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CRISIS CARTELS

Contribution from Mongolia

-- Session III --

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CRISIS CARTELS

-- Mongolia --

1. Cartel enforcement in Mongolia

1. If several competing enterprises co-ordinate their market conduct for the purpose of eliminating competition this is called a “cartel”. Coordination on prices, quantities (for instance through production quotas) or the allocation of markets are examples of cartel conduct. The companies involved in this type of conduct achieve higher profits because the competitive pressure that would otherwise exist is reduced or removed. Cartels are particularly damaging to society in that they usually raise prices for consumers and are not neutral to the distribution of wealth in society. In short, cartels are serious offenses that undermine the market based economic order. Based on this assessment, the aggressive pursuit of cartels is on top of the AFCCP’s enforcement agenda.

2. Since the enactment of the “Law of Mongolia on Prohibiting Unfair Competition” in 1993, including its amendment in 2000, cartels are outlawed in Mongolia. However, this competition law lacked enforcement actions until 2005, when the government appointed an agency to oversee the enforcement of the “Law of Mongolia on Consumer Protection”, enacted in 2003. Since then, the government agency was renamed to become the Authority for Fair Competition and Consumer Protection, as it is known today. In July 2010, the State Great Khural (Parliament) passed a new law on competition providing more powers and a wider scope for enforcement and advocacy to the AFCCP. In addition, it also entrusted the AFCCP with enforcing additional laws, including the law on procurement and the law on advertisement (unfair competition).

3. The prohibition of cartels is designed to prevent agreements between undertakings insofar as they perceptibly restrict competition between them. According to Article 11 of the new competition law, the establishment of contracts and agreements aimed at restricting competition are prohibited.

- Article 11.1 Hard core cartels are prohibited

Agreeing to set price, dividing the market by territory, restricting the production, supply, sale, shipping, transportation and market accessibility of products, investment, technical and technological innovation, agreeing in advance on the price of products and conditions and criteria when participating in the activity of procuring products, works, services by a tender, auction and state or locally owned property are prohibited.

- Article 11.2 Soft cartels shall be prohibited where they contradict the public interests or create circumstances restricting the competition.

Refusing to establish economic relations without economic or technical justifications, limiting the sale or purchase of products by third parties, refusing to cooperate to enter into deals and agreements important to competition, impeding the competitor to accede into membership of an institution for the purpose of profitable operation of the business.

4. The law of Mongolia on Competition also forbids business entities to support and participate in any form in the contracts and agreements specified under Article 11.

5. In terms of investigatory powers to enforce the ban on cartels, the AFCCP has increased its powers compared to the previous competition law. It may request documents, data, explanations and any other information for the purpose of establishing unlawful conduct and to understand the market situation from companies but also from national and local public authorities and administrations. In addition the authority may inspect business premises, search companies and seize evidence.

6. If a cartel is detected, the AFCCP may impose high fines on the companies involved. Article 11 of the new competition law specifies that companies may be fined up to 6% of the concerned products' sales revenue in the preceding year in addition to the confiscation of the illegal gains. This is a substantial change to the previous maximum fines of USD 200.

7. However, there are exemptions from the administrative penalty:

- Article 28.1. *Business entities voluntarily disclosing the breach specified in 11.1-11.3 of this law may be exempted by 100% from the administrative penalty and business entities voluntarily admitting the breach within 30 days since the day of commencing the inspection activities may be exempted by 50%.*

8. In addition, there is a monetary reward equivalent to 5% of the monetary sum of the fine for those individuals submitting authentic and relevant evidence on the companies that have entered into or have made a decision to enter into contracts and agreements restrictive of competition.

9. Until August 2010 due to the outdated and inefficient (in cartel enforcement sphere) competition legislation and methodologies, the AFCCP did not manage to expose cartel and collusive behaviour and impose preventive fines towards them very frequently as it operated without any standardised methodology and techniques to be used to detect cartels. Nevertheless, the AFCCP investigated a few major cases also under the previous competition law regime that are briefly outlined below..

2. Case 1: Price fixing by 43 auditing companies (2010)

10. The AFCCP received a written complaint that The Mongolian Institute of Certified Public Accountants (MICPA) and the Association of Auditors facilitated and led to price fixing involving the directors of 43 auditing companies for a period of 4 years. Inspectors of the AFCCP co-operated with the whistleblowers and also smaller competitors, such as the accountants of some small and new auditing companies, that were forced to fix prices against their will. The Inspectors gathered the following key documents despite the absence of inspection powers from whistleblowers and undercover informants: Rule of the MICPA, Code of Ethics of the MCPA, a copy of the minutes of the MICPA meetings, the signed price fixing agreement and some other documents. After this evidence was secured, the inspectors required MICPA and the cartel members to provide the evidence, showing the copies organized beforehand. The AFCCP won the case in the administrative court and imposed fines of 10 million tugrugs /about USD 10000 in total on 43 companies.

3. Case 2: Price fixing by 43 mobile operators (2009)

11. In 2009, G-mobile, the latest entrant in the mobile sector negotiated with Telecom Mongolia to charge calls from G-mobile to a landline at 1 Togrog (equivalent to USD 0.001), basically rendering the service free. In response, 3 other operators disconnected their services to G-mobile consumers arguing that G-mobile is stealing their market share by charging prices below the cost. In reaction, G-mobile made a

counter complaint to the AFCCP arguing that three incumbent operators stopped to provide phone/internet service to their customers in an effort to force G-mobile to increase their prices for mobile services. As a result of the subsequent investigation conducted by the AFCCP 750,000 togrog (equivalent to about USD 700) in total were imposed on the other three incumbent companies for breaching the Law of Mongolia on unfair competition and having collusively agreed to disconnect their services to the new entrant.

4. Case 3: Price fixing by 6 petroleum companies (2008)

12. In 2008, petroleum companies had simultaneously raised prices by similar amounts and at similar moments in time. In order to determine the origin of the conduct, the AFCCP initiated an investigation revealing that 6 petroleum companies had collusively raised the petroleum prices through meetings organised by the Mongolian “Oil and Gas” association. The AFCCP issued orders to stop the cartel through exchange of information and imposed surcharges of 1.500 million togros (approximately USD 1000) in total.

13. According to the new competition law, the AFCCP has to draft a Leniency program and put it into practice in order to increase the effective detection of cartels in Mongolia.