ASIA-PACIFIC COMPETITION UPDATE

Issue 32
December 2023

Competition Programme
OECD/Korea Policy Centre

IN THIS ISSUE

The Competition Programme of the OECD/Korea Policy Centre provides education and training to officials of Asia-Pacific competition authorities in the field of competition law and policy, and OECD/KPC organises events for judges. This newsletter includes information about our work and the work of the OECD, as well as news, case studies and reports from competition authorities in the Asia-Pacific region.

Entry point - Editorial Note

Despite global challenges, the Asia-Pacific region remains one of the fastest growing areas in the world. The 2023 Asian Development Outlook from ADB of September 2023 revised up growth forecast projection, to 4.9% from 4.7%, on robust domestic demand. Risks and challenges persist, including global economic uncertainties, geopolitical risks, inflationary pressures, climate change and natural hazards. Weak external demand will continue to put pressure on the region's exports[1].

Alessandra Tonazzi

Senior Competition Expert
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The OECD KPC competition program in 2023 reflect the challenges that competition authorities are facing in this scenario, devoting many of its discussions to current issues such as energy prices, sustainability, and developments in the digital economy.

With respect to inflation caused by increasing energy prices competition agencies can play a role using their tools to safeguard open and competitive energy markets, especially in abuse of dominance and merger reviews. Competition law enforcement can be complemented with more general investigations of markets conditions in form of market studies or market inquires. These topics were discussed in a workshop where competition agencies from different countries shared their experiences in analyzing and tackling competition issues in energy markets.

The compatibility of different sustainability objectives with competition policy and enforcement was the focus of many initiatives recently undertaken by competition authorities that were discussed in a workshop addressing the analysis of sustainability agreements. While regulatory interventions tend to be the preferable instrument to reach sustainability objectives, competition policy and enforcement may contribute to advancing sustainability objectives in specific ways. Sustainability outcomes are normally best achieved if firms compete. However, if market failures exist, co-operative initiatives might, under specific circumstances, be useful or even necessary to overcome them. Competition authorities may consider whether certain agreements between competitors may be allowed, whilst remaining vigilant to prevent sustainability initiatives from spilling over into anticompetitive infringements.

1. OECD (2023), Economic Outlook for Southeast Asia, China and India 2023 - Update: Resilience Under Uncertainty, OECD Publishing, Paris, https://doi.org/10.1787/cd94bcf6-en.

The evolution of digital markets remains a key issue for many economies and its effects on competition were explored in a workshop aimed at providing a good understanding of methods for assessing and measuring the market power of digital platforms, and to share experiences of agencies that have already had cases involving digital markets. More traditional issues, such as, fighting abuse of dominance and anti-competitive cartels remain, nevertheless, at the core of competition agencies' action. These were addressed in two in-person workshops, one on the use of economic analysis in abuse of dominance cases and the other on fighting cartels and bid rigging.

As in previous years a highlight of the program was the Competition Law Seminar for Asia-Pacific Judges. The seminar dealt with key legal principles concerning the standards of proof and standards of review followed by courts in competition cases, discussing the different standards that are applicable to findings of law versus findings of fact. The seminar benefitted from key remarks by Professor Frédéric Jenny, Chairman of the OECD Competition Committee, and presentations by representatives of the judiciary, such as Judge Romy Tagra, member of the Philippine Judicial Academy, and the Hon Michael O'Bryan, from the Federal Court of Australia.

This is the first newsletter since I joined the OECD Competition Division in June 2023 to coordinate the competition program of the OECD KPC. I was thrilled and honored by this new responsibility that comes after many years working for the Italian Competition Authority. I am glad that I could join the program at a time when in-person activities were resuming, as this gave me a possibility to start meeting many of you during the workshops described in this Newsletter. I look forward to a new year of interesting seminars and workshops and to the opportunity to meet many more of you throughout the year.

8th OECD Asia Pacific High Level Representatives Meeting

The 8th meeting of High-Level Representatives of Competition Authorities of Asia-Pacific took place on 6th December, in-person, in Paris, France. Sixteen jurisdictions from Asia-Pacific countries, represented at the senior level, attended the meeting.

This annual meeting, organised by the OECD, is an opportunity to discuss topics that are of common interest to the competition authorities in the region bringing the policy viewpoints and experience of the OECD to bear on the region. Following recent OECD work on environmental issues, the topic of the meeting was Competition Policy and Environmental Considerations.

The meeting opened with a presentation by Mr. Alexander Böhmer, Head of South and Southeast Asia Division, Global Relations and Cooperation Division, who shared with the participants the main areas of recent OECD work in South-East Asia and presented some of the results of the Southeast Asia Regional Programme (SEARP) in the context of its three objectives of promoting regional integration, supporting domestic reform processes and bringing Southeast

Asia countries closer to OECD bodies, standards and good practices.

The session on Competition Policy and Environmental Considerations, chaired by Ms. Alessandra Tonazzi, Senior Competition Expert, OECD, opened with a key address by Ms. Gina Cass-Gottlieb, Chairwoman, Australian Competition and Consumer Commission (ACCC). Ms. Cass-Gottlieb outlined how the Australian Government efforts to promote the achievement of environmental outcomes via markets provide context to the decision of the ACCC to nominate environmental sustainability among its top compliance and enforcement priorities. She discussed how the ACCC, as a competition and consumer agency, can play some key roles in relation to sustainability: firstly, ensuring that consumers aren't being misled when they decide to make purchases based on sustainability claims. Secondly, addressing product safety risks from the changes in Australia's economy to support consumer confidence in the green transition. Thirdly, ensuring that new markets for sustainable products and services develop in competitive ways and that transitioning markets aren't subject to anti-competitive consolidation without benefit. The ACCC has a role in advocating for effective market design that maintains the conditions for workable competition and in supporting market development. Finally, and importantly, ensuring that competition and consumer law is not operating as an unnecessary barrier to businesses pursuing legitimate sustainability objectives. She also highlighted the importance of continued cooperation on competition and environmental sustainability,

8th OECD Asia Pacific High Level Representatives Meeting

exchanging good practices and experience to work more efficiently and effectively, given that businesses' sustainability agreements will often be transnational in effect, and aiming where possible for legal consistency across jurisdictions.

Ms. Alessandra Tonazzi gave a presentation on the interplay between competition and sustainability goals, focusing on the approaches that competition authorities can take when assessing cases with an environmental dimension. She presented the recent OECD Competition Committee work on competition and sustainability. In analysing the different approaches competition authorities have taken in assessing environmental effects in competition cases four main challenges can be identified: determining which and to what extent environmental effects may be taken into account; deciding whether it is possible to take into account environmental efficiencies that benefit consumers other than those directly affected by the anticompetitive conduct or transaction (including future consumers); knowing which timeframe to adopt for the consideration of environmental effects or efficiencies; and quantifying and balancing environmental effects with other types of effects or efficiencies.

Mr. Koichi Shimabukuro, Senior Planning Officer, International Affairs Division, Japan Fair Trade Commission (JFTC), presented the "Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act" adopted by the JFTC to further improve predictability and transparency for companies regarding green initiatives

and Mr. Herbert Fung, Senior Director, Data and Digital Division, Competition and Consumer Commission of Singapore (CCCS), presented recent developments in his jurisdiction where CCCS also drafted guidance with respect to environmental objectives and competition.

The second session of the meeting was devoted to a roundtable where participants discussed competition enforcement and policy priorities in the Asia-Pacific Region. The discussion was introduced by Mr. Samuel Chan, Chairman of the Competition Commission, Hong Kong, China (HKCC), who shared the example of the priorities set by the HKCC during the pandemic, namely: cartels that aim to take advantage of government or public funding and procurements, anti-competitive behaviors which affect people's livelihood, and competition issues arising from digital economy. He then asked all the participating jurisdictions to share their enforcement priorities or the focus of each agency's current activity.

Finally, Mr. Hotae Kim, Director General of the OECD/Korea Policy Centre (OECD-KPC), presented the OECD-KPC results for 2023 and the workplan for 2024. Mr. Ori Schwartz, Head of the Competition Division, OECD, concluded the meeting.

KFTC's Top Cases in Digital Area

The KFTC's Google Case in the Android App Store Market in 2023.

Songrim KOO

Senior Competition Expert
OECD (seconded from KFTC)

In September 2021 the Korea Fair Trade Commission (KFTC) hit Google with a KRW 224.9 billion fine for blocking the entry of rival operating systems (OSs) and the development of new smart devices. Google required device manufacturers to sign Anti-Fragmentation Agreements (AFA) to block the market entry of Android fork OSs, which are rivals to the Android OS. This restriction barred competitors from developing and commercialising Android folk OSs, stifling innovation in the smart devices market and impeding the emergence of competing platforms. Consequently, the KFTC decided that Google's conduct was an illegal abuse of market dominance and sanctioned Google's anticompetitive conduct to restore competition in the mobile market and generate innovation for smart device markets.

In another significant case, in April 2023, the KFTC acted against Google's abuse of dominance in the Android app store market, imposing remedies and a fine of KRW 42.1 billion.

App stores are platforms that connect and enable transactions between app developers and consumers. As such, like with many digital platform markets, app store markets are multi-sided and feature cross-side network effects.

Google was performing its role as a so-called gatekeeper in the Android app store market as well as the Android OS market, with an overwhelming market share globally and in Korea. This case exemplifies how a dominant player in a digital market can effectively stifle competition using network effects.

Google required mobile game companies to exclusively release their games on its own app store, the Google Play store, and not release them on a competing app store, "One Store", in

exchange for featured placement, which means positioning their game in prominent locations to make them more visible and easily noticeable, as well as support for overseas expansion and marketing. As Google is a dominant player in the Android app store market, Google Play is essential for mobile game developers to generate mobile game revenues. Therefore this practice diminished developers' incentives to multi-home, restricting their ability to launch games on rival app stores such as One Store for broader distribution and increased revenue.

This resulted in One Store facing challenges in attracting new games, depreciating its value and revenue due to negative cross-side network effects, while fortifying Google's dominance in the Android app store market. This scenario highlights how monopolistic control negatively impacts the mobile ecosystem and consumers.

The app store market serves as a key gatekeeper platform, significantly influencing the entire mobile ecosystem. Competition authorities around the world are closely monitoring app store markets, and some competition authorities, such as the UK Competition and Markets Authority (CMA) and ACCC, have released market analysis papers focusing on the restriction of competition in these markets. Although app stores have fostered creativity by connecting developers and consumers globally, the abuse of market power by 'gatekeepers' may stifle innovation for themselves and app developers, as users are restricted to using dominant market players like Google. To sustain innovation in the app ecosystem, timely actions against app market operators' abuses of market power are essential.

News from Asia-Pacific Competition Authorities*

* These news items are summarised or sourced from public press releases of the relevant agencies.

Indonesia

The Indonesia Competition Commission (ICC) introduced Regulation 4/2023, enabling the government to align policies with fair competition principles using the Competition Policies Checklist (DPKPU). This regulation empowers the government to modify policies that could potentially lead to monopolistic practices or unfair competition. Government agencies can seek ICC recommendations on their policies by submitting the DPKPU results. ICC evaluates these requests through Business Competition Policy Assessment (AKPU) and provides policy impact analysis and recommendations. ICC Regulation 4/2023 aligns with Law Number 5 of 1999, assigning the ICC the role of overseeing government policies to integrate business competition values effectively and prevent law violations. The regulation outlines how the ICC can provide recommendations based on requests from government agencies, public institutions, or ICC initiatives, using AKPU evaluations and policy analyses within a 60-day period, extendable if needed. ICC recommendations suggest attention to policy impacts, policy alterations, or revocation to prevent monopolistic practices or unfair competition. Monitoring occurs within 60 days after agencies receive ICC recommendations; failure to implement them may lead to publicising recommendations or reporting to higher authorities, as detailed in ICC Regulation 4/2023.

The Indonesia Competition Commission (ICC) issued a Stipulation for Behavior Change concerning the violation of Article 9 of Law Number 5 of 1999 related to Car Air Conditioning Systems and Component Units. Denso Corporation and Sanden Corporation complied with the behaviour changes

outlined in the Integrity Pact, leading to the ICC discontinuing the examination of Case Number 16/KPPU-L/2022. The Stipulation mandates both parties to register their Indonesian subsidiaries in ICC's Compliance Program within 30 days, ensuring completion within six months; failure to register within this timeframe may prompt advancement to the Advanced Examination phase.

The Indonesia Competition Commission introduced Regulation Number 3 of 2023 (PerKPPU 3/2023) aimed at enhancing merger and acquisition notification rules. This regulation implements an electronic notification system and sets guidelines for determining asset/sales value in Indonesia. Notably, it reduces document verification timeframes, requiring a Commission Hearing for comprehensive assessments. Effective from the promulgation date, PerKPPU 3/2023 mandates notification of mergers and acquisitions within 30 days of the transaction's legal effectiveness. The regulation reflects advancements by introducing an electronic-based notification system accessible through a dedicated portal. It restricts asset and sales value calculations to those directly or indirectly owned in Indonesia, enhancing accuracy. Notifications are verified for completeness within three days of submission, and the ICC issues a registration number with notification details. The Secretariat of the ICC manages initial and comprehensive assessments, involving the Commission Council if potential monopolistic practices or unfair competition are detected. A Hearing, attended by the business actor making the notification, assesses findings and may suggest conditional approval (remedy). If approved, the Commission Council issues a Stipulation; otherwise, it proceeds to an Advanced Examination. The assessment incurs a fee of 0.004% of the asset/sales value specified in the notification, capped at Rp 150,000,000, payable by the notifying business actor, as detailed in Government Regulation Number 20 of 2023. This regulation takes effect 30 days after issuance.

Japan

The Japan Fair Trade Commission (JFTC) released a market study titled "Market Study Report on News Content Distribution," aiming to ensure fairness and transparency in transactions between News Platform Operators (NPOs) and News Media Operators (NMOs) within the news content distribution service sector on September 21, 2023. The study utilised questionnaire surveys and interviews, collaborating with competition authorities from the US (FTC), Australia, and France. In the report, the JFTC shows that NPOs might have superior bargaining position to NMOs, and it also indicates what types of conducts by NPOs may violate the Antimonopoly Act and what NPOs should do to promote a fair competitive environment such as disclosing information on the calculation basis of the license fees. The JFTC also detailed do's and don'ts for NMOs' joint negotiation with NPOs.

As a result of the market study, the JFTC will implement initiatives including the following:

- ✓ Monitoring initiatives made by NPOs and NMOs while maintaining necessary communication with them.
- ✓ Proactively engaging in collaboration and cooperation with relevant ministries and agencies.
- ✓ Strictly and appropriately responding to concrete cases involving NPOs if they are problematic under the Antimonopoly Act.

Philippines

The Department of Justice-Office for Competition (DOJ-OFC) has investigated agricultural commodity cartels, exacerbating food security concerns in the Philippines due to price fluctuations, inflation, and dependency on imports. President Ferdinand Marcos Jr. directed the DOJ-OFC to address the crisis during the State of the Nation Address on 24 July 2023. A task force was formed to probe smuggling, hoarding, and price manipulation. Collaboration between DOJ-OFC and the House Committee investigated potential cartel activities involving agricultural products and the exploitation of market inefficiencies, aided by limited cold storage facilities and regulatory favoritism.

The investigations highlighted anti-competitive conduct such as output limitation and bid-rigging in the agricultural sector, prompting recommendations for a comprehensive government-led approach to enforce competition laws, aiming to prosecute and prevent cartel activities impacting the nation's food security.

Summary of the OECD Competition Week June 2023

OECD Competition Week
June 2023

Working Party n. 2 on Competition and Regulation

The Working Party n. 2 held a Roundtable on assessing and communicating the benefits of competition interventions. The roundtable was organised in two main parts. The first covered the wide range of communication tools used by competition authorities, including annual report, press releases and interviews with the media, to target multiple audiences. Several competition authorities also conduct surveys to evaluate awareness of competition law. Survey results are often used to assess the impact of communication campaigns. Finally, several authorities described their efforts when communicating with lawmakers to encourage pro-competitive reforms. The second part of the roundtable focussed on impact assessment and the contributions revealed that a growing number of authorities use a methodology

close to the one suggested by the OECD guide that was published in 2014.

During the meeting there were presentations on trials and experiments in competition and regulation. External experts and selected delegations presented examples, such as the use of trials in abuse of dominance cases to provide evidence about alleged harm or lack of harm (Spotify, Google) and in testing remedies (Amazon Marketplace), and natural experiments in a merger in the digital sector in Japan.

Finally, the Secretariat presented the complete draft of the Competitive Neutrality Toolkit to support the implementation of the 2021 Recommendation on Competitive Neutrality. The key OECD divisions that work on related policy areas (State Owned Enterprises governance and trade) provided an overview and updates on their work.

Working party n. 3 on Enforcement and Cooperation

The Working Party n. 3 held a roundtable on future of leniency programmes. Considering the general decline in the number of leniency applications and despite a recent resurge of applications in some jurisdictions, delegates discussed the effectiveness of their leniency programmes, their recent amendments and complementary detection tools that they have introduced or reformed to increase the likelihood of detection and therefore the incentives to apply for leniency. Delegates pointed to several possible reasons to explain the decline, including recently introduced private enforcement, and the complexity of cartels and leniency applications.

The members discussed a potential revision of the 2005 Merger Review Recommendation, in a way that deepens and widens the substantive part of the recommendation and brings it more in line with recent developments in merger review.

Competition Committee

A panel of experts presented their views, recent developments, and insights on the relationship between competition and innovation from a theoretical perspective. The panel discussed how competition affects innovation, how innovation can also shape competition and the relationship between competition and other drivers of innovation. On the latter, it concluded that other drivers of innovation such as firm size, the role of government policies and financing of innovation also significantly impact the studied relationship. The hearing then raised considerations on the implications of the relationship between competition and innovation on competition enforcement and policy. From the discussion, it was clear that although there is no consensus on the relationship between both variables, as it depends on multiple considerations, the way competition authorities perceive it has an impact on their competition policy and on how they consider innovation in their enforcement activities. For that, the Competition Committee will hold a dedicated roundtable in the next meeting where competition authorities will be sharing their experience from their enforcement perspective.

The roundtable on Algorithmic Competition discussed: (i) algorithmic theories of harm and example cases; (ii) whether existing competition law is sufficient to address algorithmic theories of harm and potential remedies; and (iii) how competition authorities can investigate algorithms. The discussion highlighted the range of methods available to investigate algorithms, as well as the breadth of evidence that an authority could consider. The most relevant technique will be case-specific. An authority will not always need to adopt sophisticated technical approaches, and simpler methods or evidence may be sufficient in some cases. There have still been relatively few relevant cases and authorities have faced several practical challenges when investigating an algorithm. Authorities are increasingly developing in-house technical knowledge and sharing experience to overcome these challenges."

The Roundtable on the Consumer Welfare Standard discussed the importance of standards given their interaction with the objectives of competition law and evidentiary thresholds, before considering

the advantages and disadvantages of different standards. There were a range of different views on the importance of standards, although it was widely accepted that they interact closely with the evidentiary threshold. There was no agreement on the most appropriate standard for competition law, with standards of various attributes used across jurisdictions. The discussion noted that standards need to take into account the wider societal context and that this may lead to a different choice, depending upon how a jurisdiction values their different attributes.

The roundtable on Competition in the Circular Economy looked at the relationship between competition and circular economy. The discussion highlighted that, since both competition and the circular economy encourage resource efficiency and maximising the value of inputs and raw materials, the goals of competition policy and of circularity can reinforce each other in several ways. Competition authorities can prohibit initiatives and behaviours that negatively impact competition and circularity. They can prohibit mergers with anticompetitive effects that also hinder or slow down the move to circularity or the development of circular economy innovations. Competition policy can also proactively support the circular economy through various advocacy efforts, such as opinions to the Government in strategic sectors. In addition to several experts, the session benefitted from a presentation by ENV colleague and Circular Economy Lead, Peter Börkey.

The roundtable on Theories of Harm for Digital Mergers discussed the theories of harm currently used in the analysis of digital mergers, the potential need to develop new theories, and the challenges that this may present for competition authorities, including with respect to their ability to meet legal tests and standards of proof. Contributions from delegates indicated that many jurisdictions have already sought to fine-tune theories of harm to better reflect the specific characteristics of digital markets, including to account for network effects, harms to innovation and privacy, and the potential for mergers to entrench ecosystems. Some delegates indicated their intention to move further in this direction, including through the revision of merger guidelines, while others encouraged caution and a need to first identify a clear enforcement gap in unambiguous terms.

Summary of Workshops 2023

OECD/KPC Workshop on Digital Platform Markets: Market Power in Digital Economy and Competition Policy

The OECD/KPC workshop on Digital Platform Markets: Market Power in Digital Economy and Competition Policy took place virtually between 7 and 9 March 2023. The OECD welcomed 5 speakers from the OECD, the , CMA and the European Commission. 42 participants from 8 jurisdictions took part in the workshop.

The digitalisation of world economies has led to the introduction of new technologies, the creation of new markets, the changing of existing markets, as well as a transformation in how consumers obtain information and make purchases. Digital platforms exhibit some characteristics that affect market structure, including strong cross network effects, economies of scale and scope, big data, amongst other important characteristics.

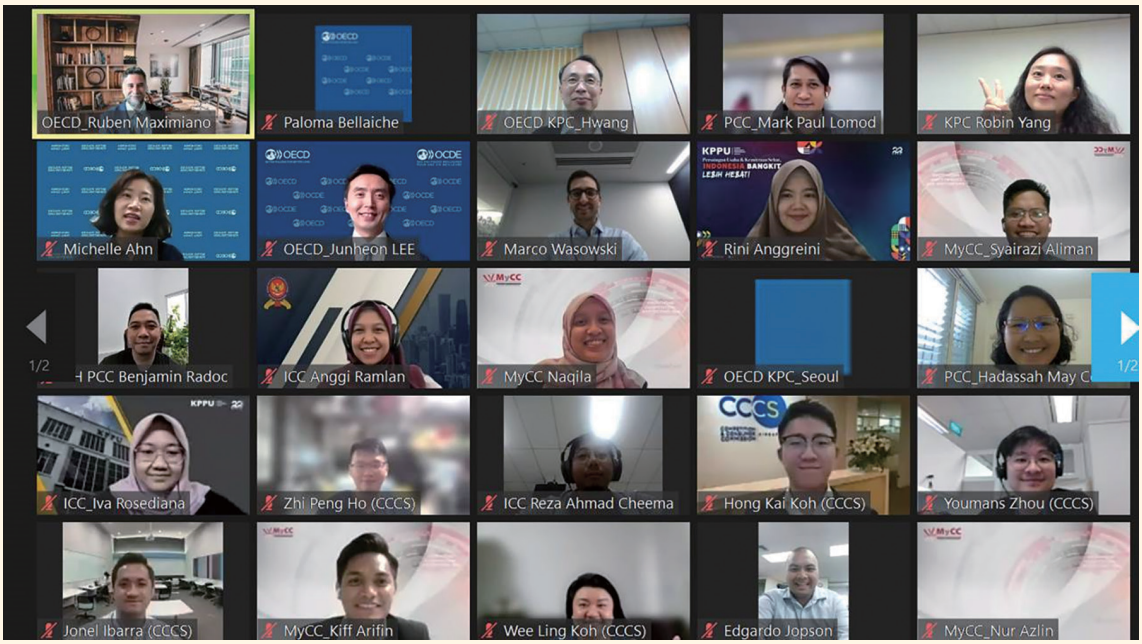
The objectives of the workshop were to provide a good understanding of methods for assessing and measuring the market power of digital platforms, and to share experiences of agencies that have already had cases involving digital markets, providing participants with an opportunity to explore the common competition issues and challenges arising from a very important component of the digitalisation of our economies: the operation of digital platforms, often multi-sided.

The first day started with opening remarks by Mr. Ruben Maximiano, Senior Expert and Regional Manager for Asia-Pacific, OECD, and Mr. Jungwon Song, Director General of the

OECD/KPC Competition Programme. The substantive part of the workshop started with a presentation by Mr. Ruben Maximiano and Mr. Gaetano Lapenta, Competition Expert, OECD, with a general overview on competition issues in the digital economy. The rest of the first day was devoted to discussing how to measure market power in the digital economy with a presentation by Martina Prosperetti, Assistant Director, Economics, and Marco Wasowski, Assistant DIrectors of Economics at the CMA.

On the second day Ms. Anna Barker, Competition Expert, ACCC, explored the competitive dynamics of the digital advertising markets, followed by a presentation by Mr. Ruben Maximiano on the characteristics of abuse cases in the digital markets, and a presentation by Mr. Jun Heon Lee, Senior Competition Expert, OECD, who shared with the participants some abuse of dominance cases in digital markets in Korea.

On the third day of the workshop Mr João Vareda, Deputy Head of Unit C.3 – Antitrust IT, Internet and Consumer electronics at the European Commission, presented the Google Android case and Ms. Victoria Mason, Assistant Director, Mr. Aaron Khan, Assistant Director, and Mr. Soo Yun Chai, Digital Markets Adviser, shared the experience and challenges of the CMA in creating a digital unit explaining its main functions.



OECD/KPC Workshop on Economic Analysis in Abuse Cases

The OECD/KPC Workshop on Economic Analysis in Abuse Cases took place in Seoul, Korea, between 9 and 11 May. The objective of the workshop was to provide the participants with an overview of the economic analysis framework used in abuse of dominance cases.

The five experts, Mr. Ori Schwartz, Mr. Junheon Lee and Ms. Holly Jamieson (OECD), Mr. Junsook Lee (US Federal Trade Commission) and Ms. Alessandra Tonazzi (Italian Competition Authority) discussed with 26 participants from 18 jurisdictions fundamental topics related to market definition and the role of economic analysis and evidence in abuse of dominance cases using both presentations and interactive group hypothetical exercises.

The first day of the workshop was introduced by Mr. Ori Schwartz, Head of the Competition Division, OECD, followed by a presentation by Mr. Hotae Kim (Director General, OECD/KPC Competition Programme). Mr. Joonsuk Lee, Ph.D., J.D. (Counsel for International Antitrust, U.S. Federal Trade Commission) gave a presentation on market definition in abuse of dominance cases, explaining how a prerequisite for the assessment of abuse of dominance cases is a correct definition of both product and geographic market definition.

Ms. Alessandra Tonazzi, analysed the elements that need to be taken into account in establishing dominance such as the existence and magnitude of market power, the market shares of the dominant firm and its competitors, the different types of barriers to entry, the ability to exclude and other factors, as well as introducing the concept of joint dominance drawing from examples from the enforcement of the EU law.

The workshop then focused on the different practices of abuse of dominance and how they are established. Mr. Joonsuk Lee focused on predatory conduct and other low or discriminatory pricing strategies such as rebates and discounts while Ms. Alessandra Tonazzi focused on other exclusionary conduct such as exclusive dealing, tying and bundling, refusals to supply/deal, margin squeeze, pre-empting scarce facilities or resources. Finally, Mr. Hideyuki Shimozu (Director, Planning Office, Investigation Bureau, Japan Fair Trade Commission) presented some key cases of abuse of dominance/bargaining position in Japan.

On the second day of the workshop Mr. Ori Schwartz presented on how to establish dominance in excessive prices cases while Mr. Joonsuk Lee explained the role of economists, economic analysis, and evidence in abuse of dominance cases. The workshop continued with a presentation on remedies and sanctions in abuse of dominance cases by Mr. Ori Schwartz. The participants were then divided in four groups to take part in two engaging hypothetical case studies, one concerning a complaint for excessive prices by a pharma company and the

other concerning the assessment of a rebate scheme.

On the third and final day of the workshop, Ms. Holly Jamieson (Senior Competition Expert, OECD) shared with the participants some tips for planning and conducting effective abuse of dominance cases, while Mr. Junheon Lee (Senior Competition Expert, OECD) presented some cases of abuse of dominance in Korea. The presentations were followed by the discussion, in small groups of participants, of a hypothetical case on vertical restraints.

Ms. Alessandra Tonazzi made a presentation on abuse of dominance and state-owned enterprises and Mr. Ori Schwartz discussed the specific features of market power and abuse of dominance in the digital economy.

An important final part of the workshop involved agencies from the Asia-Pacific region, namely India, Malaysia and Singapore, sharing their experience with abuse of dominance investigations. The workshop concluded with remarks by Mr. Ori Schwartz and Mr. Hotae Kim.

OECD/KPC Workshop on Competition and Energy Markets

The OECD/KPC workshop on Competition in Energy Markets took place virtually between 27 and 29 June 2023. The OECD welcomed 7 speakers from OECD, Flint Global, the Spanish Competition Authority (CNMC), the German Competition Authority (Bundeskartellamt), the Australian Competition Authority (ACCC), the Korean Fair-Trade Commission (KFTC) and the European Commission. 42 participants from 14 jurisdictions took part in the workshop.

The objective of the workshop was to explore how competition agencies can play a role using their tools to safeguard open and competitive energy markets especially in the area of abuse of dominance and merger reviews. Competition law enforcement can be complemented with more general investigations of markets conditions in form of market studies or market inquires. The workshop included a general introduction on energy markets and the factors that affect prices, the relationship between sector regulation and competition, advocacy and market study interventions, and the main areas where competition authorities have intervened to safeguard competitive energy markets.

The first day of the workshop was opened by Ms. Alessandra Tonazzi, Senior Competition Expert, Regional Manager, OECD, followed by a presentation by Mr. Hotae Kim (Director General, OECD/KPC Competition Program).

Then Ms. Mary Starks, Partner, Flint Global, provided an overview of the main competition issues in energy markets. She explained that in the past year, conditions in energy markets worldwide have been unprecedented. Driven by COVID-19 and, more recently, Russia's full-scale invasion of Ukraine, shortages in supply and excess demand have led to record energy commodity prices, the impact of which has been felt worldwide. High natural gas and electricity prices have had significant impacts on inflation, economic growth, living standards, and wider policy goals such as decarbonisation. In most countries, traditional, state-run monopolies have been dismantled, and wholesale and retail markets have been liberalised – although energy remains amongst the most heavily regulated sectors of the economy. When wholesale and retail energy markets were liberalised, countries deployed a combination of structural measures (e.g., separation between monopoly and competitive activities), regulatory measures and competition law to safeguard competition in these markets, ensuring that new players could enter and compete effectively with incumbent firms.

Ms. Alessandra Tonazzi gave a presentation on regulation in energy markets. Energy markets (electricity and gas) were traditionally supplied by state monopolies and generally viewed as "essential services". In the last three decades major changes affected these sectors: as state monopolies were dismantled and, in some cases, privatised, and wholesale and retail activities were liberalised. Regulation plays a crucial role in energy markets by ensuring market fairness and consumer protection and addressing market failures. The presentation focused on the main challenges faced in striking a

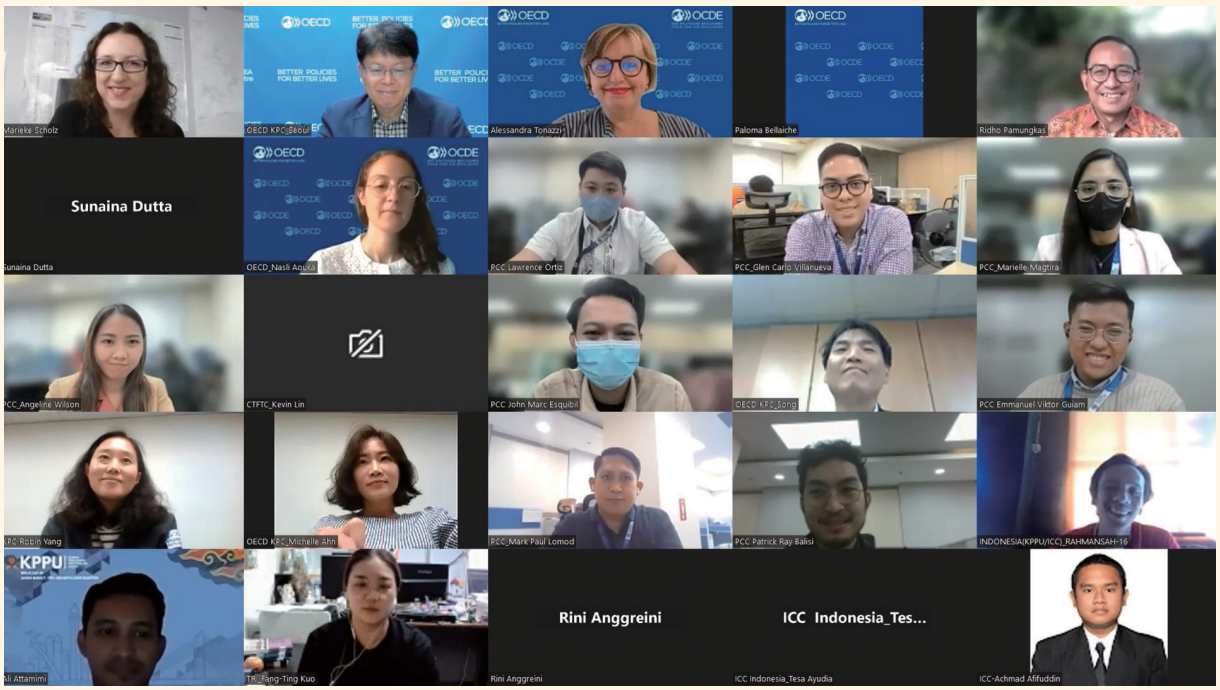
balance between promoting competition and ensuring consumer protection, addressing information asymmetry between regulators and market participants, adapting regulations to evolving market dynamics, and avoiding undue regulatory capture.

Ms. Maria Pilar Canedo, Member of the board of the Spanish Competition Authority (CNMC), has both competition and regulatory powers, presented the case Enel Green Power Espana showing how the authority balanced the two different approaches.

Many competition authorities have conducted market studies in the energy sector which were discussed on the second day of the workshop. Mr. Christoph Frisch, Bundeskartellamt, presented a market study in publicly accessible charging infrastructures conducted by the German authority. Mr. Mark McLeish, General Manager, presented the ACCC's market inquiry activity in fuel, petrol, electricity and gas markets, and the advocacy intervention following this activity. Mr. Jihong Son, Deputy Director, presented cases in energy markets by the KFTC.

On the third and last day of the workshop, Ms. Marieke Scholz presented several cases undertaken by the EU DG Comp in energy markets and, in particular, abuse of dominance practices hampering the free flow of energy within the EU, denying access to infrastructure and transmission capacity or supply, noting that the EU DG Comp had addressed eight such cases since 2013. Mr. Ridho Pamungkas, from the Indonesia Competition Commission, presented a case of excessive prices in the natural gas market.

The OECD/KPC Workshop ended with Closing remarks by Ms. Alessandra Tonazzi, and Mr. Hotae Kim.



13th OECD/KPC Competition Law Seminar for Asia-Pacific Judges

Following 12 successful events since 2011, the 13th OECD/KPC Competition Law Seminar for Asia-Pacific Judges took place virtually on 18 September 2023.This year the topic was "Standards of Proof and Intensity of Review by Courts". 26 judges from 6 jurisdictions attended the event.

The seminar dealt with key legal principles concerning the standards of proof and standards of review followed by courts in competition cases, discussing the different standards that are applicable to findings of law versus findings of fact.

An effective review by courts is a necessary complement to the internal checks and balances that competition authorities put in place to ensure due process. Understanding the standard of review for competition enforcement that courts follow is important, first, for decision-makers; their investigations, collection of evidence and decisions all need to be able to withstand judicial scrutiny. The applicable standard of review is also important for affected parties, who will consider that standard in deciding whether to challenge a decision based on available grounds of appeal and their chances of success at trial. Some jurisdictions allow full merits review of competition decisions without limitation of the legal grounds that can be invoked, or the aspects of the decision that can be appealed. A merits review can involve a reconsideration of the appropriateness of the decision and allow the judge to identify and, depending on the applicable rules and the facts of the case, correct errors. Other jurisdictions provide for a legality review of competition decisions, based on limited grounds of review, which typically cover the legality, reasonableness, and procedural compliance of the contested act.

The objectives of the seminar were to make judges more familiar with the standard of review of competition enforcement that courts follow in different jurisdictions and to provide judges with the opportunity to explore the standard of proof required by the first-instance decision-maker to conclude that the applicable substantive legal test has been satisfied and there is a breach of competition law. The seminar provided an enriching opportunity to hear different perspectives on the challenges faced by judges regarding the complex analysis of competition cases.

Mr. Hotae KIM, Director General, OECD/KPC Competition Program, opened the seminar with some welcoming remarks. Judge Romy Tagra, Presiding Judge, Regional Trial Court and Member, Philippine Judicial Academy, gave a keynote presentation on standards of proof and intensity of review by courts in the Philippines.

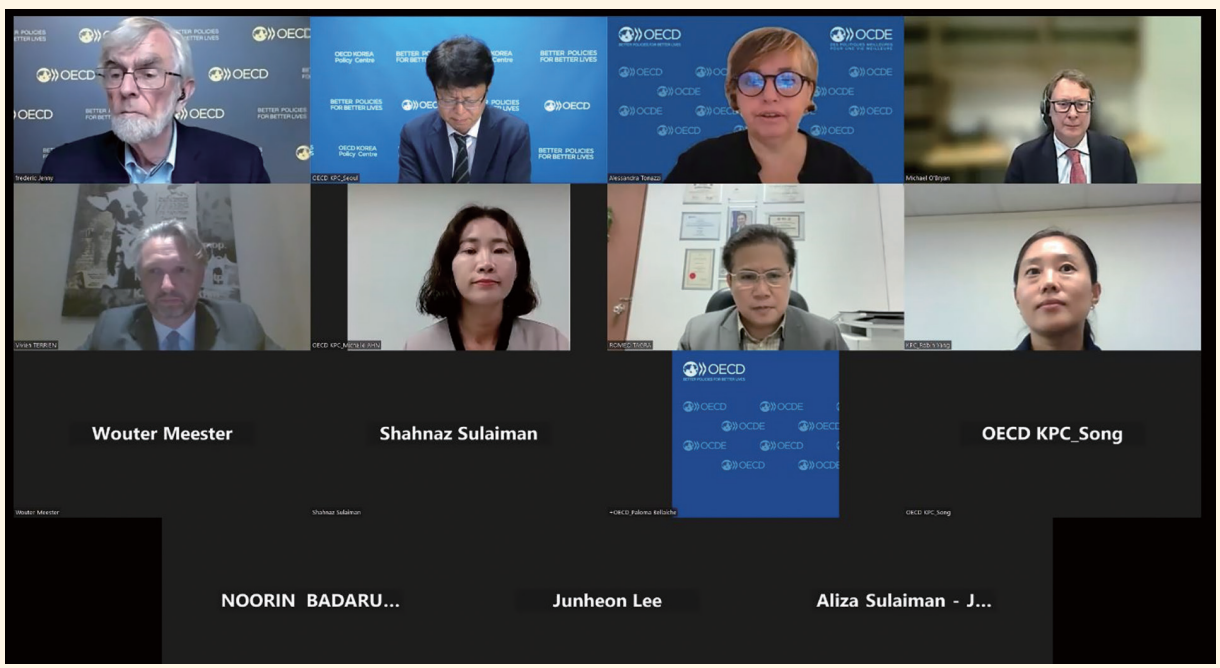
Professor Frédéric Jenny, Chairman of the OECD Competition Committee, then gave opening remarks on the intensity of review by Courts. Mr. Jenny discussed the relationships between goals of competition law, legal tests, standards of proof, and the use of presumptions and standards of review. He then illustrated how these concepts are applied in EU competition law. As far as procedural aspects are concerned, the EU courts have emphasized the importance of the Commission respecting the "rights of defense" in its enforcement of competition law. The EU courts have developed in their case

law a variety of legal standards (or tests) that should be relied upon to determine the compatibility with EU competition law of a wide range of commercial practices susceptible of creating anti-competitive effects. By adopting or refining such tests, the EU courts issue decisions of considerable economic importance for suppliers, their customers and end users. Because of their impact on welfare, such questions also involve economic policy choices. This shows that in competition law, legal and economic questions cannot be seriously divorced as the content of the standards adopted by the EU courts translate economic reasoning and need to be implemented through economic tools.

The Hon Michael O'Bryan, Judge of the Federal Court of Australia, gave special remarks on the intensity of review by courts in Australia, explaining how different standards apply in the Australian legal system with respect to three different categories of decisions: administrative authorisation and exemption decisions, civil proceedings for contraventions of competition law (including cartel conduct, mergers, monopolization) and criminal prosecutions for cartel conduct.

Prof. Richard Whish, Emeritus professor of Law, King's College London, UK, gave a presentation on the differences in review by courts in the UK and the EU, highlighting in particular how in the UK system, markets and mergers decisions are subject to judicial review by the Competition Appeal Tribunal that cannot substitute its decision for the CMA, does not hear evidence from witnesses, and focuses on procedural errors, errors of law, and whether the decision is 'irrational'. The standard of review is the balance of probabilities.

In the last session of the seminar Mr. Vivien Terrien, Referendaire, European Court of Justice, and Dr. Andriani Kalinkiri, Lecturer in Competition Law, King's College London, UK, gave a detailed examination of EU courts decisions illustrating with examples the principles underlying the standard of proofs adopted by the courts.



OECD/KPC Workshop on Cartels and Bid Rigging Kuala Lumpur Malaysia

The OECD/KPC Workshop on Cartels and Bid Rigging took place in Kuala Lumpur, Malaysia, between 3 and 5 October 2023. The OECD welcomed, in person and online, seven speakers from the OECD, the Australian Competition and Consumer Commission (ACCC), the US Department of Justice (DOJ), the Japan Fair Trade Commission (JFTC), and the Korean Fair Trade Commission (KFTC). 45 participants from 9 jurisdictions attended the workshop.

Mr. Dato Seri Mohd Hishamuddin Yunus, Chairman of the Malaysian Competition Commission, opened the workshop welcoming the participants from jurisdictions. Ms. Alessandra Tonazzi (Senior Competition Expert, OECD) and Mr. Hotae Kim (Director General, OECD KPC Competition Programme) gave some opening remarks.

Ms. Alessandra Tonazzi, then made an introductory presentation on fighting cartels and bid rigging: proactive and reactive detection tools underlying the importance for both young and mature competition agencies to find a mix of different tools in detecting cartels. While leniency programs still play a major role in the detection of cartels, agencies should complement them with other proactive tools, including market monitoring and cooperation with other reliable sources of information.

Mr. Marcus Bezzi, Chief Advisor, Competition Taskforce, Australian Treasury and former Executive

General Manager at the ACCC, intervened online to explain how to build an effective leniency program based on his experience at the ACCC and on best international practices identified by the International Competition Network and the OECD. His presentation was followed by a practical exercise where the participants, divided in small groups, discussed a case of a leniency application for a cartel, examining all the steps from receiving and assessing the application, the granting of a marker, and the corroboration of the received information with dawn raids.

The second day of the workshop opened with a presentation by Mr. Antonio Capobianco, Deputy Head of the Competition Division, OECD, on fighting bid rigging. Mr. Capobianco presented the work undertaken by the OECD on fighting bid rigging and in particular the OECD Recommendation and Guidelines. He opened his presentation outlining how a competitive procurement system will drive prices to marginal costs, minimise costs for firms and the government and drive innovation, as firms learn from one another to continuously improve products. A competitive public procurement system will accrue benefits to the whole economy as public procurement often involves key infrastructure (highways, railways, electricity, etc.) for other industries. He then explained how the Guidelines for Fighting Bid Rigging in Public Procurement help to identify markets in which bid rigging is more likely to occur and methods that maximise the number of bids, best practices for tender specifications, and selection and award criteria that inhibit communication among bidders and suspicious pricing patterns. Mr. Andrew Huang, Trial Attorney, US Department of Justice, made an online presentation on the US DOJ experience in detecting and assessing bid rigging cases.

The second day of the workshop continued with a session on the use of screens to detect bid rigging where Mr. Antonio Capobianco gave a presentation on the experiences of many competition authorities with the use of data screening to detect bid rigging cases. He highlighted some lessons from the interchange of international experience. Simple screening methods are a good starting point for authorities to improve detection rates. As offenders learn how to outsmart screening tests, authorities can develop more sophisticated and resilient methods. Public procurement is a relevant area of focus, due to greater data availability and higher incidence of cartels. As screening tests prove successful in detecting bid rigging, authorities may consider extending these methods to other markets. A screening unit should include staff with expertise in IT, in addition to competition economics. In the future, screening methods could also largely benefit from the automated collection of data from price comparison websites and other sources, combined with the use of machine learning. Mr William Lee, Legal Team Senior Member, Hong Kong Competition Commission (HKCC), presented a case study on HKCC's experience investigating and litigating a bid-rigging case arising from the use of data screening.

The participants then engaged in a hypothetical exercise where they examined some bids in a procurement process and tried to detect patterns of collusion.

The third and final day of the workshop started with a session on planning and conducting dawn raids with online presentations by Mr. James Webb, Special Agent, Federal Bureau of Investigation, US, and Mr. Blake Donald, Acting General Manager of the Competition Enforcement and Cartels Branch,

ACCC. The presentations highlighted the need to prepare carefully for dawn raids, planning every step well in advance. They highlighted that although the legal framework for conducting the dawn raids can change in each jurisdiction, the need for staff training, establishing clear internal procedures and preparing carefully are very relevant in all systems and the exchange of experiences can be very useful for competition agencies. They also briefly touched on the increasing need to gain expertise in collecting digital evidence. The presentations were followed by a hypothetical case on dawn raids.

In the final part of the workshop, Ms. Yukiko Sakuma, Deputy Director, International Affairs Division, JFTC, presented a successful bid rigging case brought by the JFTC on PCs and related equipment for public schools procured by Hiroshima Prefecture and Hiroshima City and Mr. Yunan Andika Putra, Head of Law Enforcement at the ICC's Representative Office in Balikpapan, presented some examples of how the Indonesian Competition Commission (KPPU) has been detecting and investigating bid rigging cases.

Workshop on Cooperation Agreements among Competitors

The OECD/KPC workshop on Cooperation Agreements among Competitors took place virtually between 23 and 24 November 2023. The OECD welcomed 12 speakers from OECD, the German Competition Authority (Bundeskartellamt), the European Commission, the French Competition Authority, the Austrian Competition Authority, the Netherlands Competition Authority, the Australian Competition Authority (ACCC), the Singapore Competition Commission and the Japan Fair Trade Commission. 50 participants from 10 jurisdictions attended the workshop.

This objective of the workshop was to provide participants with an opportunity to explore key issues for the analysis of cooperation agreements among competitors and the criteria used by competition authorities to decide whether they infringe competition laws.

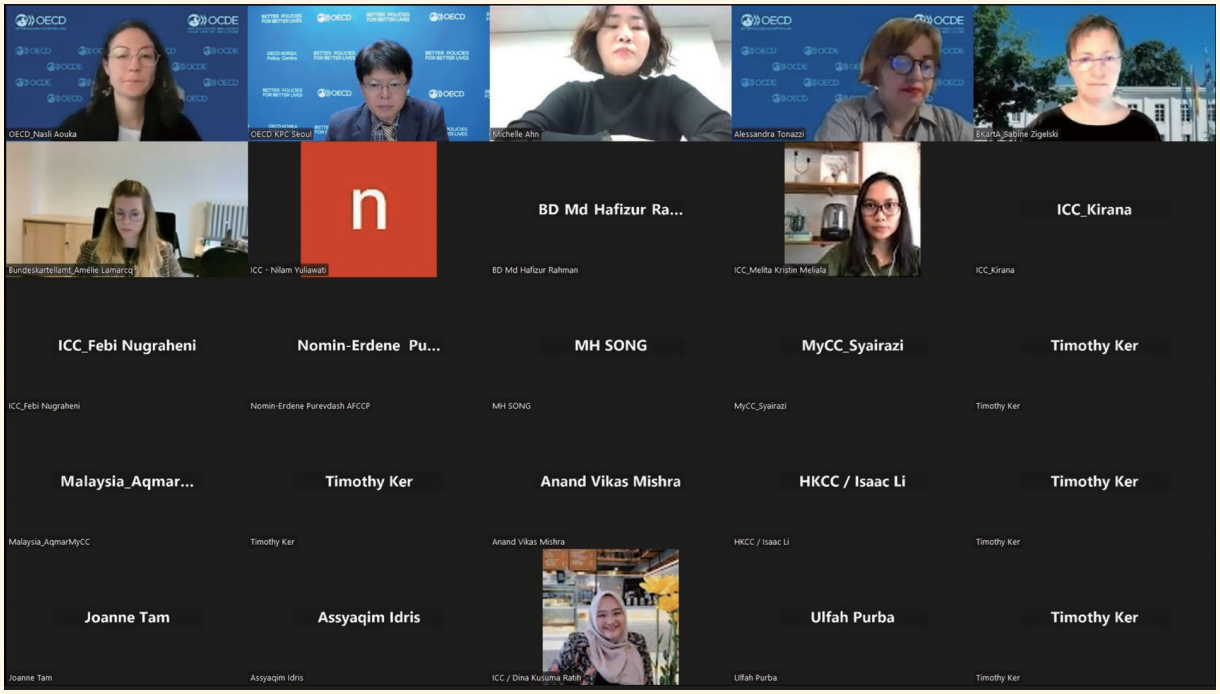
The first day of the workshop focused on the general framework used by competition authorities to establish whether cooperation agreements between competitors are compatible with competition law. After the welcoming remarks by Ms. Alessandra Tonazzi, Senior Competition Expert, Regional Manager, OECD and Mr. Hotae Kim, Director General, OECD/KPC Competition Program, Ms. Sabine Zigelski, Bundeskartellamt and Ms. Amelie Lamarcq, both from the Bundeskartellamt, gave a general overview on the competition assessment of cooperation agreements among competitors. In their presentation they underscored that while legitimate competitor collaboration can produce significant benefits there might be sometimes a temptation to go beyond. Agencies are called to balance, in their analysis, the reduction of competition with the efficiencies of cooperation agreements. They focused on examples in areas that can prove particularly risky such as information exchanges, discussions that take place in trade associations and joint bidding in public procurement. They also highlighted the need for a clear guidance – and determined enforcement – by competition agencies to provide legal certainty.

Ms. Annemarie Ter-Heedge, Deputy Head of Unit, Antitrust Electronic Communications, DG COMP, European Union, and Mr. Jeroen Capiau, both form the DG COMP, European Union, presented the DG COMP Horizontal Cooperation Guidelines that were completely revised in 2023. In their detailed presentation they presented the main novelties of the nine chapters of the Guidelines. New chapters or sections on sustainability agreements, mobile network sharing agreements, and bidding consortia were added to the Guidelines while the chapter on information exchange was extensively updated.

Ms. Anne-Sophie Rainero and Ms. Charlotte Noury, Investigation Unit, Autorité de la Concurrence, France, made a presentation on the horizontal agreements in the food retail industry assessed by the French competition authority in the cases Auchan/ Casino/ Metro/ Schiever and Carrefour/ Tesco. The joint purchasing agreements were communicated to the authority that accepted commitments after a public consultation with food suppliers and producers. The agreements were modified after the intervention of the authority with the exclusion of private label products and with a reduction of the scope of joint purchases.

The second day the workshop focused, in particular, on agreements that companies might enter into in order to achieve environmental goals exploring how competition authorities are including in their analysis sustainability issues.

Ms. Alessandra Tonazzi, Senior Competition Expert, OECD, made an introductory presentation on the topic, highlighting that some competition authorities have recently been taking initiatives to discuss and clarify the compatibility of different sustainability objectives with competition policy and enforcement. While regulatory interventions tend to be the preferable instrument to reach sustainability



objectives, competition policy and enforcement may contribute to advancing sustainability objectives in specific ways. Sustainability outcomes are normally best achieved if firms compete. Many forms of private co-operation between competitors aimed at sustainability objectives will not negatively affect competition and will thus be outside of the scope of competition law. However, if market failures exist, co-operative initiatives might, under specific circumstances, be useful or even necessary to overcome them. Competition authorities may consider whether certain agreements between competitors may be allowed, whilst remaining vigilant to prevent sustainability initiatives from spilling over into anticompetitive infringements.

Many authorities around the world are considering how to offer guidance to business to self-assess the compatibility of cooperation agreements with a sustainability objective with competition law. Ms. Celine Van der Weide, Authority for Competition and Markets (Netherlands) and Mr. Matthias Ranftl, Austrian Federal Authority, gave presentations on the guidelines on sustainability agreements adopted by their competition authorities. They explained how the authorities assess the proportionality of the competitive restrictions with respect to the sustainability goals and they highlighted the importance of availability of informal guidance to companies for their initiatives.

Mr. Will Richards, Assistant Director, ACCC Sustainability Taskforce, Australia, presented the ACCC work on sustainability agreements. The Australian competition law provides for a process called 'authorisation' which allows the ACCC to consider specific sustainability agreements that may raise competition concerns. Applicants can apply for authorisation in relation to both conduct and mergers. ACCC may grant authorisation where proposed conduct or merger is likely to result in a net public benefit - that is, where the likely public benefit resulting from the conduct outweighs the likely public detriment. The ACCC is required to have regard to a wide range of possible public benefits that would result from the relevant conduct or merger, including environmental benefits.

Ms. Lo Hwei Rong, Senior Assistant Director, Business and Economics, Singapore Competition and Consumers Commission (CCCS), made a presentation where she outlined the engagement of the Singapore Government on sustainable objectives and the actions undertaken by CCCS. The Commission found scope for more guidance and clarity on environmental sustainability initiatives, and how these objectives can be best pursued whilst ensuring that markets function effectively and competitively to spur innovation, lower prices, and improve quality and choices. To this end CCCS drafted a Guidance Note on Business Collaborations Pursuing Environmental Sustainability Objectives ("Environmental Sustainability Collaboration GN") and conducted a public consultation.

Finally, Mr. Tomotake Horimatsu, Deputy Director, Coordination Division, JFTC, presented the JFTC "Guidelines Concerning the Activities of Enterprises, Toward the Realization of a Green Society Under the Antimonopoly Act". He explained the background for drafting the Guidelines, based both on past guidance on business collaboration and past cases, and informed by the work of a study group whose results were subject to a public consultation. On this basis, the JFTC formulated the Guidelines with the objective of preventing anti-competitive conduct that stifles innovation, such as the creation of new technologies, and of encouraging the activities of enterprises toward the realisation of a green society by further improving transparency in the application and enforcement of the Antimonopoly Act.

ASIA-PACIFIC COMPETITION UPDATE

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