

COMPETITION POLICY IN ASIA

News from the OECD-Korea Policy Centre Competition Programme

June 2011, Issue 4

IN THIS ISSUE

Competition meeting reports in Asia

PAGES 1-9

News from Asian Competition Authorities

PAGES 10-12

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.



ABUSE OF MARKET DOMINANCE

OECD-Korea Policy Centre Workshop, March 2011

A Focus on Fighting Abuse of Dominance in India

Fighting abuse of dominance is one of the three core pillars of an effective competition law enforcement regime, along with fighting cartels and preventing anti-competitive mergers. Since the Competition Act came into effect in India, there have been many allegations and preliminary investigations into the area of abuse of dominance but none have yet resulted in a conclusion that the law has been contravened.

Applying and enforcing the prohibition against abuse of dominance was the focus of a workshop held jointly between the OECD-Korea Policy Centre and the Competition Commission of India in Delhi in March.

Each type of competition law enforcement has its own challenges. For example, the biggest challenge of cartel enforcement is usually an evidentiary challenge: the authority must bring to light facts that have been deliberately hidden by the conspirators.



Participants at the March 2011 Workshop

By contrast, the biggest challenge for competition authorities in the abuse of dominance area is usually an analytical challenge: almost any given trading practice by a company of significant substance can often be argued to amount to an abuse of dominance or, viewed differently, it could be argued that the trading practices to be benign or even efficiency enhancing.

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This event enabled the Competition Commission of India's members and staff to hone their abuse of dominance skills by discovering, discussing and debating international analytical practices with specialist competition staff from the OECD and its members.

Theoretical sessions set the scene by covering such topics as 'defining the market', 'identifying which companies are dominant' and 'the concept and selection of a theory of harm'. These sessions were conducted by Mr. Nick Taylor of the OECD, Dr. Mark Niefer of the US Department of Justice and Mr. Dag Johansson of the European Commission.

Mr. Praveen Purwar of the Competition Commission of India made a presentation on the law and current experience in India.

Specific case study presentations then enabled a consideration of what arguments are commonly put forward by complainants and defendants and what analytical tools are available and preferred by competition regulators in different parts of the world. These presentations were given by Mr. Seungkyu Lee of the Korean Fair Trade Commission as well as the speakers listed above.

Additionally, there was a panel discussion involving Mr. Bunker of the Competition Commission of India, Mr. Niefer, Mr. Johansson and Mr. Lee which compared the powers, duties and approaches of different competition authorities when receiving complaints (or "information" as they are known in India) and conducting investigations. ■

MERGER FUNDAMENTALS

OECD-Korea Policy Centre Workshop April 2011

Countries throughout Asia shared their experiences and expertise in merger control enforcement techniques at the Centre's first seminar for 2011. The different practices and investigatory techniques of the following jurisdictions were contrasted in the course of the seminar: Cambodia, China, Hong Kong, India, Indonesia, Korea, Malaysia, Mongolia, Pakistan, 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, analyzing the market structure and assessing any harm to competition. Some of the presentations also dealt specifically with the added difficulties of incorporating economic techniques of merger investigation in the traditional structural analysis of mergers.

João Pearce Azevedo from the OECD gave an introductory presentation about the principles of merger analysis. Later on, he also presented a session about the advantages and pitfalls of the use of economics and quantitative techniques in merger

analysis.

Tania Pringle, of the New Zealand Commerce Commission spoke about the CC's merger guidelines and a merger case in the poultry industry, while Jaeho Moon from the Korean Fair Trade Commission presented the KFTC's approach to merger regulation through a case study in the online commerce industry.

Timothy Hughes from the US Federal Trade Commission, explained in his presentation how his agency assesses a typical merger from notification through to appeal. He also talked about the interface between qualitative and quantitative evidence in the Whole Foods supermarket merger case.

During the seminar, a hypothetical merger analysis session in the banking sector was organized where the participants were split into two groups. The groups were selected on the basis of their jurisdiction's substantive merger control test: those with a version of the "dominance" test were assigned to one group while those with a "substantial lessening of competition" test or something similar were assigned to another group. Each group was then asked to analyze the case and to present their conclusions in a joint session. The group applying the "dominance" test tended to focus their analysis in unilateral effects while the other group tended to focus on coordinated effects. Interestingly, however, their main conclusions of the competitive assessment of the merger were relatively similar.

Case studies were presented by the participants from Indonesia, Chinese Taipei, Singapore and Pakistan. ■

► SINGAPORE

Singapore's merger control regime

The Singapore *Competition Act* prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition ("SLC"). CCS may investigate a merger if it has reasonable grounds to suspect a possible breach of the prohibition. Where CCS makes an infringement decision with respect to a merger, it may issue directions or accept commitments to remedy the competition concerns arising from the merger.



Mr. POH Lip Hang
Singapore

Singapore has a voluntary merger notification system¹ in which merger parties may apply to the Competition

¹ This voluntary notification system was put in place as most mergers are unlikely to raise competition concerns. A system requiring mandatory notification of mergers would be more onerous on businesses and impose

Commission of Singapore (“CCS”) for a definite decision if the parties have serious concerns that their merger would result in an SLC. CCS adopts a two-phase approach in evaluating mergers. Mergers that clearly do not raise competition concerns are cleared within Phase 1, which is expected to be completed within 30 working days. If CCS is unable to conclude at the end of the Phase 1 that the merger does not raise competition concerns, it carries out a more detailed assessment (Phase 2 review), which is expected to be completed within 120 working days.

Merger situations which take place outside Singapore or which involve parties who are not in Singapore may also be caught by the merger prohibition, as long as the merger gives rise to an SLC in Singapore. This ‘effects’ doctrine allows CCS to exercise jurisdiction over the extraterritorial activities which produce economic effects within Singapore. Indeed, many of the merger notifications CCS has received thus far are from multinational companies, rather than local companies. There are no exemptions or special provisions for cross-border mergers. The case discussed during the seminar, the “Thomson-Reuters Merger”, is one such example.

Thomson-Reuters Merger²

This case involved a merger between the Thomson Corporation and Reuters Group, both of whom are global providers of financial information products and services. Thomson and Reuters complement each other in terms of the nature of their respective businesses and the geographical regions in which they operate. This global merger was also reviewed by the European Commission and the US Department of Justice and others. In reviewing the merger, CCS assessment was as follows.

1. Aftermarket broker research: CCS found that the degree of overlap between the merging parties (pre-merger) was very high and the next largest competitor might not be able to constrain the merged entity as it also redistributed the content of Reuters. Further, to be an effective competitor, a provider of research reports would need to secure contracts with a large number of brokers to obtain a critical mass of reports with sufficient historical reach that is acceptable to customers. Hence, the cost of entry into this market was high.
2. Earnings estimate: CCS received feedback from end-users that there are no real alternatives to the parties insofar as earnings estimates are concerned. As the next largest competitor in this market did not sell its data on a standalone basis but as part of a complete desktop solution, the CCS found that customers of the merged entity would face significant switching costs in the face of post-merger

unnecessary costs.

² More detail is available at: http://app.ccs.gov.sg/cms/user_documents/main/pdf/Thomson_ReutersGD_080714Redacted.pdf

price increases. It was also difficult for new entrants to enter the market as they would need to secure a critical mass of data via contracts with a large number of brokers.

3. Fundamentals: CCS’s findings were similar to those in the earnings estimates market: high switching cost for users to switch to competitors and high entry barriers.

CCS’s assessment during the Phase 1 review found that the merger was likely to lead to an SLC in Singapore. During CCS’s period of assessment, it was announced that the US DOJ and EC had approved the merger, subject to commitments offered by the parties to the two competition authorities respectively. Given the commitments to the DOJ and the EC would essentially create another competitor that could supply the merged entity’s products worldwide, CCS considered that the commitments have a worldwide effect.

It is important to note that the acceptance of overseas commitments does not necessarily imply that CCS will allow the merger to proceed in Singapore. Rather, the CCS considers whether the overseas commitments address the competition concerns arising within Singapore, if any. ■

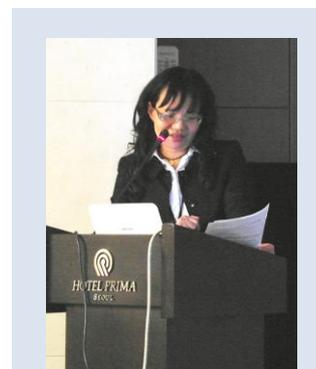
► CHINESE TAIPEI

The *Fair Trade Act* requires pre-merger filings with the Chinese Taipei Fair Trade Commission when a merger involves firms of certain dimension. Pursuant to the law, the FTC may not prohibit any of the mergers filed if the overall economic benefit outweighs the disadvantages resulting from the restraint to competition. The FTC’s Guidelines on Handling Merger Filings establishes rules to ensure the transparency of the FTC’s administrative procedures and serves as reference concerning the substantive analysis in a merger review.

Ms. Mei-Hua Lai presented two case examples at the Centre’s mergers workshop which are discussed in more detail below.

Fubon / ING Insurance

The Fubon Financial Holding Co. intended to acquire all the shares of ING Life Insurance Co. in 2008. Fubon Financial owned and operated a series of subsidiaries engaged in a range of insurance and other businesses. The FTC found that the life insurance market concentration ratio would not change significantly and that the merger would not enable the combined entity to raise prices. In reaching this finding, the FTC considered that there are many life insurance companies,



Ms. Mei-Hua Lai
Chinese Taipei

various insurance products and different product features in Chinese Taipei and that concerted action was not likely to arise. Further, after the merger, the new entity's combined market share would still be 10% lower than the leading firm in the industry. No entry barriers would have been created and the merger would not weaken the firm's capacity to buy insurance from other companies or its ability to negotiate for business. The FTC concluded that the merger did not cause substantial harm to market competition and the merger was approved.

UPEC and Weilih

Uni-President Enterprises Corporation intended to acquire 49.5% of the shares of Weilih Food Industrial Co. Ltd in 2008. UPEC core business includes food manufacturing and investments in other related businesses. The product categories affected include feeds, flour, soy sauce, meat products, instant noodles, bread, beverages, dairy products, frozen food and health food. Especially in the domestic instant noodle market, UPEC and Weilih have the largest and second largest market shares.

The FTC found that the competition between the merged companies would diminish, and the merged company would have more discretion to adjust prices free of competitive constraint. Competition would be weakened, and consumers would not have a countervailing influence on prices. The companies' sales relied on distribution channels into which they had invested a lot of time and capital which new entrants would not be able to replicate easily. Domestic instant noodle firms have long established their brand image and they have considerable influence over consumers' choices. The merger may have damaged market competition and thereby resulted in harm. The FTC concluded that the overall economic benefits did not outweigh the harm arising from the restraints on competition and prohibited the application for a merger filing. ■

► INDONESIA

According to the pre-merger notification process (contained in Commission Regulation Number 1/2009), Unilever Indonesia notified the KPPU of its intention to acquire Sara Lee Indonesia. The acquisition exceeded the asset and turnover thresholds in the Indonesian merger regulations.

The acquisition was part of global acquisition of Sara Lee's 'personal care' product that was also reviewed in about 40 other countries world-wide. For Unilever, the acquisition aimed to raise its portfolio, especially in: baby care, cologne, men's care, and powder category products. Sara Lee focused their operation only in the food and beverage industry.

Unilever is a holding company that has business interests in two product categories: (i) home and personal care, and (ii) food and ice cream. The home and personal care category accounts for 76% of the total turnover and the food and ice

cream category accounts for almost 24% of the total turnover. In both categories the sales growth is about 17%. On the other hand, Sara Lee has seven product categories: bakery, beverages, meats, body care, air care, insecticides, and shoe care. There is an overlap between Unilever and Sara Lee in the body care category, especially body wash / shower gel, roll-on deodorants, and men's hair styling cream.

In its initial assessment, the KPPU defined the relevant market and calculated the market concentration by using Herfindahl-Hirschman Index (HHI). The HHI in the body wash and shower gel product, was only 1106 pre- and 1638 post-merger and this resulted in the authority deciding it had no objection in that respect. But, the HHI figures in roll-on deodorants and in men's hair styling cream exceed 1800 and the KPPU decided to undertake a comprehensive competitive assessment on those products.

In the comprehensive assessment, KPPU assessed issues of entry barriers, anti-competitive conduct, efficiencies, and whether the failing firm defense applied. In this second stage, KPPU found that in roll-on deodorants, there is no entry barrier because it was not a hi-tech product and consumers' switching costs are low. Also, the possibility of collusive conduct is very low due to the various marketing strategies employed in the industry.

On the other hand, in men's hair styling cream product, the KPPU found that the industry is saturated with changes to consumer tastes away from cream towards gel instead. Also, KPPU found this product market is not very dynamic.

The analysis of efficiencies found that the acquisition could reduce expenditures on raw materials that can, in turn, reduce market prices. And, last but not least, the KPPU found that the failing firm defense did not apply in this case.

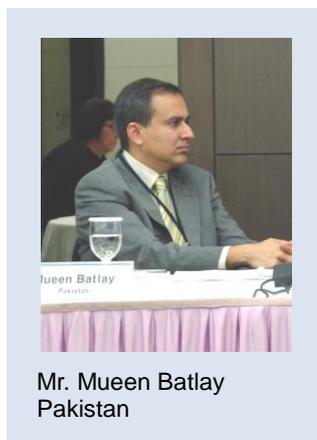
As a result of this analysis, the KPPU provided pre-merger approval. In due course, Unilever also undertook the required post-merger notification to the KPPU and because there was no material change, it was not necessary to undertake a detailed re-assessment of the transaction. ■



Ms. Novi Nurviani
Indonesia

► PAKISTAN

Conditional approval in the Agritech / Fauji deal



Mr. Mueen Batlay
Pakistan

Recently, the Competition Commission of Pakistan (CCP) reviewed a merger in the fertilizer sector and issued a conditional approval which is the first of its kind for the agency. The CCP's decision seeks to support the market-based evolution of the industry by giving approval but also to safeguard against an anti-competitive outcome through imposing conditions.

Fauji Fertilizer Company (FFC), the dominant player in the urea market, and the only producer and largest supplier of Diammonium Phosphate (DAP), applied to the CCP seeking clearance to acquire more than a 75% stake in another fertilizer company, Agritech. Through the transaction FFC would gain management control of Agritech and its subsidiary Hazara Phosphates Limited. That subsidiary is involved in the production/selling of Single Super Phosphate (SSP) fertilizer.

FFC stated that lenders to Agritech's parent company, Azguard-9, had approached FFC, asking them to buy Agritech, to save 10,000 jobs and prevent them from having to write-off \$235 million in loans. They assured CCP that despite the merger, strong competition and planned market expansion would reduce FFC's market share.

FFC further noted that the private sector import of DAP injected import competition to the market. They also pointed out that Agritech would benefit from FFC's production and distribution network.

In its preliminary Phase 1 assessment, CCP determined that the merger further strengthened FFC's existing dominant position, and decided to undertake a Phase 2 assessment.

In the Phase 2 assessment, the CCP observed that FFC's dominance greatly increased irrespective of how the relevant market was defined. Looking at the market for all fertilizers, the market share of FFC would go up from 45% to 54%, while its share in the market for urea would go up from 48% to 54%, and that of DAP, from 42% to 50%. In both urea and DAP markets, FFC's share would increase significantly in both the Punjab and Khyber Pakhtunkhwa provinces. In the urea market, a government subsidy active in the supply of gas used as raw material for fertilizer production, gave the local urea producers an edge over imports.

Looking at market concentration, the Herfindahl-Hirschman Index³ (HHI) was high to start with, at 3083, for the overall

³ This is a tool that measures market concentration, and is calculated by taking the sum of the squares of market shares.

fertilizer market, and it would rise by 569 points with the merger. The pre-merger HHI for FFC stood at 2266 points, and would rise by 607 points with the merger. Hence an already concentrated market would become even more so.

Examining the failing firm defense, CCP noted that Agritech's parent company, Azguard-9, was highly leveraged, and sought to divest Agritech in an attempt to de-lever, as a matter of business strategy. However, both Agritech and Azguard-9 were profitable and they possessed reserves. They appeared likely to be able to arrange further financing. Therefore the CCP concluded that the failing firm defense did not hold.

Ultimately, the CCP conditionally approved the merger. In its decision, it observed that FFC's market position would strengthen, but not substantially above the degree of dominance that it already held. It noted that as the government was involved in the import of urea, the level of import competition in the urea market was hard to assess. Judging the dynamics of the overall fertilizer market, its innovation and increasing production capacity, CCP was of the view that the merger was unlikely to substantially lessen competition.

So as not to dampen the evolving fertilizer market, while at the same time safeguarding the interest of consumers, (in this case farmers) the CCP applied conditions based on assurances that had been provided by FFC itself. The conditions were:

1. Agritech and FFC's premier brands would maintain their separate identity for 2 years, with a price-cap on the Agritech brand for 1 year. The condition to keep the brands separate would be reviewed after 1 year, provided FFC's market share fell by 6%.
2. For 3 years FFC would inform the CCP about any price-escalations with reasons.
3. Based on criteria including price behavior, keeping of capital expenditure commitments, and changes in market share, CCP would review its decision in a year, and may require FFC to divest a subsidiary in the event of unsatisfactory developments.

The decision reflects the CCP's sensitivity to market driven evolution while also seeking to allay competition concerns. ■



Participants at the April 2011 Workshop

▶ VIETNAM

Control over Economic Concentration in Vietnam



Mr. Nguyen Manh Linh
Vietnam

Economic concentration is one of three fields under the scope of competition law. The objective of the supervision and management of economic concentration is to avoid creating a monopoly or dominant positions in the market which could lead to competition restraint among enterprises and a breakdown of the effective operation of the market. Up to the present, the Vietnam Competition Authority (VCA) has received official notifications on eight

cases of economic concentration. Details are in the following table.

Economic concentration notifications to VCA*

No.	Year	Sector	Involved companies
1	2008	Paper production	Tân Mai Paper Stock Company Đông Nai Paper Stock Company
2	2008	IT	Sáng Tạo Stock Company NEC Vietnam Limited Company
3	2008	Telecommunication equipment	Lucent Technologies Việt Nam Company Alcatel - Lucent Việt Nam Limited Company
4	2009	Oil drilling service	PV Drilling PVDI
5	2009	Manufacture of mattresses, blankets, and pillows	Mirae Stock Company Mirae Fiber Stock Company
6	2010	Manufacture of consumer goods	Unilever Việt Nam Limited Company International Unilever Việt Nam Limited Company
7	2010	Life insurance	Prudential life insurance company AIA life insurance company
8	2010	Food	Kinh Đô Stock Company Miền Bắc Stock Company Kido's Ice-cream Company

* Including official papers and notification dossiers as prescribed by law

Two illustrative cases are discussed in more detail below.

AIA and Prudential

In April 2010, VCA received two official documents of Prudential Plc (based in the UK) and American International Group Inc (AIG – based in the US) asking for consultation on the acquisition of AIA Group Limited (AIA), which is a subsidiary entirely owned by AIG, by Prudential.

At that time, those two insurers were operating in Vietnam in which Prudential Vietnam and AIA Vietnam's market shares in

the life insurance market were 39.97 percent and 6.67 percent, respectively. The market shares were calculated on the total revenue in 2009. Hence, the proposed case must be notified to VCA because the combined market share of both parties is 46.64 percent (over 30 percent and below 50 percent). However, by June 2010, representatives of the parties notified the VCA that the acquisition of AIA and Prudential was not proceeding and as a consequence, the case was closed.

North Kinh Do Food and Kinh Do Food

In October 2010, VCA received the official dossier of Kinh Do Food JSC to consult with the VCA on the merger between the North Kinh Do Food JSC and KIDO's to the Kinh Do JSC. Based on the information provided by the parties involved and, the provisions of the Competition Law and Decree 166/2005/ND-CP, the relevant markets and the combined market share of parties are:

- Manufacturing and retailing of confectionery products in the territory of Vietnam: 24.5 percent
- Manufacturing and retailing of ice-cream in the territory of Vietnam: 17.3 percent
- Manufacturing and retailing of yoghurt in the territory of Vietnam: < 1 percent.

After reviewing data in the market, barriers of market entry, the existing state of competition as well as the interlocking directorial issues, VCA approved the above mentioned merger. ■

COMPETITION IN TELECOMMUNICATIONS SECTOR

OECD-Korea Policy Centre Workshop May-June 2011

The telecommunications industry is very important for any modern economy. Telecommunications is always a very substantial industry in itself as well as an industry that provides services widely needed by businesses and consumers alike. Further, the provision of state of the art telecommunications services is both a common goal of economic development and a means to enable further economic development. Efficient telecommunications services are also a means to enhance interregional competition in other markets, for example, through enabling internet sales where the buyer and seller are not located in the same place.

For all these reasons competition in this industry was chosen as the topic for a workshop at the OECD-Korea Policy Centre.

Some Asian jurisdictions do not yet have (or comparatively recently obtained) general competition laws and general competition regulators. However, these countries have usually already put in place telecommunications regulators with the power to enforce competition provisions within telecommunications legislation. Consequently, this event was attended by representatives of the telecommunications

regulators from the Philippines, Malaysia and Singapore as well as general competition authorities from other jurisdictions who are already familiar with the Centre's events. Many of these participant authorities contributed case study presentations.

The event started with a focus on better regulation in telecommunications through presentations by Mr. Hong Dae Won of the Korean Fair Trade Commission and Mr. John Gandy of the New Zealand Commerce Commission and a sector overview from Mr. Nguyen Manh Linh of the Vietnamese Competition Authority about the transition occurring in that country.

The second topic concerned issues that are most familiar to general competition authorities – the enforcement of the abuse of dominance and horizontal conduct prohibitions in competition laws. Mr. Gandy of the NZCC focused on abuse of dominance cases and discriminatory dealing cases; Mr. Ajay Kumar Chauhan of the Indian Competition Commission presented a case of concerted vertical tying; and Ms. Riris Munadiya of the Indonesian competition authority presented a suite of cases in the Indonesian industry ranging over vertical foreclosure by a dominant firm, cartel price fixing, a merger and a prohibited cross-ownership.

The third topic of the workshop concerned interconnection disputes and on this topic presentations were provided by Nick Taylor of the OECD at a theoretical level and by Ms. Hsin Yi Chang of the Chinese Taipei Fair Trade Commission on an case study involving an internet peering interconnection dispute. Relatedly, Mr. Tng Litong of the Infocomm Development Authority of Singapore gave a presentation on the Singapore – Malaysia mobile telephone roaming rate reductions (with comments from the Malaysian perspective of the same case provided by Ms. Hui Ching Long of the Malaysian Communications and Multimedia Commission).

The fourth topic concerned mergers in the telecommunications industry and presentations were provided by Mr. Jongbae Park of the Korean Fair Trade Commission and Mr. Syed Umair Javed of the Competition Commission of Pakistan.

The final topic concerned the recent trend by governments to promote the roll-out of broadband internet infrastructure where the private sector is unwilling to alone undertake the level of investment sought by the government. The challenge is for the government intervention to occur without undermining (or indeed if possible promoting) competition. Mr. Gandy of the NZCC presented on the New Zealand's two policies in this regard: the Ultrafast Broadband Initiative and the Rural Broadband Initiatives. ■

► INDIA

Director General of Competition Commission of India: in pursuit of excellence

The Competition Commission of India is one of the youngest Competition Regulatory bodies which has come into existence by the enactment of the *Competition Act* 2002, to prevent

practices having adverse affect on competition, to promote and sustain competition in market so as to protect the interest of consumers in India.

The Director General, Competition Commission of India is an authority also created under the Act. The DG is an investigation authority with special duties, powers and functions. He holds a unique and distinct position within the Competition Commission of India, since no such separate investigation authority exists in any other international jurisdictions. The office of the DG therefore has a pivotal position for administration and enforcement of the Competition Act in India. The procedural provisions in the Act and Regulations provide that the DG initiates investigations into any contraventions of relevant sections. On the directions of the Commission, the DG carries out a in-depth investigation and submits a detailed report with recommendations to the Commission based on his findings emanating from corroborative evidences on record. The investigation report therefore becomes the precursor to the final order of the Commission.

The role of DG is of great importance, since his investigation report is the basis on which the Commission relies in reaching to a conclusion and final order in every case. The DG has therefore to discharge his functions with utmost caution, transparency and in conformity to the powers vested in him. He has the powers to widen the scope of investigation so as take into account all kinds of conduct by enterprises which lead to appreciable adverse effect on competition in the relevant market.



Mr. A.K Chauhan
India

The DG has the power of a Civil Court including the powers to summon and enforcement of attendance, examination on oath, order discovery and production of documents, take evidence on affidavit and requisition of public records. The DG holds special powers for production of documents and carries out search and seizure at the premises of the enterprises as per the provisions envisaged in the Companies Act. He is also vested with the powers to initiate penalty proceedings against parties who fail to produce documents, information and appearance before him.

The office of the DG has 40 officers who are largely professionals from the field of Law, Economics and Financial Analysis. A case is assigned to a team who investigates and collects evidence to reach findings. Thus the investigation report is a blend of findings of fact and the application of law based on the idiosyncratic character of the case. The investigators use all kinds of techniques depending on the nature of the case: questionnaires, examination of witnesses,

market intelligence, forensic IT, financial analysis, economic analysis, market surveys, expert opinions, digital evidences, inspections and search and seizure.

The DG has submitted 63 investigation reports in the last financial year. In many of these cases, economic analysis and corroborative evidences have established anti-competitive conduct including cartelization, bid rigging, and restrictive trade practices involving both horizontal and vertical agreements and abuse of dominance. The cases of abuse of dominance include imposing unfair or discriminatory prices or conditions in purchase or sale of goods and limitations or restrictions on production of goods and services. The investigations have been carried out in different industries such as cement, steel, sugar, aviation, tyre, pharma, real estate, telecom, banks, film production and distribution, automobile and financial markets. The Commission has taken cognizance of the anti-competitive conduct or abuse of dominance based on the investigation reports of the DG and has consequently passed remedial orders to eliminate the anti-competitive conduct and in some cases has levied penalties. ■

► INDONESIA



Ms. Riris Munadia
Indonesia

Interaction between the competition agency and the sector regulator plays crucial role in telecommunication industry. This was a key conclusion of at the Competition Workshop on Telecommunication Industry conducted by the OECD Korea Policy Centre on 31 May – 2 June 2011 in Jeju Island, Korea. The workshop was attended by competition agency and regulator from twelve Asian countries and discussed current market

structures and business behavior, and the roles of the two types of authorities in solving telecommunication cases.

Different countries represented at the workshop have adopted different forms of cooperation. Some countries merged two jurisdictions, while other gave precise division of tasks between the sector regulator in telecommunications and their competition agency. Both models had benefits but appear to create different problems at the implementation.

Indonesia was given opportunity to provide comprehensive picture on market structure in telecommunication which developed from monopoly to a more competitive market. Thank to the 1999's law on telecommunication, the industry is now relatively open for new entrance to create competition pressure. Similar to other jurisdictions, the market shifted from single operator on fixed line to mobile products with many operators but a state owned enterprise plays a dominant role in the industry.

To achieve effective supervision of the market with respect to competition, the competition agency and the sector regulator in Indonesia are each given a clear division of tasks. The sector regulator is entrusted with setting rules and standards and enforcing compliance with them, while competition agency has enforcement powers as stipulated by the competition law (the Law n.5/1999).

Several instances of business misconduct were shared during the workshop sessions. Market control, blocking, cartels, mergers, and cross ownership contraventions are common types of illegal conduct experienced in Indonesia. It is notable that the competition agency and the sector regulator have taken a joint hand-in-hand approach to tackling those forms of misconduct, specifically by integrating their market intelligence. This, and the development of joint guidelines, showed good and well maintained cooperation among both agencies in closing gaps that could otherwise arise in the implementation of the two bodies of regulation. ■

► SINGAPORE

Singapore-Malaysia Roaming Rate Reductions

The price that a mobile telephone consumer pays for roaming calls and SMSes when travelling overseas typically contains two key components – a charge imposed by the visited operator which will be determined by the roaming agreement in place between the home operator and the visited operator, and a charge imposed by his home operator.

The telecom regulators in both countries, the Infocomm Development Authority of Singapore (IDA) and the Malaysian Communications and Multimedia Commission (MCMC), have been studying the rates charged by mobile operators to better understand the prevailing industry practice and charging model. In June 2010, a joint announcement was made by Mr. Lui Tuck Yew, then-Acting Minister for Information, Communications



Mr. Tng Litong
Singapore

and the Arts, Singapore, and his counterpart H.E. Dr. Rais Yatim, Minister of Information, Communications and Culture, Malaysia, that both countries were committed to explore ways to reduce the prevailing roaming rates for mobile phone users. In April 2011, after detailed work conducted by both countries' telecommunications regulatory agencies, Mr. Lui Tuck Yew and H.E. Dr. Rais Yatim jointly announced the successful conclusion of discussions to reduce bilateral roaming rates for mobile phone users in Singapore and Malaysia.

The roaming rate reduction applies from May 2011. Charges for mobile phone subscribers from Singapore travelling to Malaysia and vice versa will fall by up to 30 per cent for voice

calls and 50 per cent for SMSes.

The price reductions will be implemented by mobile operators over two phases, for both prepaid and postpaid subscribers. Both the wholesale inter-operator charges and the retail subscriber charges will be reduced to affect the lower prices.

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The telecom regulators in both countries, the Infocomm Development Authority of Singapore (IDA) and the Malaysian Communications and Multimedia Commission (MCMC), have been studying the rates charged by mobile operators to better understand the prevailing industry practice and charging model. In June 2010, a joint announcement was made by Mr. Lui Tuck Yew, then-Acting Minister for Information, Communications and the Arts, Singapore, and his counterpart H.E. Dr. Rais Yatim, Minister of Information, Communications and Culture, Malaysia, that both countries were committed to explore ways to reduce the prevailing roaming rates for mobile phone users. In April 2011, after detailed work conducted by both countries' telecommunications regulatory agencies, Mr. Lui Tuck Yew and H.E. Dr. Rais Yatim jointly announced the successful conclusion of discussions to reduce bilateral roaming rates for mobile phone users in Singapore and Malaysia.

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The price reductions will be implemented by mobile operators over two phases, for both prepaid and postpaid subscribers. Both the wholesale inter-operator charges and the retail subscriber charges will be reduced to effect the lower prices. ■

► PAKISTAN

Dealing with the effects in Pakistan of a global teleco merger

The Competition Commission of Pakistan conditionally approved the acquisition by Vimplecom of all the shares in Wind Telecom. Vimplecom is a company incorporated in Bermuda which operates out of Netherlands and is owned primarily by Norwegian company Telenor ASA. Telenor and a Russian company, Altimo, had filed a merger review application before the Commission.

The Commission's concerns stemmed from the fact that after the acquisition, Telenor ASA, which directly owns and operates Telenor Pakistan, the second biggest cellular telco in Pakistan, would also get indirect control of Pakistan Mobile Communication Limited (PMCL), the biggest cellular telco in

Pakistan, through Wind Telecom. It would be pertinent to mention here that Wind Telecom owns a majority share in Orascom Telecom Holding which wholly owns PMCL. The acquisition, if permitted without conditions, would have concentrated over half the cellular telecommunication market under common ownership, creating an unprecedentedly strong dominant position. The Commission's concerns were augmented by the fact that the acquisition would increase the ability of all the cellular telcos in the market (both those that were part of the merger and their competitors) to coordinate their behavior. The concern was validated with prima facie evidence provided to the Commission by an informant that showed that in recent past, the cellular telcos had coordinated their actions on a number of commercially sensitive issues.

In its order, the Commission issued directions to Vimplecom and its subsidiaries to structurally ensure that Telenor ASA and its subsidiaries cannot take part in any deliberations or decision making regarding PMCL. Further, the order forbids Vimplecom and its subsidiaries from entering into any non-arm length transaction with Telenor Pakistan as well as prohibiting cross employment and management. The Commission will monitor the compliance with its order by Vimplecom and its subsidiaries and will reserve the right to review its decision in case of non-compliance. ■



Mr. Syed Umair Javed Pakistan



Participants at the May-June 2011 Workshop

NEWS FROM ASIAN COMPETITION AUTHORITIES

► KOREA

30th Anniversary Ceremony of the KFTC

The Korea Fair Trade Commission (KFTC) held a commemoration ceremony marking the 30th anniversary of its foundation and adoption of fair trade system on April 1 at the Korea Chamber of Commerce and Industry.

Among hundreds of notables invited were Prime Minister Hwang-sik Kim and Chairman Tae-Yeol Huh of the National Policy Committee of the Korean National Assembly.

In his speech, the KFTC Chairman Dongsoo Kim said that “the remarkable economic growth of Korea was attributable in part to the introduction of competition law which helped create the pro-competitive culture in society.” He further stressed that the pro-competitive culture should now be accepted as a daily practice.

He concluded with the resolution that the KFTC would faithfully pursue its role to create the win-win environment for all economic participants, including large businesses, SMEs, producers and consumers.

This year’s anniversary of the KFTC was specially celebrated with congratulatory video messages from heads of the world’s major competition authorities including William Kovacic (Commissioner of the US FTC), Alexander Italianer (Director General for Competition of European Commission), Allan Fels (Former Chairman of Australian Competition and Consumer Commission) and Kazuhiko Takeshima (Chairman of Japan Fair Trade Commission)

Along with this ceremony, the KFTC selected 30 big cases which had a social and economic impact during the 30 years of its work. Examples include:

<Abuse of Market Dominance>

- Microsoft Corporation (Feb., 2006)

The KFTC imposed surcharges of KRW 32.4 billion (USD 30 million) on MS for its tying the Window Media Player with the Window operating system. This is the KFTC’s first extraterritorial application of competition law regarding the abuse of market dominance in Korea.

- Qualcomm (Dec., 2009)

The KFTC imposed a surcharge of KRW 273.2 billion (USD 252 million) on the Qualcomm for charging discriminative royalties on mobile companies and excluding competitors. The surcharge was the biggest which was imposed on a single company.

- Intel (Nov., 2008)

The KFTC imposed a surcharge of KRW 26.6 billion (USD 246 million) on Intel for trying to exclude its

competitor in the relevant market by providing various rebates to local original equipment manufacturers in exchange for not purchasing CPUs from competing enterprises.

<Cartels>

- Bid rigging by five military oil suppliers (Oct., 2000)

The five refiners rigged the bidding for the military supplies, and the military had to use 20% of oil reserve because nine times of bid was canceled owing to this cartel. The KFTC imposed a surcharge of KRW 121.1 billion (USD 112 million), and KRW 196 billion (USD 181.5 million) of damages was set for the damage suit sued by the Ministry of Defense.

- International cartel of six graphite electrodes manufacturers (Apr., 2002)

This is the First case of applying the Korea antitrust law on an international cartel, and the KFTC imposed KRW 5.6 million (USD 5.2 million) for this price cartel.

- Price fixing between three sugar manufacturing companies (Jul., 2007)

It is the longest cartel that the KFTC uncovered, which was prolonged for 14 years. For this cartel, the KFTC imposed a surcharge of KRW 51.5 billion (USD 47.3 million). ■

KFTC resolution on merger remedies

The KFTC passed a resolution on June 15 regarding the standard assessment on corrective measures for Mergers elucidating the standards for corrective measures and points to consider with regard to anti-competitive Mergers.

1. The principle that structural measures are preferred

- It states that structural measures, which help competitively maintain the market structure, are preferable rather than behavioral measures when imposing corrective measures for anti-competitive M&A.
- The KFTC expects that applying the preference for structural measures will completely remedy any consumer detriment caused by anti-competitive mergers.

2. Adoption of measures relating to intellectual property rights

- The KFTC is able to adopt corrective measures relating to intellectual property rights such as ordering sales or compulsory licenses. These orders may be appropriate where redundancy or a concentration of intellectual property rights cause anti-competitive concerns of Mergers followed by recent international trends.

3. Identification of general standards and types of corrective measures

- The resolution identifies general standards including principles of effectiveness, proportion, clarification and viability in order for selection of best corrective measures

for each anti-competition type.

- The resolution categorizes the types and standards of measures by dividing them into structural measures and behavioral measures.
 - Structural measures : prohibition, asset disposal and intellectual property rights
 - Behavioural measures : measures enhancing the position of competitive partner and measures regulating the market outcomes

Restraints against four refiners for cartel on “Gas Stations Allocation”

The KFTC decided in May to impose the total surcharge of KRW 434.8 billion(USD 402 million) against four refiners for using the so-called “Original Distributor Control System” to refrain from competition to secure gas stations distributing their own products and guarantee stable market share.

Under the “Original Distributor Control System”, oil refiners agreed not to seek to win over distributors who were “original distributors” previously contracted to another refinery. Under this system, a refiner could not supply its oil to its rivals’ original distributors without consent from rival refinery operator. The KFTC also decided to refer the three parties that played the most active role in the cartel to the prosecution for criminal enforcement.

Enhanced refining capacity was installed in the 1990’s at the same time as new importers entered and demand stagnated which caused the market to change rapidly. Another development that concerned petrol refineries was a new practice of distributors installing additional petrol pumps carrying other brands of petrol (i.e. “Multiple Sign-pole System”).

In response, refiners also agreed to hamper the operation of the Multiple Sign-Pole System. For example, when a gas station who was a supplier of one refinery’s product proposed to install a second petrol pump bearing another refinery’s brand, the original refinery withdrew its consent to use the first brand and insisted that the stations remove the brand from existing sign-poles. In parallel, the refineries who would supply the petrol for the second or additional brand would refuse to authorize the erection of a sign-pole bearing their brand until consent was obtained by the distributors from their existing refinery-supplier. As a result of these anti-competitive agreements, changes in refinery supplier were very rare shares of service stations remained almost constant for 10 years. The changes between 2000 and 2010 were: SK (36.0% to 35.3%), GS (26.5% to 26.8%), HDO (20.9% to 18.7%) and S-Oil (13.2% to 14.7%).■

CONTACT INFORMATION

SEND US YOUR NEWS

We publish news, case studies and articles received from competition authorities located throughout the Asia-Pacific region in our newsletter. If you have material that you wish to be considered for publication in this newsletter, please contact ypark@oecd-korea.org.

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