

# Asia-Pacific Competition Update

News from the OECD/Korea Policy Centre Competition Programme

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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.



## News from Asia-Pacific Competition Authorities

### ❖ KOREA

#### Reward for Reporting Cartel Conduct Increased to KRW 3 Billion

The Korea Fair Trade Commission (KFTC) has lowered the threshold to be met by individuals reporting cartel conduct to obtain a reward and has raised the upper limit of reward compensation to KRW 3 billion from KRW 2 billion. The increase is designed to encourage more people to come forward and report anti-competitive practices to the KFTC. The new guidelines came into force on 6 November 2012.

The KFTC eased the criteria on payment ranges and ratios to a significant extent in order to increase the amounts of basic reward compensation payable to persons who report cartel conduct. Under the new conditions, a person may receive a reward up to two times larger than before for the same information.

#### Collusion by ATM and Cash Dispenser Manufacturers

On 4 December 2012, the KFTC decided to impose corrective orders and fines of KRW 5.1 billion on LG N-Sys and KCT for cartel conduct. The KFTC found that the two ATM and cash dispenser manufacturers discussed their supply ratio for contract and bidding prices before submitting their proposals in a tender for ATMs called by the National Agricultural Cooperative Federation (NACF).

LG N-Sys and KCT engaged in a cartel (relating to 32 bids to NACF) for around six years from 8 March 2002 to 15 January 2008 by agreeing their supply ratio in advance and obtaining an order according to the ratio. Around February 2002, these two manufacturers agreed to obtain an order on a sixty (LG N-Sys) to forty (KCT) ratio in a tender which was then adjusted to a fifty-fifty basis around February 2003.

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Further information about the Competition Programme at the OECD/Korea Policy Centre can be found at [www.oecd-korea.org](http://www.oecd-korea.org)

## News from Asia-Pacific Competition Authorities

### KFTC Holds 7<sup>th</sup> Seoul International Competition Forum and 16<sup>th</sup> International Competition Policy Workshop

The KFTC held the 7<sup>th</sup> Seoul International Competition Forum on 5 September 2012 in Busan. Participants included high-ranking figures and experts of major competition authorities from all over the world. The forum discussed competition policy issues that are currently drawing global attention.

In this forum, aside from high-ranking officials and experts of major competition countries, international organisations such as the OECD, UNCTAD and leading competition academics from institutions such as the US's Anti-monopoly Research Institute, the Chinese Academy of Social Sciences, and Australia's Graduate School of Public Administration participated. The following issues were discussed: direction of competition policy in the new economic environment, possibilities for developmental harmonisation of competition and consumer policy, protection of intellectual property rights and regulation on abuse of patents.

The following day, 6 September 2012, the KFTC held the 16<sup>th</sup> International Competition Policy Workshop. Working-level managers of major competition authorities including China, Japan, and Australia, officials of international organisations as well as internal and external experts on competition law participated in this event.

Intense discussions were carried out during the workshop covering issues like plans to enhance cooperation between competition authorities and enforcement of competition law on public enterprises.

### ❖ INDONESIA

#### Indonesia - Significant Increase in Merger Notifications to KPPU

Since Government Regulation No. 57 Year 2010 regarding the Merger or Consolidation of Business Entities and

Acquisition of Companies Leading to Monopolistic Practices and Unfair Business Competition was issued, merger notifications to the Indonesian Competition Commission (KPPU) have increased dramatically.

Over 70 notifications were made to the KPPU in 2012 - a very significant increase from 2010 when just 3 notifications were made.

2012 also saw the KPPU issue a fine for late notification of a merger. In December 2012 the KPPU fined PT Mitra Pinasthika Mustika the amount of IDR 4,600,000,000 for delayed notification of its acquisition of shares in PT Austindo Nusantara Jaya Rent as a violation of Article 29 of Law No. 5 of 1999.

### ❖ MALAYSIA

#### MyCC Fines Floriculturist Association

On 6 December 2012, the Malaysia Competition Commission (MyCC) issued a final decision against the Cameron Highlands Floriculturist Association (CHFA) for contravening section 4(2) of the Competition Act 2010.

This decision follows the earlier proposed decision issued to CHFA on 24 October 2012 when the CHFA was found engaging in an anti-competitive agreement to increase the prices of flowers by 10%. The MyCC's final decision upholds the earlier proposed remedial actions except for the financial penalty. Those remedial actions are that:

1. The CHFA shall cease and desist the infringing act of fixing prices of flowers;
2. The CHFA shall provide an undertaking that its members shall refrain from any anti-competitive practices; and
3. The CHFA shall issue a public statement on the above mentioned remedial actions in the mainstream newspapers.

The MyCC is stocktaking all trade and professional associations rules and regulations which may infringe the Competition Act 2010.

## ❖ INDIA

### MOU with US Antitrust Authorities

On 27 September 2012 the United States and India signed a Memorandum of Understanding on Antitrust Cooperation that aims to facilitate greater cooperation between the U.S. and Indian competition authorities. The Chairperson Federal Trade Commission (FTC) Jon Leibowitz and the United States Department of Justice Acting Assistant Attorney General, Joseph Wayland from the US side and the Chairman Competition Commission of India Ashok Chawla and the Ambassador of India for the Ministry of Corporate Affairs (Government of India) signed this Memorandum of Understanding in Washington DC. The signing took place in the presence of senior officers from the US Department of State, the US Federal Trade Commission, US Department of Justice and the Embassy of India.

The US and Indian competition authorities intend to cooperate to enhance the effective enforcement of their competition laws, to share and to keep each other informed of significant competition policy and enforcement developments. They also intend to work together in technical cooperation activities related to competition law enforcement and policy. The effectiveness of the cooperation under this Memorandum will be evaluated on a regular basis to ensure that the expectations and needs of both sides are being met. This cooperation aims to create an environment in which the sound and effective enforcement of competition law and policy supports the efficient operation of markets and economic welfare of the citizens besides establishing good communications between the US and Indian competition authorities on competition law and policy.

## ❖ PAKISTAN

### Competition Commission of Pakistan: 2012 in Review

The year 2012 has been an active year for the Competition Commission of Pakistan (CCP or the Commission) in terms

of enforcement. The Commission disposed of ten cases by adjudicating and issuing orders.<sup>1</sup> Of these orders, two involved violation of Section 4 of the Competition Act 2012 ('the Act'), i.e., prohibited agreements; four involved violation of Section 10 of the Act: deceptive marketing practices; two involved mergers/acquisitions cleared after phase-II review; one involved a leniency application under Section 39 of the Act; and one involved exemption from application of Section 4. In addition, eighty four applications for exemption under section 5 of the Act were granted; fifty-six pre-merger applications were cleared in phase-I; one hundred and five show cause notices (statements of objections) were issued and seven search and inspections were conducted.

Two cases are of global importance: one is the leniency sought by Siemens (Pakistan) Engineering Company Limited<sup>2</sup>; and the second one is acquisition of Pfizer Nutrition Business of Pfizer Inc. by Nestlé S.A. The Nestlé/Pfizer merger gave an opportunity to the Commission to strengthen its international relations by coordinating the merger review with the Australian Consumer and Competition Commission (ACCC). The coordination revealed that the parties had given different rationales to the two agencies for the transaction. In Pakistan, it was submitted that the reason the acquirer is willing to pay US\$11.8 billion was because it wanted to keep the target's brand name and brand following; whereas in Australia, it was clear that the acquirer was fine if it could not keep the target's brand and brand following. In Pakistan, the Undertaking given by Nestlé is to the effect that "Pfizer (Wyeth) products will continue to be available for a period of three years from the date of the closing of the transaction in Pakistan."<sup>3</sup> Whereas the undertaking given by Nestlé to the ACCC includes an obligation to divest the Pfizer Nutrition business through exclusive license to a prospective

<sup>1</sup> See [http://cc.gov.pk/index.php?option=com\\_content&view=article&id=168&Itemid=41](http://cc.gov.pk/index.php?option=com_content&view=article&id=168&Itemid=41)

<sup>2</sup> [http://cc.gov.pk/images/Downloads/leniency\\_application\\_filed\\_by\\_ms\\_siemens\\_engineering.pdf](http://cc.gov.pk/images/Downloads/leniency_application_filed_by_ms_siemens_engineering.pdf)

<sup>3</sup> In the matter of Acquisition of Pfizer Nutrition Business of Pfizer Inc. by Nestlé S.A. (File No.493 /MERGER-CCP/2012) Para 12, available at: [http://www.cc.gov.pk/images/Downloads/nestle\\_order.pdf](http://www.cc.gov.pk/images/Downloads/nestle_order.pdf)

## News from Asia-Pacific Competition Authorities

purchaser to be approved by the ACCC.<sup>4</sup> The cooperation between the CCP and ACCC informed them of the asymmetric information supplied by the merging parties, and helped both agencies in designing the remedies.

### ❖ CHINESE TAIPEI

#### Fair Trade Commission Fines Optical Disc Manufacturers

Optical disc drive manufacturers Toshiba-Samsung Storage Technology Corporation (TSSTK), Hitachi-LG Data Storage Korea Inc. (HLDSK), Philips & Lite-On Digital Solutions Corporation (PLDS), and Sony Optiarc Inc. have been fined for cartel conduct. The Fair Trade Commission (FTC) found that the companies contacted one another by email, telephone or by meeting to exchange information regarding their quotations and expected priority sequencing either before or during the bidding for the optical drive tenders held by Dell Inc. (Dell Computers) and Hewlett-Packard Company (HP Computers) at least between September 2006 and September 2009. The FTC found that on several occasions, the companies even reached an agreement on the final winning bid and expected priority sequencing. They also exchanged other sensitive information such as that related to their productivity and production. The conduct was able to affect the supply and demand of the domestic optical drive market and was in violation of Article 14 of the Fair Trade Act. In September 2012, the FTC ordered the companies to immediately cease the unlawful act and also respectively imposed on them administrative fines of NT\$25,000,000, NT\$16,000,000, NT\$8,000,000, and NT\$5,000,000.

### ❖ VIETNAM

#### VCA Publishes Review Report on Vietnam Competition Law

On 8 October 2012, the Vietnam Competition Authority

(VCA), in collaboration with the Japan International Cooperation Agency (JICA), made public the Review Report on Vietnam Competition Law.

The Vietnamese Competition Law was established in the National Assembly in December 2004, then, took effect on 1 July 2005.

After 5 years' experience of enforcement, the VCA has found many weakness and loopholes in the current legal framework. In late 2010, the VCA, in collaboration with JICA, formed a Taskforce to carry out a study on possible amendments to the Competition Law. The Report is the fruit of this work.

In the Report, changes to the way of approaching violations are proposed, namely, from a market share based standard to a 'market power' standard and, from a listing method to an 'impact' based definition in line with the international standards of competition law.

In addition the Report recommends the establishment of an independent authority for the enforcement of Competition Law in Vietnam.

Both the full and the brief version of the Report can be found on the VCA's website: <http://www.vca.gov.vn>

### ❖ AUSTRALIA AND CHINA

#### ACCC and China's State Administration for Industry and Commerce Sign Memorandum of Understanding

On 18 September 2012 the Australian Competition and Consumer Commission (ACCC) and the State Administration for Industry and Commerce (SAIC) of the People's Republic of China signed a Memorandum of Understanding (MoU).

The MoU promotes cooperation and coordination between the ACCC and the SAIC, particularly in regard to law enforcement, information sharing and staff training.

The MoU was signed in Canberra by ACCC Chairman, Mr Rod Sims and the SAIC's Minister, Mr Zhou Bohua.

<sup>4</sup> Undertaking to the Australian Competition and Consumer Commission available at: <http://www.accc.gov.au/content/index.phtml/itemId/1090709/fromItemId/751046>

## August 2012 OECD/KPC and ASEAN Joint Workshop on Bringing Competition into Regulated Sectors



### Workshop on Bringing Competition into Regulated Sectors : Makati City (Philippines), 8-10 August 2012



**Ms Simone WARWICK**

Senior Competition Expert, OECD

In 2012 the OECD/Korea Policy Centre Competition Programme held its first ever joint event with the ASEAN Secretariat. The workshop was exclusively for participants from ASEAN nations and was generously hosted by the Office for Competition of the Philippines Department of Justice. The participants and experts

receive a warm, if rather wet, welcome to Makati City for the workshop.

The topic selected for this event was “Bringing Competition into Regulated Sectors” and the participants included representatives from competition agencies, sector regulators and other relevant government agencies.

The workshop began with welcomes from Mr Jay Young Kang, Director-General of the OECD/Korea Policy Centre Competition Programme, Ms Thitapha Wattanapruttipaisan, Head of the Competition, Consumer Protection and IPR Division of the ASEAN Secretariat, and Mr Geronimo Sy, Assistant Secretary of the Philippines Department of Justice.

Ms Wattanapruttipaisan then started the substantive part of the workshop with a presentation on competition law and policy in ASEAN, outlining work towards the goal for all ASEAN nations to have competition laws by 2015.

This was followed by an introductory presentation by Ms Simone Warwick of the OECD/Korea Policy Centre about the workshop topic of bringing competition into

regulated sectors. Ms Warwick continued with a second presentation after lunch looking at the factors relevant to the enforcement of competition law in regulated sectors. The final presentation of the day was a country presentation by Mr Herbert Fung of the Competition Commission of Singapore (CCS). Mr Fung's presentation considered a range of issues relating to different methods for electronic payments in Singapore and posed the question as to whether regulation or competition law enforcement was the best way to deal with to the issues in question.

Day two of the workshop commenced with a presentation by Mr Simon Constantine of the United Kingdom's Office of Fair Trading (OFT). Mr Constantine explained the way in which jurisdiction over competition matters in the UK is shared between the competition authorities and certain sector regulators who all hold concurrent powers. Following this, Mr Satoru Ara of the Japan Fair Trade Commission (JFTC) shared some of the JFTC's experiences in coordinating and cooperating with sector regulators when dealing with competition issues in regulated sectors.

Mr Tim Hughes of the United States Federal Trade Commission then spoke about cooperation and coordination between the United States Federal Trade Commission and Department of Justice with the Federal Communications Commission regarding antitrust concerns in the telecommunications sector.

Ms Fintri Hapsari of Indonesia's KPPU ended the day with an outline of the role of the KKPU and a discussion of the KPPU's work in the telecommunications sector and its particular in its SMS case.

On the final day of the workshop, Ms Hilary Jennings of the OECD started the day with a presentation on policy considerations relevant to the promotion of competition in regulated sectors. Mr Adonis Sulit of the Philippines Department of Justice Office for Competition (OFC) then spoke about the OFC's first year of work, with a particular focus on its advocacy activities with sector regulators.

Mr Hughes returned for a second presentation, this time on the efforts made to improve competition in regulated professions in the United States. Mr Ara also made a second presentation about the work of the JFTC in advocating for a reduction of exemptions from Japan's Antimonopoly Law.

In the afternoon the participants heard from Mr Joongkyu Sun of the Korea Fair Trade Commission (KFTC). Mr Sun explained the way in which the KFTC carries out competition assessment in line with the OECD's Competition Assessment Toolkit.

To end the workshop Mr Constantine gave a second presentation, this time looking in detail at the financial services sector in the United Kingdom and at the dual regulatory and competition enforcement approaches which have been used in that industry.

The OECD/Korea Policy Centre would like to thank the ASEAN Secretariat and the Philippines Department of Justice for supporting this workshop.

## ◆ INDONESIA

### Implementation of Competition Law in Indonesia: Cooperation with Sector Regulators in Enforcement



Ms Fintri HAPSARI  
Investigator, KPPU

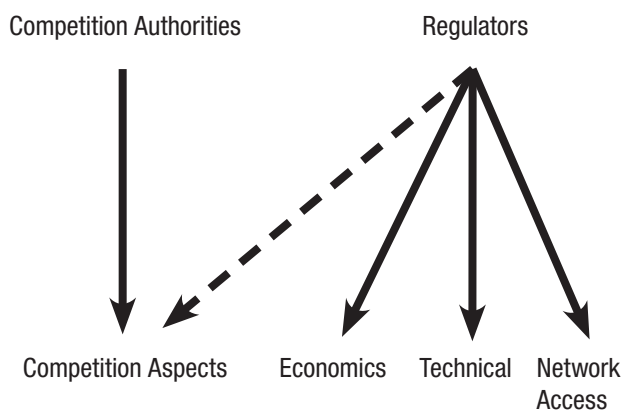
In 1961, telecommunications services in Indonesia were provided by state owned enterprises. The government

imposed a monopoly on telecommunications services in Indonesia. In September 2000, regulatory reforms were introduced aimed at increasing competition and removing the monopoly. This resulted in new entrants in the telecommunication industry.

In July 2003, the government formed the Indonesian Telecommunication Regulatory Authority (BRTI) to regulate and control the telecommunication industry. Then, BRTI reported to the government (the Ministry of Communication and Information Technology).

By law, regulators have functions of regulating price, setting standards and making sure that the network is accessible for all operators. By law, competition law is a specific law which applies for all sectors. As for safeguarding competition, sector regulators and the KPPU have a common interest, but only the KPPU has the authority to conduct investigations and enforce competition law.

The illustration below sets out the cooperation between competition authorities and regulators:



Competition authorities have responsibility for competition aspects. There are four functions to be considered in formulating a model of cooperation between competition authorities and regulators (OECD, 1999):

1. Competition protections for unfair practices and mergers/acquisitions;
2. Access regulations for making sure access to

network infrastructure is not discriminatory;

3. Economics regulation for pricing policy;
4. Technical regulations for standardisation and maintaining quality of services.

In Indonesia, the KPPU as the competition authority has duties (based on Law No 5/1999) including the following:

1. Evaluate agreements that may result in monopolistic practices and/or unfair business competition;
2. Evaluate business activities or conduct of business actors that may result in monopolistic practices and or unfair competition;
3. Assess abuse of dominant position;
4. Provide advice and recommendations concerning government policies related to monopolistic practices and/or unfair competition;
5. Prepare guidelines and publications related to this law;
6. Submit reports to the President and parliament.

Besides that, the responsibilities of the KPPU are to:

1. Receive reports on violation of the law from the public and business actors;
2. Conduct research on presumption of any business activities that could cause unfair competition;
3. Conduct investigations and examinations on presumed cases;
4. Summon and invite business actors and witnesses and experts who it considers know of any violation;
5. Ask for information from government agencies;
6. Impose sanctions;
7. Decide and determine whether or not there has been any loss suffered by business actors or the public.

In carrying out its responsibilities in the

telecommunications sector, the KPPU has coordinated with the Indonesian Telecommunication Regulatory Authority (BRTI). In case of telecommunications sector, BRTI gave their support on the KPPU's case handling. An example is the SMS (Short Message Service) Case. The SMS case related to an agreement between telecommunication operators to fix the minimum price for off net text messaging services. Their basic argument for doing so was to prevent spam and network breakdown due to an increase in traffic. The agreement was considered as price fixing by BRTI.

BRTI gave the information to KPPU. After elaborating the reports, KPPU started a full scale investigation. During the investigation, BRTI were very helpful in providing vital information needed by KPPU. BRTI gave vital information about SMS cost structure and network capacity and their characteristics.

According to BRTI calculation, the agreed SMS price was highly overpriced. According to a BRTI expert, to prevent network breakdown, operators must always increase their network capacity. SMS traffic is not the only factor that can contribute to network breakdown, rather the most important factors were voice and data communication.

Information provided by BRTI enabled KPPU to:

- ▶ Estimate fair price of SMS;
- ▶ Estimate excess profit;
- ▶ Estimate potential consumer loss;
- ▶ Build counter arguments about the possibility of network breakdown due to an increase in SMS traffic

Lessons learned from this case:

- It is very difficult to conduct competition analysis without relevant information from technical experts, network and also economics of pricing;
- Background information about network usage, cost structure and product characteristics are very essential to the analysis;
- Investigation requires full knowledge and comprehension about sector characteristics which include all of the defined functions such as economic, technical, competition and network features.





## October 2012 OECD Competition Committee Meetings

### Competition Assessment Developments

Working Party No. 2 of the Committee discussed the draft report on the implementation of the 2009 Recommendation on Competition Assessment. Based on answers received from members and observers, the report surveys the competition assessment processes in use and provides examples of how competition assessment is carried out. By comparing the responses with each other, it also draws some conclusions for the fine tuning of the Recommendation and the associated Competition Assessment Toolkit.

### Hearing on ex-post Evaluation of Competition Policy Interventions

Evaluation of competition policy is one of the two work streams identified under the long-term strategic approach of the Committee. This hearing focused on one of the three categories in which evaluation of competition enforcement and advocacy activities can be grouped: ex-post evaluation of specific interventions. Two experts, William Kovacic (George Washington University) and Steve Davies (University of East Anglia and ESRC Centre for Competition Policy), helped to shed some light on issues that so far have proven very difficult to address, in particular:

- how to perform ex-post assessments of abuses of dominance;
- how to account for the deterrent effect; and

- how to consider non-price long term effects (e.g. on innovation and quality).

They also discussed the lessons that can be derived from the ex-post assessments of cartel decisions.

### Leniency for Subsequent Applicants

Working Party No. 3 of the Committee discussed issues relating to leniency for subsequent applicants. All OECD jurisdictions have adopted immunity/leniency programmes to fight cartel behaviour. However, these programmes vary across jurisdictions to fit the specificities of each jurisdiction's enforcement framework, and may differ depending on whether the antitrust enforcement system is administrative or judicial. Despite these differences, immunity programmes can be grouped into two fundamental types: (i) amnesty programmes and (ii) leniency programmes. Under an amnesty programme, only co-operation from the first-in applicant is rewarded, usually with full immunity from fines; subsequent applicants do not benefit from any reductions in the level of the fines imposed on them. In contrast, a leniency programme offers full immunity to the first-in applicant as well as reductions of fines for subsequent applicants.

The discussion addressed a wide range of issues including the policy rationale for rewarding subsequent applicants, different means and tools to reward co-operation from subsequent applicants, and the relationship between leniency for subsequent applicants and other enforcement

## OECD Competition Committee Meetings

policies. The discussion was based on a short Issues Paper from the Secretariat, 15 country contributions, and presentations from delegations.

### Preliminary Results of the OECD/ICN Survey on International Co-operation

On 27 July 2012, the OECD and the ICN launched a joint questionnaire to survey current practices on international co-operation between agencies in enforcement cases/investigations, and to identify examples of effective international co-operation and areas for improvement.

Based on the replies to the questionnaire received so far from both OECD and ICN countries, the Secretariat made a short oral presentation on the preliminary results from the survey. These results will inform decisions on future work that the OECD (and the ICN) will undertake to foster more and better international co-operation between enforcement agencies.

### Limitations and Constraints to International Co-operation

As part of the long-term project of the OECD Competition Committee on International Co-operation, Working Party No. 3 of the Committee held a roundtable discussion on the "Limitations and Constraints to International Co-operation."

On a number of occasions, the Competition Committee has looked at impediments, constraints or challenges to effective international co-operation on enforcement cases. Significant work has been done in identifying these challenges, whether legal or practical. However, with the exception of the constraints

posed by legal limitations on the exchange of confidential information (where the Committee has developed instruments and best practices), the Committee has not devoted significant resources to discuss practicable solutions to these constraints.

The purpose of this session was to discuss solutions, if any, that agencies have put in place to limit the impact of a particular limitation or constraint on its enforcement action.

The discussion built on the preliminary results from the OECD/ICN survey (referred to above). It was also based on a short issues paper from the Secretariat, country contributions, and presentations from delegations.

### Competition and Payment Systems

Competition agencies have taken a strong interest in secure, competitive and innovative payment systems, which are crucial to consumers and companies as trade increasingly moves towards e-commerce. An OECD Roundtable discussion was held in 2006 on the usage of payment cards. Key points that came out of the roundtable were that i) substantial potential market distortions are likely to happen in the operation of payment card markets that lead more expensive forms of payment processing while driving out cheaper ones; and ii) greater levels of co-operation between competition authorities and financial regulators are desirable in order to ensure that competition problems in these markets are appropriately addressed.

Competition delegates decided to review countries experiences on developments since the 2006 discussion regarding all non-paper-based forms of payment such as debit and credit cards as well as e-payments (through internet, mobile

phones, etc). The findings of the 2006 roundtable, the 2012 EU Green paper Towards and integrated European market for card, internet and mobile payments and country written contributions provided the background for the discussion, which also benefited from the participation, as a discussant, of Wilko Bolt (Senior Economist, De Nederlandsche Bank).

## Competition in the Financial Sector

The OECD Competition Committee has, over recent years, extensively discussed competition issues in the financial sector, involving current and former financial market regulators, leading academics and representatives of the business community. Competition delegates agreed to revisit the key findings of these discussions which have been compiled into a booklet (see <http://www.oecd.org/competition/roundtables>). Recent developments were discussed and key points which emerged from these past discussions were assessed in light of recent experience.

## Roundtable on “The Role of Efficiency Claims in Antitrust Proceedings”

Although the concept itself is seldom defined, competition laws and guidelines in many jurisdictions nowadays often discuss efficiencies to a fair extent, or at least mention them. This is not surprising since it is frequently said that one of the prime objectives of competition law should be the promotion of economic efficiency.

Yet to date efficiency claims have rarely turned out to be decisive in competition proceedings. Competition authorities, however, are

increasingly presented with such claims and need to develop or update their expertise in evaluating them.

This Roundtable discussed the increasing importance of efficiency claims in competition analysis. The discussion was facilitated by the Secretariat’s Background Note which focused on:

- whether efficiencies should be accounted for, and if so what types of efficiencies should matter;
- what welfare standard should competition authorities adopt and what standard of proof should be required;
- at which stage of the analysis efficiencies should be taken into account; and
- whether the treatment of efficiency claims in dominance cases is different from that in mergers.

Efficiency claims can also be assessed ex-post. As a complement to the Committee’s work stream on the evaluation of competition enforcement and advocacy activities, the Secretariat’s Note addressed the question of whether efficiency claims materialise in mergers, surveying the variety of methods and results which have been used in different industries and jurisdictions.

The discussion was based on a Secretariat background paper and 15 country contributions. It benefitted from the participation of: Dr Helen Jenkins, Managing Director at Oxera; Professor (Emeritus) Frederic Michael Scherer, John F. Kennedy School of Government, Harvard, USA; and, Dr Hans W. Friederiszick, Managing Director at E.CA Economics and Faculty Professional at the European School of Management and Technology (ESMT), Germany.

## October 2012 Workshop on Competition Issues in the Aviation Sector

# October 2012 Workshop on Competition Issues in the Aviation Sector



### Workshop on Competition Issues in the Aviation Sector: Busan, 17-19 November 2012



**Ms Simone WARWICK**

Senior Competition Expert, OECD

In 2012 the OECD/Korea Policy Centre Competition Programme's sector focused event looked at competition issues in the aviation sector. Participants and experts from 14 countries met in the port city of Busan to discuss this topic.

After a welcome from Mr Jay Young Kang, Director-General of the OECD/Korea Policy Centre, the workshop started with a presentation by Ms Simone

Warwick of the OECD/Korea Policy Centre. This presentation provided an overview of the regulatory changes in the aviation industry in recent decades and considered how those changes impact the role of competition authorities in the sector.

This was followed by a presentation from Mr Herbert Fung of the Competition Commission of Singapore (CCS) entitled Aviation Economics 101. Mr Fung's presentation provided an overview of the economic incentives relevant to the airline industry.

After lunch on the first day, Mr Jaegul Park of the Korea Fair Trade Commission (KFTC) presented on the KFTC's experiences in the airline cargo cartel, a cartel which has seen enforcement action by competition authorities all around the world. This was followed by a country presentation from Dr K.D. Singh of the Competition Commission of India (CCI) which provided some background on the aviation industry in India and then looked at the airline cases considered by the CCI to date.

Day two of the seminar began with a second presentation by Ms Warwick, this time on the European approach to airline mergers. In addition to outlining the European

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approach to aviation mergers, Ms Warwick discussed in detail the European Commission's 2007 prohibition decision in the Ryanair/Aer Lingus merger case. This presentation was followed by a country presentation by Ms Noor Aisyah Amini of Indonesia's KKPU which highlighted both the successful advocacy work of the KKPU in the area of aviation regulation and also its enforcement activity with respect to airlines.

Dr Richard Chadwick of the Australian Competition and Consumer Commission (ACCC) then gave the first of two presentations looking at the way in which the ACCC deals with the authorisation of aviation alliances. To end the morning session, Mr Fung returned to talk about some of the airline alliance cases considered by the CCS.

The final day of the workshop started with Dr Chadwick presenting in detail two airline alliance authorisation decisions made by the ACCC in recent years. One case focused on the trans-Tasman market and the other focused on the trans-Pacific market. This was followed by a country presentation from Ms Aleezay Khaliq of the Competition Commission of Pakistan (CCP). Ms Khaliq shared two airline related cases which have been considered by the CCP in recent years.

Ms Warwick then returned for her final presentation of the workshop, this time on the question of airports and competition. This presentation considered two different issues – on the one hand the problems that arise from airport market power and the on the other hand the possibility that different airports may in fact compete.

After lunch the participants welcomed Mr Robert Young of the United States Department of Justice Antitrust Division. Mr Young shared some of his extensive experience in dealing with competition cases in the US aviation industry. In particular he spoke about the US approach to both airline mergers and airline alliances.

The workshop ended with a practical exercise. This involved the participants breaking into small groups to consider three scenarios which raised questions of market definition, competitive assessment and possible

remedies in airline merger or alliance cases. After a lively discussion each group reported back on their preliminary conclusions.

### ◆ INDIA

#### Indian Case Study: Abuse of Dominant Position and Cartelisation by the Airlines



Mr Kapil Dev  
SINGH

Deputy Director,  
Competition  
Commission of India

In the aviation sector, the Competition Commission of India has dealt with cases involving alleged abuse of dominant position by the airlines; and cartelisation by airlines in fixing air fares.

#### *M P Mehrotra v. Jet Airways (India) Ltd. & Anr., Case No. 04 of 2009*

On 13 October 2008, Jet Airways & Kingfisher Airlines (together then commanding 48% of the market share) issued a joint statement announcing the formation of an alliance extending to the following areas: code-sharing on both domestic and international flights; interline/special re-protection agreements to leverage the joint network deploying aircraft covering both domestic and international flights; joint fuel management; common ground handling etc.

It was held by the Commission that as neither of the carriers was found to hold a dominant position and further the carriers did not form part of a 'group', no case of abuse of dominant position was made out. Further, it was held that the agreements were not anti-

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competitive and were rather a common industry practice. Further, the same were held to be beneficial to the interests of the consumers and facilitated travel.

### ***In re: Domestic Airlines***

RTPE No. 05 of 2009, Suo Motu Case No. 02 of 2010 and Reference Case No. 01 of 2011

#### **Facts**

RTPE No. 05 of 2009: In February 2009, airline operators simultaneously withdrew promotional offer fares and hiked the air fares by 25 per cent across the board.

Suo Motu Case No. 02 of 2010: In October-December, 2010, during Diwali festival season, airlines raised fares together.

Reference Case No. 01 of 2011: After a strike called by the pilots of Air India (the national carrier) with effect from the midnight on 26 April 2011, different airlines started charging exorbitant fares for tickets.

#### **Commission findings**

It was held by the Commission that the withdrawal of promotional fares and hike in air fares during February 2009 was more a result of a response by airlines to the factors of general market conditions/ seasonality and not due to an anti-competitive agreement among the airlines. Further, it was held that the increase in demand caused bookings in the higher fare buckets during peak season (Diwali festival) for the passengers who had booked tickets close to the date of departure giving an impression that passengers were being charged excessively. Lastly, it was noted that increases in airfares during April/ May 2011 were due to peak traffic season coupled with reduced capacities as a result of strike by Air India pilots. Thus, due to increased load factor, the purchase of tickets sold in the higher buckets of all the airlines had gone up.

As a result, no evidence of cartelisation amongst airlines was found in increasing air fares. Minutes of Federation of India Airlines (FIA) also did not reveal any concerted action among the airlines. The rise in air fares was more a function of demand and supply, and not an outcome of

any anti-competitive agreement.

### **Competition Concerns in the Sector**

#### ◇ **Competitive neutrality**

Competitive neutrality is required to be ensured between private carriers and the national carriers.

#### ◇ **FDI in Aviation Sector**

Recently, i.e. 14 September 2012, the Cabinet Committee on Economic Affairs approved the proposal of the Department of Industrial Policy and Promotion permitting foreign airlines to make foreign investment, up to 49 percent, in scheduled and non-scheduled air transport services.

## ◇ **INDONESIA**

### **Competition in the Indonesian Aviation Industry**



**Ms Noor Aisyah Amini**  
Investigator, KPPU

The Indonesian aviation industry can be divided into two major regimes, one before 1999 and one after 1999. Before 1999, the industry was a highly regulated industry, only certain airlines were permitted to serve certain routes. At that time national/hub routes could only be served by Garuda Indonesia (a state owned company), regional/spoke routes could only be served by Garuda Indonesia and Merpati Nusantara (a state owned company) and remote area routes could only be served by private companies which operated under Merpati Nusantara's management. This regulation gave a huge

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privilege to Garuda Indonesia and Merpati Nusantara as they could monopolise “fat” routes.

The lack of competition resulting from the regulation created an expensive and inefficient industry. There was only small growth in passengers and routes. At that time only 7 (seven) companies operated in the Indonesian aviation industry namely Garuda Indonesia, Merpati Nusantara, Mandala, Bouraq, Bayu, Sempati, and Pelita Air.

After 1999, there was significant reform in the Indonesian aviation industry. Reform was started by KPPU’s advocacy to the Indonesian Government to adjust some aviation regulations to be friendlier towards a competitive climate.

KPPU has two main roles in the Indonesian aviation industry, namely competition policy and law enforcement. Regarding competition policy in the aviation industry, KPPU had sent some recommendation letters to the Indonesian government which resulted in the said reforms. By those letters, KPPU recommended the government abolish Indonesia National Air Carriers Association’s (INACA) right to set the ticket price, to abolish the government’s plan to stipulate a floor price for economy class on scheduled flights within Indonesia and to abolish INACA’s agreement in setting fuel surcharge rates among its members. Those recommendations led to the ability of airline companies to compete on price and later led to the significant growth of passengers, routes and airlines.

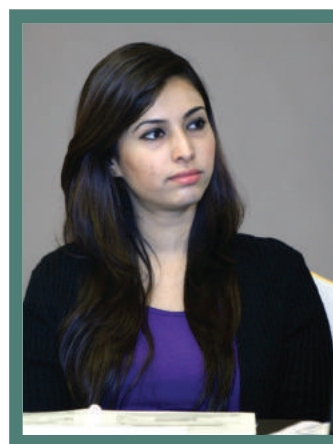
As a result of the reforms, the number of airline companies active in the Indonesian market increased to 23, low cost carriers were introduced in Indonesia, ticket prices decreased by up to 35%, flight frequency and passenger numbers increased significantly with passenger growth reaching 16 % per year.

Regarding law enforcement, KPPU reached a verdict concerning price fixing in fuel surcharges. In 2006, KPPU found that INACA had an agreement among its members to set the fuel surcharge rate at Rp. 20.000/ passenger. Regarding the case, KPPU decided that 9

members of INACA violated article 5 of Law No. 5/1999 on price fixing agreements and imposed fines of Rp. 1 billion to 25 billion on those parties.

### ◆ PAKISTAN

#### Competition in the Aviation Sector in Pakistan



**Ms Aleezay Khaliq**

Assistant Director,  
Competition  
Commission of Pakistan

The Competition Commission of Pakistan (CCP) was established under the Competition Ordinance, 2007 promulgated on 2 October 2007. On 13 October 2010, the Competition Ordinance was enacted as the Competition Act 2010 (the Act). The main aim of the Act is to provide a legal framework to create a business environment based on healthy competition for improving economic efficiency, developing competitiveness and protecting consumers from anti-competitive practices. The main substantive provisions of the Act include abuse of dominant position, prohibited agreements, deceptive marketing, merger control and competition advocacy.

#### **Background: Aviation industry in Pakistan**

Currently, there are three airlines in Pakistan, Pakistan International Airlines (PIA), Shaheen Air International and Air Blue. Each of these airlines operates domestic and international flights. PIA is the flag-bearing national airline that remains approximately 89.93% government owned, with the remainder of the shares being held privately and listed on Pakistan’s three stock exchanges. The airline was launched in 1955. It has a fleet of 39

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aircraft. The other two airlines are privately owned. Shaheen Air International was established in 1993 and today operates 9 aircraft. Air Blue was founded in 2004 and has a fleet of 8 aircraft.

The Civil Aviation Authority (CAA) of Pakistan was established in 1982. CAA is responsible for the certification, economic/regulation and safety of the aviation industry in Pakistan. CAA also provides both airport and air navigation services.

Below are actions taken by the CCP pertaining to the aviation industry.

### **PIA Hajj fares case:**

The CCP took notice of media reports that PIA was charging exorbitant Hajj fares. The inquiry report concluded that PIA is a dominant player in the market and abuse of dominant position is not allowed under the Competition Act. It was also concluded in the inquiry report that fares charged to pilgrims traveling on short duration of scheduled flights amounted to unjustifiable price discrimination between pilgrims and regular passengers which is also another form of abuse of dominant position.

On the count of unreasonable increase in Hajj airfares during the year 2008, as compared to Hajj season 2007 i.e. from Rs. 38,500(\$433) to Rs. 70,000(\$787) for the South and from Rs. 46,200(\$519) to Rs. 85,000(\$955) for North and thereby abusing its dominant position, a token penalty of Rs. 10 million (\$ 0.1 million) was imposed on PIA. A lenient view was taken in line with the CCP's stance of promoting good business practices in the market rather than penalising undertakings. On the count of discrimination between Hajji (pilgrims) passengers and regular passengers on scheduled flights, PIA was directed to work out an amount of refund to be paid back to the Hajjis based on the difference of fare between the regular passengers and Hajjis, who flew on commercial flights operated by PIA during Hajj season 2008 for performing a short duration Hajj.

### **PIA ticket cancellation charges case**

The CCP received various complaints pertaining to PIA's practice of charging a percentage of the ticket fare whenever passengers reschedule or cancel flight reservations within 48 hours of a flight, which is not

only contrary to the practice followed by other domestic and international carriers but is also discriminatory.

The inquiry report concluded that PIA was in fact charging different fares to different passengers for the same service. The CCP found that such practice was discriminatory and fell under the section 3 of the Competition law. The CCP educated PIA about the latter's practice. PIA after having understood the concern of the CCP, adjusted its charges and structure to charge the fare based on the categorisation of cabin-type and route.

### **Policy note**

As part of its mandate the CCP can also issue policy notes to the Government recommending changes in law/policy when competition is impeded. During the proceedings in the PIA Hajj Fare case, the CCP observed that the Bilateral Air Services Agreement of 1972 between Pakistan and Saudi Arabia had created a duopoly in the operation of direct scheduled air services between Pakistan and Saudi Arabia by granting exclusive rights to operate direct routes to PIA and Saudi Airlines (SV). This led to uncompetitive pricing, services and suppressed choice for the passengers especially during the hajj season when they had no other alternative.

The CCP recommended that the agreement be amended to allow multiple airlines to operate direct scheduled services and hajj services between the two countries, unrestricted competition between all airlines operating between Pakistan and Saudi Arabia. The CCP recommended that each airline operating between the two countries should decide its own airfare independently, without interference from either country's aviation authority or airlines.





## November 2012 Workshop for Judges



## November 2012 Workshop for Judges

### Workshop for Judges on Abuse of Dominance : Beijing, 28-29 November 2012

Following on from a successful first event in 2011, the OECD/Korea Policy Centre Competition Programme held its second annual workshop for judges in 2012. The 2012 workshop was held in Beijing and focused on the topic of abuse of dominance.

The 26 participants included 15 judges from courts across China as well as judges from Indonesia, Malaysia, Singapore, Vietnam, Pakistan, Mongolia and the Philippines.

The invited expert speakers at the event were Professor Frédéric Jenny, Chairman of the OECD Competition Committee and former judge of the French Supreme Court (Cour de Cassation), Dr Mike Walker from CRA in London, Judge Sangwook Kang from the Seoul High Court and Mr François Renard from Allen & Overy in Beijing.

The two day workshop started with opening remarks from Professor Jenny which were followed by two introductory presentations by Ms Simone Warwick of the OECD/Korea Policy Centre Competition Programme – one on the principles of competition law

and the second an introduction to the topic of abuse of dominance. This was followed by a more in-depth presentation by Dr Walker on the question of “What is dominance?”. In the afternoon, Mr François Renard spoke about exclusionary abuses before handing over to Professor Jenny to share his perspectives on key issues for judges in abuse of dominance cases.

Day two started with a presentation by Dr Walker on the use of economic evidence (and economic experts) in abuse of dominance cases. Professor Jenny then returned to speak about some of the tests which can be used to identify abusive conduct before sharing his views on a number of abuse of dominance cases in Europe and Asia.

In the afternoon, the final presentation of the workshop was given by Judge Kang of the Seoul High Court who spoke about his experience in dealing with an appeal from a decision of the Korea Fair Trade Commission in an abuse of dominance case relating to subscription television. The workshop ended with a hypothetical case study exercise facilitated by Dr Walker and Ms Warwick which prompted a great deal of discussion and debate among the judges.



**< 2013 OECD Competition Workshops >**

No.	Theme	Date	Venue
1	Practice and procedure in competition case	3.6~8	Seoul
2	Intellectual property and competition law	4.17~19	Jeju Island
3	In-country event	6.26~28	Kuala Lumpur
4	Use of direct evidence in cartel investigations	9.4~6	Seoul
5	Competition workshop for judges	10.23~25	Seoul
6	Complex merger: analysis and procedures	12.11~13	Busan

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