

7th OECD/KPC Competition Workshop for Asia-Pacific Judges

Manila, Philippines, 5-7 April 2017



In April 2017, the OECD/KPC held in Manila (the Philippines) a workshop for judges dedicated to understanding the economic principles underlying competition cases, the methods used by economists and their application in cases before the courts.

This event was organised in close contact with the ASEAN secretariat and as a contribution to one of the goals of the ASEAN Competition Action Plan 2016-2025, and was co-sponsored with GIZ. All of ASEAN Member States were present as well as judges from Hong Kong and Pakistan. The fact that the event took place

in the Philippines allowed for a wide participation of the Filipino judiciary, of which many were judges from the Philippines Court of Appeal, including Presiding Justice Andres Reyes.

The goals of the Workshop were to engage in a discussion amongst judges in the Asia - Pacific region and beyond as well as between judges and the experienced economists to allow judges to become more familiar with economic concepts and theories as well as to be more confident when presented with economic based arguments in the context of competition cases.



The panel of speakers in this event included judges from OECD member countries, a senior *référéndaire* (law clerk) from the EU and two experienced economists. The panel was composed of Justice Alan Robertson, of the Federal Court of Australia, Mr. Donghwan Shon, Presiding Judge at the Uiejongbu District Court of Korea and Mr. Vivien Terrien (*référéndaire* for Marc Jaeger, President of the General Court of the European Union). The two economists were Mr. Miguel de la Mano, former Deputy Chief Economist at the European Commission and now at Compass Lexicon, and Ms. Rhonda Smith, former Lay member of the High Court of New Zealand. These two well-known economists have ample familiarity with presenting and/or dealing with economic evidence in the context of court proceedings.

The workshop was structured so that the main economic concepts and principles were shared on the first day of the event. To start the day Mr. Ruben Maximiano of the OECD put Competition Law and Policy into the wider economic and business practices context. Mr. Maximiano analysed the mechanisms of competition and well functioning markets as well as its benefits not only for the specific markets but also for the wider economy. He then also considered anti-trust and restrictive trade and commercial practices, and the central role of market power as a distinguishing factor between anti-trust and such other laws, that are perhaps more familiar to judges in certain jurisdictions. This allowed for the introduction of the most important economic principles underlying competition law





which is the relevant market, market power and anti-competitive effects and efficiency benefits.

The rest of the day were for the two expert economists to expand on the introductory session and to dive deep into the concepts with four sessions: two on relevant markets followed by two further sessions on the concept of significant market power and dominance. These sessions were organised so that Ms. Rhonda Smith would give a theoretical back drop for the principles under discussion that were then complemented with practical application in the context of real cases, by Mr. Miguel de la Mano.

The second day started with the application and discussion of the concept of market definition with a hypothetical case scenario of a procurement process by hospitals of pharmaceutical products, in a case developed by Ms. Rhonda Smith. Participants were divided into small groups with each group having to develop arguments for the market definition, a session that developed into a lively discussion of some of the concepts discussed during the previous day's sessions. The last session on economics

was also driven by Mr. Miguel de la Mano that discussed the economics underlying merger control.

The second part of the workshop was dedicated to the more legal questions of integrating economic principles and evidence into the court decisions, first with two sessions dedicated to an in depth examination of the EU court's practice by Mr. Vivien Terrien, of the EU General Court. In a fascinating overview of how the EU courts have developed their review of the European Commission's decisions, starting with the standard of review in competition cases, and then discussing in detail the concepts of restriction by object and by effect and the role that economics and economists play. One of the takeaways from that session is that, whilst important as evidence, economics cannot take the place of legal assessment and adjudication.

This was a point also stressed clearly by Justice Robertson of the Federal Court of Australia in two captivating sessions where he gave





a very clear account and discussion of how economic evidence is taken into account in Australia, with many practical pointers and discussion of cases at the Federal Court in the last few years.

The last session of the second day was offered by Judge Mr. Donghwan Shon, Presiding Judge at the Uiejongbu District Court of Korea, analyzing a number of different cases where evidence was evaluated and considered by the courts in Korea in the context of abuse of dominance cases.

The last day opened with a session set to discuss a hypothetical merger decision by a Competition Authority. For this session, the plenary was broken up into 4 smaller groups where judges discussed amongst themselves the decision of the Competition Authority as well as written economic evidence that was brought before them. After analysing this evidence the judges were brought into a plenary session where they called upon an economic expert that was “hired” by the Court to offer advice and explanations on a number of economic issues and questions raised by all judges present. A very interactive and interesting sessions, allowing judges to simulate the questioning of an economic expert – a role that was well represented by Mr. Miguel de la Mano.

The final session was lead by Mr. Ruben Maixmiano of the OECD and consisted in a discussion on how judges learn, drawing upon the different experiences from the various countries present, both from OECD members and non-member jurisdictions. It became very clear from the discussion that judges are avid for more workshops on competition law and policy and that more work needs to be done to give judges access to such types of training and fora.

Overall, a very highly rated event where judges were very engaged in interesting discussions amongst themselves and with the panel members.

