

Onwards and upwards

Competition law enforcement is increasing in Asia

by **Mark Jephcott and Peggy Leung***

Recently there has been a clear trend among several Asian competition authorities towards greater enforcement against competition law infringements. This trend is not limited to well-established jurisdictions such as Japan and South Korea, but also extends to the more nascent regimes in countries such as Singapore, Malaysia, China and Thailand. In this article, we highlight some of the key enforcement actions undertaken in 2012 in these six Asian jurisdictions.

Japan

Japan has one of the oldest competition regimes in the world. The Antimonopoly Act (AMA) was enacted in 1947 and the 2009 amendments of the AMA modernised the legislation. Notably, the 2009 amendments strengthened Japan's anti-cartel regime by increasing the maximum prison terms for individual cartelists from three years to five years and by raising the surcharge – the civil penalties imposed by the Japan Fair Trade Commission (the JFTC) – rates from 10% to 15% of turnover for companies playing leading roles in price-fixing cartels. The JFTC has recently tended towards more vigorous enforcement.

In 2012, the JFTC issued cease and desist orders and surcharge payment orders in three bid-rigging cases. In January, four automobile part manufacturers were found to have conspired in the procurement of automotive wire harnesses and wiring devices ordered by Toyota, Daihatsu, Honda, Nissan and Fuji. Three of the manufacturers were ordered to pay surcharges of JPY12.89bn in total (approximately US\$160m). In September, the JFTC found that nine enterprises that manufactured and distributed specified expanded polystyrol blocks had rigged bids to win orders from construction companies. Eight of them were subjected to surcharges of JPY202.08m in total (approximately US\$2.5m). More recently in October, several undertakings found to have participated in bid-rigging activities relating to four government engineering works in the Kochi prefecture were ordered to pay surcharges of JPY1.76bn (approximately US\$22m).

Furthermore, on 14 June 2012, the JFTC filed criminal charges against NSK Ltd of Tokyo, NTN Corporation of Osaka, Nachi-Fujikoshi Corporation of Toyama and seven executives of the three companies in relation to a price-fixing cartel in industrial machinery bearings and automotive bearings. The JFTC alleged that, in 2010, certain employees of these companies were engaged in collectively raising the sale price of bearings. The alleged cartel broke down when one of the participants, JTEKT Corporation, self-reported to the JFTC in 2011, which resulted in JTEKT's immunity from criminal prosecution. The penalties are expected to be more severe given the new rules under the 2009 amendments, as well as the fact that the three companies – together with Koyo Seiko Co (currently JTEKT) – are repeat offenders, having been involved in a bearings price-fixing cartel in 1973.

South Korea

The South Korea competition regime is another well-established jurisdiction. The relevant legislation, the Monopoly Regulation and Fair Trade Act (MRFTA), was first enacted in 1980. The competition enforcement agency, the Korea Fair Trade Commission (the KFTC), was established the following year. Since then, South Korea has been very active in cartel enforcement. Significant regulatory reforms in antitrust have also been underway in recent years.

On 28 March 2012, the KFTC imposed a remedial (cease and desist) order and a surcharge (civil penalty imposed by the KFTC) on four South Korean instant noodle manufacturers for a price-fixing cartel lasting from May 2001 to February 2010. According to public sources, the manufacturers shared detailed sensitive information with each other (including price increase plans and release times for certain products) during the annual meetings held by the instant noodles industry association.

The manufacturers were found to have colluded in raising the price of instant noodles six times during the infringement period. They were subject to a combined surcharge of KRW135.4bn (roughly US\$123m), with the most severe penalty imposed on Nongshim for KRW107.77bn (approximately US\$98m). The KFTC said that the fact that the relevant goods related to basic foods for consumers justified the severity of the sanctions, adding that this decision was important in demonstrating the agency's focus on sectors closely linked to people's daily life.

The KFTC also uncovered two bid-rigging cases in the construction sector in 2012. Both cases involved government construction projects. One case related to a project for the construction of welfare facilities for the elderly, commissioned by the Bucheon-si, a satellite city of Seoul. The other related to a coastline survey and database project ordered by the Hydrographic and Oceanographic Administration.

China

China adopted its Antimonopoly Law (the AML) on 30 August 2007 and this came into force on 1 August 2008. Modelled on the competition laws in the EU, the AML is the first modern antitrust law in China. In addition to the AML, other competition laws are the Anti-Unfair Competition Law of 1993 and the Price Law of 1998.

In October 2012, the National Development and Reform Commission published a new decision on the local price bureau's investigation into a cartel in the local sea sand mining sector. Although the fine imposed in this case is relatively low, the decision is noteworthy in that this is the first published decision where (1) a price bureau has directly applied the AML when imposing the fine on the infringing companies (ie calculating the fine based on a maximum of 10% of turnover in the previous year); and (2) leniency was granted to one of the infringing entities under the AML (although it is not clear from

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the decision whether this company volunteered the information before or after the investigation). In previous cases, the NDRC appeared to rely on the Price Law rather than the AML.

Singapore

While the Singapore Competition Act dates back to 1 July 2007, it is only recently that cartel enforcement has really taken off in the republic, with the Competition Commission of Singapore (the CCS) prosecuting three high-profile cases in 2011.

In 2012, the CCS has concentrated on the transport sector in terms of cartel enforcement. On 18 July 2012, it imposed financial penalties totalling S\$286,766 (roughly US\$234,000) on two ferry operators for engaging in unlawful sharing of price information, contrary to section 34 of the Competition Act. This is the first Singaporean infringement decision based on information exchange between competitors. In previous CCS cartel enforcement actions, the exchange of information was viewed as supporting evidence of a price-fixing or bid-rigging arrangement.

In reaching its decision, the CCS pointed out that the relevant ferry market (a popular ferry route for foreign tourists travelling from Singapore to Indonesia's resort island, Batam) was a duopoly and the commercially sensitive pricing information exchanged included quotations to corporate clients and travel agents. During its investigation, the CCS uncovered emails from the ferry operators to clients containing price information which were blind copied to the competitor, and evidence of price verification between the operators prior to providing quotes to clients. In its decision, the CCS also noted that unauthorised infringement by employees does not relieve the company of its liability under the Act.

More recently, on 6 September 2012, the CCS issued a proposed infringement decision (PID) against 13 motor vehicle traders, alleging that the traders had engaged in bid-rigging at public auctions. This enforcement action followed a CCS public announcement regarding its intention to combat bid-rigging arrangements which, due to their prima facie anticompetitive nature, had the object of preventing, restricting or distorting competition (the equivalent to having the "object" of restricting competition in the EU, and constituting a "per se" violation of competition law in the US). The CCS has previously targeted bid-rigging in cases against companies performing electrical and building works in 2010 and pest control companies in 2008.

Malaysia

Malaysia has the newest competition regime of the six. Its Competition Act came into force on 1 January 2012. Nevertheless, the authority has announced that it is already investigating several potential violations.

On 24 October 2012, the Malaysia Competition Commission (MyCC) issued its first PID, in a case against the Cameron Highlands Floriculturist Association (the CHFA) alleging that it had violated the Malaysia Competition Act 2010 by engaging in an anticompetitive agreement to increase the prices of flowers by 10%. The CHFA is a trade association with more than 100 members who collectively produce more than 90% of the total temperate cut flowers in Malaysia, with a total production value of RM80m (approximately US\$26m) in 2011.

The investigation commenced in March 2012, when local

media reported an announcement by the CHFA president that its members had agreed to increase the prices of flowers by 10%. The Malaysian Competition Act 2010 prohibits enterprises at the same level of production or supply chain from agreeing to fix the price of their goods or services. The Malaysian authority deems such agreements to have the object of significantly preventing, restricting or distorting competition.

In its press release, the MyCC said that the term "agreement" under the price-fixing prohibition includes a decision by a trade association, and MyCC policy is to investigate such associations:

"In Malaysia, these associations often go beyond their general role to represent businesses and safeguard the interests of their members by involving themselves, directly or indirectly, in the business operations of their members and deciding how much a member should produce or at what price it should sell its products".

The PID has been characterised as a "soft approach" by the MyCC, as remedial measures have been suggested instead of fines. The CHFA has also been asked to comply with several remedial actions, including ceasing the current price-fixing actions, providing an undertaking against future price-fixing actions and issuing a public statement in mainstream newspapers. The CHFA has 14 days from the date of the PID to make representations. Failure to comply with the remedial actions may result in a final infringement decision imposing a penalty of up to 10% of the worldwide turnover of the relevant enterprise over the period of the infringement.

MyCC is also reported to have embarked on two other investigations into the steel and cement-making industries. In addition, it has notified the media that the investigation for alleged anticompetitive activities between MAS and AirAsia is still ongoing, despite the cancellation of a proposed share swap deal between the parties.

Thailand

According to public sources, Thailand has recently appointed a new director-general of the Internal Trade Department, Viboonlasana Ruamraksa, who has indicated her intention to invigorate the enforcement of competition law in Thailand.

The Thai Competition Commission (TCC) recently indicated that it would revive the enforcement of a case that has been pending for almost 10 years. This case, initiated around 2001, relates to alleged exclusivity agreements between Honda and its distributors, which banned them from dealing with Honda's competitors and displaying their advertising. Honda held a significant share (approximately 70% in 2003) in the motorcycle manufacturing market in Thailand. The Thai Commission referred the case to the public prosecutor in 2003 under section 29 of Thailand's 1999 Trade Competition Act. However, various procedural issues – along with the minimal enforcement approach – were reported to have slowed down the prosecution process.

The recent gesture of the Internal Trade Department in planning to appoint a judge to hear the Honda issues before the Statute of Limitations bars the case in April 2013, suggests a possible change in enforcement emphasis. In addition, it has been reported that the TCC is seeking to investigate the supermarket chain Tesco, as well as the brewer Thai Beverage, for alleged price-fixing and unfair trade practices.