, the number one outdoor brand.



## China sees a 43% increase in merger notifications in 2011

M&A cases have increased at a very fast pace in China in 2011. The Ministry of Commerce (MOFCOM) received 194 applications for M&A deals from both domestic and foreign companies between January and mid-December, up 43% from a year earlier. As at mid-December 2011, MOFCOM had finished vetting 160 cases, up 40% from 2010. Of those 160 cases, 94% were approved. There were four conditional approval cases which represent about 3% of total cases and five applications were withdrawn after being filed (3% of the total cases).

MOFCOM has analysed the 160 concluded cases according to the industrial classification for national economic activities. According to this analysis, there were 103 cases in the manufacturing industry which represents 64% of total cases and approximately the same number as in 2010. Thirteen of the cases were in the information transfer, computer services and software industries which represents about 8% of cases, 10 cases were in the electricity, gas and water production and supply industries which represents 6% of the total, a further 10 cases (or 6%) were in the transportation, storage and postal service industries, and another 10 cases (or 6%) were in wholesale and retail industries. Seven cases were in the mining industry (representing 4% of total cases), 3 cases were in the construction industry, 2 were in the financial sector, and one was in each of the real estate industry and the scientific research, technical services and geological industry.

Compared to 2010, the proportion of cases in the manufacturing, transportation, storage and postal service industries has increased in 2011 while the proportion of cases in the mining, wholesale and retail industries has declined. However, there is no indication of an obvious change in the level of applications in the other industries as compared to 2011.

## News Across Asia

### ❖ MALAYSIA

#### Competition Act of Malaysia Comes into Force

The Malaysian Competition Act 2010 (Act) came into force on 1 January 2012. The Malaysian Competition Authority (MyCC), which was established under the Act on 1 April 2011, is the authority responsible for enforcing the provisions in the Act. The Act prohibits two types of anti competitive practices:

- anti competitive agreements between enterprises such as price fixing, market sharing, limiting or controlling market access and bid rigging arrangements; and
- abuse of a dominant position.

The MyCC is also empowered to conduct a review into any market to determine whether there are any distortions in the competitive process. Upon the conclusion of a market review, the MyCC shall publish its findings and recommendations.

For the year 2012, the MyCC's main focus will be on advocacy and capacity building.

### ❖ PAKISTAN

#### Competition Conference in Pakistan – December 2011

The Competition Commission of Pakistan (CCP) held its 2nd International Conference, "Competition Enforcement Challenges and Consumer Welfare in Developing Countries," on December 1-2, 2011 in Islamabad, Pakistan with the collaboration of the Competitiveness Support Fund (CSF/USAID).

The Conference was attended by over 20 representatives from competition agencies, the economic sector and academia from the Americas, the European Union, Africa, the Far East, South Asia and the Caribbean

Community (CARICOM) (altogether representing 50 different countries), along with stakeholders from different sectors in Pakistan. The Finance Minister also attended the two day Conference.

CCP Chairperson, Rahat Kaunain Hassan, touched upon key areas of competition law enforcement, advocacy and the challenges faced by CCP in implementing competition law. She said the purpose of this conference was to create awareness about the significance of a competition regime for the Pakistani economy and to learn from the experiences of the developed and developing regimes.

On the second day of the conference, the Honorable Prime Minister of Pakistan, Syed Yousaf Raza Gilani, was the chief guest. The Prime Minister recognised that CCP has been active since its inception in addressing market manipulation. He also acknowledged and appreciated that CCP was chosen and given a fair rating by the Global Competition Review in the year of 2011.

Further information about the conference is available at:

[http://www.cc.gov.pk/index.php?option=com\\_content&view=article&id=97&Itemid=86](http://www.cc.gov.pk/index.php?option=com_content&view=article&id=97&Itemid=86)

### ❖ SINGAPORE

#### CCS' Updates

CCS does not limit its role to the enforcement of the Competition Act. It is equally important, if not more, to prevent anticompetitive practices from taking place in the first instance. Accordingly, CCS has been devoting substantial resources to advocacy and outreach to our stakeholders.

CCS is always mindful of the need to be innovative and interesting in communicating the message on the importance of competition. For example, CCS developed a series of manga comics as an entertaining medium to supplement our educational handbooks. The three titles to date are FIXED!—illustrating the harm of price-fixing, FOILED!—illustrating the abuse of dominance,

and FREED!—describing the Leniency Programme.<sup>1</sup> CCS recently also organised the inaugural CCS Digital Animation Film Contest, where participants were challenged to create stories about issues related to competition law through digital animation films. The winning and other entries<sup>2</sup> can be accessed via the CCS Broadcast section of the CCS website.<sup>3</sup>

## ◆ VIETNAM

### Annual Report Published

The Vietnam Competition Authority (VCA) (Ministry of Industry and Trade) is responsible for the enforcement of competition, consumer protection and certain trade laws in Vietnam. The VCA is also involved in promoting and establishing more effective competition laws.

Among the publications released by the VCA in 2011 was its 2010 Annual Report. The Report highlights details of cases conducted by the VCA in its three main areas of responsibility which are competition, consumer protection and trade remedies. The Report also outlines the training undertaken by the Department in 2010.

In recent years there has been a lot of work done on the competitiveness of the Vietnamese economy (for example with the issue of the Vietnam Competitiveness Report 2010). Those developments have continued in 2011 with the Minister of Industry and Trade and the United Nations Industrial Development Organization (UNIDO) launching the 2011 Vietnam Industrial Competitiveness Report on 30 November. The Report seeks to contribute to the policy debate in Vietnam by providing a conceptual framework for understanding the drivers of industrial competitiveness, positioning Vietnamese industries in the international context and identifying industrial bottlenecks that can be addressed by policy.

1 <http://www.ccs.gov.sg/content/ccs/en/Media-and-Publications/Publications.html>

2 <http://www.youtube.com/watch?v=OQlvYRPhUyc&lr=1>

3 [http://www.ccs.gov.sg/content/ccs/en/Media-and-Publications/events/ccs\\_digital\\_animationfilmcontestawardceremony.html](http://www.ccs.gov.sg/content/ccs/en/Media-and-Publications/events/ccs_digital_animationfilmcontestawardceremony.html)

## Other News

### 2012 GCR Agency of the Year Awards – Asia Pacific, Middle East and Africa

Warm congratulations to the following authorities who were nominated for Global Competition Review's Agency of the Year Award in 2012 (Asia Pacific, Middle East and Africa):

- Competition Commission of Pakistan (this is the first time a South Asian authority has been nominated for the award);
- Ministry of Commerce (MOFCOM), China;
- National Development and Reform Commission (NDRC), China;
- Korea Fair Trade Commission; and
- Australian Competition and Consumer Commission.

The award ultimately went to the Australian Competition and Consumer Commission. Congratulations.



## Busan Workshop on Abuse of Dominance Fundamentals

# 2011 December Busan Workshop on Abuse of Dominance Fundamentals



## Summary of Busan workshop



**Dr. Eric EMCH**  
Consultant  
OECD

Controlling the abuse of a dominant market position represents one of three main planks of antitrust enforcement worldwide, alongside cartel enforcement and merger regulation. Particularly for developing

countries moving from a state-oriented economy to one that is more free-market oriented, preventing entrenched monopolists from foreclosing a normal competitive market process can be a key part of developing and maintaining a healthy economy. Yet separating anticompetitive foreclosure from what is simply aggressive competition that benefits consumers can be challenging for any competition authority.

This workshop, on “Abuse of Dominance Fundamentals,” focused on the fundamental questions of what constitutes anticompetitive behavior on the part of monopolist or would-be monopolist, how such behavior can be distinguished from healthy competition, and the economic and legal analysis that underlies the distinction. Presentations and discussion touched on economic theories of abuse of dominance, legal categorisations and analysis of different types of abuse,

## Busan Workshop on Abuse of Dominance Fundamentals

and case studies from participating countries. On the final day of the workshop, participants drew from the discussion of the first two days to analyse and discuss two hypothetical abuse of dominance cases based on real-world court decisions.

The first day of the workshop provided an overview of abuse of dominance and its regulation in several jurisdictions, with introductions to two distinct categories of abuse of dominance. Dr. Eric Emch, consultant to the OECD, began the discussion of assessing monopoly power in abuse of dominance cases, an important step of any abuse of dominance analysis. Mr. Hideyuki Shimozu of the Japanese Fair Trade Commission then presented an overview of the JFTC approach to abuse of dominance, illuminating the discussion with reference to the JFTC's approach to the MDS Nordion case in 1998 and the Intel case in 2005. Dr. Shabistan Aquil and Mr. Vipul Puri of the Competition Commission of India gave an overview of how abuse of dominance is treated by the 2002 Competition Act of India. Ms. Serena Ho of the Competition Commission of Singapore presented a detailed analysis of the CCS's first abuse of dominance decision – its case against the ticketing services firm SISTIC, currently under appeal.

Near the end of the first day, Mr. Andrew Heimert of the US FTC gave an overview of the economics and law of exclusive dealing, emphasising the challenge in distinguishing between the often pro-competitive effects of exclusive dealing with possible anticompetitive harms. Mr. Heimert illustrated the economic and legal analysis of exclusive dealing with a discussion of the FTC's 2010 decision in *Transitions Optical*. At the close of the day, Mr. Jung Won Song of the OECD introduced the topic of excessive pricing, a controversial subject that some jurisdictions refrain altogether from categorising as an abuse. A lively discussion among participants followed, which was interrupted only by the need for dinner.

The second day of the workshop picked up where the first one left off, with a discussion of whether excessive pricing could be categorised as an abuse. The formal presentations began with a lecture by Dr. Eric Emch on the economic theory of bundling and tying, focusing on identifying particular avenues under which that behavior might be anticompetitive, and distinguishing those from the much more common instances of precompetitive or competitively neutral tying and bundling. Ms. Hsiu-Feng Hsu of the Chinese Taipei Fair Trade Commission then discussed the CTFTC approach to vertical restraints, with a focus on particular charges



## Busan Workshop on Abuse of Dominance Fundamentals

the CTFTC has brought against particular department stores and “hypermarkets.” Mr. Heimert of the USFTC followed with an introduction to the topic of remedies, noting that the crafting of workable remedies can prove one of the more challenging aspects of an abuse of dominance case. Mr. Heimert discussed the various types of remedial tools available, including injunctions, divestiture, and monetary relief. Finally, Ms. Xiao Di of the Chinese Ministry of Commerce (MOFCOM) gave an introduction to China’s approach to competition enforcement in general and abuse of dominance in particular.

Day three of the workshop began with a discussion of predatory pricing. Dr. Emch gave an introduction to the economics of predation, while Mr. Song of the OECD presented a series of case studies from the EC, Korea, and the EU, illustrating the economic commonalities but some of the legal distinctions in approach across jurisdictions.

In the middle of the day, participants broke down into four smaller groups to discuss hypothetical cases involving an artificial teeth monopolist engaging in exclusive dealing and a water heater monopolist engaging in predatory behavior. Discussion ranged from the appropriate role of competition regulator versus

a sector regulator in addressing abuse of dominance concerns, to market factors that might indicate (or contraindicate) a monopoly position, to what types of evidence a competition authority can feasibly obtain to inform its decision. At the end of the session, groups shared their analyses with one another and compared their approaches.

After a break, the workshop resumed with a discussion of abuse of IP rights, led by Mr. Byung-Hee Ko of the KFTC, who detailed the factors one must consider in determining when legitimate protection and use of valid intellectual property rights can cross the line into abusive behavior. The workshop concluded with further case studies presented by participating countries. Mr. Richardo Frans Adiatma of the KPPU gave an overview of Indonesia’s law regulating abuse of dominance along with a case study relating to the KPPU’s finding of abuse by Carrefour Indonesia. Finally, Mr. Puri and Dr. Aquil of the Competition Commission of India gave a thorough treatment of two abuse cases considered by the CCI in the real estate and stock exchange markets, respectively. The presentation included a detailed analysis of how the CCI assessed firm dominance and whether conduct at issue might be abusive.





## Busan Workshop on Abuse of Dominance Fundamentals

### ◆ CHINESE TAIPEI

#### Vertical Restraints Regulation - Distribution Businesses



**Ms. Hsiu-Feng HSU**  
Specialist  
Fair Trade Commission  
Chinese Taipei

The Chinese Taipei Fair Trade Commission (FTC) has had to deal with a number of cases in which large scale distribution business (being supermarkets, hypermarkets, convenience store chains, department stores and other high volume retail businesses) have abused their advantageous market positions or improperly charged additional fees.

These distribution businesses often have an advantageous market position compared to their trading counterparts. In some cases they hold a dominant position in the market. Many have grown very quickly because they have had low costs, low prices and have met consumer demand for “one-stop shopping”.

Abuses of an advantageous market position are divided into two parts. One relates to upstream suppliers, the other relates to downstream franchisees.

Conduct directed at upstream suppliers includes demands for “most favoured” prices, restricting a supplier from supplying to other trading counterparts, the charging of additional fees and improperly returning products.

The imposition of “additional fees” is one of the most common violations of the Fair Trade Act. The term “additional fees” relates to fees charged to suppliers by distribution businesses, or to deductions made from amounts payable for goods, or to other kinds of fees demanded from suppliers by distribution businesses

through other means. There are two main principles which distribution businesses should follow: the use of the fee should be directly related to promoting the sale of the product and the amount of the fee should be reasonable. For example, the fee should not exceed the benefit that the supplier may reasonably expect to derive from the sale.

The conduct relating to the downstream franchisees mostly occurs in respect of convenience stores. The distributors as the franchisors decide: what to sell in the stores, when to undertake promotional programs, how to place the products on the shelves, and the price of the products. Moreover, they decide the quantities that franchisees should purchase from them. The FTC accepts that in a franchise relationship, the franchisor has good reasons for exercising more control over franchisees - for example, in order to maintain brand image, consumers’ impression and so on. Accordingly the FTC’s regulation on franchise relationships deals mainly with the disclosure of relevant information before the franchise contract is signed.

### ◆ INDIA

#### Abuse of Dominance under the Indian Competition Act, 2002



**Mr. Vipul PURI**  
Deputy Director  
Competition Commission  
of India



**Ms. Shabistan AQUIL**  
Deputy Director  
Competition Commission  
of India

## Busan Workshop on Abuse of Dominance Fundamentals

Abuse of dominance is one of the key provisions contained in the Competition Act, 2002 (Act). Section 4 lays down that no enterprise or group shall abuse its dominant position. Dominance is not treated as bad per se; it is the abuse of a dominant which is prohibited. Thus, section 4 involves two distinct parts, first determining whether the enterprise has dominant position; second examining whether conduct of the dominant enterprise falls within the definition of abuse.

Dominant position has been defined in the Act, in terms of the position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market, in its favour. No specific test of market share or assets or turnover is prescribed to determine dominance. It is the responsibility of the Commission to decide whether or not the enterprise is dominant therein, and for this purpose, the Commission is guided by the factors specified in section 19 of the Act.

After it is established that the enterprise is enjoying dominant position, the Commission must determine if the conduct is abusive. Abuse is stated to occur when an enterprise or a group of enterprises uses its dominant position in the relevant market in an exclusionary or/and an exploitative manner. The Act gives an exhaustive list of practices that shall constitute abuse of dominant position and, therefore, are prohibited. The list is as follows:

- *Imposing unfair or discriminatory prices or conditions in purchase or sale, including predatory pricing*
- *Limiting or restricting production of goods or provision of services*
- *Limiting scientific development to the prejudice of consumers*
- *Denial of market access in any manner*
- *Conclusion of contract subject to supplementary obligations*
- *Using its dominant position in a second relevant market*

Where a contravention is established, the Commission

may pass directions to discontinue such a practice and impose a penalty as specified under section 27 of the Act or pass such other orders or issue such directions as it may deem fit. The Commission may also, under section 28 of the Act, direct the division of an enterprise or group enjoying a dominant position to ensure that such an enterprise or group does not continue to abuse its dominance.

### Case Examples - Abuse of Dominance in Stock Exchanges and Real Estate

#### NSE Case

NSE India Ltd (NSE) is a stock exchange operating trading platforms in the following segments:

- a. Wholesale Debt Markets;
- b. Equity;
- c. F&O; and
- d. Currency Derivatives (CD).

MCX-SX is a stock exchange operating a trading platform for CD Segment only.

It had been alleged that by abusing its dominant position, NSE had:

- a. Engaged in predatory pricing in CD Segment;
- b. Limited the scientific development of software for Electronic Trading Platforms by refusing to share the code of its software (NOW) with FTIL (the parent company of MCX-SX); and
- c. used its dominant position in one market (a non-CD segment) to protect the other relevant market, i.e. the CD segment.

*NSE's submission* - NSE made the following submissions:

1. It is not dominant in the CD segment on the basis of market shares.
2. There are no variable costs that can be attributed to the CD segment.
3. Refusal to share software interface code is due to problems and user complaints in respect of FTIL's software.
4. Zero pricing is meant to develop the nascent market of CD.

## Busan Workshop on Abuse of Dominance Fundamentals

*Competition Assessment* - The CCI concluded

1. NSE was dominant in other segments of the stock exchange market and had the financial resources to sustain a zero pricing policy in the CD segment long enough to outlive the competition and thus was in a position to leverage its dominance in other segments to protect the CD segment. (Note that an alternative view was given in a Dissenting Order which considered the case to be one of network industry effects i.e. externalities and not of abuse of dominance).
2. NSE was not able to substantiate the zero variable cost in the CD segment.
3. Refusal to share the software interface code was an attempt to deny the market access to ODIN for Electronic Trading Platforms and this would have the effect of limiting the technical development in this area.
4. The markets are not nascent and in fact sufficiently mature therefore zero pricing as a tool to develop nascent market cannot be justified.

*Order of the Commission* - NSE was directed to cease and desist from unfair pricing (i.e. zero pricing), exclusionary conduct and unfairly using its dominant position in other market/s to protect the relevant CD market with immediate effect. NSE was also fined INR 550 million (US\$ 12 million).

### **DLF Case**

This case related to real estate sector. DLF, a developer, was accused of abusing its dominant position by the Flat Buyers Association with respect to a project it had developed in the city of Gurgaon. DLF was accused of unilaterally changing the conditions of the project, imposing an agreement loaded in its favour and to the detriment of the buyers, delaying the handing over of the flats etc. The relevant market determined in this case was high end, residential accommodation in the area of Gurgaon.

*DLF's submission* - DLF made the following submissions:

1. The relevant market should be the market for residential accommodation and not the high end

residential accommodation market as 'high end' cannot be defined. If at all high end is to be defined it should be based on the basis of area (square feet) rather than monetary value.

2. Dominance should be assessed exclusively based on market shares.

*Competition Assessment* - The CCI concluded:

1. High end can be defined by creating a monetary bracket as capacity to pay is a sound criterion for defining relevant market.
2. Dominance is a position of strength and it is relevant to consider all the relevant factors in section 19(4) including financial resources, land bank etc.

*Order of the Commission* - DLF was found guilty of abusing its dominant position by imposing unfair conditions in sale of goods and services. DLF was also fined INR 6.3 Billion (US\$ 140 Million).

## ◆ SINGAPORE

### Singapore's First Abuse of Dominance Decision - The Sistic Case



**Ms. Serena HO**  
Competition Analyst  
Competition  
Commission of  
Singapore

### Background of the case

The Competition Commission of Singapore (CCS) issued an infringement decision against SISTIC.com Pte Ltd for the abuse of a dominant position in June 2010. This is the first time that CCS has made a decision under section 47 of the Competition Act since this prohibition

## Busan Workshop on Abuse of Dominance Fundamentals

came into force in 2006, and the largest single firm financial penalty that CCS has imposed to date.

SISTIC was found to have restricted competition in the ticketing services market by reserving a large share of the market to itself through a series of exclusive agreements with venue operators and event promoters (Exclusive Agreements).

### Dominance and Abuse of Dominance

Over the assessment period spanning from January 2006 to March 2009, CCS found that SISTIC had exclusive contracts with 19 parties - two major venue operators, The Esplanade Co. Ltd and the Singapore Indoor Stadium, and 17 other event promoters. Together, the 19 agreements foreclosed about 60-70% of the ticketing services market in Singapore.

The restrictions under the Exclusive Agreements were found to be harmful to competition. They restricted event promoters' choice of ticketing service providers, artificially perpetuated SISTIC's dominant position, and allowed SISTIC the ability to charge ticket buyers higher prices.

CCS found SISTIC to be dominant in the ticketing services market in Singapore. Its market share had persistently been around 90%, of which about 60-70% was attributable to the Exclusive Agreements. High entry barriers are artificially erected through the network effect between event promoters and ticket buyers, created by SISTIC's conduct.

### Financial Penalty and Behavioural Remedies

To bring the infringement to an end, CCS directed SISTIC to remove or modify as necessary any clause(s) under the Exclusive Agreements that has the effect of requiring the use of SISTIC as the sole ticketing service provider. Further, CCS imposed a penalty of S\$989,000 on SISTIC for infringing section 47 prohibition of the Competition Act.

### Appeal Proceedings

SISTIC lodged an appeal against CCS' infringement decision on 3 August 2010 with the Competition Appeal Board. Singapore's Competition Appeal Board is an independent body appointed by the Minister of

Trade and Industry. The current chairman is a retired Supreme Court judge, Mr L P Thean. Five members of the Competition Appeal Board, made up of prominent individuals from the business, academic and legal communities, constituted the panel that presided over the appeal hearing from 26 September to 5 October 2011. The Competition Appeal Board's decision is expected to be issued in the first quarter of 2012.

### Further Information

The infringement decision against SISTIC can be found from the public register on the CCS website: [http://app.ccs.gov.sg/public\\_reg\\_investigations.aspx](http://app.ccs.gov.sg/public_reg_investigations.aspx)



## OECD Competition Committee Meetings – February 2012

### Hearing on the Digital Economy (Part Two)

#### OECD Competition Committee Meetings, February 2012

Part one of the Hearing on the Digital Economy took place in October 2011. This second part of the Hearing focused on three features of the digital economy that have implications for competition law enforcement. First, network effects exist, but they can have limitations. Not all companies that benefit from network effects become entrenched behemoths that remain dominant for decades. The key for competition authorities is to protect incentives and opportunities to innovate rather than focusing too much on static effects.

Second, there is a tendency among policymakers to assume that open platforms are good and closed/semi-closed platforms are bad. But platforms can be very efficient and innovation-friendly, regardless of how open or closed they are. Enforcers should keep in mind that platform-versus-platform competition works, so they need not intervene unless conduct by a dominant firm impedes that type of rivalry. Standards are very similar to platforms; both are essential catalysts for innovation. They make entry easier, especially for smaller companies, by giving them a pre-existing ecosystem to jump into instead of having to establish their credibility as a totally independent (and possibly unknown) producer/creator. With respect to standards, competition authorities have to watch

out for ambush situations like the Rambus case, in which a standard was hijacked by a company with undisclosed intellectual property rights (IPRs).

Third, enforcers can lower entry barriers, mitigate the disadvantages of network effects and avoid lock-in by requiring interoperability. But doing so may interfere with IPRs, damage innovation incentives, and leave consumers with the lowest common denominator technology, so mandatory interoperability is not a panacea.

### Competition in Hospital Services

#### OECD Competition Committee Meetings, February 2012

The major lesson from the roundtable discussion on Competition in Hospital Services, and a necessary precursor to competition in hospital services, is the importance of choice on the demand side. This choice may be exercised either directly by patients or through general practitioners or other intermediaries. An additional prerequisite for competition to operate effectively is appropriate incentives, notably to provide high quality services and to do so efficiently, i.e. by reducing costs.

In this context information is extremely important as emphasised by several countries where hospital rankings are used to increase the information available to patients. The roundtable also revealed that low-income patients in

## OECD Competition Committee Meetings

particular consider hospital choice to be a very important factor for them.

What emerged from the discussion is that the way hospital services are paid for is important. In particular with fixed prices, competition will lead to greater quality. If there is also competition on price, there is much more uncertainty as to the quality of hospital services under competitive conditions.

Another important element for functioning competition in the hospital services sector is the principle that money has to follow the patient even if it is not the patient that ultimately pays. If hospitals are not disciplined by changes in demand (for instance in terms of their revenue) the benefits of competition are unlikely to be realised. While in many countries hospitals are affected by the demand they face, public hospitals in some countries are relatively isolated from such market effects, and are, for example, precluded from bankruptcy. In these circumstances the degree of market discipline that can be exerted on hospitals is limited.

The roundtable demonstrated that competition can play an important role in rendering the provision of services more efficient and can lead to better health outcomes.

### Unilateral Disclosure of Information with Anticompetitive Effects

#### OECD Competition Committee Meetings, February 2012

A roundtable was held on Unilateral Disclosure of Information with Anticompetitive Effects (e.g. press announcements). The roundtable was an

opportunity to follow up on past discussions on transparency and collusion and focused particularly on policy and enforcement questions related to purely unilateral communications by firms directed either to competitors or to the public at large. The discussion indicated that there is little in the way of decisions or case-law specific to unilateral announcements and that the analysis is very much case-specific depending on the context and form of the disclosure. Most agencies see private announcements (i.e. communications to competitors only) of future price intentions as being problematic and difficult to justify. By contrast, purely public statements (i.e. to consumers and the public at large) are generally viewed as pro-competitive as they help consumers to better choose between competing products. Public announcements could, however, have anti-competitive effects, if they could be construed as invitations to collude or include messages directed at competitors (rather than consumers).



## 2012 OECD Global Forum on Competition

This was the 11th meeting of the Global Forum on Competition (GFC) and the largest meeting to date. There were some 400 participants from 107 delegations, including 55 non-OECD member economies and 18 international, regional and non-governmental organisations. Mr. Pascal Lamy, Director General, WTO and Mr. Otaviano Canuto, Vice President, the World Bank, delivered keynote speeches. Mr. Lamy focused on the interaction between competition policy, development and the international trading system. He suggested it was time to re-start that dialogue, without pre-judging the nature of future institutional linkages. Mr Canuto focused on the importance of competition in agri-business supply chains. He also highlighted the importance of international co-operation between competition authorities in tackling global cartels connected with the food industry.

There was broad support for the idea that future work might focus on competition and poverty and a number of suggestions from participants as to how to address the topic. These included: the notion of inequality - whether everyone benefits from competition to the same extent; the impact of competition on essential goods and services of particular relevance to the poor; and the role of competition in tackling vested interests and opening-up markets e.g. for SMEs.

### Competition and Commodity Price Volatility

A full day was devoted to the discussion on Competition and Commodity Price Volatility.

The discussion covered three broad themes. The first dealt with the sources of commodity price volatility. The debate revealed that neither competition, nor impediments to competition, are the underlying cause of volatility. However, impediments to competition, particularly in relation to government policies (e.g. public interventions to insulate domestic markets such as export restrictions), can significantly exacerbate the magnitude of volatility. Consequently, there is a role for competition authorities to intervene, in particular with regard to anti-competitive regulation.

The second theme focused on the effects of commodity price volatility. It was evident from the discussion that volatility affects the population disproportionately, burdening most severely poor rural regions. Governments therefore often intervene to redistribute the burden and in the past such intervention has sometimes been counterproductive either by creating significant inefficiency or even compounding the disparities.

The third theme was specifically targeted at the role competition authorities can play. Many cases of competition law enforcement actions were discussed, both at the national and international levels. The discussion also underlined the importance of market studies for competition authorities both in uncovering competition problems that can be solved by enforcement and by enabling competition authorities to engage in effective advocacy efforts. Numerous delegations described the regulatory changes made as a result of their

competition authorities' intervention, as well as their success in persuading governments not to introduce potentially anticompetitive measures.

### **Improving International Co-operation in Cartel Investigations**

During the session on Improving International Co-operation in Cartel Investigations, the value and extent of informal co-operation in cartel cases was emphasised by a number of participants. However formal co-operation was markedly less prevalent, especially between developed and developing countries. Even among regional groupings in developing countries, co-operation was limited, due to legal and capacity constraints as well as a lack of technical expertise. A number of participants noted that convergence on tools and sanctions would be beneficial. It was acknowledged that developing a track record of domestic cartel enforcement was important in demonstrating capability and developing trust between agencies.

The private sector offered some practical guidance on addressing the challenges of encouraging co-operation from the parties in providing confidentiality waivers. This included promoting legislative solutions to protect confidential information, and addressing inconsistencies between leniency programmes, which could otherwise undermine the effectiveness of these programmes. Alternatives to co-operation were also suggested, such as assigning a lead-agency to undertake an international investigation based on the best-placed agency to act.

Experiences from international co-operation in

tax and anti-corruption emphasised the importance of multilateral instruments and the commitment to implement and enforce these obligations. Developing standard definitions of concepts that are common sticking points is also helpful. Building trust and confidence between enforcers is key to formal co-operation, and co-operative relationships are important for developing "early warning systems" that can facilitate the exchange of intelligence.

### **State Owned Enterprises (SOEs) and the Principle of Competitive Neutrality**

In this session, there was an exchange of experiences between member and non-member countries on challenges in markets where public undertakings co-exist with private competitors. Presentations from the delegations of Colombia, Malaysia, South Africa, Australia and the European Commission were followed by a lively discussion.

The discussions focused on the challenges involved in enforcing competition rules against SOEs, particularly when an SOE pursues both commercial and non-commercial objectives. Some participants described the different role that SOEs play in national economies and the legal framework in place in their jurisdiction to ensure that companies are not granted unfair advantages because of their state ownership.



## Workshop on Rewarding Cooperation in Cartel Investigations

# 2012 March Workshop on Rewarding Co-operation in Cartel Investigations



## Workshop on Rewarding Cooperation in Cartel Investigations

### OECD/Korea Policy Centre Workshop 14-16 March 2012



**Ms. Simone  
WARWICK**  
Senior Competition  
Expert  
OECD

For the first OECD/Korea Policy Centre Competition Programme event of 2012, representatives from competition authorities across Asia came together to discuss the topic of “Rewarding Co-operation in Cartel Investigations”.

Rewarding co-operation in cartel investigations, particularly through the use of leniency policies, has become increasingly common in the last decade. Today, over 50 countries have adopted leniency policies, including a number of countries in the Asian region. As Mr. Soohyun Yoon of the Korea Fair Trade Commission (KFTC) said during the workshop, leniency programmes are considered “the most effective tool for cartel detection”.

The workshop looked not only at leniency policies, but also at reward and bounty schemes which are used by a number of national competition authorities (including in Korea, the United Kingdom, Pakistan and Hungary) to reward co-operation in cartel cases.

The workshop focussed on both why co-operation should be rewarded in cartel investigations and how co-operation can be rewarded in practice.

The workshop started with a welcome from the Director-General of the OECD-Korea Policy Centre Competition Programme, Mr. Jay Young Kang. Mr. Kang also gave a presentation on the activities of the Korea Policy Centre and the KFTC.

Ms. Simone Warwick of the OECD set the scene for the workshop with an opening presentation discussing the reasons why rewarding co-operation in cartel investigations is effective and providing an overview of the prerequisites for implementing a successful leniency policy. Later in the workshop, Ms. Warwick gave a second presentation detailing the key elements of successful leniency policies and reward schemes.

Mr. Takujiro Kono of the Japan Fair Trade Commission (JFTC) gave a presentation on the leniency policy of the JFTC. The presentation provided an overview of the JFTC’s leniency policy of and also focussed on the way the JFTC operates the policy in practice. Mr. Kono also spoke about international co-operation in leniency cases.

Mr. Adam Louka of the Australian Competition and Consumer Commission (ACCC) gave two presentations during the workshop. The first presentation was an overview of the two policies the ACCC has put in place to reward co-operation – its immunity policy and its co-operation policy. Mr. Louka’s second presentation provided a practical perspective on how applications are made and received under the ACCC’s policies. That presentation also considered how a number of hypothetical scenarios would be dealt with under the policies.

Mr. Soohyun Yoon of the KFTC presented on both the leniency and bounty schemes of the KFTC. Mr. Yoon’s presentation illustrated that changes made to Korea’s leniency policy since 2005 (including the adoption of automatic immunity) had made the policy significantly more effective. Mr. Yoon also described the KFTC’s bounty scheme and explained its role as a complement to the KFTC’s leniency policy in tackling cartel cases.

Ms. Hilary Jennings of the OECD gave a presentation on international co-operation in cartel cases involving leniency applicants. Ms. Jennings spoke about the opportunities and challenges that leniency applications present when it comes to international co-operation. This included a discussion of the role of waivers and the need for competition authorities to co-ordinate their investigations in leniency cases.

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The participants also took part in a practical exercise based on a hypothetical cabbage cartel.

Mr. Geronimo Sy of the Philippines Department of Justice and Mr Harikumar Sukumar Pillay of the Competition Commission of Singapore (CCS) took lead roles in the exercise. They played the parts of two hypothetical competition officials and acted out a series of scenes about the leniency applications made in the cabbage cartel investigation. Between each scene, the participants discussed the issues which had arisen during the previous scene and gave recommendations as to how the investigation should proceed.

During the workshop presentations were also made by:

- Mr. Harikumar Sukumar Pillay of the CCS (about its practical experiences in leniency cases and the ways it which it promotes its leniency policy);
- Mr. Pramod Singh of the Competition Commission of India (about the leniency programme under the Indian Competition Act 2002); and
- Mr. Ishtiaq Ahmed of the Competition Commission of Pakistan (about both the leniency regulations and reward scheme operating in Pakistan).

### ❖ PAKISTAN

#### Leniency and Reward Payments in Pakistan



**Mr. Ishtiaq AHMED**  
Deputy Director  
Competition  
Commission of Pakistan

#### *Leniency*

In Pakistan, the Competition (Leniency) Regulations 2007 have been in place since 2007 and they apply to violations of Chapter II of the Competition Act, 2010. There are three levels of leniency under the Regulations: total immunity from financial penalties, reduction in the financial penalty up to 100% and reduction up to 85%.

Certain criteria must be met by leniency applicants. In the case of total immunity the undertaking must be the first to provide the CCP with evidence of the prohibited agreement (and it is only available in cases where the CCP does not already have sufficient information to establish the alleged violation).

The other two types of leniency are for those undertakings who fail to qualify for total immunity. Applicants must unconditionally admit the infringement, abandon participation in any prohibited activity forthwith and make full and truthful disclosure. The reduction in financial penalty in these circumstances is discretionary.

#### *Reward Scheme*

The Reward Payment to Informants Scheme was introduced by the CCP with the aim of uncovering and taking action against cartel activity. It involves the payment of a reward between Pak Rs. 200,000 and Pak Rs. 0.5 million. The payment of a reward is conditional on the information provided being accurate, verifiable, and useful in the CCP's anti cartel enforcement work.

There are four stages for reward payments to the informant; (i) an initial token payment upon receipt of the information (ii) confirmation of the information through enquiry by the CCP (iii) confirmation through the order of the CCP and (iv) recovery of the penalty (substantial portion of reward). The initial token payment will be paid to the informant within 30 days of the receipt of the information. For the remaining 3 stages, the payments shall be made within six months of issuance of an enquiry report or the passing of the order. The reward scheme is not available to CCP officials or their relatives.

#### **STOP PRESS – First Grant of Leniency by CCP**

Shortly after the March workshop, the CCP granted leniency for the first time following an application

## Workshop on Rewarding Cooperation in Cartel Investigations

filed by Siemens (Pakistan) Engineering Company Limited in respect of alleged bid rigging and other collusive activities. The conduct relates to tenders called by electric power distribution companies (Discos) to procure switchgear and transformers from the members of the Pakistan Electrical Power Equipment Manufacturers' Association (PEMA).

In accordance with Regulation 4(1) of the Leniency Regulations, Siemens has been granted a 100 percent reduction in penalty with respect to the alleged contravention.

Although the application for leniency came after the CCP had issued a show cause notice to Siemens (and 24 other undertakings), the CCP decided that the information provided in its application and the 233 documents it submitted represented significant added value and substantiates the allegations made by the CCP.

In addition, the information provided by Siemens revealed price fixing conduct which had not been alleged in the show cause notice. Siemens has therefore been granted full immunity in respect of that separate conduct.

The case is very significant given the size of the markets concerned. Total orders issued by the Discos during the period 2008-2011 were of the value of PKR 36 billion.

### ◆ INDIA

## Getting Started: India's Leniency Regulations



**Mr. Pramod Kumar SINGH**  
Head  
Anti-Trust Division  
Competition  
Commission of India

Under section 27 of the Indian Competition Act, 2002, heavy administrative penalties apply for cartel conduct. The Competition Commission of India (CCI) has been empowered to impose upon each member of the cartel, a penalty of up to three times of its profit for each year of the cartel or ten percent of its turnover for each year of the cartel, whichever is higher. In addition, if a contravention has been made by a company, a penalty can also be imposed on individuals who were in charge of and were responsible for the conduct of the business of the company. Furthermore, proceedings for compensation can also be brought before the Competition Appellate Tribunal against the members of cartels for any loss or damage shown to have been suffered by any person or enterprise as a result of the cartel.

It is well known, however, that cartels are difficult to detect. With a view to effectively combating cartels the CCI has a leniency program to aid in the detection of cartels and in obtaining sufficient evidence to prove their existence. The leniency program has been devised to encourage cartel members to come forward and share information with the CCI by providing an incentive to those cartel members who choose to make true and vital disclosures and cooperate with the CCI. The leniency program is, therefore, an official system for offering lenient treatment to a cartel member who reports the cartel to the CCI.

Section 46 of the Competition Act embodies the leniency principle in the form of a "lesser penalty" for a whistleblowing member of the cartel. The CCI framed its Lesser Penalty Regulations in 2009 which set out the procedure and extent of lesser penalties. Under the Indian leniency program the benefit of a lesser penalty can be granted to a maximum of three cartel members subject to their meeting the conditions prescribed.

Upon receiving an application the priority status of the applicant is marked and conveyed. The first applicant can be granted a reduction in penalty up to 100% if the disclosure enables the CCI to form a prima facie opinion regarding the existence of a cartel or, where the matter is already under investigation, the applicant provides

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such evidence which enables the CCI to establish the contravention. The second and third applicants can also avail themselves of a reduction in penalty up to 50% and 30% respectively if the disclosure made by them significantly adds value to the evidence already in the CCI's possession. The lesser penalty applicants are required to discontinue participation in the cartel and co-operate honestly throughout the proceedings before the CCI, otherwise the conditional leniency can be revoked.

So far no leniency application has been made and the CCI is working to spread awareness among the stakeholders. The CCI is taking on cartels which have been detected through other means – the CCI recently imposed fine of INR 165 Crores on 48 Liquefied Petroleum Gas Cylinder Manufacturers involved in a bid rigging case.

### ❖ SINGAPORE

#### Leniency Programme for Cartels



**Mr. Harikumar  
Sukumar Pillay**

Senior Assistant  
Director  
Competition  
Commission of  
Singapore

#### Leniency Programme

In 2009, the Competition Commission of Singapore (“CCS”) established its leniency programme for undertakings involved in cartels. Under the programme, CCS will grant an undertaking total immunity from financial penalties if the following conditions are

satisfied:

- i. The undertaking is the first to provide CCS with evidence of the cartel activity before an investigation has commenced, provided that CCS does not already have sufficient information to establish the existence of the alleged cartel activity; and
- ii. The undertaking:
  - a. provides CCS with all the information, documents and evidence available to it regarding the cartel activity;
  - b. maintains continuous and complete co-operation throughout the investigation and until the conclusion of any action by CCS arising as a result of the investigation;
  - c. refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to CCS (except as may be directed by CCS);
  - d. must not have been the one to initiate the cartel; and
  - e. must not have taken any steps to coerce another undertaking to take part in the cartel activity.

CCS may also grant up to 100% reduction in financial penalties where the undertaking is the first to come forward but which does so only after an investigation has commenced, or up to 50% reduction in financial penalties for subsequent leniency applicants which provide evidence of cartel activity before CCS issues a written notice under section 68(1) of the Competition Act stating its intention to make a decision that the prohibition under section 34 of the Act has been infringed. Any reduction in the level of the financial penalty under these circumstances is discretionary. In exercising this discretion, CCS will take into account:

- i. the stage at which the undertaking comes forward;
- ii. the evidence already in CCS' possession; and
- iii. the quality of the information provided by the undertaking.

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The CCS leniency programme is aimed at encouraging cartel members to come forward to assist CCS in uncovering cartels. The benefits of granting lenient treatment to undertakings who cooperate with CCS outweigh the need to impose financial penalties on these undertakings. Given the secretive nature of cartels, many competition agencies around the world have put in place leniency programmes to combat cartels. Without leniency programmes, some cartels may never be uncovered and consumers will continue to be harmed by the cartels.

In June 2010, CCS concluded its first case arising from a leniency application. Arisco, the leniency applicant, revealed to CCS that its previous management had entered into bid-rigging arrangements with other companies for electrical or building works projects. Typically, the company that was interested in winning the project (“the requester”) would request for a cover bid from at least one other company (“the supporter”). The requester would inform the supporters of his bid price so that the latter could submit a higher quote. In some instances, the requester even prepared the quotation for the supporters. This created the false impression of competition.

With information obtained from Arisco, CCS carried out surprise inspections at the premises of the companies, conducted interviews with the relevant personnel and issued notices seeking information and documents. In total, 14 companies were found to be involved in the bid-rigging arrangements between July 2007 and April 2009. As Arisco came forward to CCS with information before any investigation commenced and had met all the conditions of the CCS leniency programme, it was granted total immunity from financial penalties.



## OECD/Korea Policy Centre Competition Programme

### < 2012 OECD Competition Workshops >

No.	Theme	Date	Venue
1	Rewarding cooperation in cartel investigations	3.14~16	Seoul
2	Merger analysis and the implementation of remedies	5.8~10	Jeju
3	Vertical restraints	6.27~29	Seoul
4	Bringing Competition into Regulated Sectors	8.8~10	Philippines
5	Judge training	10.17~19	TBD
6	Sector focused event : Aviation	11.28~30	Busan

### SEND US YOUR NEWS

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