

# Asia-Pacific Competition Update



News from the OECD/Korea Policy Centre Competition Programme

October 2012, Issue 7

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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

#### Philips Korea Fined for Maintaining Resale Price of Electric Goods

On 25 June 2012, the Korea Fair Trade Commission (KFTC) imposed a fine of KRW 1.5 billion (USD 1.2 million) on Philips Korea, a local branch of Royal Philips Electronics of the Netherlands. Philips Korea had been preventing online retailers from selling small electronics items below a certain price.

Philips Korea is the leading seller of small household appliance in Korea with a 61.5% of the electric razors market, 57.1% of the electric toothbrush market, 45.2% of the electric iron market and 31.3% of the coffee machine market.

Philips is the first EU company to be fined by the KFTC.

#### Changes to KFTC Leniency Programme

In June, the KFTC amended the Enforcement Decree of the Monopoly Regulation and Fair Trade Act (MRFTA) to change the KFTC's current leniency programmes.

One of the main changes is to limit the reduction in penalty surcharge for cartel participants who voluntarily report after the first due date for reporting (i.e. the date on which the first whistle blower comes forward).

For cartels with only two participants, a 100% exemption will only be given to the first participant to come forward. No reduction will be given to the second participant, even if it cooperates.

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## News from Asia-Pacific Competition Authorities

For a cartel with three or more participants, participants who come forward two or more years after the first whistle blower has come forward will also not receive any reduction in penalty surcharge.

The amendments will result in more effective sanctions against any joint act between two minor business operators. It is also expected to increase the exposure rate by promoting competition in voluntary reporting and should result in the prompt settlement of cases.

### KFTC signs MOU with Chinese Competition Agencies

The Chairman of the KFTC participated in the signing ceremony of an MOU with the Chinese competition agencies. The purpose of the MOU is to strengthen bilateral cooperation with the Chinese competition authorities including the Ministry of Commerce of the People's Republic of China (MOFCOM), the National Development and Reform Commission (NDRC), and the State Administration for Industry and Commerce (SAIC).

With MOFCOM, the system of mutual assistance in merger reviews is to be strengthened to facilitate consultation and the exchange of information in order to enable consistent corrective action on competition-limiting global M&A.

With the NDRC, the KFTC discussed the role of competition authorities in price stabilisation as well as how to strengthen cooperation in international cartel investigations.

With the SAIC, measures for strengthening bilateral cooperation in consumer policies as well as the area of antitrust law were widely discussed.

### ◆ PHILIPPINES

### Setting the Strategic Direction of the Office for Competition

The Office for Competition (OFC) anchors its actions on a two-fold mission of enforcement and advocacy. Accordingly, the OFC began to make itself operational starting with a Strategic Planning Workshop at the beginning of 2012 and after it had established external linkages following the issuance of Executive Order No. 45 in June 2011 establishing the OFC.

Barely a year after, the commitment has translated into significant strides by the OFC in the areas of institutional and capacity building, cooperation with sector regulators and development partners, advocacy, regional cooperation and enforcement action.

The commitment to institutional and capacity building translates into trainings shared with sector regulators who also serve as co-chair of the OFC Working Groups, whether locally initiated by the office in partnership with development partners or internationally obtained through regional partners from competition authorities and organisations worldwide. Parallel efforts to bring the first consolidated bill drafted by OFC to its passage into law are also being made.

All these are detailed in the Year 1 Report and Strategic Plan of Action, the OFC's most recent and major publication. Aside from providing information on what the OFC has done so far in carrying out the Department's mandate as the country's first competition authority, it sets the strategic direction of the office in the next three years (2013-2015). This report, with the OFC brochure, serves as advocacy tool to bring competition policy and law into the mainstream of public consciousness highlighting the benefits that competition brings to overall economic growth and the crucial role that each individual plays in its effective enforcement.

Looking forward, the Guidelines that will facilitate the cooperation between the OFC and sector regulators and the Procedure for Complaints Intake and Referral between these agencies, as well as the Advocacy Plan and activities for the National Competition Day to be held at the end of the year are already in the final stages.

## ❖ HONG KONG & BANGLADESH

### New Competition Laws in the Region: Hong Kong and Bangladesh

June saw new competition laws passed in both Hong Kong and Bangladesh.

On 14 June, **Hong Kong's** Legislative Council passed the Competition Ordinance – the first cross-sector competition law for Hong Kong. The prohibitions will come into effect once the new Competition Commission and Tribunal are established.

The law includes prohibitions on anti-competitive agreements and abuses of market power. The law does not include a general merger control regime but it does revise the existing merger control regime which applies to telecommunications mergers.

On 17 June, the **Bangladesh Parliament** (Jatiya Sangsad) passed the Competition Act 2012 bringing competition law to Bangladesh.

The Act provides for the establishment of the Bangladesh Competition Commission (BCC) which will be made up of a Chairperson and no more than four other members. The BCC will be responsible for implementing and enforcing the Competition Act. The Act includes prohibitions on anticompetitive agreements and abuses of a dominant position.

## ❖ PAKISTAN

### Competition Commission of Pakistan Imposes Fines for Price Fixing

On 2 July 2012, the Competition Commission of Pakistan (CCP) imposed a total penalty in the sum of PKR 770 M, including PKR 50 M on 1-Link (Guarantee) Limited and PKR 50 M each on its 11 founding member banks and PKR 10 M on each of its 17 non-founding member banks

for imposing uniform customer charges for Off-Us ATM cash withdrawal transactions in violation of Section 4 of the Competition Act, 2010.

A CCP Bench comprising of Chairperson, Ms. Rahat Kaunain Hassan, Member, Mr. Abdul Ghaffar and Member, Dr. Joseph Wilson, passed an Order on 28 June 2012 in respect of the proceedings initiated against 1-Link and its member banks for imposing uniform customer charges for Off-Us cash withdrawal transactions, which amounts to violate Section 4 of the Competition Act.

A detailed press release about the case is available on the CCP's website: [www.cc.gov.pk](http://www.cc.gov.pk).

## ❖ SINGAPORE

### Competition Commission of Singapore Fines Ferry Operators

On 18 July 2012 the Competition Commission of Singapore (CCS) issued an Infringement Decision against two ferry operators in Singapore for breaching the Competition Act. The ferry operators were found to have infringed Section 34 of the Act, which prohibits, amongst other things, concerted practices which have as their object the prevention, restriction or distortion of competition within Singapore.

The two ferry operators in question were Batam Fast Ferry Pte Ltd (“Batam Fast”) and Penguin Ferry Services Pte Ltd (“Penguin”).

CCS started its investigation after receiving a complaint from a member of the public. During the investigation, CCS obtained evidence that the two ferry operators had exchanged and provided to each other sensitive and confidential information relating to ferry ticket pricing, including quotations to clients. There were instances of emails which were blind copied from one ferry operator to another in relation to confidential price information

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sent to clients, and instances of price verification between the ferry operators when clients asked for quotes for the purchase of ferry tickets. The unlawful conduct covered ferry tickets sold to corporate clients and travel agents which were commercially sensitive information, and excluded ferry tickets sold over the counter at published rates.

Total penalties of SGD 286,766 were imposed on the two ferry operators (SGD172,906 on Batam Fast and SGD 113,860 on Penguin). Both Parties have since paid the penalties imposed and have not filed any appeal against CCS' decision. Further information about the case is available on the CCS website: [www.ccs.gov.sg](http://www.ccs.gov.sg).

### ◆ INDIA

#### Competition Commission of India Issues Record Cartel Fine

On 30 July 2012, the Competition Commission of India (CCI) found cement manufacturers in violation of the provisions of the Competition Act, 2002 which deal with anticompetitive agreements including cartels.

The CCI imposed a penalty on eleven cement manufacturers at the rate of 0.5 times their profit for the year 2009-10 and 2010-11. The total penalties amounted to more than 60 billion rupees (more than USD 1 billion). The CCI also imposed a penalty on the Cement Manufacturers Association.

The cement companies in question were engaging in parallel and coordinated behaviour on price, dispatch and supplies in the market.

In addition to the fines, the Cement Manufacturers Association has been asked to disengage and disassociate itself from collecting wholesale and retail prices through the member cement companies and also from circulating the details on production and dispatches of cement companies to its members.

### ◆ MALAYSIA

#### MyCC Investigates Price Fixing in Flower Market

On 23 July 2012 the Malaysia Competition Commission (MyCC) announced that it is investigating the Cameron Highlands Floriculturist Association (CHFA) for price-fixing of flowers sold to distributors and wholesalers in Malaysia.

The investigation was triggered when the President of the Association made a news statement in March 2012 that its members had agreed to increase the price by 10%. Under the new Malaysian Competition Act 2010, it is a violation when enterprises at the same level of the production or supply chain agree to fix the price of their goods or services. An infringement under this Act may attract a financial penalty of not more than 10% of the worldwide turnover of an enterprise over the period of the infringement.

## 2012 May Workshop on Merger Analysis and the Implementation of Remedies

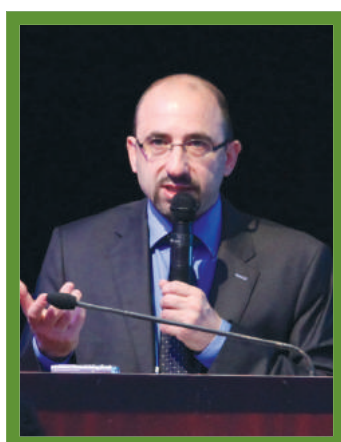


### OECD Competition Workshop for Asia-Pacific Countries

OECD Korea Policy Centre, Competition Programme



### Workshop on Merger Analysis and the Implementation of Remedies: Jeju, 8-10 May 2012



**Mr João Azevedo**  
Senior Economist  
OECD

Countries throughout Asia shared their experiences and expertise in merger control enforcement techniques and

the enforcement of remedies at the Centre's second seminar for 2012. The different practices and investigatory techniques of the following countries were contrasted in the course of the seminar: China, India, Indonesia, Korea, Mongolia, Pakistan, Philippines, Singapore, Chinese Taipei, Thailand and Vietnam.

During the seminar, the presentations by both the expert speakers and the participant countries covered all relevant issues related to merger control enforcement, including such essential steps like defining the relevant market, analysing the market structure, assessing any harm to competition and imposing remedies. Some of the presentations dealt specifically with the complexities involved in the imposition or negotiation of remedies in merger cases.

Dr Sang-Woo Nam, the Executive Secretary of the OECD/Korea Policy Centre introduced the workshop. He

## 2012 May Workshop on Merger Analysis and the Implementation of Remedies

was followed by Mr Jay Young Kang, Director General of the Competition Programme, OECD/Korea Policy Centre who gave an introduction to the Centre and the KFTC.

Mr João Azevedo, from the OECD, gave a talk about the introductory principles of merger analysis. Later on, he also presented a session about the monitoring and the enforcing of behavioral remedies and the role of arbitration clauses.

Ms Morag Bond, of the Australian Competition Consumer Commission, talked about the ACCC's approach to merger control. She then detailed several merger cases that involved behavioral remedies.

Ms Dina Kallay, from the US Federal Trade Commission, explained the FTC's experience with behavioral and structural remedies. She also gave a talk about the difficulties of implementing merger remedies with an international dimension and the need for international cooperation in those cases.

Mr Sung-Keun Kim, from the Korea Fair Trade Commission presented the competition law and the procedures of the KFTC and he detailed the analysis of remedies through a case study in the brewery industry.

During the seminar, a hypothetical merger analysis session in the telecoms sector was organised where the participant countries were split into three groups. Each group was asked to analyse the facts of the case, including defining the relevant market, assessing the anti-competitive implications of the proposed merger, the effects of entry and competition on prices and innovation, and the impact of different sets of remedies.

Case studies were presented by the following participant countries: Indonesia, Chinese Taipei, Singapore and Pakistan.

### ◆ Korea

#### Regulations of the KFTC relating to business combinations



**Mr Sungkeun Kim**

Director  
Korean Fair Trade  
Commission

In Korea, the regulation of mergers is dealt with under the Monopoly Regulation and Fair Trade Act (MRFTA).

The MRFTA prohibits business combinations restraining competition. The following acts are considered as combinations:

1. Acquisition or ownership of stocks of other companies
2. Interlocking directorates
3. Mergers with other companies
4. Acquisition through transfer, lease, or acceptance of the whole or a main part of the business operations of another company, or acquisition through the transfer of the whole or a main part of the fixed operational assets of another company ("transfer of operations")
5. Participation in the establishment of a new company

#### Notification obligations

Mergers involving large companies with total assets or annual turnover of at least KRW 2 trillion are subject to pre-merger notification; other mergers should be notified within 30 days after the closing of the transaction.

In addition, when one party's worldwide assets or annual sales exceeds KRW 200 billion and that of the other

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exceeds KRW 20 billion, the business combination should be notified to the KFTC. In case of foreign to foreign mergers if both parties' local sales are over KRW 20 billion and the general company size requirement is satisfied, those mergers should be reported to the KFTC as well.

### Types of remedies and general principles of merger remedies

The KFTC imposes two types of remedies against business combinations restricting competition. One is structural remedies and the other is behavioral remedies. Structural remedies mean those that change the asset portfolio or ownership structure of a party or parties to an acquisition and include prohibitive measures, asset sales measures (divestiture), IPR measures, etc. Behavioral remedies mean those that restrict to a certain degree, terms, ways, and scope of operation, or internal management activity of a party or parties to an acquisition over a given period of time. The number of remedies between the years 2005 and 2011 is as follows.

<Table 1 : the number of structural and behavioral remedy between the year 2005 and 2011>

Year	2005	2006	2007	2008	2009	2010	2011	Total
Structural remedy	0	3	0	0	1	1	1	6
Behavioral remedy	1	3	3	4	2	2	1	16
Total	1	6	3	4	3	3	2	22

When the KFTC imposes remedies against business combinations restricting competition, the KFTC follows four general principles. Namely, the remedies should be able to effectively resolve the competition concerns raised by the combination, the KFTC should impose the minimum level of remedies necessary to resolve the competition concerns and to effectively restore or maintain competition. Also those remedies should be unambiguous and specific so that their implementation can be objectively assessed, and be implemented. Finally, the KFTC should collect opinions from not only a party or parties to an acquisition but also from stakeholders including competing businesses, consumers, suppliers, related experts, etc.

## ◆ INDONESIA

### Merger case in Commission for the Supervision of Business Competition, Indonesia (KPPU): Acquisition Bucyrus International Inc. by Caterpillar Inc.



**Ms Lina Rosmiati**  
Investigator  
KPPU

Based on article 28 and 29 act No. 5 / 1999 and Based on articles 28 and 29 of Act No. 5 / 1999 and Government Regulation No. 57 / 2010, the KPPU is responsible for the control of mergers and acquisitions. A company is obligated to notify a merger to the KPPU when their transaction meets the threshold. Notification must be made by latest 30 days after the effective date of the transaction. Furthermore, in Government Regulation No. 57/ 2010, there are pre-merger notification mechanisms, but pre-merger notification is voluntary. In practice, most companies choose post-merger notification.

On this occasion the KPPU presented on its judgment regarding the acquisition of Bucyrus International Inc (Bucyrus) by Caterpillar Inc (Caterpillar). The acquisition happened abroad, but both parties had subsidiaries in Indonesia, so the KPPU had to do an assessment for this acquisition.

The KPPU found an overlapping product of both Bucyrus and Caterpillar is surface mining trucks. After analysing the market, the KPPU concluded that the market concentration in the surface mining truck industry is highly concentrated. While the level of market concentration in the surface mining truck industry is

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high (HHI>1800), the KPPU assumed that the acquisition will complete Caterpillar's product line, so consumers will have a wide selection of products at a better price. So the KPPU issued no objections against the acquisition of Bucyrus International Inc. by Caterpillar Inc. in Indonesia.

During the discussion at the workshop, the group discussed the determination of the relevant market and market share implemented by the KPPU. The speakers also recognised that in developing countries the main difficulties in defining the relevant market and market share is the lack of data in the market.

### Introduction:

The Competition Commission of Pakistan (CCP) was established under the Competition Ordinance, 2007, promulgated on 2 October 2007 later enacted as Competition Act, 2010 ('the Act') notified on 13 October 2010. Presently, the CCP consists of a Chairman, 5 members and 122 officers/staff members. CCP strives to achieve a robust economy, and to help drive economic growth by encouraging and enforcing free competition in all spheres of commercial and economic activity in order to enhance economic efficiency and to protect consumers from anticompetitive behavior.

### A conditional approval of the acquisition of Wind Telecom S.p.A by Vimpelcom Limited

On 17 March 2011, the CCP issued conditional approval for a merger in the telecom sector. It was a cross-border merger, VimpelCom Limited, a Bermudan company listed on the New York Stock Exchange intended to acquire Wind Telecom S.p.A (formerly Weather Investments S.p.A), an Italian private company. Both parties were engaged in the business of mobile telecom service. Although this was a cross border merger, it carried notable effects in Pakistan markets - the target Wind Telecom indirectly held about 51.7% shares in Orascom Telecom Holdings, S.A.E (OTH), an Egyptian company, which had a 100% owned subsidiary in Pakistan, Pakistan Mobile Communications Limited ('PMCL').

As a result, the acquirer was going to indirectly take

control of PMCL. Orascom (the holding company of PMCL) was going to have a new board of directors and consequently a major shift in decisive influence in the PMCL and its subsidiaries in Pakistan. CCP observed that Telenor Egypt was present on the board of acquirer Vimple Com by having 25.0% voting shares and its subsidiary Telenor Pakistan, was also present in the Pakistan mobile telecom service market. Telenor and PMCL had 23.9% and 32.5% market share in terms of subscribers respectively. Post merger market share could be 56.40% in the relevant geographic market. This situation could create a dominant position of the acquirer in the market.

Section 11(1) of the Act states that "No undertaking shall enter into a merger which substantially lessens competition by creating or strengthening a dominant position in the relevant market." To determine whether or not the said acquisition was likely to substantially prevent or lessen competition, the prevailing position of the competition in the market was examined.

- Acquirer Vimplecom (Telenor) 23.90% market share
- Target-Wind Telecom (PMCL) 32.50% market share
- Post merger share 56.40% market share Under Clause (e) of Section 2 of the Act the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent of the total relevant market.

The calculated HHI of the overall market also increased from 2353 to 3907, showing an increase of 1554 in the mobile telecom service market. This was a clear indication that the post-acquisition mobile telecom market will be highly concentrated. Therefore, the CCP decided to open a second phase review and the applicant was advised to supply some additional information in the case as required under section 11(6) of the Act read with Regulation 11(2) of the Competition (Merger Control) Regulations, 2010.

### Hearing by the Bench:

The case was heard by a single Member Bench wherein the Bench raised concerns regarding potential impact on competition in the relevant market through coordinated



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effects and/or strengthening or creating of a (joint) dominant position.

### Conclusion:

The undertaking, having understood the concerns of the Commission, proposed and committed to implement, and the Bench agreed to grant its 'No Objection' on 17 March 2011, based on the following conditions to alleviate competition concerns:

- PMCL would, as appropriate under Pakistani law, pass resolutions at the board and/or amend its constitutional documents (i.e., Articles of Association) with respect to criteria for being nominated and serving as a director. Criteria would be framed for PMCL based on general conflict-avoidance principles, and would have the effect that employees, directors or other representatives of the Telenor group, would not be eligible to serve on the board of directors or equivalent governing body of PMCL or any of its subsidiaries currently operating in Pakistan, so long as Telenor operates a subsidiary that is in competition with Orascom Telecom and/or PMCL in Pakistan.
- Management of VimpelCom, OTH and PMCL (and other relevant subsidiaries in Pakistan) are expressly prohibited by board resolutions, through proper procedures, or in any other manner from sharing commercially sensitive information relating to the businesses of VimpelCom and its subsidiaries in Pakistan with Telenor or representatives of the Telenor group; and from entering into any arrangement with Telenor Pakistan to procure goods and services, other than arrangements of the kind presently in place, except (A) on an arms-length basis, or (B) to the extent generally or specifically permitted by the Pakistan Telecommunication Authority (for example, infrastructure sharing) or the Competition Commission of Pakistan.
- Each of VimpelCom and OTH would put in place corporate resolutions prohibiting any person serving on its board of directors or equivalent body who is affiliated with Telenor (i.e., an officer, director or other employee of the Telenor group) from

participating in discussions or decisions that relate to PMCL or other operations of VimpelCom or OTH in Pakistan.

- VimpelCom Management would notify the Commission as and when they undertake any changes to the above policies in a way that would affect the operations of VimpelCom and its subsidiaries (or Telenor and its subsidiaries) in Pakistan.

Further, the Bench made it clear to the applicant undertaking that the Commission reserves the right to assess the effects of the transaction on the relevant market after one year from the date of the closing of the transaction under subsection 13 of section 11 of the Act. The applicant was required to file a compliance report within three months from the date of closing of the transaction. The undertaking submitted the compliance report within due time.

## ◆ PAKISTAN

### Merger Remedies in Pakistan



**Mr Mubashar  
Jamal**

Senior Joint Director  
Competition  
Commission of Pakistan

### Introduction:

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governing body of PMCL or any of its subsidiaries currently operating in Pakistan, so long as Telenor operates a subsidiary that is in competition with Orascom Telecom and/or PMCL in Pakistan.

- Management of VimpelCom, OTH and PMCL (and other relevant subsidiaries in Pakistan) are expressly prohibited by board resolutions, through proper procedures, or in any other manner from sharing commercially sensitive information relating to the businesses of VimpelCom and its subsidiaries in Pakistan with Telenor or representatives of the Telenor group; and from entering into any arrangement with Telenor Pakistan to procure goods and services, other than arrangements of the kind presently in place, except (A) on an arms-length basis, or (B) to the extent generally or specifically permitted by the Pakistan Telecommunication Authority (for example, infrastructure sharing) or the Competition Commission of Pakistan.
- Each of VimpelCom and OTH would put in place corporate resolutions prohibiting any person serving on its board of directors or equivalent body who is affiliated with Telenor (i.e., an officer, director or other employee of the Telenor group) from participating in discussions or decisions that relate to PMCL or other operations of VimpelCom or OTH in Pakistan.
- VimpelCom Management would notify the Commission as and when they undertake any changes to the above policies in a way that would affect the operations of VimpelCom and its subsidiaries (or Telenor and its subsidiaries) in Pakistan.

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### ◆ SINGAPORE

#### Merger Analysis and Remedies, Singapore Case Study



**Mr Terence Seah**  
Assistant Director  
Competition Commission  
of Singapore



**Ms Serene Seet**  
Assistant Director  
Competition Commission  
of Singapore

Mr. Terence Seah presented on the merger regime in Singapore, including a case study on merger remedies and commitments.

Unlike the merger regimes in most other jurisdictions, the merger regime in Singapore is voluntary and there is no requirement for mandatory notification of mergers and acquisitions in Singapore. The voluntary regime encourages merging parties to conduct self assessment of their mergers and to apply to the Competition Commission of Singapore (“CCS”) for a decision only if they think their merger situation is likely to raise competition concerns. The CCS Guidelines for Substantive Assessment of Mergers provides that CCS is generally of the view that competition concerns are unlikely to arise in a merger situation unless:

- The merged entity will have a market share of 40% or more; or
- The merged entity will have a market share of between 20% to 40% and the post merger concentration ratio of the three largest firms in the market is 70% or more.

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This voluntary regime was put in place in recognition of Singapore's small open economy. Given that most mergers in an open trade orientated economy are unlikely to raise serious competition issues, a voluntary regime avoids increasing business costs or delaying business decisions unnecessarily as a result of lengthy merger investigations. This also allows CCS to focus on mergers that are more likely to raise competition issues and devote its limited resources to areas of greater benefit. The relatively small size of the economy also means that CCS is likely to become aware of mergers that might raise competition concerns and which have yet to be notified. However, in relation to the issue on un-notified mergers, CCS has powers to investigate un-notified mergers if it has reasonable suspicions that a merger has resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore.

The following diagram lists out the general steps CCS takes in its substantive assessment of mergers:



Case Study on Remedies and Commitments – Thomson/Reuters

Section 69 of the Competition Act (Cap. 50B) provides for CCS to issue directions to effect appropriate remedies in mergers where the section 54 prohibition on mergers has been infringed or if carried into effect, will infringe the Act. Section 60A of the Act provides that CCS may accept commitments at any time before making a decision on a merger.

CCS has not issued any unfavourable decisions to date on mergers since the merger regime came into force on 1 July 2007. Accordingly, CCS has not issued any remedies nor accepted any commitments from merging parties. CCS did, however, take into consideration global commitments offered by the merging parties to the US Department of Justice and the European Commission in the Thomson/Reuters merger when issuing a favourable

decision to clear the acquisition by Thomson Corporation of the Reuters Group. CCS considered that the commitments proposed would have worldwide effect and was satisfied that they would sufficiently address Singapore's competition concerns.

### ◆ CHINESE TAIPEI

## Using Merger Remedies to the Ensure Favorable Economic Outcomes: A Case Study



Ms Ya-Ching Shih  
Specialist  
Chinese Taipei Fair Trade Commission

The Chinese Taipei Fair Trade Act (CTFTA) was enacted to maintain trading order, protect consumers' interests, ensure fair competition, and promote economic stability and prosperity. As outlined in Article 12 of the CTFTA, whenever a merger application is received by the Chinese Taipei Fair Trade Commission, an analysis is made on whether the overall economic benefit outweighs the disadvantages that may result from the restriction of competition. Furthermore, merger remedies can be attached to ensure the overall economic benefits of the merger outweigh the disadvantages of competition restraint.

When Dafu Media Co., Ltd. filed a pre-merger notification regarding its intention to merge with Shengting Co., Ltd., Kbro Co., Ltd. and twelve cable TV systems operators controlled by Kbro, there were several key concerns that would result from the merger which could lead to a restriction of competition. These concerns were analysed on whether the overall economic benefit

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would be greater than the disadvantages resulted from competition restraint.

The first concern was that Kbro and TWM Broadband (TWM) would have close to one third combined market share in the cable television industry.

Secondly, Kbro and TWM were both the top 3 content providers in the satellite television market. Provided that the number of cable television subscribers to the merging parties did not exceed one third of the national cable television market and the number of program channels provided did not surpass one quarter of the total available channels in the nation, the CTFTA concluded that there would be no significant disadvantage resulting from restriction of competition. In fact, several economic benefits would arise from this merger: digital development in cable television services, improvements in the visual media industry, the expedition of digital convergence, and the additional options that would be available to consumers as a result of the merger.

Lastly, there were overlapping advisors between Dafu and TWM. This meant that should the two enterprises operate jointly, market power and concentration would increase.

To address these potential issues that could lead to restriction of competition, merger remedies were put in place to ensure the overall economic benefits would be greater than the disadvantages caused by the merger.

Both structural and behavioral remedies were put in place. A total of six structural remedies outlined limitations to: obtaining or selling shares of its own or other cable television networks and content providers, the appointment of board directors, supervisors, or managers, co-management or delegated management with other cable television services, and the production of new analog satellite television programs. A total of four behavioural remedies outlined limitations to: form any contract or agreement of any form with other cable television services, the participation of any type of joint program sales with another cable television program supplier, never refuse to license their satellite television programs or undertake any discriminative treatment to competitors without justifiable causes, and furthermore, to never charge different prices or conditions when licensing their satellite television programs. Lastly, three supervisory remedies were put in place to ensure that the expected overall economic benefits of the merger would be executed.

By taking into consideration the framework of existing regulations and control, the competitive market structure, and future technological development tendencies, merger remedies can be used to monitor and supervise the potential competition restraints and encourage activities that increase overall economic benefits.



## OECD – June Competition Committee Meetings

### Evaluation of Competition Enforcement and Advocacy Activities

Evaluation of competition policy is one of the two work streams identified under the OECD Competition Committee's long-term strategic approach. In February 2012 the Committee decided to start this work stream by performing a stocktaking exercise on what competition authorities currently do, or have done, in terms of evaluating the impact of their competition enforcement and advocacy activities. A questionnaire was circulated to competition authorities to support this exercise, which focused on the three categories in which evaluation of competition enforcement and advocacy activities can be grouped:

- Evaluation for accountability: which covers the overall activities of the competition authority over a period of time, generally a year, in order to account for the use of its resources.
- Ex-post evaluation of specific interventions: which involves the detailed qualitative and quantitative assessments of the impact, in general on consumer welfare in the relevant market(s) of specific interventions by the competition authority.
- Evaluation of the broader impact of competition policy: which examines the links between the activities of the competition

authority and one or more high-level economic variables, such as productivity, innovation or growth.

The objective of this roundtable was to understand competition authorities' experiences in performing these three types of evaluation of the impact of their enforcement and advocacy activities, to find out to what extent these evaluations are required by governments and what impact they have on the authorities, to learn how these evaluation exercises are undertaken and what they focus on, and what kind of difficulties these evaluation exercises pose.

### International Cooperation

#### *a. Stocktaking exercise of the Competition Committee's past work*

Following the February 2012 discussion on the two long-term strategic themes for the Competition Committee and its Working Parties, it was agreed that the first step in the long-term project on international co-operation would be a **stocktaking** exercise in Working Party 3.

Building on the extensive work done by the OECD Competition Committee over the last two decades on international co-operation, the purpose of the discussion was to identify issues concerning international co-operation that may deserve future attention.

### *b. Draft questionnaire on international co-operation*

At the Committee meetings in February, it was also agreed that the OECD Secretariat should start working, in liaison with the International Competition Network, on a **survey of international cooperation practices**. Together with the stocktaking of OECD past work on international co-operation, this questionnaire will help delegates to chart their future work under this work stream. The details of the questionnaire were discussed at the meeting.

### **Recommendation on fighting bid rigging in public procurement**

The Competition Committee approved the draft recommendation that was developed by WP3. The Recommendation has been subsequently adopted by the OECD Council. This recommendation builds on the extensive work done by the Committee and WP3 in the area of collusion and public procurement, including on the Competition Committee Guidelines for Fighting Bid Rigging in Public Procurement, which have proved very successful as an advocacy tool both in Member and Non-member countries. With this new OECD instrument, which will complement existing OECD recommendations in this area, the existing Committee Guidelines will benefit from a stronger OECD commitment and visibility.

A copy of the Recommendation can be found at <http://www.oecd.org/daf/competition/>

### **Hearing on Competition and Behavioural Economics**

Neoclassical economic theory pervades competition policy. It presumes that firms are profit maximisers and that both firms and consumers make rational, self-interested choices. Behavioural economics, on the other hand, uses findings and approaches from other social sciences, such as psychology and sociology, to probe the limitations of neoclassical economics' rationality assumptions. The possibility of poor, or at least non-standard, decision making by market participants is central to the behavioural approach. For example, suppose that corporate executives actually care more about how their profits compare with those of their rivals than about the absolute magnitude of profits. The behavioural approach probes the ways in which that value system would be significant for competition policy. The OECD Competition Committee held a **hearing** to explore the fairly *avant garde* application of behavioural economics to competition policy. A panel of experts, including Professors Xavier Gabaix (New York University), Steffen Huck (University College London) and Maurice Stucke (University of Tennessee), offered insights and answered questions from delegates in a free-ranging discussion framed by four topics:

- i) a brief introduction to behavioural economics;
- ii) implications of behavioural economics for cartel deterrence;
- iii) implications of behavioural economics for merger enforcement; and
- iv) implications of behavioural economics for abuse of dominance / monopolisation.

## 2012 June Workshop on Vertical Restraints

# 2012 June Workshop on Vertical Restraints



### Workshop on Vertical Restraints: Seoul, 27-29 June 2012



**Ms Simone  
WARWICK**

Senior Competition  
Expert  
OECD

The OECD/Korea Policy Centre's June 2012 workshop was on the topic of Vertical Restraints. Representatives from 14 competition authorities from across Asia took part in the workshop. This included for the first time a representative from Bangladesh.

The workshop began with an introductory presentation from Ms Simone Warwick of the OECD/Korea Policy Centre. This presentation provided participants with an overview of the different types of vertical restraints. It also looked at the extent to which vertical restraints are prohibited in different jurisdictions and at some of the reasons for the adoption of different approaches around the world. As the topic of vertical restraints typically requires a level of economic analysis, the next



## 2012 June Workshop on Vertical Restraints

presentation, by Ms Lilla Csorgo, Chief Economist at the New Zealand Commerce Commission, focussed on the economics of vertical restraints. Ms Csorgo's presentation dealt with two key points. First, the four main ways in which vertical conduct can result in competition concerns, and second, the economic justifications or rationale for vertical restraints.

After lunch on the first day, the workshop moved away from a general discussion and into specific types of vertical restraints. Mr Byung Geon Lee, Senior Deputy Director at the Korea Fair Trade Commission (KFTC), spoke about the KFTC's kiwi fruit case which involved an exclusive dealing arrangement imposed by New Zealand kiwi fruit supplier, Zespri, on major retailers in Korea. Mr Lee's presentation resulted in a lively discussion between participants on the features of that case. Day one ended with a short quiz about the day's discussions.

Day two began with another presentation from Ms Simone Warwick, this time on the European approach to vertical restraints. This presentation started with an outline of the way in which the European Union looks at vertical restraints. Ms Warwick then focussed on a number of European cases – in particular some exclusive dealing cases and a number of resale price maintenance cases which also involved indirect horizontal collusion (so-called hub and spoke arrangements). This was followed by a second presentation from Ms Lilla Csorgo on the topic “Exclusion Good, Exclusion Bad” in which she looked in detail at two different exclusive dealing cases. One was about exclusive dealing in garbage disposal and the other was about exclusive dealing in movie exhibition. Ms Csorgo contrasted the two cases, as one was found to raise competition concerns while the other did not. The session also included two presentations from participating countries – one from Mr Kuldeep Kumar of the Competition Commission of India and the other from Ms Hoang Thi Thu Trang of the Vietnam Competition Authority.

Mr Will Tom, General Counsel of the United States Federal Trade Commission, gave two presentations on the final day of the workshop. His two presentations looked at the US approach to both vertical interbrand

conduct and vertical intrabrand conduct. Mr Tom's spoke about the theory behind the US approach to vertical restraints (for example in respect of resale price maintenance and exclusive dealing) and also about the application of that theory in specific cases. Among others, Mr Tom talked about the Department of Justice's case against Microsoft in the 1990's and the FTC's recent case against Intel.

The final day also included two presentations from participating countries, one from Ms Amun Sikander Khan of the Competition Commission of Pakistan and the other from Ms Rahma Wati Faisal of the KPPU, Indonesia. The workshop ended with a lively discussion and debate among the participants as they considered a hypothetical exclusive dealing case.

### ◆ INDONESIA

#### Indonesia Case Study: Vertical Restraints in Cement Distribution



**Ms Rahmawati  
Faisal Syahrudin**  
Investigator  
KPPU

*At the OECD/Korea Policy Centre workshop on vertical restraints, Ms Rahmawati Faisal Syahrudin of the KPPU made a presentation on a vertical restraints case in the cement distribution industry in Indonesia.*

Articles 8, 15 and 19(d) of the Indonesian Law Number 5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition are relevant to vertical restraints.

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### • Article 8

Business actors shall be prohibited from entering into agreements with other business actors setting forth the condition that parties receiving goods and or services shall not sell or re-supply goods and or services received by them, at a price lower than the contracted price, potentially causing unfair business competition.

### • Article 15

- 1) Business actors shall be prohibited from entering into agreements with other business actors, stipulating that the party receiving the goods and or services shall only resupply or not resupply the aforementioned goods and or services to certain parties and or at a certain place.
- 2) Business actors shall be prohibited from entering into agreements with other parties stipulating that the party receiving certain goods and or services must be prepared to buy other goods and or services of the supplying business actor.
- 3) Business actors shall be prohibited from entering into agreements concerning prices or certain price discounts for goods and or services, stipulating that the business actor receiving goods and or services from the supplying business actor:
  - a. must be prepared to buy other goods and or services from the supplying business actor; or
  - b. shall not buy the same or similar goods and or services from other business actors, competitors of the supplying business actor.

### • Article 19 (d)

Business actors shall be prohibited from engaging in one or more activities, either individually or jointly with other business actors, which may result in monopolistic practices and or unfair business competition, in the following forms:

- d. engage in discriminatory practices towards certain business actors.

This case was started by the KPPU on its own initiative in 2005. It concerned the distribution of cement in area

4 areas namely: Blitar, Jombang, Kediri, Kertosono, Nganjuk, Pare, Trenggalek and Tulungagung. The relevant market in the case was the supply of cement in each of the four areas. The reported businesses were Semen Gresik, Ltd. (Semen Gresik) along with its eleven distributors. They were alleged to have violated article 8 on resale price maintenance and article 15 on exclusive dealing.

During the investigation, the investigating team found that certain agreements entered into between Semen Gresik and its distributors in East Java included the following conditions:

- Distributors must only distribute to assigned parties;
- Distributors must maintain price stability;
- Distributors are prohibited from selling other cement brands;
- Semen Gresik determines the area in which each distributor can market its cement;
- Semen Gresik determines and sets the prices at which the distributors can sell its cement.

The agreements also provided sanctions for breaches of their terms.

Semen Gresik used a Vertical Marketing System (VMS), which operated as follows:

- Each distributor has one or more fixed subscribers (FS);
- Each FS has one or more stores;
- Sales between distributors are prohibited, as are sales between FS;
- Distributors are prohibited from supplying other than their FS;
- FS are prohibited from supplying other than their own stores;
- Semen Gresik oversees the VMS pattern by placing Area Manager in each area.

The investigating team found that Semen Gresik was a dominant player, as it had a market share of around 70% and customers preferred its cement over that of its competitors, even though Semen Gresik charged higher prices.

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The investigation team also found that the agreements had anti-competitive effects because they eliminated competition between the different Semen Gresik distributors and accordingly customers were paying higher prices and did not have a choice of products.

The Assembly Commission concluded that the reported business actors were proven to have violated articles 8 and 15 of Law Number 5/1999. It therefore ordered Semen Gresik to remove the clause in its agreements prohibiting distributors from supplying other than their own FS group as well as the clause prohibiting its distributors from selling other cement brands. Semen Gresik was ordered to pay fine of IDR 1.000.000.000 while the eleven distributors had to pay fine of IDR 1.000.000.000 jointly.

### ◆ INDIA

#### Vertical Agreements: Provisions of Competition Act, 2002



**Mr Kuldeep Kumar**

Deputy Director  
Competition  
Commission of India

*At the OECD/Korea Policy Centre Workshop on vertical restraints, Mr Kuldeep Kumar of the Competition Commission of India (CCI) made a presentation on the application of India's Competition Act, 2002 (the Act) to vertical agreements. The relevant provision of the Act is section 3, which came into force from May 2009.*

#### Vertical Agreements [Section 3(4)]

Section 2(b) of the Act defines the term “agreement” as including “any arrangement, understanding or action in

concert - i) whether or not, such arrangement, understanding or action is formal or in writing; or ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.”

Under section 3(4) of the Act, agreements between enterprises or persons at different stages/levels of the production chain (i.e. vertical agreements) are prohibited if such agreements cause or are likely to cause an appreciable adverse effect on competition (AAEC). Vertical agreements include:

- “Tie-in arrangements” include any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods
- “Exclusive supply agreements” include any agreement restricting in any manner the purchaser in the course of its trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person
- “Exclusive distribution agreements” include any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods
- “Refusals to deal” include any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought
- “Resale price maintenance” includes any agreement to sell goods on condition that the price to be charged on the resale by the purchaser shall be the price stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

The one difference that shall always stand between horizontal and vertical agreements is that horizontal agreements are presumed to have an AAEC whereas with vertical agreements, the onus of proving an AAEC lies on the CCI. In addition, the exemption in the Act relating to joint venture agreements applies only with respect to anti-competitive horizontal agreements (and provided such agreements increases efficiency in production etc).

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The term “appreciable adverse effect on competition” (AAEC) used in section 3 is not defined in the Act but section 19(3) provides that the CCI shall, when determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:

- a) creation of barriers to new entrants in the market;
- b) driving existing competitors out of the market;
- c) foreclosure of competition by hindering entry into the market;
- d) accrual of benefits to consumers;
- e) improvements in production or distribution of goods or provision of services;
- f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

It should also be noted that while criteria (a)-(c) help to determine whether an agreement has an appreciable adverse effect on competition, criteria (d)-(f) provide various arguments that can be used to justify such agreements.

### Points to Ponder

The provisions relating to vertical agreements under Indian Competition Law may be said to suffer from certain drawbacks as there are no exemptions given to vertical agreements on the basis of threshold levels (like the de minimis exemption, or block exemptions given in the EC) and all such agreements are required to be tested for adverse effects under section 19(3).

“A Journey of a thousand miles starts with a single step”. The first step has been taken by the CCI and competition law soon is going to change the face of Indian economy, for the good of Indian citizens.

## PAKISTAN

### Vertical Restraints under the Competition Act 2010



**Ms Amun Khan**  
Assistant Director  
Competition  
Commission of Pakistan

*At the OECD/Korea Policy Centre workshop on vertical restraints, Ms Amun Sikander Khan of the Competition Commission of Pakistan (CCP) made a presentation on the treatment of vertical restraints cases in Pakistan.*

The competition concerns that arise with respect to vertical restraints can be dealt with under section 3 of the Competition Act 2010 (Act) which pertains to abuse of a dominant position and section 4 of the Act which pertains to prohibitive agreements.

### McDonalds- Refusal to Deal/Exclusive Dealing Case 2009

SIZA Foods is a franchisee of McDonalds in Pakistan. The complainant, Murree Brewery - a manufacturer of beverages, alleged in the complaint that they wrote several letters to SIZA requesting that they consider selling Murray Brewery beverages in McDonalds outlets, to no avail and that SIZA exclusively sold Coca Cola products. An enquiry by the CCP revealed that SIZA is a dominant player in the market which was defined as foreign fast food restaurants in Pakistan. While there was no written agreement between SIZA and McDonalds for exclusive supply, an “agreement” as defined under the Act includes any arrangement, understanding or practice, whether or not it is in writing or intended to be legally enforceable. It was held in the order that the practice is tantamount to exclusive dealing - an arrangement between a manufacturer (Coca Cola) and a buyer (SIZA) requiring

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the buyer to take all of its needs for the contracted good from a single manufacturer. The exclusive dealing arrangement had an impact on Murree Brewery, as it was foreclosed from having access to McDonalds outlets. SIZA gave an undertaking to include other beverage options, provided they conform to international standards prescribed by McDonalds, so that there is more choice for consumers and no barriers to access.

### Bahria University - Tie-In Case 2009

The CCP took notice of a news item in which Bahria University announced it had made it mandatory for all incoming students to buy laptops imported by the University. This appeared to be a case of tying of the provision of educational services with the purchase of laptops. The CCP enquiry revealed that the University had imported 4500 Acer Laptops in 2006 and was selling them to students since 2007. The relevant market was defined as educational services at the graduate and undergraduate level in Islamabad and the admission records of competing universities revealed Bahria University had a substantial market share. In 2007, the total number of PC servers imported into Pakistan was 149,000. Based on information received from computer sellers, of the 149,000 PC servers, 10 per cent (that is, 14,900) were laptops. The University, by purchasing and selling 4500 laptops, effectively foreclosed at least 30% of the laptops market. Students were categorised into those who paid upfront in full and those who paid in installments for the laptops. Students that could not purchase in a lump sum payment, had to pay interest at 12.65% compared to 5-8% which was the competitive rate of a student loan in the Pakistani market. A market survey of laptop prices revealed that the University was selling the laptops at a lower price as compared to the open market. However those who purchased in installments ended up paying much more owing to the interest charges. The CCP concluded that the University had abused its dominant position by a) forcing students who could not pay in full to accept unfair loan conditions at 12.65 % interest and b) making the purchase of laptops mandatory through tying and thereby restricting choice and information. A cease and desist order was passed directing the University to a) discontinue mandatory sale of laptops b) give students rebates an amount totaling Rs. 10 M prorated on the basis of the interest amount paid so far, and to be paid in future by each student.

Vertical agreements between suppliers and distributors which enhance economic efficiency even though they may result in anti-competitive effects can be exempted under sections 5 and 7 of the Act after applying the rule of reason analysis laid down in section 9 of the Act. The most common types of exemption applications relate to distribution agreements containing restrictive clauses relating to territorial allocation. The total number of exemption certificates granted to date is 393.

## ◆ VIETNAM

### Case study: Exclusive dealing in the Vietnam beer market



**Ms Thu Trang Hoang Thi**  
Official  
Vietnam Competition Authority

*At the OECD/Korea Policy Centre Workshop on vertical restraints, Ms Hoang Thi Thu Trang of the Vietnam Competition Authority (VCA) presented a case involving exclusive dealing in the Vietnam beer market.*

Several years ago Tan Hiep Phat Company Ltd. (THP) - a producer of Laser beer - sought to enter the beer market in Vietnam, but it faced many difficulties in supplying its beer to restaurants and pubs because of exclusive dealing contracts signed between those restaurants/pubs and other beer producers.

In 2007 THP filed a complaint with the VCA against Vietnam Brewery Limited (VBL) - a producer of Tiger and Heineken beer. THP alleged that VBL had abused its dominant position in the premium beer market in some big cities in Vietnam to deter new competitors.

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The VCA's investigation mainly focused on identifying the relevant market, determining if VBL had a dominant position in that market and collecting evidence to prove the exclusive dealing conduct.

### Relevant market

The relevant market in this case was identified by the VCA as the beer market for the whole country, wider than the "premium beer" market definition proposed in THP's complaint.

The VCA decided that all kinds of beer distributed in Vietnam are interchangeable in terms of their characteristics, use and prices. Beer is an alcoholic drink and the VCA did not find out any clear boundary between price levels of different kinds of beer. In addition, beer products of VBL and other competitors are distributed across almost the whole of the country and under similar conditions in the different geographical areas in Vietnam without entry barriers.

### Dominant position

In the Vietnam beer market VBL had a market share of about 20%, lower than the 30% threshold, under which a firm is considered to be dominant according to Vietnam Competition Law. Therefore, VBL did not have dominant position in Vietnam beer market.

### Exclusive dealing contracts

During the investigation the VCA discovered that VBL had signed exclusive dealing contracts with over 190 of

the more than 8,600 beer sale partners in Vietnam (i.e. about 2% of total sale volume). Based on that number of exclusive dealing contracts, VBL could not significantly restrict competition.

### Conclusion

Evidence on exclusive dealing by VBL in this case was not sufficient to constitute a violation as prescribed in Clause 6, Article 13 of Vietnam Competition Law, as VBL was not dominant in the relevant market. As a result, VCA proposed to the Vietnam Competition Council that it issue a decision to suspend the case.

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.



**< 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	Sector focused event: Aviation	10.17~19	Busan
6	Judge training	11.28~29	China

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