Voluntary Peer Review of Competition Law and Policy in Mongolia

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Views expressed are these of the author and do not reflect the official position of any national or international institution, including FAS-Russia, AFCCP-Mongolia and UNCTAD
Outline of the Presentation

- The Mongolian context of competition law and policy development
- Competition legislation, incl. state aid control, public procurement and other provisions
- Courts and private bar
- Government and non-government stakeholders: competition advocacy issues
- Sector legislation and policies viewed from competition policy perspective
- The Mongolian competition authority: agency profile and capacity building
- Observations and recommendations.
The Mongolian context of competition law and policy development

- Fast economic growth mainly based on development of natural resources and influx of FDI:
  - GDP growth of 7% per year since 2003
  - About 20% in the end of 2011
  - EIU forecast for 2012 is about 15%

- Human development and inclusiveness of growth problem
  - Although per capita GDP tripled from $638 in 2004 to $2200 in 2010 the country is on 100 (out of 169) place according to UNDP Global Human Development Report based on per capita GDP, life expectancy and education level

- Structure of economy: «national projects » vs the universe of SMEs
  - 98% of companies have less than 199 employees

What can be a role of competition law enforcement and policies in the Mongolian realities?
Competition law development in Mongolia: historical benchmarks

- 2005 – conversion of UCRA into AFCCP. Actual enforcement started.
- 2010 – new Law on Competition adopted.
The Scope of Competition Law and Policy

- Market definition and dominance assessment
- Legal safeguards against the major types of violations
  - Cartels and leniency provisions
  - Unilateral abuses
  - Merger review
- State aid control
- Public procurement
- Competition law and sector regulations
- AFCCP powers and agency profile – to be considered further
Nationwide exemptions from antitrust law

- Constitutional limitations of foreign entry into development of natural resources
- IPR
- Purchases of “strategic products”
- Price increases by natural monopolies authorized by sector regulators and approved by AFCCP
Institutional Framework: AFCCP

First deputy Prime Minister
Chairman
Vice Chairman
BOARD
Public Administration
Law, Inspections and Regulation
Law on Competition
Public Procurement Law
Consumer Protection
Consumer Protection Law
Law on Advertisement
International Cooperation
Market Studies

As of 2011:
33 staff
Budget is about $ 310000
198 investigations
107 public tender bids examined
44% of the bids annulled
The role of the judiciary

- Courts
  - Prevalence of formal and procedural approach over substantive analysis
  - Insufficient communication between AFCCP and the courts

- Private practitioners
  - Practical absence of lawyers specializing in antitrust cases
  - Lack of legal skills in antitrust matters
Competition Advocacy

- The National Parliament and Government:
  - Sector Regulators
  - NDIC
  - State Property Commission
- Implementation of national development projects and competition
- Business community
- Consumer associations
- Legal profession
- General public
Competition policy stakeholders

Well organized

A
Big businesses and their associations
Government bodies/policy makers
Legislators
Powerful consumer associations

B
Private lawyers

C
Small business companies
Farmers/cattle breeders
Scholars
Mass end customers
General public

D
Some local authorities
Smaller consumer associations
Part of the judges

Less informed

Less organized
Observations and possibilities for improvement of the Mongolian competition regime

- Make AFCCP Regulatory Board fully operational
- Upgrade the staff skills and agency capacity, including priority setting and planning, keep institutional memory
- Improve competition legislation and complement it with Guidelines
- Increase the agency influence in order to promote competition policy in particular sectors; improve coordination with sector regulators
- Dialogue with the judges corps
- Seek “grass roots” support to competition enforcement and policy, e.g. facilitate private damage recoupment and private bar development
- Improve the agency visibility and image with stakeholders and general public, upgrade advocacy and communication skills; facilitate growth of competition culture
- Improve public procurement rules and procedures, achieve its better transparency, e.g. by introduction of e-bidding
- Make more clear delineation between authority of AFCCP and sector regulators; improve coordination between them.
Major Recommendations:
Improving the Competition Law

- Dominance assessment: consider introduction of qualitative criteria additionally to existing quantitative threshold.
- Cartels: make clear delineation between horizontal and vertical anticompetitive agreements; emphasize the *per se* illegality of cartels in the Law.
- Unilateral violations: consider broader use of effect based treatment.
- Merger review: provide for possibilities of use of remedies.
- Substantive and procedural *Guidelines* are needed.
Major Recommendations: Strengthening Enforcement

- **Case handling**: consider a legal possibility for extension of the terms of consideration of antitrust cases, if needed.

- **Investigation procedures**: develop more clear procedures acceptable for courts.

- **Sanctions**: consider introduction of more substantial penalties for impediments to inspections and more effective means for collecting fines.

- **Damage recoupment**: improve legal and procedural possibilities for private damage recoupment; advertise such possibilities among potential claimants.
Major Recommendations: Complementary Policies

- **State aid control**: broaden legal possibilities and transparency of state aid provisions to insure its better use for development.

- **Public procurement**: improve transparency of public procurement, including introduction of electronic auctions.

- **Sector regulation**: provide for more clear separation of responsibilities of competition authority and sector regulators and better coordination among them.

- **State-controlled enterprises**:
  - Avoid replacement of government monopolies with private ones, consider their unbundling to ensure competition;
  - Ensure equal access to essential supplies and facilities;
  - Make an appropriate choice between the implementation of competition law and price control, where necessary.
Major Recommendations: Ensuring Policy Coherence

- Strike the right balance between the interests of national and regional development and safeguarding competition.
- Ensure AFCCP’s participation in the development of licensing rules, granting concessions, and other matters related to development programs.
- Provide AFCCP with equal possibilities of participation in government development programs.
- Ensure equal access to supplies and essential facilities in the course of implementation of these programs.
- Develop competitive distribution networks and short-cut dominant market intermediaries (especially in meat, rice and sugar), and promote competition.