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Competition Law:
Global Developments



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One World: Law & the Environment Beyond Covid

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The President's Message

Jack Li
President



The Future of the Legal Profession: Sailing into Cyberspace

My Dear Colleagues, Members and Friends, Brothers and Sisters,

The 2022 New Year is here and COVID-19 is still with us, forcing the postponement of our Dubai Annual Meeting & Conference to next year.

The profession is constantly changing. We need to fundamentally rethink the formation of lawyers, both now and in the future, to allow law firms and their clients to thrive in a rapidly changing legal ecosystem.

The IPBA held four onsite forums in 2021: the 30th Annual Meeting & Conference of the IPBA was successfully held in Shanghai in April; the IPBA East Asia Forum was held in September in Tianjin; our Arbitration Day Event was held in November in Guangzhou; and the last onsite forum was the IPBA Legal Forum in the Capital Markets, held on the beautiful campus of the East China University of Political Science & Law ('ECUPL'). It is in this final forum that the IPBA signed an MOU with the ECUPL.

The IPBA Virtual Conference 2021 held last June was really impressive. Close to 400 delegates attended the conference and nearly 200 panelists spoke. This was the first fully virtual conference held right after the Annual Meeting and Conference in Shanghai under the devastating impact brought about by the COVID-19 Pandemic. I do appreciate the joint efforts and collaboration from all members and officers working for the IPBA during such a difficult time.

The COVID-19 virus has been spreading around the world, but the virus cannot stop our activities for communication. There were plenty of IPBA Webinars at this unprecedented time in history, with rich topics

that attracted the attention of our members and non-members alike. For example, the webinar focused on Virtual Hearings in Construction Disputes held on 27 January 2021 and the one on EPC Contracts in Renewable Energy Projects: Challenges and Strategies on 31 March 2021, etc., were all held successfully and involved heated discussions among the panelists.

The future of the legal profession is one of the hottest topics at the moment, especially amid the Pandemic when everything (including the legal sector) changes on a daily basis. That is why the legal market needs to adjust to the changing world and factors which have a substantial impact on the economy, such as the demands of clients, swift development of technology and the capability to provide flexible service with a new approach. Business needs are evolving rapidly. In a globalised and strongly competitive market, clients require lawyers with a deep understanding of the way they operate. They need creative and dedicated lawyers who know how to harness the law, their skillsets and, increasingly, technology to make their business thrive. This is a call for us to rethink the nature of legal services—to be imaginative.

The Pandemic made mobile technology and videoconferencing software apps such as Zoom and Microsoft Teams essential business tools. The International Legal Technology Association's 2020 annual technology survey reported that in 2017, five per cent of respondents said they used Zoom for videoconferencing while in 2020 that figure was 71 per cent.

Contract negotiation may migrate to technology platforms that enable faster communication, better collaboration and access to market data in real time.

In addition, online platforms enable legal teams to standardise processes across the organisation, with uniform practices for contract design, internal approvals and the signing and archiving of agreements. Integration with other information systems can help ensure relevant data is on tap to strengthen negotiating positions. Thanks to cyberspace, you can present and promote yourself by creating your own personal brand.

I would like to extend my sincere gratitude to all of you for supporting the Shanghai conference, as well as me personally in my work as the 30th President of the IPBA.

Under the Covid situation, the Shanghai conference overcame a series of difficulties and was eventually held as an onsite-combined-online conference in Shanghai, which attracted more than 600 delegates to celebrate this most important event of the IPBA and exchange points of view on hot topics.

I will be retiring as a Director in March when my term as President ends. I am also sending my greatest respect and gratitude to all the officers and global members, for

their assistance, encouragement and support during my one year and nine months term as President.

I believe the Pandemic will eventually come to an end in the near future. I am convinced that Dubai, Tokyo and Chicago will also do an even greater job for their events. I look forward to meeting you in Dubai, Tokyo and Chicago!

We are the spirit, IPBA

We are the family, IPBA

We are forever, IPBA

We are together, IPBA

Yours sincerely,

Jack Li
President

Join the Inter-Pacific Bar Association

Since its humble beginnings in 1991 at a conference that drew more than 500 lawyers from around the world to Tokyo, the IPBA has blossomed to become the foremost commercial lawyer association with a focus on the Asia-Pacific Region. Benefits of joining IPBA include the opportunity to publish articles in this IPBA Journal; access to online and printed membership directories; and valuable networking opportunities at our Annual Meeting and Conference as well as 10 regional conferences throughout the year. Members can join up to three of the 24 committees focused on various of commercial law practice areas, from banking and finance, to insurance, to employment and immigration law, and more. We welcome lawyers from law firms as well as in-house counsel. IPBA's spirit of camaraderie ensures that our members from over 65 jurisdictions become friends as well as colleagues who stay in close touch with each other through IPBA events, committee activities, and social network platforms. To find out more or to join us, visit the IPBA website at ipba@ipba.org.





The Secretary-General's Message

Yong-Jae Chang
Secretary-General



Dear IPBA Members,

The past two years have been very challenging in ways that no one could have imagined, yet through our spirit of resilience we have adapted to the circumstances in the way we work, live and interact with others. Even after the world returns to normalcy, many of these changes are expected to continue: working from home and having online meetings has proved to be 'doable' even in the legal profession; virtual conferences include attendees around the globe and reduce travel costs; and hybrid events ensure that those who cannot attend in person are able to participate.

On the other hand, the importance of human interaction cannot be overstated. We sincerely hope that the postponement of the Annual Meeting and Conference in Dubai until next year will be the last disruption that is made to our normal conference schedule. The planned dates are now 7–10 March 2023 and registration is open at the conference web site: www.ipba2023.org/. This will be a momentous event to mark the chance of being able to see all of you in person for the first time since 2019, and we hope to see all of you there!

By the time you receive this Journal, Jack Li's two-year term as IPBA President will have ended and we will have a new President, Richard Briggs. I wish to thank Jack and his team for all of their hard work during his extended term. His legacy will be remembered well by all of our members for many years to come. Other Officers and Council members also have terms that ended at the AGM in March, including Committee Coordinator Jonathan Warne, Membership Committee Chair Corey Norton, Chief Technology Officer Varya Simpson and Publications Committee Chair Priti Suri, as well as numerous Membership Leaders and Committee

Chairs, Co-Chairs and Vice-Chairs. New leadership is in place and we look forward to the exciting ways that they will make the IPBA even better. You can find the lists of current IPBA leadership on the IPBA web site.

Since last June, when my term as Secretary-General began, I am continuing to oversee many projects at the IPBA, including improving our processes and infrastructure to increase efficiency at the Secretariat. This project actually began several years ago and past Secretary-General Michael Burian built a solid base on which to advance to the next stage of bringing the results of our research and analysis to fruition. The next two years will be a turning point for the IPBA, but an association cannot mature without a few growing pains so we appreciate you bearing with us as this project progresses.

While the full Virtual Conference held in June 2021 was well received, the Officers felt that an intensive period of online activity is tiring no matter how great the content is. This year, there are no plans to hold a virtual event on such a wide scale; rather, we plan to continue to offer smaller (yet focused) online events such as substantive webinars organised by the IPBA committees, as well as informal social events just to keep in touch. We are also keen to strengthen our collaboration with other associations: we will bring you some joint events with the AIJA in particular over the next few months. As the schedule for these is evolving, please check the IPBA web site for the latest information.

In the meantime, stay healthy and safe until we can meet again.

Yong-Jae Chang
Secretary-General



Message to the Reader

Dear Reader,

Welcome to the March issue of the IPBA Journal. The theme for the first issue of 2022, and my last as the Chair of the Publications Committee, is 'Competition Law: Global Developments.' Today, competition law and related policy is an essential element of the legal and institutional framework for the global economy. Issues of its enforcement and policy span multiple jurisdictions. Companies operating across borders are witnessing a wave of regulatory developments, driven by geopolitics, digitization ramifications, and changing consumer and societal expectations. This has been accelerated by the pandemic. As companies venture beyond core competencies and expand into new spaces, the technological transformation is in focus as there is enhanced scrutiny on various types of behaviour, be it collaboration arrangements or data ownership practices. As transforming businesses reinvent themselves, they face new and often complex competition law risks. Governments and regulators are intervening more actively to promote more sustainable societal goals while encouraging competition, innovation, productivity and growth. Such dynamics will impact conduct and should be a priority for boardrooms.

I am really thrilled with the positive responses I received on this theme and the authors in this edition have covered a wide array of extremely topical areas underscoring the developments in their jurisdictions. The first article, titled 'Competition Law: Indian Developments' authored by Manas Chaudhari, examines the evolution of this law from an Indian perspective and demonstrates the changes with specific instances. His view is interesting in so much as he demonstrates that a predictable regime is unfolding in competition law enforcement in India. In the second

article, Tunku Farik from Malaysia uses examples of anti-competitive behaviour which distort competition and the regulatory regimes governing them in 'Competition Law in the Traditional and Digital World: Examining Anti-Competitive Behaviour and Abuse of Dominant Position.' Clearly, the digital transformation has created a need to resolve new questions of law by the competition authorities.

The third article, written by Ricky Aringo Sabornay, is titled 'Understanding Algorithmic Collusion and the Rise of Digital Cartels.' He provides a perspective on the various issues surrounding the increasing use of pricing algorithms due to use of artificial intelligence, the ongoing debate regarding algorithmic collusion, and proposed measures to deal with its antitrust risks. In the fourth article titled 'What Are the Rules of Counteracting Anti-Competitive Practices in Force in the Polish Legal System?' Jaroslaw Kruk explains basic principles and practices in Poland, notes the growing number of cases initiated by Polish authorities, and the fines imposed on companies and key officers. He cautions that entrepreneurs must be mindful of prohibitive practices that violate consumers' collective interests, be it in executing restrictive agreements or efforts to secure a dominant market position.

In the fifth article titled 'Competition Law: Global Developments Anti-Competitive Agreements and Abuse of Dominance: Parallels Between Brick & Mortar and E-World: A Look at Singapore' Kala Anandarajah examines recent trends in conduct that may be anti-competitive or an abuse of dominance as applied to the digital markets, while drawing analogies with the brick-and-mortar world. She makes an important point that digital businesses should be cautious to avoid perceptions of leveraging market power. The final article is on 'Anti-Competitive Framework in Vietnam' by James

Bui. He underscores that while Vietnam has established an effective competition legal framework and regulators to oversee market competition, these, however, only cover fundamental matters. Given the growth in other areas, like technology and finance, several issues require legislative action to catch up with the new trends.

The spotlight of 'Up Close and Personal' is on the stalwart Caroline Berube who, in my view, is a one-woman army. One of my earliest friends in the IPBA, she continues to both amaze and inspire me, managing her three lovely children and a law practice that she heads. She truly epitomizes someone who pushes the envelope all the time while juggling multiple hats that she wears all the time. In the Q&A, she rightly says, women are "fighting battles no one knows about, being a mother, being a partner ... and yet, remaining authentic and committed to show up. This is real life. I think we need to celebrate the success of these inspiring women daily."

In addition, you will also find in this edition details about new members joining the IPBA between December 2021 and February 2022 as well as a section on Members' Notes, containing recent member news. It would be great to encourage new members and see them contribute articles proactively and, of course, please do continue to share professional milestones for the Journal.

A few years ago, when I was asked to become the Vice-Chair of the Publications Committee, I was scared and hesitant, not knowing what I was committing myself to. I spoke with prior Chairs to get a sense of the work and the time required. Somehow, in the end I agreed on the basis of a call with Rhonda—an American, who was sitting in Japan while I, an Indian, was speaking to her while in New York. After I put the phone down, I paused and realized here was a chance to experience the truly global nature of the IPBA differently, by focusing on the content of the Journal and learning about legal developments across varied practice areas from different parts of the world. I was unsure if such an opportunity would ever arise and, suddenly, the daunting task did not seem so daunting.

I would be remiss if I did not mention that I also had a great Chair in the form of John Wilson, who spent time teaching and discussing all important and essential matters for this role, while I played the understudy! And, I have again been fortunate to have a fantastic Vice-

Chair, James Jung, who supported me all through, with ideas, suggestions on themes, reaching to possible authors and so much more. As always, thanks for the consistent contributions, for which both James and I remain grateful. My apologies to those who I have been unable to accommodate because I really tried to adhere and respect the timelines of the publishers and the pages of the Journal in order to stay within budget. I do hope that the enthusiasm I have experienced shall continue.

While the pandemic had started when I took over as Chair, little did I know my entire term will be a virtual one. And, that has been the toughest part of this function, that I never got to see so many of you since Singapore in 2019. It was both a fun and a fulfilling journey, something that I did not anticipate at the outset. As I transition out of this role, I feel there is no unfinished business, but a sense of fulfilment of having done what I had to do, to the best of my ability. It is time to pass on the baton to both James Jung and Olivia Kung, the incoming Chair and Vice-Chair, respectively. I have no doubt they will do a stellar job and create their own special legacies.

Adios, my IPBA family, until we meet again. I hope it will be at the in-person conference in Dubai in early March 2023. Stay safe, healthy and well.

Priti Suri
Chair – Publications Committee, IPBA

IPBA Upcoming Events

Event	Location	Date
IPBA Annual Meeting and Conferences		
31st Annual Meeting and Conference	Dubai, UAE	March 7-10, 2023
32nd Annual Meeting and Conference	Tokyo, Japan	1st Quarter 2024
IPBA Mid-Year Council Meeting		
Meetings of the IPBA Council and One-Day Regional Conference	Seoul, Korea	September 24-26, 2022
More details can be found on our web site: https://ipba.org The above schedule is subject to change.		

Publications Committee Guidelines for Publication of Articles in the IPBA Journal

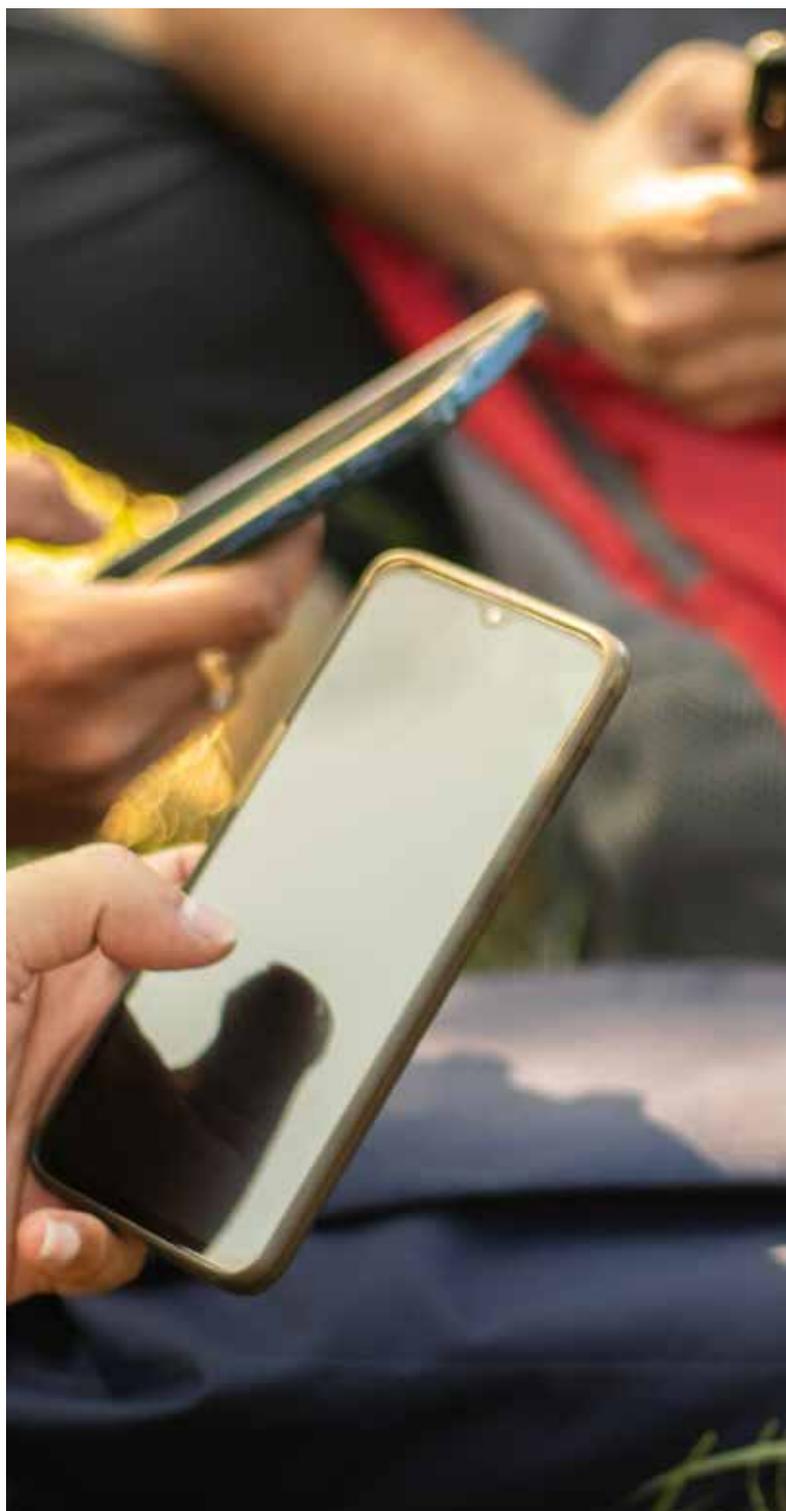
We are pleased to accept articles on interesting legal topics and new legal developments that are happening in your jurisdiction. From time to time, issues of the Journal will be themed. Please send: (1) your article to both **Prifi Suri** at p.suri@psalegal.com and **James Jung** at jjung@collaw.edu.au; (2) a lead paragraph of approximately 50 or 60 words, giving a brief introduction to, or an overview of the article's main theme; (3) a photo with the following specifications (File Format: JPG or TIFF, Resolution: 300dpi and Dimensions: 4cm(w) x 5cm(h)); and (4) your biography of approximately 30 to 50 words.

The requirements for publication of an article in the *IPBA Journal* are as follows:

1. The article has not been previously published in any journal or publication;
2. The article is of good quality both in terms of technical input and topical interest for IPBA members;
3. The article is not written to publicise the expertise, specialization, or network offices of the writer or the firm at which the writer is based;
4. The article is concise (2500 to 3000 words) and, in any event, does not exceed 3000 words;
5. The article must be written in English (with British English spelling), and the author must ensure that it meets international business standards;
6. The article is written by an IPBA member. Co-authors must also be IPBA members; and
7. Contributors must agree to and abide by the copyright guidelines of the IPBA. These include, but are not limited to
 - a. An author may provide a link on the website of his/her firm or his/her personal website/ social media page to the page of the Journal on which the first page of his/her article appears; and
 - b. An author may not post on any site an entire PDF of the Journal in which the article authored by him/her appears.

Competition Law: Indian Developments

The evolution of India's competition regime has not been free from multiple challenges. Besides the oversight of the appellate authorities, the Constitutional higher courts played roles in fine-tuning due process issues on regular basis. Amendments in Regulations helped attain predictability, but proposals for substantial amendments to the principal legislation is a newer challenge to all stakeholders which is yet to unfold.



Introduction

The Indian Competition Act 2002 (as amended) ('the Act')¹ is the core legislation which established the Competition Commission of India ('CCI' or 'Commission') on 14 October 2003 with an intent, *inter alia*, to eliminate



trade practices of enterprises which cause or are likely to cause anti-competitive effects in the markets of India.² The Act superseded the Monopolies and Restrictive Trade Practices Act 1969 ('MRTP Act') by a notification³ since the MRTP Act had 'become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is a need to shift the focus from curbing monopolies to promoting competition'.⁴ The Act is civil legislation premised on the principles of natural justice and the rule of reason.⁵

Reasons for Delay in Operationalisation of the CCI

Even though the Act obtained Presidential assent on 13 January 2003, it still took more than six years to operationalise the CCI.⁶ The reasons for this delay was primarily on account of the filing of two Constitutional Writ Petitions against the proposed structure of the Commission by private individuals. The petitioners were of the view that since the MRTP Act, the predecessor agency, had always been headed by judicial members, then the CCI also should be headed by judicial members, whereas the intention of the Act was for flexibility between judicial and non-judicial members or experts from the fields of competition law and economics.

The first Writ Petition was filed in August 2003 before the High Court of Madras and the second was before the Supreme Court of India in October 2003.⁷ The Writ Petition before the Supreme Court was heard in great detail and was disposed of by a well-contested order on 20 January 2005. While disposing of the matter, the Supreme Court of India observed that since the Act had a combination of adjudicatory, advisory, regulatory and inquisitorial powers, it would be appropriate to have a specialised appellate tribunal between the CCI and the Supreme Court of India as the Court of First Appeal to be headed by a judicial member. Pursuant to the observations of the Supreme Court of India, the Government of India drafted an amendment bill and placed the same before Parliament which decided to have open public consultation on the Bill and constituted a high-powered Parliamentary Committee for the same. Evidence was collected for over a year from all stakeholders by this high-powered committee and, based on such feedback, the Bill was further modified and once again placed before Parliament for deliberation. On 25 September 2007, Parliament approved the Bill and the Act stood amended.⁸

Notifications of Different Provisions of the Act

The Act is divided into nine chapters. Chapter II discusses the substantive provisions of the Act. There are four provisions (sections) in this Chapter. Sections 3 and 4, respectively, prohibit enterprises from entering into anti-competitive agreements—both horizontal and vertical—and abusing a dominant position in the markets within India. Whereas, sections 5 and 6, respectively, mandate the CCI to regulate a combination between two or more enterprises ('merger control'), either by way of acquisition of shares, voting rights, controls and mergers and amalgamations. The Government of India notified sections 3 and 4 of the Act on 20 May 2009 and regulation of combinations, pertaining to sections 5 and 6, on 1 June 2011.⁹ The operationalisation of the first court of appeal was also simultaneously notified on 15 May 2009.

The Salient Features of the Act

Anti-Competitive Agreement Cases

Horizontal agreements, including cartels and the rigging of bids in public procurement, are presumed to cause appreciable adverse effect on competition ('AAEC')¹⁰ within India, whereas vertical agreements may be declared void if they cause or are likely to cause an AAEC within the markets of India. Thus, the finer legal interpretation which has evolved over the years shows that once an agreement between competitors on 'price or price signals' or any other 'commercial coordination between them e.g., market allocation or limiting production' has been established, the presumption of breach of the Act is concluded against the respondents.¹¹ An 'agreement' under the Act has been defined very broadly with an intent to capture coordination and understanding between independent enterprises which may fall within the ambit and scope of cartels and bid rigging.¹²

However, in the case of commercial agreements in vertical business chains between different levels of businesses, the Act mandates the CCI to apply the rule of reason test. For example, if a manufacturer in a vertical business chain has been enjoying market power for a long period of time and sets a price for the product manufactured by it and dictates the same to be maintained by downstream dealers, then the defence of the rule of reason may be distinguished. Maruti Suzuki

India Ltd ('MSIL'), the passenger vehicle auto market leader of India, has been found to have been engaged in minimum resale price maintenance ('RPM') with its dealers across India for a long duration of time. The salient portion of the contested order is given below:

The Commission concludes that MSIL of India not only entered into an agreement with its dealers across India for the imposition of Discount Control Policy amounting to RPM, but also monitored the same by appointing MSAs and enforced the same through the imposition of penalties, which resulted in AAEC within India, thereby committing contravention of the provisions of Section 3(4)(e) read with Section 3(1) of the Act.

A penalty amounting to INR 2 billion (US\$26.8 million) was directed to be paid within 60 days of the receipt of the order by MSIL. The Order was passed on 23 August 2021.¹³ MSIL has preferred an appeal before the first court of appeal and the appeal is currently sub-judice.

Vertical agreements may be declared void if they cause or are likely to cause an AAEC within the markets of India.

Abuse of Dominance in the Digital Market

Section 4 of the Act frowns upon abuse of the dominant position of an enterprise but not the dominance itself. It is another prohibitory decree of the Act. The inquiry and investigation proceeds on the rule of reason. There are a few cases, although at very preliminary stages, which are worth noting for developments. The CCI is considering the unilateral conduct of some digital companies, which require a fair competition assessment, ensuring that other markets, more specifically retail brick-and-mortar markets, will not be adversely affected by their operations in India.

For instance, after issuing an investigation against Google for alleged abuse of its dominant position in the market for licensable mobile OS for smart mobile devices and the market for app stores for Android OS in 2020,¹⁴ the CCI has directed two new investigations against Google in 2021 and in 2022. CCI's investigation order of 2021¹⁵ is related to allegations of abuse of a dominant position in the smart TV operating systems ('TV OS') market. The CCI, in its *prima facie* decision, noted that the agreements between Google and Android TV licensees granting access to the Android smart TV OS, required Android TV

licensees to (1) mandatorily preinstall the entire suite of Google applications; (2) comply with minimum Android compatibility requirements; and (3) preload Google applications and place them on the default home screen. Considering these aspects, the CCI was of the preliminary view that Google's conduct amounted to an anti-competitive vertical agreement as well as abuse of dominant position and directed an investigation by the DG. In January 2022, the CCI ordered another investigation against Google into allegations of abuse of dominant position suffered by news publishers.¹⁶ The CCI, *inter alia*, found that Google's unilateral and opaque methodology for determining and sharing ad revenues with online news publishers and not paying them for using their website's 'snippets' in Google's search results, was abusive and directed the DG to investigate.

The CCI has also directed an investigation against Apple in December 2021 into abuse of dominant position allegations in the market for app stores for iOS (the operating system for Apple's phones).¹⁷ The CCI found that: (a) mandatory use of Apple's proprietary 'in-app purchase' mechanism to enable a user to unlock the app's various paid features; (b) prohibition from enabling such features in the app which encouraged use of purchasing methods other than 'in-app purchase'; and (c) charging a high commission of up to 30 per cent on subscriptions, *prima facie* amounted to imposing unfair pricing and conditions, denying market access and leveraging. All of these matters are sub-judice as of writing.

Investigation by the office of the DG is a fact-finding statutory exercise, hence, in terms of the relevant provisions of the Act, it does not necessarily indicate that the digital enterprises which are being investigated would definitely receive adverse orders by the CCI.

Merger Control: Main Updates

(1) Approval of the CCI

On 31 May 2021, the merger control or regulation of combinations mandate of the CCI successfully completed ten years of the implementation of the substantive provisions dealing with Indian merger control (sections 5 and 6). If the combined asset or turnover thresholds provided in section 5 are exceeded, subject to de minimis thresholds, the acquirer, and in some cases the parties, must mandatorily notify the CCI. No part of a reportable transaction can be implemented or put into effect without the CCI's prior approval. Breach of

this rule can attract monetary penalties.¹⁸ During the initial enquiry, namely the Phase I review, the CCI is required to form a preliminary view on the likelihood of the transaction to cause or not to cause an AAEC within India.¹⁹ In the absence of any competitive concerns, the CCI expeditiously approves the transaction in the Phase I review. If the CCI is of the *prima facie* view that the transaction can cause an AAEC, it is required to commence a detailed investigation (that is, a Phase II review) and may approve or modify or block the transaction.²⁰ Notably, to date, the CCI has not blocked any transaction and has, either conditionally or unconditionally, approved all notified transactions.²¹

(2) Non-Renewal of the Notification Regarding 50 per cent Voting Rights for a 'Group'

Section 5 of the Act defines the term 'group' to include two or more enterprises when one enterprise can, either directly or indirectly, exercise 26 per cent or more of the voting rights in the other enterprise.²² However, by way of a notification dated 4 March 2016 ('Group Threshold Notification'), the Ministry of Corporate Affairs ('MCA') had exempted enterprises exercising less than 50 per cent of voting rights in other enterprises from section 5 of the Act and, hence, from the 'group' definition. As a result, only subsidiaries were to be considered when calculating the assets and turnover under the Group Test for assessing a transaction's reportability.

The Group Threshold Notification lapsed on 3 March 2021 and has not been renewed since. Therefore, the 26 per cent voting rights threshold for a 'group' stipulated in section 5 of the Act revives in application. Consequentially, the value of assets and turnover of non-subsidiary investee entities in which voting rights exceed 26 per cent must be factored in while assessing a transaction's reportability under the Group Test. This can potentially trigger a surge in merger filings with substantial additions to the value of assets or turnover of any 'group'. Additionally, the impact of the drop in shareholding for 'group' qualification on the applicability of intra-group exemptions is yet to be fully ascertained.

(3) Success of the Green Channel Route

By way of a notification dated 13 August 2019²³, the CCI amended the Combination Regulations²⁴ and introduced a fast-track 'Green Channel' mechanism for notifying transactions where parties to a transaction (including downstream affiliates) do not exhibit any horizontal, vertical or complementary overlaps ('Green

Channel Route'). A transaction notified under the Green Channel Route receives 'automatic' CCI approval upon filing and is not subject to the conventional 30-day waiting period. Moreover, the burden of information and competitive analysis of parties is significantly lower. Such a notification can be made only through Form-I but without market-facing information.

The Green Channel Route was introduced in the wake of the rise in private equity investments in India which are typically characterised by non-problematic minority acquisitions. Statistics are telling regarding the Green Channel Route's success—out of approximately 220 transactions notified to the CCI since August 2019, as many as 45 transactions were notified under this route.

Digital Enterprises: The New Challenge

The digital economy is primarily based on innovation and more innovation and, as all competition law professionals know, this is one of the 'safe-harbour' defences against any alleged breach of anti-competitive practices relating to abuse of dominance.

The market-share concentration among a few renowned digital enterprises, leading to either monopolisation or oligopolistic concentration, continues to attract the attention of competition agencies. Coupled with the foregoing facts, acquisition of start-up digital enterprises is another facet, often characterised as 'killer acquisition', which also engages the attention of competition agencies. However, on a detailed assessment of these acquisitions, the core justifications of these transactions may at times show enhancement of the economic efficiencies of the parties to such transactions. Thus, it is too early to confirm that all commercial *ex ante* regulatory activities of digital enterprises are per se anti-competitive.

Options are being considered to introduce an *ex ante* legal regime to check the unfettered growth of a few digital enterprises. However, *ex ante* assessment of *ex post facto* breaches, if any, may rarely be identical to exercising suo motu powers, hence, there is perhaps an inherent legal contradiction. Economists and other professional experts who regularly assist and advise the Commissioners of competition agencies in all matters,

must engage in carrying out thorough research to find out the authentic and real objective and economic justifications of the business models of these innovative enterprises and help agencies minimise contrarian evolution of law.

As regards 'self-preferencing', 'gatekeeping' and 'network effects', where the emerging terminologies governing the current thought processes of competition agencies are concerned, all of these ingredients are also very significantly found in traditional markets. The members of trade associations, when using the platform of trade association collectively, tend to promote their own business interests with all authorities and plead for better commercial terms, which seems very similar to 'self-preferencing'.

These traditional industry sectors, either represented by their trade associations or by their own corporate business strategies, directly or indirectly prefer not to allow new entrants to enter the relevant market, which seems identical to 'gatekeeping'. Finally, the unwritten and sometimes written strategies of integration in the market structure, more particularly, among upstream, mid-stream, downstream and end consumers/customers are identical to 'networking' among the various independent enterprises in the entire vertical business chain of any industry segment.

With a bit of up-to-date but robust research by experts within a competition agency, it seems that digital enterprises can be investigated successfully and possible anti-competitive adverse effects, if any, can also be remedied without carrying out drastic amendments to the law. The CCI successfully applied the existing provisions of the Act and met the repeated challenges of aggrieved enterprises in Constitutional Writs²⁵ filed against it before various High Courts and more often than not before the Supreme Court of India in Special Leave Petitions on the sole ground primarily that it lacked jurisdiction to investigate digital enterprises. A bouquet of a few on-going cases²⁶ successfully handled by the CCI within the existing framework of the Act, clearly substantiate the foregoing analyses more comprehensively:

The CCI via a *prima facie* order directed the office of the DG to investigate allegations of abuse of dominance against Amazon and

It is noteworthy that the CCI has all along been well supported by the constitutional higher courts thus far.

Flipkart and both these digital enterprises challenged the jurisdiction of the CCI in Constitutional Writs before High Court and finally before the Supreme Court of India but failed to get any favourable order against the CCI. Investigation before the DG has resumed and the same is sub-judice as on date.

The CCI took *suo motu* cognisance of WhatsApp's updated privacy policy which enabled it to share user data with Facebook and its subsidiaries. The CCI *prima facie* held privacy to be an element of non-price competition and that in digital markets, unreasonable data collection and sharing may grant competitive advantages to the dominant players and may result in exploitative as well as exclusionary effects. The investigation is sub-judice.

Apple is alleged to impose unlawful restraints on app developers from reaching users of its mobile devices (e.g., iPhone and iPad) unless they go through the 'App Store' which is stated to be controlled by Apple. The Commission is of the *prima facie* view that mandatory use of Apple's IAP for paid apps & in-app purchases restrict the choice available to the app developers to select a payment processing system of their choice especially considering when it charges a commission of up to 30 per cent for app purchases and in-app purchases.

Comprehensive amendment, as normally has been suggested across jurisdictions, may solve some issues momentarily, but as innovation in the digital market is extremely fast-paced, the competition agencies may at times not be able to keep pace with such dynamism. Frequent amendments to the Act to meet the challenges of the changes in this market also *prima facie* appear onerous, if not impossible. Most of the competition legislation does not per se envisage that all business entities must be investigated. All businesses are *prima facie* not engaged in anti-competitive practices. It is the statutory duty of the competition agency, assisted by a competent investigating wing and experts on law and economics, to find solutions to this problem. Adhering to the 'principles of natural justice', 'due process' and carving out the sub-set of business within a whole pie of any business model and establishing breach, if any, should be the right way forward. This

process must be considered on merit and be done with proper due diligence.

In terms of sections 5 and 6 of the Act, the first trigger to scrutinise any combination of enterprises is assessing the combined thresholds of assets and turnover of such enterprises. However, applying these thresholds for digital enterprises may not always allow the CCI to scrutinise a combination of digital enterprises. This legal infirmity may be remedied by introducing the transactional value of the deal in addition to the existing rule of assets and turnover tests. No further amendment in law may be needed as of now.²⁷

High Courts and Supreme Court and Jurisdictional Challenges

It is noteworthy that the CCI has all along been well-supported by the constitutional higher courts thus far in its *prima facie* orders on competition law investigations of any sector, including the digital sector in particular:

- The CCI directed the office of the DG to cause an investigation into alleged exclusivity arrangements, deep discounting and preferential listing with respect to mobile phone brands by Flipkart's and Amazon's e-commerce platforms in 2020²⁸ by adopting the due processes laid down in the Act. However, challenges by Flipkart and Amazon to the investigation were not only quickly dismissed by the single bench²⁹ and the division bench³⁰ of the Karnataka High Court, but were also promptly rejected by the Supreme Court of India.³¹ The promptness of disposal by the constitutional courts clearly reemphasised the elaborate ratio enunciated by the Supreme Court of India in September 2010.³²
- The CCI initiated an investigation in March 2021 into possible abuse of dominance by WhatsApp on account of the 'take-it-or-leave-it' nature of the policy³³ imposed upon subscribers. Facebook and WhatsApp challenged the CCI's order before the Delhi High Court on the ground that the 2021 policy itself was disputed and pending adjudication before the Supreme Court of India. However, as early as April 2021, the Court rejected this argument and refused to interfere with the CCI's investigation, upholding its jurisdiction to initiate an antitrust enquiry.³⁴
- Similarly, the contents of an investigation report against Google with respect to abuse of its dominant

position in the (1) market for licensable mobile operating systems for smart mobile devices; and (2) market for app stores for the Android operating system, were leaked to the media. Google filed a petition against the CCI challenging the leak before the High Court of Delhi in September 2021. The CCI contended that it did not leak any information to the media and committed to establishing a fact-finding inquiry panel to investigate the incident. To expedite proceedings, it recalled a previous order that rejected certain confidentiality claims by Google and accepted the claims in full. Considering the CCI's concessions, the Court refused to grant any interim relief to Google and dismissed the petition, while clarifying that Google was still at liberty to seek legal recourse for the leak.³⁵

Hence, the attempts to stall any competition law investigations in the digital sector have been quashed by the Indian higher constitutional courts repeatedly.

International Co-operation With Competition Agencies³⁶

The CCI is an active member of the International Competition Network ('ICN') and the Brazil, Russia, India, China and South Africa ('BRICS') Competition Agencies. The CCI is mandated to enter into international cooperation with competition agencies to additionally implement the 'effects doctrine'.³⁷ A Memorandum on Co-operation ('MoC') entered into with Japan's competition agency, the Japan Fair Trade Commission, in July 2021 is testimony to the importance of this mandate. The CCI has dealt with Japan-based entities in both enforcement and merger control cases. In fact, the CCI recently imposed a penalty on two Japanese companies after a leniency application revealed coordination on prices, allocation of markets and bid rigging in the electrical power steering systems market.³⁸

The CCI also entered a Memorandum of Understanding with the Competition Commission of Mauritius in late December 2021. The CCI already has cooperation agreements with several antitrust agencies, including those of Europe, USA, Brazil, Russia, China, Australia, South Africa and Canada.

Competition (Amendment) Bill 2020

The Competition (Amendment) Bill, 2020 proposes important changes to both the behavioural and the merger control regimes. Various positive issues

emerged during the continuance of the evolution of the jurisprudence ever since various provisions of the Act were implemented, which *prima facie* triggered consideration of some of them by way of a comprehensive amendment to the principal legislation. The Bill is under consideration by the Indian Parliament. Should the Bill be approved by the Parliament and assented to by the President of India, quite a few newer mandates will emerge. Some of the salient features of the Bill are discussed below:

- The introduction of the settlements and commitments regime for vertical restraining conduct and abuse of dominance unilateral conduct, excluding cartel conduct, may bring about an expeditious disposal of enforcement matters besides providing predictability in procedural law.
- The right to appeal certain CCI orders will be contingent on the payment of 25 per cent of the penalty which may have been aimed at enhancing penalty recovery and preventing superficial appeals, but could simultaneously cause hardship to some appellants.
- It specifically introduces buyers' and hub-and-spoke cartels, bringing non-conventional anti-competitive conduct within the Act's ambit.
- It fortifies the leniency regime by proposing a 'leniency plus' policy, which will permit a leniency applicant part of one cartel to disclose another cartel in a separate market and avail penalty mitigation for both cartels.
- In relation to merger control, it is reiterated that the Bill introduces deal value thresholds (in addition to existing asset and turnover thresholds) to confront inadequate regulation of combinations, with a focus on digital markets.

Evidently, the Bill is indicative of the dynamic approach of India's competition regime. It remains to be seen when the proposed amendments will be given effect to.

Conclusion

The active participation of the CCI in the International Competition Network and BRICS conferences, both as a key participant and host, sometimes has strengthened its commitment to contribute proactively on an

international pedestal on issues of shared interests and common themes. The last few years demonstrate that the CCI has thoughtfully strategised a multi-pronged approach to discharge its mandate effectively—on the one hand it has launched market studies to decode complexities in emerging markets and identify areas susceptible to anti-competitive conduct and, on the other hand, its concerted efforts towards cracking down on big tech has emerged as a clear enforcement priority. Even on the merger control front, while the green channel benefit appears to have accomplished what it was positioned to achieve (that is, easing the merger approval process for financial investors), the standard of control devolving towards material influence could reshape the future of merger control in India.

Finally, with the Competition Amendment Bill on the verge of being introduced, the existing competition law landscape is poised for a major overhaul and will likely mark a paradigm shift with the introduction of a whole suite of new features, such as settlement and commitments, extension of IPR exemption of abuse of dominance, deal value thresholds, etc. The unfolding of an interesting regime, more predictable than before, is well on the cusp of transitioning into a new era of competition law enforcement in India.

Notes

- ¹ Obtained the assent of the President of India on 13 January 2003 after both Houses of the Indian Parliament had passed the Competition Bill.
- ² The Government of India by Notification SO 1198(E) dated 14 October 2003 established the CCI in terms of, section 7 of the Act.
- ³ With effect from 1 September 2009.
- ⁴ Extracted from the Statement of Object and Reasons of the Act.
- ⁵ Section 36(1) read with section 36(2) of the Act.
- ⁶ From 20 May 2009, the CCI was permitted to enforce antitrust disputes relating to anti-competitive agreements and abuse of dominant position of enterprises.
- ⁷ *Brahm Dutt v Union of India and Others* [WP 490 of 2003 before the Supreme Court of India].
- ⁸ The Competition (Amendment) Act 2007 (39 of 2007).
- ⁹ The section 1(3) proviso enables the Government of India to notify different provisions of the Act on different dates.
- ¹⁰ Section 3(3) of the Act.
- ¹¹ Case 29 of 2010 [*BAI v CMA and Others*], a cement cartel case currently sub-judice before the Supreme Court of India, order passed in August 2016.
- ¹² Section 2(b) of the Act: 'agreement includes any arrangement or understanding or action in concert: (i) whether or not, such arrangement, understanding or action is formal or in writing; or (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings'.
- ¹³ *Suo Motu Case No 01 of 2019*.
- ¹⁴ *XYZ v Alphabet Inc and Others*, Order dated 9 November 2020 in Case No. 07 of 2020, see <http://cci.gov.in/sites/default/files/07-of-2020.pdf>;
- ¹⁵ *Kshitiz Arya and Another v Google LLC and Others*, Order dated 22 June 2021 in Case No. 19 of 2020, see <http://cci.gov.in/sites/default/files/19-of-2020.pdf>.

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- ¹⁸ Section 43A of the Act.
- ¹⁹ Section 29 of the Act and regulation 19 of The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011 ('Combination Regulations').
- ²⁰ Section 31 of the Act.
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- ²² Explanation (b) to section 5 of the Competition Act 2002.
- ²³ The Competition Commission of India (Procedure in regard to the transaction of business relating to combination) Amendment Regulations, 2019 vide Notification No. F. No. CCI/CD/Amend/Comb. Regl./2019, dated 13 August 2019.
- ²⁴ The Combination Regulations (see n 19 above) set out the procedure, inter alia, for filing and scrutiny of a merger notification before the CCI.
- ²⁵ *Amazon & Flipkart v Delhi Vyapar Mahasangh*; SLP dismissed in the Supreme Court in August 2021.
- ²⁶ Please visit the website of the CCI at www.cci.gov.in for details of these orders in the section relating to 'Orders' under section 26(1) of the Act.
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Competition Law in the Traditional and Digital World: Examining Anti-Competitive Behaviour and Abuse of Dominant Position

An overarching goal of competition law is to promote economic efficiency. An effective implementation of competition law supports the competitive process and maximises the benefits of competition. Some examples of anti-competitive behaviour by firms which distort or harm competition and the regulatory regimes governing such behaviour are considered in this article.



Introduction: The Role of Competition Law

Competition law is intended to protect and preserve the process of competition from restraints that can impair its functioning and reduce its benefits.¹ It aims to regulate the conduct of businesses by prohibiting firms from engaging in conduct or behaviour which distort or harm competition. It is important that competition is protected as a competitive market maximises economic welfare which, in turn, protects consumers' interests as firms will offer a greater variety of services and products at lower price points. The United Kingdom's ('UK') Department of Trade and Industry had depicted the importance of competition in the economy as follows:²

The importance of competition in an increasingly innovative and globalised economy is clear. Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production.

An Overview of Prohibited Conduct

Examples of prohibited anti-competitive behaviour by firms include cartel conduct, entering into anti-competitive agreements, abusing market power, engaging in exclusive dealings and resale price maintenance. Mergers and acquisitions transactions by firms are also subject to close scrutiny by competition authorities for their potential to substantially lessen competition, create a monopoly or create a greater degree of concentration in the market.

The competition regime in most jurisdictions, including the UK, European Union ('EU'), Hong Kong, Singapore and Malaysia, prohibits firms from indulging in two main forms of anti-competitive behaviour: (1) agreements which have as their object or effect the prevention, restriction or distortion of competition; and (2) conduct amounting to an abuse of a firm's dominant position and/or market power. However, merger controls differ more between competition regimes in each jurisdiction. For example, unlike in the UK, EU and Singapore, in Hong Kong only telecommunications carrier-related mergers (that substantially lessen competition) are prohibited under the Competition Ordinance (Cap 619). In Malaysia, at present, only mergers involving the telecommunications and aviation service sectors are subject to a voluntary notification regime under the Malaysian Aviation Commission Act 2015 (Act 771) and the Communications and Multimedia Act 1998 (Act 588) (read together with the Guidelines on Mergers and Acquisitions issued by the Malaysian Communications and Multimedia Commission).

Competition Law in Traditional Economies: Cartels and Anti-Competitive Agreements

Introduction

One of the main forms of anti-competitive conduct prevalent in the traditional economy are anti-competitive agreements. These are agreements that have the object or effect of restricting competition. Examples of anti-competitive agreements are cartel agreements to fix prices, share markets, restrict output and collusive tendering. A cartel is formed when firms agree to act together or where firms agree to not compete with one another, usually with a view to increase profits. They are seen as one of the most grave and serious violations of competition law as they injure customers by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others.³ Consumers have to



pay more for a certain service or product than they would have had to if there was no such collusion. This increase in transaction price by a cartel is known as an overcharge. An overcharge is the increase in the transfer of income or wealth from buyers to the members of the cartel that occurs as a result of a collusive agreement.⁴ A survey conducted in the United States found that the median cartel overcharge for all types of cartels over all time periods is 25 per cent: 18 per cent for domestic cartels, 32 per cent for international cartels, and 28 per cent for all successful cartels.⁵

In view of the extent and severity of the harm and injury that may be caused to consumers as a result of such practices, it is no surprise that the authorities have generally taken a strong stance against hardcore cartel activity such as price fixing.

Examples

(1) European Union

In July 2016, the European Commission found MAN, Volvo/Renault, Daimler, Iveco, and DAF to have infringed EU antitrust rules and imposed a record fine of €2,926,499,000 on Volvo/Renault, Daimler, Iveco and DAF. The European Commission in imposing the fine took into account the respective companies' sales of medium and heavy trucks in the European Economic Area as well as the serious nature of the infringement, high combined market share of the companies, the geographic scope and duration of the cartel.⁶ MAN was exempted from the fines for revealing the existence of the cartel to the Commission. The Commissioner for competition, Margrethe Vestager, said that 'This is also a clear message to companies that cartels are not accepted.'⁷ In 2017, Scania—which refused to admit liability for its participation in the cartel and partake in the settlement agreement along with MAN, Volvo/Renault, Daimler, Iveco and DAF and as such was investigated under the standard cartel procedure—was fined a total of €880,523,000 by the European Commission.⁸

(2) Malaysia

A notable example of the Malaysian competition authorities' attempt at enforcing the prohibition against agreements that have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services was in 2014 where the Malaysia Competition Commission ('MYCC') found that a collaboration agreement entered into between AirAsia Berhad ('AirAsia') and Malaysian Airline System

Berhad ('MAS') had infringed the prohibition under Section 4 of the Competition Act 2010 on grounds that it had found the collaboration agreement had the object of preventing, restricting or distorting competition by allocating markets (between AirAsia and MAS) and that there was no necessity to prove that the collaboration agreement had any anti-competitive effect. The MYCC proceeded to impose a fine of RM10,000,000 on both AirAsia and MAS.

AirAsia and MAS subsequently appealed to the Competition Appeal Tribunal ('CAT') where the CAT allowed the said appeal. In 2018, the High Court (on MYCC's application for a judicial review of the CAT's decision to the High Court) reversed the CAT's decision and found, *inter alia*, that by reason of the collaboration agreement having set out AirAsia and MAS routes and area of operation and without having to compete with each other as before (and therefore enabling AirAsia and MAS to control the pricing of airline business such as ticket price to the disadvantage of consumers), the collaboration agreement had an anti-competitive object which was prohibited under the Competition Act 2010.⁹ Dissatisfied, AirAsia and MAS then appealed to the Court of Appeal who had in April 2021 set aside the High Court decision and reinstated the CAT's decision.¹⁰ The MYCC subsequently sought leave to appeal the ruling of the Court of Appeal to the Federal Court and the matter is expected to be heard in 2022.

It must be noted that unlike most jurisdictions, the Competition Act 2010 in Malaysia has a deeming provision whereby the existence of a horizontal agreement which has the object to either: (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions; (b) share market or sources of supply; (c) limit or control production, market outlets or market access, technical or technological development or investment; or (d) perform an act of bid rigging, will be sufficient to satisfy the requirement that it has the object of significantly preventing, restricting or distorting competition in any market for goods or services (and will therefore be caught by the prohibition under the Competition Act 2010).

(3) United States

The Department of Justice ('DOJ') announced in 5 November 2019 the formation of the Procurement Collusion Strike Force ('PCSF')¹¹ whose purpose was to lead a national effort to protect taxpayer-funded projects

at the federal, state and local level from antitrust violations and related crimes. A recent example of the PCSF's work in targeting procurement collusion was in 2020 involving a Connecticut insulation contracting company and one of its owners pleading guilty to bid rigging and fraud for conspiring with other insulation contractors to rig bids and engage in other fraud on contracts for installing insulation around pipes and ducts on construction projects at universities, hospitals, and other public and private facilities and there have been five convictions connected to this US\$45,000,000 scheme.¹²

Competition Law in Traditional Economies: Abuse of Dominant Position

Introduction

Competition regimes seek to control the exercise of market power. Market power refers to the ability of a firm (or group of firms) to raise and maintain price above the level that would prevail under competition.¹³ The ability of a firm to raise its prices is usually constrained by competitors and the possibility that its customers can switch to alternative sources of supply. When these constraints are weak, a firm is said to have market power and if the market power is great enough, to be in a position of dominance or monopoly.¹⁴

It must be noted that possession of substantial and/or dominant market power in itself (without abuse of such power) is not a violation of competition law. Only where there is an abuse of a dominant position it is considered a threat to the functioning of the free market.¹⁵ Examples of abusive conduct by firms are, among others, predatory pricing, limitation of production, tying/bundling practices and refusals to deal. Generally, in applying the determining if there is abusive conduct, one must first determine the relevant market, whether the firm or group of firms is in a dominant position and the specific practices that could potentially adversely affect competition. A narrow definition of a 'market' will tend to result in higher market shares for incumbent firms and a greater market share will render it more likely to exercise market power.¹⁶

Examples

(1) European Union

In 2005, the European Commission found that AstraZeneca had committed two abuses of dominant position which

is prohibited under Article 102 of the Treaty on the Functioning of the European Union. In 2010, the General Court of the European Union confirmed the Commission's decision, which considered that AstraZeneca had abused its dominant position. AstraZeneca appealed to the Court of Justice of the European Union ('CJEU'). The CJEU upheld the General Court of the European Union's finding that AstraZeneca had abused its dominant position¹⁷ by supplying misleading information to national patent offices and reiterated that the concept of 'abuse' is an objective concept and that European competition law prohibits a dominant undertaking from eliminating a competitor using other methods than competition on the merits. It further upheld the General Court's finding that an undertaking in a dominant position has a special responsibility to the market under Article 102 of the Treaty on the Functioning of the European Union and cannot use regulatory procedures to make entry of competitors on the market more difficult without a legitimate reason or an objective justification.¹⁸

It is no surprise that the authorities have generally taken a strong stance against hardcore cartel activity such as price fixing.

(2) Malaysia

In February 2021, the MYCC had imposed a financial penalty totalling RM10,302,475.98 fine on Dagang Net Technologies Sdn Bhd ('Dagang Net') for the abuse of its dominant position by engaging in exclusive dealing through the imposition of exclusivity clauses which harmed competition in the market because it prevented software providers from providing similar services to end users (in this case, manufacturers, importers, exporters, freight forwarders and shipping agents) in the upcoming uCustoms system, thereby leaving its competitors at a competitive disadvantage when entering the uCustoms market.¹⁹ Dagang Net is set to appeal against the findings of the MYCC. Dagang Net was held to have infringed section 10(1) of the Competition Act 2010, which prohibits an enterprise from engaging, whether independently or collectively, in any conduct amounting to an abuse of dominant position in any market for goods and services.

Competition Law in Digital Markets

The Rise of Digital Markets

'Digital markets' have been defined as markets where companies develop and apply new technologies to existing businesses or create brand new services using



digital capabilities.²⁰ It has been estimated that global internet traffic in 2022 will exceed all the internet traffic up to 2016.²¹ Digital platforms provide many benefits, but have also gained significant control of consumer data, which confers market power.²² Concerns have been voiced regarding the increased concentration in certain industries, including technology, labour's falling share of income and growing income inequalities and some of these concerns have been related to insufficient competition and/or ineffective competition policies or enforcement.²³

The increasing digitalisation of the economy raises the question of whether the existing approach to competition regulation is sufficient. To this, Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzerin had stated²⁴ that there is no need to rethink the fundamental goals of competition law in the light of the digital 'revolution' and that vigorous competition policy enforcement is still a powerful tool to serve the interests of consumers and the economy as a whole.²⁵ However, they have also acknowledged that the specific characteristics of platforms, digital ecosystems and the data economy will require the current established concepts, doctrines and methodologies to be adapted and refined.²⁶

Challenges to the Competition Regime in a Digital Market

Traditional methods and competition tools used to determine the relevant market, measure market power, scrutinise mergers and assess pro-competitive and anti-competitive effects, may be unsuited to features of digital business models.²⁷ One example of the potential challenges that competition authorities may face is the current approach in competition law which relies heavily on the 'consumer welfare' standard as a tool to measure the benefits or harm caused to consumers in terms of price. Under this framework, practices such as predatory pricing do not come under antitrust scrutiny at first glance since they seem to benefit consumers at the start with the offering of lower prices—however, this may harm consumer welfare as it may lead to an increase in price and decrease in choices later on due to the elimination of competition.²⁸ Price may also not be the most appropriate criterion in competition analysis involving online platforms as many services are offered for free—this is because consumers in fact pay through the provision of personal data and therefore it has been suggested that 'consumer welfare' should be broadened to include other criteria such as consumer privacy and choice, personal data protection, switching costs and the lock-in effects of dominant platforms.²⁹

Another potential challenge that competition authorities may face is in defining the relevant market where it is a unique feature of digital markets that they are often a zero-price market where consumers are not charged for the service and/or product provided. Therefore, application of the long-standing test for determination of a relevant market which is the small but significant non-transitory increase in price may not be suited to delineate these markets. However, it must be noted that zero price markets do not mean that there are no benefits from serving these consumers—they typically subsidise the non-paying side by profits made on a different side of the platform (frequently the advertising side) and also usually derive data from the non-paying side.³⁰ These forms of 'exchange' have facilitated recognition that the zero-price side of a platform can be part of a market.³¹

Anti-Competitive Agreements

An example of anti-competitive behaviour in this new digital ecosystem is the 2016 case where Trod Limited admitted to agreeing with GB eye Limited that they would not undercut each other's prices for posters and frames sold on Amazon Marketplace via Amazon's UK website which is an online retail platform. The agreement was implemented by using automated repricing software which the parties each configured to give effect to the illegal cartel.³² The cartel applied to posters and frames sold by both parties on Amazon Marketplace via Amazon's UK website from 24 March 2011 (at the latest) to 1 July 2015 (at the earliest). Following an investigation by the Competition and Markets Authority ('CMA'), Trod has agreed to accept a fine of £163,371 for taking part in the cartel.³³ Trod was also given a 20 per cent discount to reflect the resource savings to the CMA as a result of Trod's admission and co-operation.

Abuse of Dominant Position

Digital markets pose a challenge to competition authorities in that it is relatively more difficult to assess whether a firm has a dominant position and whether there has been abuse. However, this does not mean that a finding of abusive conduct is unlikely. As an example, in June 2017, the European Commission imposed a record fine on Google in the sum of €2,424,495,000 in light of its finding that Google had abused its dominant position in the market for online general search services in Belgium, Czech Republic, Denmark, Germany, Spain, France, Italy, the Netherlands, Austria, Poland, Sweden, the UK and Norway, by favouring its own comparison

shopping service, a specialised search service over competing comparison shopping services. Dissatisfied, an action was brought by Google and Alphabet against the Commission's decision before the General Court of the European Union, but in November 2021 the General Court of the European Union upheld the fine.³⁴

Recent Developments

UK

Among the proposals made by the Competition and Market Authority Market³⁵ is to introduce a pro-competitive regulatory regime which broadly consists of two parts: (1) a code of conduct whereby platforms deemed to have strategic market status will need to comply with, *inter alia*, the principles of fair trading, trust and transparency and open choices or risk having to pay fines (which the new regulatory body empowered to implement the regulatory functions will have the power to impose);³⁶ and (2) additional 'transformational' interventions under which the new regulatory body empowered to implement the regulatory functions will be able to, among other things, restrict a platform's ability to acquire default search positions, implement measures to increase transparency of fee and transaction data and require sharing of 'click-and-query' data with rival platforms to allow them to improve their algorithms.³⁷

EU

In the EU, the European Commission had initiated an enquiry into the Internet of Things ('IoT') and issued a final report on 20 January 2022.³⁸ One of the main areas of potential concern which was raised by the stakeholders was regarding certain exclusivity and tying practices in relation to voice assistants.³⁹ With regard to the proposed follow-up actions to address such concerns, submissions to the public consultation appear to emphasise the need for enhanced competition law enforcement and regulation in relation to the identified concerns.⁴⁰

Reflection

As may be observed from the developments discussed above, there are further and new questions of law that await resolution by the competition authorities, especially in light of the rise of digital markets. Although the core principles and well-established fundamentals of competition law are here to stay, it remains to be seen the extent to which the authorities will adapt and customise the same in cases involving digital markets.

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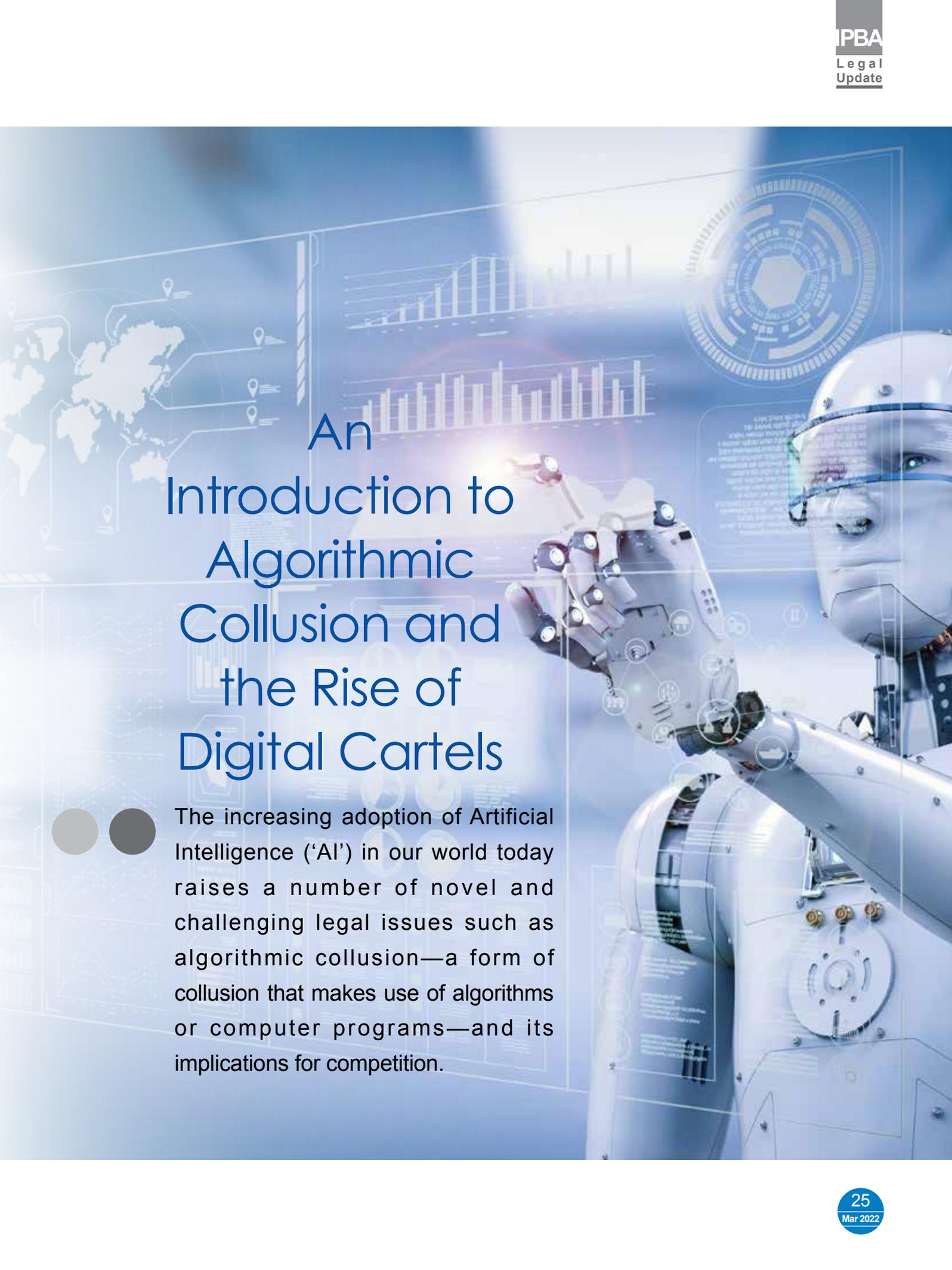
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An Introduction to Algorithmic Collusion and the Rise of Digital Cartels

● ● The increasing adoption of Artificial Intelligence ('AI') in our world today raises a number of novel and challenging legal issues such as algorithmic collusion—a form of collusion that makes use of algorithms or computer programs—and its implications for competition.

Introduction

The use of Artificial Intelligence or AI¹ is becoming more and more prevalent and, without a doubt, is rapidly changing our world. We use AI every time we look for the best route to go to our destination, book our next flight or buy stuff online.² In health care, doctors use it to detect and treat serious diseases like cancer³ or assist in surgeries.⁴ Engineers use AI to develop self-driving cars⁵ while many businesses, especially in the finance and travel industry, use it to make pricing decisions.⁶

Surely, AI brings us a lot of wonderful innovations, but it also raises novel and challenging legal issues. In the field of competition, one issue that has been receiving a lot of attention recently is algorithmic collusion—a form of collusion that makes use of algorithms or computer programs—and its implications for competition. Competition law scholars and policymakers are concerned that as AI develops, smart self-learning algorithms programmed to maximise profits would end up tacitly colluding and creating undetectable digital cartels that are beyond the reach of existing competition law.

Other scholars, however, believe that 'the concerns with respect to algorithmic collusion do not seem to be justified at the moment',⁷ noting several challenges to its feasibility. They argue that it remains unclear whether algorithms increase or decrease the likelihood of collusion, with some even suggesting that the use of algorithms may more likely result in price discrimination rather than collusion. They also point out that studies from experimental economics on tacit collusion and computer science literature on machine learning and algorithmic coordination involving several actors show that the ability to communicate among algorithms is necessary for them to collude, and it is difficult to achieve this at this time.⁸ Some studies show that algorithms may indeed be able to learn to communicate, but only in a very limited way.⁹ Others challenge the assumption underlying much of the literature that similar algorithms with the same strategy will be adopted across different firms, while others argue that the fast emergence of countervailing technologies can in fact undermine collusion by algorithms.

This article hopes to introduce the various issues surrounding the increasing use of (pricing) algorithms and its implications for competition and competition law and to analyse the ongoing debate regarding the feasibility of algorithmic collusion as well as the different measures that scholars have proposed to deal with its antitrust risks.

It begins by providing a brief introduction to algorithms and how they may be used to facilitate collusion. It then presents four challenges to the feasibility of algorithmic collusion and concludes with the proposed measures that scholars have come up with to deal with it.

Algorithms, Pricing Algorithms and Collusion

Algorithms are basically a set of instructions for solving a problem or performing a task.¹⁰ In the case of pricing algorithms, these are instructions on how to determine the price of a product or a service at a particular time on a given set of conditions.

Many industries have resorted to using pricing algorithms to optimise their commercial strategies, lower their production costs and maximise their profits, using personalised and dynamic pricing, among others.¹¹ Using pricing algorithms that take into account competitor pricing, supply and demand, among other things, businesses are able to automatically change prices of their products or services to an optimum amount. If the demand for the product or service is low, pricing algorithms adjust the price accordingly to generate whatever revenue is possible. If the demand is high, they also adjust their price to maximise profits. This has been a common practice in several industries such as hospitality, travel and entertainment.

Consumers, on the other hand, have also resorted to pricing algorithms to improve their purchasing decisions, by comparing prices and quality, predicting market trends and even automating the execution of decisions through 'digital butlers'.¹²

Pricing algorithms offer a lot of benefits for both suppliers and the consuming public, but some believe that they also enable 'new forms of co-ordination that were not observed or even possible before'¹³ or what is now called 'algorithmic collusion'. Collusion is a mode of conduct among firms in a market whose objective is to raise prices to supra-competitive levels to earn higher profits.¹⁴ Firms may collude by agreeing to set minimum prices, limiting their production levels or allocating customers or territories among themselves, allowing them to effectively give each firm a monopoly over some areas, which then leads to higher prices and reduced output.¹⁵

Governments prohibit collusion because it adversely affects consumers and society as a whole. It allows companies to set higher prices to get higher profits,

serves as a barrier to entry and discourages new firms from entering the market. It can also make companies lazy and avoid innovation and efforts to increase their productivity.

Collusion can be horizontal or vertical.¹⁶ A horizontal collusion is an agreement between competitors while a vertical collusion is an agreement between a supplier and retailer that are in a supply relationship with each other. Aside from this classification, economists also usually distinguish between tacit and explicit collusion. Tacit collusion refers to anti-competitive conduct achieved without any express agreement, but which the competitors are able to maintain by recognising their mutual interdependence, while explicit collusion refers to anti-competitive conduct based on express agreements, whether written or oral.¹⁷ Both tacit and express collusion result in harm to consumers, however, since competition laws generally prohibit anti-competitive agreements and not collusion per se, tacit collusion falls outside its scope.

Between tacit and explicit collusion, a grey area exists—often seen in concentrated markets with very few players—where firms are able to coordinate without an express agreement. To address this situation, some jurisdictions have broadened the concept of 'agreement' by inferring its existence even when there is no express agreement as long as there is proof of parallel conduct together with other factors such as information exchanges, showing that there was indeed coordination among them. In the case of the EU courts, they use the concept of 'concerted practice', which allows them to take on anti-competitive conduct even when it does not amount to an agreement.

Some believe that algorithms expand this grey area between illegal explicit collusion and legal tacit collusion and make it easier and more likely for firms to collude, especially those in the digital markets.

Pricing Algorithms Facilitating Collusion

In their book, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*,¹⁸ Ariel Ezrachi and Maurice Stucke identified four scenarios algorithms can be used to facilitate collusion: (1) Messenger; (2) Hub and Spoke; (3) Predictable Agent; and (4) Digital Eye.¹⁹

The Messenger refers to a classic digital cartel. In this scenario, humans agree to collude and machines execute the collusion, acting as mere intermediaries or messengers. However, algorithms in this scenario are a mere extension of the human will. Here, members of the cartel use the algorithm to effectively implement and monitor their collusion by collecting data concerning a rival's business choices, screening information to look for any possible divergence and implementing immediate retaliations, among other things.²⁰ The illegality inheres in the agreement or collusion among humans and so, regardless of whether algorithms were used to facilitate the collusion, competition enforcers can rely on the case law involving an illicit agreement or concept of 'object' or 'per se' illegality to establish violations and impose fines on the companies.²¹ The legal concept of agreement can be applied straightforwardly and prosecutors with sufficient evidence will have no difficulty condemning the use of machines to facilitate the cartel.

The Hub and Spoke emerges when 'sellers use the same algorithm or the same data pool to determine price'.²² An industry-wide use of a single algorithm, which competitors use to determine the market price or react to market changes, would result in a de facto hub-and-spoke structure as the market behaviour of the competitors aligns due to the use of a similar 'brain' to determine their price strategy. There are two possible situations when algorithms can perform the hub function. The first one involves the use of an upstream supplier's pricing algorithm by several competitors and another would be when competitors outsource their pricing to a third-party vendor. Both situations can lead to the use of the same algorithm throughout the industry, in which the algorithm serves as a hub that would result in the same pricing strategy for all.

The Predictable Agent occurs when humans unilaterally design the algorithm to deliver predictable outcomes and react in a given way to changing market conditions.²³ Unlike the first two scenarios, there is no agreement among competitors, but each of them is developing algorithms unilaterally, with awareness of likely developments of other algorithms used by others.²⁴ In this case, an industry-wide adoption of algorithms may lead to tacit collusion and higher prices.²⁵

Governments prohibit collusion because it adversely affects consumers and society as a whole.

Tacit algorithmic collusion can only happen under certain market conditions. First, it can happen in markets with very few players involving the same products where the algorithms can accurately observe the price and other important terms of the sale.²⁶ As firms can more easily observe their rivals' pricing, other relevant terms of sale and deviations from current equilibrium, tacit collusion becomes more sustainable. Second, a credible deterrent mechanism once deviation is detected must exist.²⁷ Algorithms provide this credible deterrent mechanism as it can quickly detect, punish and deprive discounting rivals of any significant profits from deviation.²⁸ Third, current and potential competitors not part of the coordination, as well as the customers, should not be able to jeopardise the results expected from the coordination.²⁹ The fact that algorithms do not exhibit human biases makes the tacit collusion even more stable.

To illustrate how algorithmic tacit collusion may arise, Ezrachi and Stucke cite three studies in Chile,³⁰ Germany³¹ and Perth, Australia³² which all involved petrol prices that were made available online. The study in Chile found that posting petrol prices online weakened competition and even increased the petrol stations' profits by 10 per cent on average. The same thing happened in Germany where petrol prices further increased, instead of decreased, after petrol stations were required to report any changes in price for fuel in 'real time'. The petrol price transparency program in Perth—although it took a longer time—likewise yielded the same results.

Reminiscent of science fiction novels,³³ the Digital Eye arises when algorithms become so complex and sophisticated that they start to learn by themselves. Two technological advancements can lead to this scenario. The first involves the ability of computers to process high volumes of data in real time to achieve a God-like view of the marketplace and, the second, is the increasing sophistication of algorithms. Together they can 'expand tacit collusion beyond price, beyond oligopolistic markets, and beyond easy detection'.³⁴

Unlike the first three scenarios, the algorithms in the fourth scenario are neither used to help humans collude nor are they employed knowing that tacit collusion was the likely outcome. Here, not only is the legal concept of agreement but also the concept of intent absent. While algorithm developers foresee tacit collusion as one of many possible consequences, they do not intend

to attain it. They could not predict how likely, when or how long it is that the use of algorithms throughout the industry would result in tacit collusion and would therefore have no clue whether the algorithms have been tacitly colluding. The algorithms are not programmed to collude, but given an objective to maximise profits and optimise performance, these self-learning algorithms can reach a tacitly coordinated outcome even without its human owners intending to collude.

The third and last scenarios present new challenges because under existing laws tacit collusion is not considered illegal.³⁵ Even though tacit collusion may have the same effects as explicit collusion, it does not trigger antitrust intervention because competition law recognises it as a rational reaction by competitors to market dynamics. Moreover, proof of agreement is usually required in most jurisdictions to be liable for a violation of anti-competitive laws. Since algorithmic tacit collusion is not a product of any agreement to begin with, such proof cannot be obtained, especially when we consider that the use of superior algorithms that could lead to maximum profit is the rational choice. Because of this, competition authorities may not be able to effectively confront algorithmic tacit collusion.



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Four Challenges to Algorithmic Collusion

Divergent Views

There is a general consensus that algorithms in the first two scenarios—the Messenger and the Hub and Spoke—could facilitate price fixing³⁶ and that current antitrust laws can, in fact, sufficiently address them. However, there are diverging views when it comes to the third and fourth scenarios.

The views are wide-ranging and from these views, four challenges to the feasibility of these scenarios can be extracted, namely: (1) the Ambivalent Nature of Algorithms; (2) the Communication Dilemma; (3) the Fallacy of Algorithmic Homogeneity; and (4) the Rise of Algorithmic Consumers and Other Countervailing Strategies.

Ambivalent Nature of Algorithms

The first challenge—the Ambivalent Nature of Algorithms—arises from the fact that it remains unclear whether algorithms increase or decrease the likelihood of collusion.³⁷ While there are various scenarios in which algorithms could be used to sustain collusion, they can also be used to increase competition by making

the market more transparent, developing new and improving existing products. Firms' ability to make new products using algorithms has also promoted market entry and this has compelled companies to innovate, thereby resulting in dynamic efficiencies.³⁸ Likewise, algorithms encourage static efficiencies by lowering production cost, improving product quality and resource allocation, among others.³⁹

The Communication Dilemma

The second challenge—the Communication Dilemma—refutes the assumption that it is easy for autonomous price setting algorithms to behave in a coordinated way as proponents of algorithmic collusion suggest. The economic literature on tacit collusion and computer science literature on machine learning and algorithmic coordination in a multi-agent setting indicate that: (1) it is generally not easy to achieve a tacitly collusive, profit maximising outcome; (2) communication between agents is of vital importance for a collusive outcome to be reached if there are more than two firms in a market; and (3) coordination is in general not easy to achieve and depends strongly on the specific setting that is used and also tends to become more difficult when the complexity of the algorithms increases—the more sophisticated the algorithms are the less probable collusion becomes.⁴⁰

The Fallacy of Algorithmic Homogeneity

The third challenge—the Fallacy of Algorithmic Homogeneity—assails the idea that everyone would adopt the same kind of algorithm that inevitably promotes collusion. It is argued that the goal of profit maximisation does not necessarily lead to collusion. Competitive pricing strategies may yield better results in a digital environment where information is collected and used to customise products.⁴¹ Using personalised information, algorithms may more likely adopt predatory pricing or other exclusionary conduct as an optimum strategy to realise long-term profit rather than collusion. Also, algorithmic asymmetry or differences in algorithms should be the baseline hypothesis for antitrust policy⁴² because firms will continue to improve their algorithms or the algorithms themselves will change based on their learning processes, resulting in algorithmic heterogeneity.⁴³ Under the regime of algorithmic heterogeneity, a larger range of competitive outcomes becomes plausible. Certainly, tacit collusion becomes more difficult when competitors display asymmetries in costs, investments, structure or market share.



The Rise of Algorithmic Consumers and Other Countervailing Strategies

Finally, the last challenge—the Rise of Algorithmic Consumers and Other Countervailing Strategies—can prevent, if not totally eliminate, algorithmic collusion. Algorithmic consumers or digital butlers⁴⁴ that consumers use to make and execute decisions can counteract some negative welfare effects of algorithms used by suppliers, by creating buyer power, using decisional parameters to avoid harm and customer anonymisation.⁴⁵ An algorithmic consumer that has a sufficiently large number of users or that coordinates its conduct with other algorithmic consumers can make transactions less frequent and small and therefore incentivise suppliers to deviate from the status quo. Likewise, algorithmic consumers can be programmed to include decisional parameters designed to eliminate or at least reduce harm to consumers. An algorithm, for instance, might be able to recognise the coordination among competitors and refrain from doing business with them until they lower their prices⁴⁶ or it can be programmed to always buy some portion of its goods from at least one new source, bolstering incentives for new suppliers to enter the market.

Other types of 'disruptive algorithms' and countermeasures such as masking⁴⁷ and data perturbation⁴⁸ can also neutralise the negative effects of algorithmic collusion.⁴⁹ Even government agencies are using algorithms nowadays, especially for detecting crime.⁵⁰ In the US, for example, more data-driven approaches to detect patterns of criminal behaviour are being developed.⁵¹ Collaborating with crime analysts, PhD students from MIT have created 'Series Finder', an algorithm that assists the police to detect series of crimes and identify likely suspects by using past criminal data to identify burglary patterns.⁵²

The development of all these countermeasures will exacerbate the technical challenges to algorithmic collusion or at the very least make it easier to detect and punish.

Changes in Competition Law Approaches

Amidst the diverging views on algorithmic collusion, almost everyone seems to agree that there is a need to prepare for the possibility that self-learning algorithms may eventually tacitly collude. Some argue that the existing laws are broad enough to cover instances of

algorithmic collusion while others propose developing a special Rule-of-Reason. Others suggest the adoption of new institutional systems, specific regulatory measures, as well as market-based solutions that companies themselves can undertake.

Widening the Old Net

One of the challenges that algorithmic collusion presents is that there is insufficient evidence of an 'agreement' or of an intent to change market dynamics among competitors. However, Jan Blockx argues that EU antitrust law does not absolutely require evidence of intent 'and that the standard to find horizontal collusion in the sense of Article 101 TFEU is fairly low',⁵³ such that it can cover algorithms, self-learning or not. Blockx explains that, while the language of European antitrust law is undoubtedly anthropocentric,⁵⁴ European courts have actually focused their analysis of the notion of agreement on the 'expressions' of the parties rather than 'wills' or 'intentions'.⁵⁵ For there to be an 'agreement' in the sense of Article 101 TFEU, it is enough for one party to send an invitation to collude to the other party⁵⁶ and that the other party tacitly accepts that invitation. Also, even if there is no invitation to collude, the mere communication of commercially sensitive information from one party to another would still amount to a violation under Article 101 TFEU as a 'concerted practice'.⁵⁷

Illegal Tacit Agreements and the Rule-of-Reason

Michal Gal takes a more careful approach than Blockx and uses the concept of 'plus factors' and argues that while tacit collusion or conscious parallelism per se does not violate competition law because of the absence of agreement, certain ways of using algorithms or other practices that in combination with algorithms facilitate coordination may be considered illegal.⁵⁸ One such 'plus factor' is facilitating practices, which 'are positive, avoidable actions that allow competitors to more easily and effectively achieve coordination by overcoming impediments to coordination, in a way that goes beyond mere interdependence'.⁵⁹ Gal believes that the algorithm's ability to facilitate coordination should be balanced against its pro-competitive effects and therefore suggests to subject algorithms to a rule of reason analysis to determine whether their use should be prohibited or not.⁶⁰

New Net and Antitrust Tools

Others take a step further and suggest the adoption of new institutions and creation of new tools such as the

establishment of a comprehensive institutional system for handling various concerns, including competition law concerns, presented by algorithms,⁶¹ requiring operators to disclose their source codes to ensure greater transparency and accountability,⁶² auditing and sandbox testing,⁶³ allowing firms to adopt algorithms that would conceal their source code,⁶⁴ adopting a deceleration process, in which there would be a time delay to incentivise those who wish to earn profits by lowering their prices.⁶⁵

However, many of these solutions appear to be onerous, hard to enforce and generally inappropriate for digital marketplaces. Disclosing source codes of pricing algorithms is quite unthinkable because they represent the firms' price-making policies and strategies, which they would be very unwilling to share with their rivals and the general public. Furthermore, such a requirement would produce unexpected issues with intellectual property law and would also significantly decrease the incentive for companies to innovate.⁶⁶

Auditing or sandbox testing may also prove ineffective, especially deep-learning algorithms, since (1) these algorithms are not necessarily designed to collude nor instructed to collude, but rather to maximise profit; (2) auditing will unlikely catch up with the development of the industry considering particularly the self-learning nature of algorithms; and (3) it may be difficult to stop algorithms from ignoring publicly available information.⁶⁷

Concealing the source codes of algorithms and the deceleration process both amount to a direct regulatory intervention on technological development and would most likely result in drawbacks to the fast-developing AI landscape. Too early or hasty intervention would greatly endanger innovation, especially since there has been no conclusive evidence of either the collusive impacts of algorithms or the effectiveness of these solutions.

Market-Based Solutions

Finally, businesses themselves can take practical solutions to avoid algorithmic collusion such as compliance by design⁶⁸ and developing 'disruptive algorithms' to neutralise the collusive effects of other algorithms or help authorities monitor and detect such collusive behaviour.

Conclusion

We are still in the early days in the development of AI and its application to pricing algorithms, but with the current

progress of AI research, it is very likely that the day may come when algorithms may in fact eventually learn to coordinate and behave in a collusive way without any human intervention. Thus, despite the uncertainty of the collusive outcome of algorithms today, it is important for us to keep a close watch and start thinking of solutions on how to prevent or deal with such possibility. However, any measure should be carefully examined and should be grounded on empirical studies so as not to thwart innovation in AI technologies.

Notes

¹ AI is a set of algorithms that display human-like capabilities such as reasoning, learning, planning and even creativity.

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³ N Hemsöth (2016), *The Next Wave of Deep Learning Applications*, *The Next Platform*, available at www.nextplatform.com/2016/09/14/next-wave-deep-learning-applications/ (accessed on 26 January 2022).

⁴ See Intuitive Surgical's website available at www.intuitive.com/en-us/products-and-services/da-vinci (accessed on 26 January 2022).

⁵ See D Spencer (2018), *The Road to the Future: A Regulatory Regime for the Rise of the Robot Cars*, 42 *Wm. & Mary Envtl. L. & Pol'y Rev.* 647.

⁶ S Mehra (2015), *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, *Minnesota Law Review*, Vol 100, Forthcoming; Temple University Legal Studies Research Paper No. 2015-15 at p 1343, available at <https://ssrn.com/abstract=2576341> (accessed on 26 January 2022).

⁷ U Schwalbe (2018), *Algorithms, Machine Learning, and Collusion* (1 June 2018) at p 3, available at <https://ssrn.com/abstract=3232631> (accessed on 26 January 2022).

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Id.*, p 7.

¹¹ OECD (2017), *Algorithms and Collusion*, Background Paper prepared by the Secretariat, at p 9, available at [https://one.oecd.org/document/DAF/COMP\(2017\)4/en/pdf](https://one.oecd.org/document/DAF/COMP(2017)4/en/pdf) (accessed on 26 January 2022). See also M Gal and N Elkin-Koren, *Algorithmic Consumers* (2017) 30 *HARV. J. L. & TECH.* 309 at p 336, available at <https://jolt.law.harvard.edu/assets/articlePDFs/v30/30HarvJLTech309.pdf> (accessed on 26 January 2022).

¹² OECD (2017), n 11 above, pp 14–15.

¹³ *Id.*, p 19.

¹⁴ OECD (1993), *Glossary of Industrial Organisation Economics and Competition*, compiled by RS Khemani and DM Shapiro, commissioned by the OECD, available at www.oecd.org/regreform/sectors/2376087.pdf (accessed on 26 January 2022).

¹⁵ L Kaplow and C Shapiro (2007), *Antitrust*, *Harvard Law and Economics Discussion Paper No. 575*, at p 23, available at <https://ssrn.com/abstract=961264> (accessed on 26 January 2022).

¹⁶ S Van Uytsel (2018), *Artificial Intelligence and Collusion: A Literature Overview*, In: M Corrales, M Fenwick, N Forgó (eds) *Robotics, AI and the Future of Law. Perspectives in Law, Business and Innovation*. Springer, Singapore, available at https://doi.org/10.1007/978-981-13-2874-9_7.

¹⁷ R Whish and D Bailey (2015), *Competition Law*, 8th Edn (Oxford University Press), p 597.

¹⁸ A Ezrachi and M Stucke (2016), *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*, *Harvard University Press*, at p 233.

¹⁹ Other scholars alternatively call these: (1) the classic digital cartel; (2) inadvertent hub-and-spoke; (3) tacit algorithmic collusion; and (4) dystopian virtual reality, respectively: see N Colombo (2018), *Virtual Competition: Human Liability Vis-à-Vis Artificial Intelligence's Anti-competitive Behaviours*, 2 *EUR. COMPETITION & REG. L. REV.* 11 at pp 12–14.

²⁰ See n 11 above, p 24.

- ²¹ A Ezrachi and M Stucke (2016), n 18 above, p 42.
- ²² A Ezrachi and M Stucke (2017), Artificial Intelligence & Collusion: When Computers Inhibit Competition (8 April 2015). University of Illinois Law Review, Vol 2017, 2017 at p 1787; Oxford Legal Studies Research Paper No. 18/2015; University of Tennessee Legal Studies Research Paper No. 267, available at <https://ssrn.com/abstract=2591874> (accessed on 26 January 2022).
- ²³ A Ezrachi and M Stucke (2016), n 22 above, p 1783.
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- ²⁵ S Megregian et al., EU Commissioner Warns Companies of Potentially Unlawful Use of Pricing Algorithms, NAT'L L. REV. (31 March 2017), available at www.natllawreview.com/article/eu-commissioner-warns-companies-potentially-unlawful-use-pricing-algorithms (accessed on 26 January 2022).
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- ²⁹ See n 26 above.
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- ³³ N Colombo (2018), n 19, p 14.
- ³⁴ A Ezrachi and M Stucke (2016), n 18 above, p 71.
- ³⁵ Id., p 66.
- ³⁶ U Schwalbe (2018), n 7 above; see also A Ezrachi and M Stucke (2018), Sustainable and Unchallenged Algorithmic Tacit Collusion, University of Tennessee Legal Studies Research Paper No. 366; Oxford Legal Studies Research Paper No. 16/2019, available at <https://ssrn.com/abstract=3282235> (accessed on 26 January 2022).
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- ³⁹ See OECD (2017), n 11 above, pp 12–15.
- ⁴⁰ Ibid, p 17.
- ⁴¹ M Dolmans (2017), 'Artificial Intelligence and the Future of Competition Law—Further Thoughts' (reaction to Prof. Ariel Ezrachi), presentation at the GCLC Lunch Talk: Algorithms and Markets: Virtual or Virtuous Competition? pp 8–9,).
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- ⁴⁴ M Gal and N Elkin-Koren, Algorithmic Consumers, (2017), n 11 above.
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- ⁵⁵ J Blockx. (2017), n 53 above, p 4.
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- ⁶⁰ Ibid, p 39.
- ⁶¹ OECD, Big Data: Bringing Competition Policy to the Digital Era—Note by Annabelle Gawer (2017) at p 16, available at [https://one.oecd.org/document/DAF/COMP/WD\(2016\)74/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2016)74/en/pdf) (accessed on 26 January 2022).
- ⁶² See Scherer's discussion of 'sunshine laws' in M Scherer (2016), Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies, Harvard Journal of Law & Technology, Vol 29, Number 2, Spring 2016, at p 399, available at <https://ssrn.com/abstract=2609777> (accessed on 26 January, 2022).
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- ⁶⁶ Ibid.
- ⁶⁷ A Ezrachi and M Stucke (2016), n 18 above, pp 230–231.
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What Are the Rules of Counteracting Anti-Competitive Practices in Force in the Polish Legal System?

The purpose of this article is to briefly guide readers on the basic principles of the prevention of anti-competitive practices in Poland. These issues are gaining importance both globally and in Poland. This is evidenced in particular by the growing number of cases initiated by the Polish authorities, as well as by the amount of fines imposed on companies, but also on persons holding executive positions.



One of the most essential elements of a free market economy is competitiveness. In Poland, the principles of concentration control are regulated in the Act on Competition and Consumer Protection of 16 February 2007. The authority authorised to undertake actions aimed at detecting and combating violations of the competition rules specified in the Act is the President of the Office of Competition and Consumer Protection.

In the modern world, one of the most serious threats to fair and equal competition among companies is the capture of a significant portion of the market by one of them. A company in the course of business may want to use its position to limit or eliminate other competition and, as a result of such actions, to increase its position in the market. The task of the state and its authorities is to prevent or eliminate the effects of actions detrimental to competition and practices that violate the collective interests of consumers, which is why antitrust law prohibits, for example, the abuse of a dominant position.

Under the Polish Competition and Consumer Protection Act, it is prohibited to enter into agreements that have as their object or effect the elimination, restriction or otherwise prejudice competition on a relevant market. The purpose of an agreement should be understood as

the will of its participants expressed in the content of a specific document, as well as what the parties to the agreement have not expressly stated in the agreement, but intend to achieve. According to the information provided by the President of the Office for Competition and Consumer Protection, restrictive agreements may take the form of horizontal agreements (cartels) concluded between competitors, that is, companies operating at the same level of trade, for example, manufacturer–manufacturer or vertical agreements concluded between companies operating at different levels of trade, for example, manufacturer–seller.

In view of the legal provisions, agreements are prohibited which consist in particular of provisions on fixing prices and other conditions for the purchase or sale of goods, limiting or controlling production or applying, in similar agreements with third parties, onerous or non-uniform contractual terms creating different conditions of competition for those parties. Also prohibited are agreements that make the conclusion of a contract contingent upon the other party's acceptance or performance of some other consideration, that has no factual or customary connection with the subject matter of the contract, as well as agreements limiting access to the market or eliminating from the market companies not covered by the agreement and agreements covering agreement between companies participating in the tender or between those companies and the company being the organiser of the tender on the conditions of submitting offers, in particular the scope of work or the price.

The ban on concluding anti-competitive agreements does not apply to competitors if their aggregate share in the relevant market affected by the agreement does not exceed 5 per cent and to companies who are not competitors if the share of none of them in the relevant market affected by the agreement does not exceed 10 per cent.

In addition, agreements which at the same time contribute to the improvement of production, distribution of goods or to technical or economic progress, are likely to provide the buyer or user with a fair share of the benefits arising from the agreements or do not create opportunities for those undertakings to eliminate competition in the relevant market for a substantial part of specific goods, are exempt from the prohibition on anti-competitive agreements. However, the company must remember that the onus is on the

company to prove the grounds used to exempt the agreements in question.

But what happens if a business fails to comply with the prohibition on such agreements? Companies that conclude agreements restricting competition are threatened with a financial penalty amounting to 10 per cent of the company's turnover generated in the year preceding the issuance of a decision stating the use of such practices. It should be remembered that the lack of awareness of the agreement in question does not exempt the trader from liability.

Internationally, consumer law violations continue to increase. In 2020, the President of the Office of Competition and Consumer Protection in Poland issued more than 1,000 competition and consumer protection decisions preceded by a properly conducted investigation of the case, imposing more than PLN30 billion in penalties for dishonest companies.

A fine of PLN8 million has been imposed on the telephone operator TeleGo for misleading consumers by not providing them with full and fair information about the operator with whom they are signing a contract and the purpose of the visit and by impersonating an existing operator that customers already trust in order to gain new customers. The company Kaufland Polska Markets was also fined over PLN124 million for requiring suppliers to reduce the price of agricultural and food products after their sale, unfairly exploiting its contractual advantage and misleading consumers as to the country of origin of the vegetables. However, the largest penalty to date, amounting to over PLN723 million, was imposed on Jerenimo Martins Polska, which, as it was established in the course of the proceedings, used unfair discounts towards suppliers of products, mainly fruit and vegetables.

When talking about imposing penalties on individual companies, keep in mind that a manager who, in the exercise of his or her function, during the time of the asserted violation of those prohibitions, intentionally permitted by his or her act or omission the violation of the said prohibitions by that company, may also be subject to liability. Indeed, under the provisions of the Act, a manager may be subject to a monetary penalty of up to PLN2 million.

As we have read in the Office's explanations regarding the determination of fines for companies in cases

related to violations of the ban on restrictive competition practices, the size of the fine depends on the potential impact of the violation on the market, that is, in simpler terms, the greater the potential severity of the negative consequences associated with the violation or the greater the benefit to be derived by the business, the higher the penalty. The President of the Office will first set the basic amount of the monetary penalty and then adjust the amount by taking into account further grounds for imposing an appropriate monetary penalty to the violation committed, taking into account, among other things, the nature of the violation, the degree of influence of the manager on the violation, aggravating and mitigating circumstances, the duration of the violation or the maximum penalty. Aggravating circumstances may include acting as an organiser of the restrictive agreement, significant benefits received by the manager, coercion or pressure and having previously committed a similar infringement. On the other hand, mitigating circumstances include acting under duress, contributing to for the trader to voluntarily remedy the infringement, contribution to abandon on one's own initiative the prohibited practice before or immediately after commencing the proceedings, to take action on one's own initiative to stop the infringement or remove its effects or to cooperate with the President of the Office during the proceedings.

After taking these factors into account, the President, in determining the amount of the penalty, may reduce it or increase it by 50 per cent. A business that has entered into a restrictive covenant, under the 'leniency program', may apply for full immunity or a reduction in the fine if it admits to participating in the covenant and provides the Authority with information and evidence demonstrating the practice.

For the first time, in 2020, the President of the Office issued decisions imposing financial sanctions on managers personally responsible for prohibited agreements. The first ruling concerned market sharing, price fixing and bid rigging in the Warsaw heat market. The total fines amounted to nearly PLN120 million and were imposed on companies from the Veolia group and the person managing in Veolia Energia Warsaw. The sanctions

were avoided by entities from the PGNiG Group, which decided to cooperate with the Office under the aforementioned leniency program. The second decision involving penalties for managers concerned collusion between leading fitness chains in Poland. The total sanctions imposed on the companies by the President of the Office of Competition and Consumer Protection amounted to over PLN32 million and, on the managers, approximately PLN800,000.

At this point, it is worth mentioning that the Office of Competition and Consumer Protection does not recognise an anti-competitive agreement permitted imitation, which consists of the company's self-adjustment to changing market conditions, in particular to the behaviour of competitors (for example, observing the pricing policies of direct competitors and adjusting its sales offerings accordingly).

The
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The Competition and Consumer Protection Act, in addition to prohibiting anti-competitive agreements, also prohibits practices that restrict competition. A practice restricting competition may take a unilateral form through abuse by a company of its dominant position on a given relevant market, that is, with considerable market power, leading to distortion of competition on the market. The prohibition on abuse of a dominant position is absolute. It is assumed that a company has a dominant position if its share in the relevant market exceeds 40 per cent. Under the Act, abuse of a dominant position consists of, in particular, imposing unfair prices (for example, excessive or abnormally low prices, distant payment terms), limiting output (for example, withdrawing a particular product or range of products from production in order to artificially inflate prices), tying arrangements or preventing the conditions necessary for the emergence or development of competition (for example, fixing undervalued prices to eliminate competition).

The decision to recognise a practice as restrictive of competition is issued by the President of the Office of Competition ordering to discontinue the practice that violates the prohibitions. The President has the possibility, in order to cease the practice or remove its effects, to apply measures consisting, for example, of licensing

intellectual property rights on non-discriminatory terms, allowing access to certain infrastructure on non-discriminatory terms and modifying the contract or providing other entities with certain products or services on non-discriminatory terms.

An example of abuse of dominant market position by a company is the situation of the postal operator, Poczta Polska, which was obliged by the President of the Office to change its market behaviour. The deficiencies related to the need for the contractor to provide the Polish Post Office with commercial information about the customers for whom it was performing the service. The Office also noted the lack of a fixed price list for services. Pricing was conducted on a case-by-case basis, which meant that an independent postal contractor could not offer an instant quote for postal services to its customers. This may have adversely affected its attractiveness as a trading partner. The decision of the President of the Office for Competition and Consumer Protection is binding on the company, which means that Poczta Polska must immediately cease the monopolistic practices, but the President of the Office has not decided to impose a fine on the operator.

Recently, the President of the Office also fined NTIM, which promoted the rockwall investments platform in Poland, on which the Shield program, which is a banned pyramid promotional system, operated. Its board members who intentionally allowed the violations also received sanctions. During the investigation it was found that consumers were persuaded to pay money into projects that promised benefits dependent primarily on the introduction of new people into the system. The total fine was over PLN270,000.

Several years ago, Telekomunikacja Polska (now Orange Polska) was fined €127.5 million for abusing its dominant position in the broadband internet market. As the notices read, Orange was penalised for offering alternative operators unreasonable terms in broadband and unbundled local loop access agreements, delaying the process of negotiating access agreements to products, or restricting access to its network and subscriber lines.

Internationally, the highest penalty for abuse of a dominant position to date in the digital world was received by Google's platform. The EC fined Google €2.42 billion in connection with this violation, which was accused of favouring its own price comparison service on its general results pages through more favourable

presentation and positioning, while degrading results from competing comparison sites through ranking algorithms.

It is worth emphasising that a characteristic feature of all practices consisting in abuse of a dominant position is that they would not exist if the dominant company did not use its market power.

It is well known that entities operating in digital markets use network effects to monopolise markets, limiting the development of competitors or companies operating using services provided by these entities. It is reasonable to assume that digital giants who manage digital platforms and have incomparably more user data may be able to shift their market power to markets related to their services, and thus limit the growth of smaller companies.

Thus, steps to guarantee fair competition rules and strengthen consumer protection online seem justified, particularly as the global situation related to the COVID-19 Pandemic has resulted in an unprecedented increase in interest in purchasing through online sales platforms and processes for digital advertising are also unclear to the recipients themselves—users often don't know why they are being shown certain content and on what basis it was tailored to them.

In the Polish legal system, one of the forms of protection against the use of unfair competition techniques among consumers is the need to obtain the consent of the President of the Office for a so-called concentration. According to the literature, a concentration is an economic activity consisting in the acquisition of assets and liabilities of companies participating in it. In practice, concentration brings about a permanent change in control of the companies involved. An acquisition or merger of companies requires, in certain cases, the consent of the President of the Office of Competition of the final sale agreement for the shares in the company to be sold which has to be signed before the concentration is effected, that is, before the final sale agreement for the shares in the company to be sold is signed. The President of the Office grants such consent if the transaction will not result in significant organic competition, in particular the transaction will not lead to the creation or strengthening of a dominant position of its participants.

The President of the Office gives his consent for the implementation of the concentration or may issue a decision provided that certain conditions are met. If

the President issues a negative decision, it will lead to a fruitless end to the long-standing transaction negotiations between the parties. The issued decisions expire if within two years from the date of their issuance the companies do not execute the planned concentration, nor do they submit a motion for extending the deadline.

In Poland, the Act does not provide a definition of a legal concentration of enterprises, but only provides a list of its forms, such as the merger of two or more independent companies, the assumption of direct or indirect control over one or more companies by one or more companies through the purchase or acquisition of shares, other securities, stakes or in any other manner, or the creation of a joint venture by companies, as well as the acquisition by the trader of part of the property of another trader, if the turnover realised by that property in either of the two fiscal years preceding the filing exceeded equivalent of €10 million on the territory of the Republic of Poland.

Most importantly, an intention of concentration is subject to notification to the President of the Office if the total turnover in the financial year preceding the year of notification realised by all companies participating in the concentration exceeded the equivalent of €1 billion worldwide or the equivalent of €50 million in Poland. The intention of concentration consisting in acquisition of control is not subject to notification if the turnover in Poland of the company, over which the control is taken, did not exceed the equivalent of €10 million in any of the two years preceding the planned transaction.

With the above in mind, it should be remembered that a notification of an intended concentration should be made with utmost care, fairly and honestly, while the transaction itself should take place only after it has been approved. The President of the Office may overrule decisions if they were based on unreliable information for which the companies involved are responsible in the concentration or if the companies do not meet certain conditions.

Among the decisions of the President of the Office granting consent for the acquisition of companies, one may distinguish the consent the Commission took into consideration the market shares of the merging companies, the impact on competition and other factors prescribed by the anti-trust law and concluded that the transactions do not threaten competition in any of the markets under scrutiny.

The President of the Office also decided to impose a penalty for building a gas pipeline without the required consent. The President imposed more than PLN9 billion in fines on Gazprom and more than PLN234 million on the five other companies involved in the venture.

Both Poland and other European Union countries are obliged to comply with international regulations in addition to their national laws. All companies must bear in mind the prohibition on practices that violate the collective interests of consumers, whether in terms of entering into restrictive agreements covering all types of arrangements between companies or attempts to take a dominant position on the market. A practice infringing a collective consumer interest is any behaviour of a company contrary to the law or morality, in particular infringement of the obligation to provide consumers with fair, truthful and complete information, as well as unfair market practices or acts of unfair competition. As mentioned earlier, neither the mere possession of a dominant position nor the taking of actions to obtain it is prohibited, but the law prohibits going beyond predetermined norms. State authorities should, according to their jurisdiction and competence, implement legal projects necessary to ensure the proper functioning of market mechanisms and competitiveness in the economy operating within the single European market.

Notes

¹ The author acknowledges the substantial contributions by Tanya Tang, Chief Economist and Policy Advisor, Rajah & Tann Singapore LLP. Tanya has over 15 years of public policy and regulatory experience, within government and as a regulatory consultant.



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Anti-Competitive Agreements and Abuse of Dominance: Parallels Between Brick & Mortar and E-World: A Look at Singapore

Competition law is a business law that seeks to ensure fair competition in all markets across different types of business operations, whether in brick and mortar or in the digital world. With or without COVID-19, technology has been amid us for some time now resulting in the sprouting of not just ecommerce platforms, but also a varying number of online businesses that offer both products and services. This article looks at recent trends in relation to anti-competitive and abuse of dominance concerns as it applies to the digital markets, showing parallels with the brick-and-mortar world. The article focuses on Singapore, but additionally looks at a comparison against enforcement of abuse of dominance in the traditional world.



Introduction

Competition law is a business law that seeks to ensure fair competition in all markets across different types of business operations. Business undertakings and the way businesses conduct their affairs have evolved over the years, and undoubtedly with fervour in recent years, least of all because of COVID-19.

With or without COVID-19, technology has been amid us for some time now resulting in the sprouting of not just ecommerce platforms, but also a varying number of online businesses that offer both products and services. COVID-19 somewhat accelerated this growth as physical movement was restricted. We are now in an environment where there is no turning back

to traditional or, perhaps more aptly said, the pure brick-and-mortar business environment. This has seen regulators taking steps to see how best to manage regulatory concerns given the nuances involved in the e-world. The range of regulation cuts across competition, consumer protection, data protection, trade and more. On competition, given the rise of large technology players and platforms and the network effects that characterise digital markets, competition regulators are considering novel theories of harm in relation to abuse of dominance in digital markets.

This article looks at recent trends in relation to anti-competitive agreements and abuse of dominance concerns as it applies to the digital markets, showing parallels with the brick and mortar world. The article focuses on Singapore, but additionally looking at a comparison against enforcement of competition law in the traditional world.

Regulating Behaviours in Anti-Competition Laws in Singapore

Overview

As an overview, it is pertinent to note that the main prohibitions contained in Singapore's Competition Act (Cap. 50B) (the 'Act') include the prohibition against agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore ('Section 34 Prohibition'), as well as the prohibition against a dominant undertaking engaging in any conduct which amounts to an abuse of a dominant position in Singapore ('Section 47 Prohibition').

The Section 34 Prohibition: What and How it Applies in the Digital World

The Section 34 Prohibition applies to agreements entered into between undertakings, whether within or outside Singapore, which have as their object or effect an appreciable level of prevention, restriction or distortion of competition within Singapore. Such agreements may include price-fixing agreements, market-sharing agreements, agreements to fix trading terms and conditions and the exchange of price and non-price information. An appreciable effect or object is deemed to exist where:

- the agreement is between competitors, and their combined market share is 20 per cent;



- the agreement is between non-competitors and their individual market share is 25 per cent; or
- the agreement involves price-fixing, bid-rigging, market-sharing or output limitations—in this case, the market share numbers become irrelevant and it is then not necessary for the Competition and Consumer Commission of Singapore ('CCCS') to prove the effect of the agreement.

A key concern when looking at anti-competitive behaviour in the digital world relates to exchange of information. On exchange of sensitive business information between competitors, note that CCCS takes a strict approach. Where the information exchange is between competitors and relates to current confidential strategic information (for example, prices, planned strategies or production volumes), CCCS will typically find that such exchange violates the Section 34 Prohibition. This is based on the premise that undertakings should determine their business behaviour independently. This independence is lost when an undertaking receives strategic information from a competitor, as it is presumed to have adapted its market conduct accordingly, resulting in an appreciable adverse effect on competition.

On this, CCCS has issued various infringement decisions for exchange of information, such as an infringement decision against certain owners/operators of hotels for the exchange amongst their sales representatives of commercially sensitive information regarding confidential corporate rates and proposed future price increases and bid prices (CCCS 700/002/14), an infringement decision against ten freight forwarders for exchanges of information regarding the imposition of security surcharges and fuel surcharges (CCS 700/003/11) as well as an infringement decision against two ferry operators for unilateral disclosure of information by one ferry operator to another regarding their ticket prices to corporate clients and travel agents (CCS 500/006/09).

While such anti-competitive information exchanges can and do take place in traditional markets, there are features in digital markets that can make it easier for information exchange between competitors to occur,

resulting in anti-competitive effects. For example, the availability of large amounts of customer and pricing data in digital form would make it much easier for digital players (and their employees) to exchange commercially sensitive information among themselves at the click of a button. Even if it is assumed that competitors are wary of violating competition laws, the fact that they use certain technological tools with automated programmes can unknowingly or more likely negligently facilitate this. What is more complex is where artificial intelligence is brought into the foray and through various seemingly innocuous algorithms, an exchange of information is facilitated. Such information exchanges (even if they occur between two or three market players) can have an anti-competitive effect, given the concentrated nature of digital markets, the frequent interactions between market players and the importance of data in digital markets.

A key concern when looking at anti-competitive behaviour in the digital world relates to exchange of information.

In its 2018 infringement decision against Grab and Uber in relation to the sale of Uber's Southeast Asian business to Grab which was found by CCCS to have led to a substantial lessening of competition in the provision of ride-hailing platform services in Singapore (CCCS/500/001/18), CCCS noted that several characteristics of the ride-hailing platform market increase the likelihood of coordination amongst market players. First, the small number of players and high concentration of the market would make it easy for firms to coordinate their behaviour. Second, the high degree of transparency on pricing, where information of competing firms can be easily obtained from public sources, clearly enabled the possibility of collusion. Third, there was repeated interaction among market players. While the above were the characteristics observed by CCCS in the ride-hailing market in respect of the potential anti-competitive effects of a merger transaction, the same characteristics are likely to apply to other digital markets, given the prevalence of network effects and hence a relatively concentrated market. Additionally, while the characteristics as identified seemingly apply to the brick-and-mortar world, they clearly apply in the digital world as well.

Separately, in its E-commerce Platforms Market Study report, CCCS expressly alerted businesses to the fact that they should note that where artificial intelligence or

algorithms are used to support or facilitate an existing or intended anti-competitive agreement or concerted practice, such activities are clearly subject to the Section 34 Prohibition.

It is of course difficult to establish the fact of anti-competitive collusion with traditional investigative techniques as we may understand. This is especially so where the use of algorithms results in market behaviour without any prior or ongoing communications among market players. Here, there is no clear consensus on how collusive outcomes may be achieved. Yet, regulators, including CCCS, have been equipping themselves to be well capable of doing so. Technology clearly aids the regulator as well. CCCS has also recognised publicly the fact of collusion potentially occurring under such circumstances.

The Section 47 Prohibition: Identifying Dominance and the Abuse Thereof

The Section 47 Prohibition prohibits a dominant undertaking from engaging in any conduct which amounts to an abuse of a dominant position. Consistent with the 'big is not bad' mantra generally adopted by competition authorities around the world, the Section 47 Prohibition does not prohibit companies from attaining a dominant position; only the abuse of the dominant position is prohibited.

When assessing the market power of an entity, CCCS looks at market shares of the relevant undertaking, potential barriers to entry, the number of competitors and the power of customers or suppliers, among other factors. In the context of the digital world, CCCS reviews the strength of network effects, which is a distinctive feature of platform markets. Network effects occur where users' valuations of the network increases as more users join the network—a common example is where a telephone network becomes more valuable the more customers enter the telephone network as this means that existing customers would be connected to more people on the same network. In the case of multi-sided platforms which facilitate interactions between two or more groups of users by matching users on one side of the platform (for example, buyers) with users on the other side of the platform (for example, sellers), indirect network effects frequently occur where a user's valuation of the multi-side platform increases with the increase in the number of users on the other side of the platform. A ride-hailing platform is an intuitive example where

indirect network effects would arise, as the platform will become valuable to drivers if there are more riders on the other side of the platform, and more valuable to riders if there are more drivers on the other side of the platform, thereby creating a 'virtuous circle'. Such indirect network effects can reinforce the incumbency of existing players present in the market and constitute a barrier to market entry as it would increase the time and investment required for a new potential entrant to build up sufficient users on both sides of the platform to compete effectively with existing players in the market.

The significance of network effects is a fact-specific analysis as it would depend on factors such as the prevalence of multi-homing (that is, the practice by suppliers or consumers of using more than one platform simultaneously for their transactions) and switching costs. Where users multi-home across competing suppliers (that is, use multiple platforms instead of exclusively using one platform only), network effects may not represent a significant barrier to entry for new entrants as the new entrant can still amass users and grow the size of its platform. These factors were considered by CCCS in its assessment of the barriers to entry in the market when assessing the proposed acquisition of Uber by Grab in 2018.

These factors were also considered in CCCS's infringement decision in 2010 against SISTIC (CCS/600/008/07), a ticketing service provider in Singapore. At that point, CCCS found that SISTIC was a dominant ticketing service provider in Singapore with a persistent market share of 85 per cent to 95 per cent. CCCS assessed that SISTIC had engaged in an abuse of dominance by entering into a series of exclusive agreements with two key venue operators to require all events held at these venues to use SISTIC as the sole ticketing service provider, as well as with 17 event promoters which required the event promoters to use SISTIC as the sole ticketing service provider for their events. In arriving at its decision, CCCS noted that the Relevant Market (which it had defined as the market for the provision of open ticketing services in Singapore to both event promoters and ticket buyers) was characterised as a two-sided market, given that: (1) it brought together two distinct groups of customers, being event promoters and ticket buyers; (2) indirect network effects exist between the two groups of customers, as a ticket service provider becomes more valuable to ticket buyers if it has more event promoters as customers are

able to secure access to more events and also becomes more valuable to event promoters when it has more ticket buyers who buy tickets or make searches via this service provider; and (3) the two groups of customers fail to negotiate and internalise the externalities resulting from the indirect network effects, given the high transaction costs for ticketing sales and the inefficiencies associated with event promoters selling all their tickets on their own as it is not their core business.

Indeed, CCCS noted that the indirect network effect between event promoters and ticket buyers gave rise to the ability and incentive for SISTIC to deploy a strategic price structure that would foreclose competition from one side, extract monopoly rent from the other side, while perpetuating its dominance on both sides. These factors plus the exclusivity lead CCCS to penalise SISTIC.

Separate to the importance of network effects, CCCS had in its E-commerce Platforms Market Study also identified that when assessing market power in digital markets, static market power indicators may be less informative given the dynamic nature of digital markets. This is a clear indication of the evolution of the analysis that competitive assessments will have to undergo. The concepts of volume, entry barriers and even counter-factuals will need to be carefully reviewed to ascertain what particular combination of data is to be used in the analysis.

The current approach of CCCS is to adopt an effects-based approach to assess abuse of dominance as reflected in the cases it has reviewed, including the SISTIC decision. This is also clearly set out in CCCS guidelines which state that in conducting an assessment of an alleged abuse of dominance, CCCS will undertake an economic effects-based assessment in order to determine whether the conduct has, or is likely to have, an adverse effect on the process of competition. In doing so, it is sufficient for CCCS to show a likely effect and it is not necessary to demonstrate an actual effect on the process of competition.

The effects-based approach is consistent with the general position taken by competition authorities around the worldwide. But two features of the Singapore assessment framework potentially differ:

- First, CCCS is only concerned about exclusionary behaviour when assessing abuse of dominance.

'Exclusionary behaviour' refers to anti-competitive behaviour which harms competition, for example, by removing an efficient competitor, limiting competition from existing competitors or excluding new competitors from entering the market. This is unlike some other competition authorities which also look at 'exploitative behaviour' by dominant undertakings. One main example of exploitative behaviour is where a firm uses its market power to impose unfair prices or other conditions on consumers, for example, through charging excessively high prices to its customers. This means that CCCS only looks at where the conduct of dominant undertakings makes it difficult for competitors to enter or compete in the market.

- Second, CCCS adopts a total welfare standard which means that CCCS will consider the effects on both producer welfare and consumer welfare when assessing conduct. This means that CCCS is more likely to consider it acceptable when a conduct reduces consumer welfare (for example, through higher prices charged to consumers) if it leads to efficiencies or benefits to the undertaking without unduly harming the process of competition.

These two differences suggest that, all else equal, the likelihood of enforcement would be lower in Singapore. This could be why, while CCCS has launched several investigations involving abuse of dominance, it has tended to settle these without a finding of infringement. Of course, the resolutions could also be a reflection of the pro-business approach of the Singapore regulator.

The cases investigated included two investigations in the digital markets. The first was CCCS's investigation in 2016 into an online food delivery provider in Singapore, following complaints of exclusivity agreements between the online food delivery provider and certain restaurants, which prevented the restaurants from using the services of other online food delivery providers, which could foreclose competing online food delivery providers. However, CCCS ceased its investigation as there was no evidence that competition had been harmed. The second was CCCS's investigation in 2019 into the online food delivery and virtual kitchen sector in Singapore which involved online food delivery service providers refusing to supply online food delivery services to F&B operators which used a competing virtual kitchen. Following CCCS's investigation, the two online

food delivery service providers started supplying their online food delivery services to F&B operators using the competing virtual kitchen, therefore allowing the F&B operators the choice of using multiple online food delivery providers to expand their consumer reach.

When considering whether certain conduct may amount to an abuse, CCCS noted in its E-commerce Platforms Market Study that some theories of harm may be more prevalent in digital markets, especially with e-commerce platforms that compete in multiple market segments. CCCS noted that conduct that could give rise to competition concerns in such digital markets include:

- *Exclusive dealing*: Where an e-commerce platform operator requires a seller to sell or deal exclusively on its platform, it prevents switching or multi-homing and serves to guarantee an e-commerce platform a certain number of users on one side, which contributes to the value of the service to users on the other side of the platform. Due to the prevalence of indirect network effects, this raises barriers to entry and makes it difficult for new players to enter the market and for existing players to compete effectively. This was the theory of harm in the aforementioned investigation involving exclusivity agreements between an online food delivery provider and certain restaurants, which prevented the restaurants from using the services of competing online food delivery providers.
- *Tying and bundling*: Where an e-commerce platform operator competes in multiple market segments, it can leverage its market power in one market segment into another market to foreclose its competitors, by engaging in tying and/or bundling. Tying refers to the practice of requiring buyers what wish to purchase one product (the tying product—this is typically the product that the entity has market power in) to purchase another product (the tied product—this is typically the product that is subject to competitive forces). Bundling refers to the way that products are offered and priced by the seller and can take the form of the undertaking offering a lower total price when the consumer purchases the

The current approach of CCCS is to adopt an effects-based approach to assess abuse of dominance as reflected in the cases it has reviewed.

goods as a package from the supplier as opposed to buying the two products separately. By doing so, the dominant undertaking is able to use its market power in one product market to force or encourage customers to purchase another product which it faces competition in. This can lead to competition concerns in the tied market, the tying market or both. While such strategy can occur and have an anti-competitive effect in traditional markets too, it could be a more common problem in digital markets where e-commerce platform operators tend to compete in multiple market segments once they have gained a critical mass of multiple user bases on board. It may also be easier for digital market players to engage in the tying and bundling of services which are offered more seamlessly online.

In its E-commerce Platforms Market Study, CCCS provided the example of an e-commerce platform being able to offer reward programmes that cut across all its products and/or services, acting as a form of bundling which allows the e-commerce platform operator to leverage market power from one market (for example, where users are earning rewards) into another (for example, where users can spend the rewards), making it more difficult for competing e-commerce platforms to offer a viable competing product and/or service.

- *Self-preferencing*: Self-preferencing occurs when a company gives preferential treatment to its products and/or services when they are competing with other products and/or services provided by a competitor using the platform. CCCS noted that it is possible for abusive preferencing to occur when a dominant undertaking leverages its market power in one market and accords favourable treatment to itself, resulting in harm to competition in another market. For example, a vertically integrated dominant undertaking could leverage its market power in an upstream market and give preferential treatment to its own downstream products, to the exclusion of competing sellers that utilise the dominant undertaking's upstream products.

In its recently revised Section 47 Guidelines, CCCS cited the example of how a dominant e-commerce platform

that provides platform services to connect sellers of goods and services with buyers while concurrently also participating in the downstream market as a seller, may be able to leverage its market power at the upstream level by giving preferential treatment to the products it sells downstream through better placement of its products as compared to other competing sellers.

Notwithstanding the limited number of cases involving abuse of dominance, there does not appear to be obvious differences in how CCCS will assess abuse of dominance in traditional and digital markets.

To elaborate, the conduct of exclusivity and refusal to supply, which CCCS has investigated in respect of digital markets, have also been investigated by CCCS in traditional brick-and-mortar markets. For example, CCCS investigated the exclusivity restrictions imposed by Asia Pacific Breweries in relation to its practice of supplying draught beer to retail outlets solely on an exclusive basis as well as cord blood bank Cordlife in relation to its exclusive agreements with baby fair organisers and hospitals that potentially have the effect of limiting competition from other providers of cord blood bank services in Singapore. CCCS also investigated refusal to supply by lift spare part providers to third-party lift maintenance companies which could prevent other lift maintenance contracts from effectively competing for contracts to maintain and service lifts of a particular brand in Singapore. These investigations ceased without any infringement decision as the parties being investigated had provided CCCS with voluntary commitments to amend their business practices that were the subject of the investigation.

As noted in the discussions above, the assessment framework for abuse of dominance would generally apply equally to traditional and digital markets. It is only that certain features of digital markets could render it more conducive for dominant undertakings to engage in certain types of strategy. For example, tying and bundling strategies are likely to be more attractive and feasible among 'super apps' that offer a range of services such as e-payment, ride-hailing and food delivery services, where network effects and economies of scope make it easier for digital players to concurrently participate in multiple market segments.

Looking Forward

Doing business digitally has grown considerably, with not just platforms but also various other businesses marketing their goods and services online. As these businesses grow, CCCS's interest has also been piqued with an increasing focus on the digital markets. This can only mean that CCCS will continue to be alert to potentially anti-competitive and abusive behaviour in the digital markets. The findings from the E-commerce Platforms Market Study and the recent changes to the CCCS competition guidelines are clear that CCCS would be sensitive to the harms posed by the leveraging of dominance from one market to affect competition in another market. Finally, there are already major reviews of ecommerce platforms and other e-offerings globally and it is possible that similar alleged violations could be found to exist in Singapore too. It follows that digital businesses should be especially alert to avoid perceptions of leveraging market power, be it from an adjacent or complementary product market or from an upstream or downstream market.



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Kala Anandarajah practises at Rajah & Tann, which is a leading regional SEA firm, in the areas of Competition (merger control, cartels, conduct, etc.), Trade (export controls, FTAs, sanctions, etc.) and Consumer Protection. Anandarajah sits on various boards and was in 2014 awarded the Public Service Medal (Pingat Bakti Masyarakat), which is conferred by the President of Singapore. In 2021, Anandarajah was honoured to have been awarded the Highly Commended Lawyer in Private Practice at the *Legal 500 Southeast Asia Awards* (one of only two), awarded the Outstanding Achievement by *Women in Business Law Awards Asia* and recognised as one of only two Most Highly Regarded in the Southeast Asia chapter by *Who's Who Legal: Southeast Asia Competition*.

Anti-Competition Framework in Vietnam

Being known as a very dynamic market in South East Asia, Vietnam is also a challenging playground for both foreign investors and domestic participants. Recently, the market has witnessed many remarkable M&A transactions across sectors, which entails matters related to market concentration and competition. Not to be left behind by this trend, Vietnam has established an effective competition legal framework and supervising bodies to oversee market competition. In this article we will provide a brief overview of competition legislation and the enforcement trends in Vietnam in recent years.

Introduction

Development of Competition Legislation in Vietnam

Economic competition is regarded as a material characteristic of every market economy. In Vietnam, such a market economy was not officially established until the late 1980s with the abolition of the former ineffective 'Bao Cap' regime, in which the State played an exclusive role in distributing most of commodities circulated in the economy. The transformation to a market economy in Vietnam has brought about the urge to have competition legislation in place to regulate the business conduct of its participants to secure a fair competitive process and to incentivise firms to create more economic outcomes.

In Vietnam, the legal framework on competition mainly rests on the 2018 Law on Competition and its implementing regulations ('2018 LOC'), which is a replacement of the former and the first formal legislation on competition in Vietnam introduced in 2004 ('2004 LOC'). The 2004 LOC established the very first foundation for competition law in Vietnam by introducing the basic concepts on competition.

Given that the 2018 LOC does not provide any direct references individually applied to foreign entities to restrain their conduct when it comes to the competition



process, foreign entities are subject to entry barriers on many industries when doing business in Vietnam under investment regulations for the sake of public safety and the public interest of Vietnam. In this article, we will not discuss such investment entry barriers as a restraint of competition but aim to provide readers with a quick recap of the competition landscape in Vietnam by focusing on the legislative tools used to oversee the competition of market participants.

To Whom it Applies

The 2018 LOC touches on a wide range of entities in Vietnam or offshore, which may exert their influence over Vietnam's markets. The entities could be both individuals or enterprises manufacturing, supplying goods or providing services, either in the private or public sectors. The monopoly of the State on some public utilities such as electricity and rail travel is also regulated by the 2018 LOC.

Further to the said entities which are involved directly in market activities, professional entities and professional associations based in Vietnam, concerning domestic and foreign agencies, organisations and individuals, are also subject to the application of the 2018 LOC. To put it differently, under the 2018 LOC, entities engaging in marketing, whether directly or indirectly, may be subject to competition regulations.

Competition Authority

By law, the competition authority in Vietnam is the National Competition Commission ('NCC'). However, the NCC has not been formed since the 2018 LOC came into force. Thus, Vietnam still maintains the dual system consisting of the Vietnam Competition and Consumer Authority ('VCCA') and the Vietnam Competition Council ('VCC'), which has been established under the 2004 LOC.

Established by and under the Ministry of Industrial and Trade, among other things, the VCCA is responsible for:

- Accepting and investigating cases related to restraint of competition acts (that is, restrictive agreements, abuse of dominance and monopolisation).
- Accepting, investigating and adjudicating cases on acts of unfair competition and other violations of competition law.

- Assessing the applications for exemption from restrictive agreements.
- Overseeing economic concentration.

Upon the initial investigation of the VCCA, the VCC will handle complaints and adjudicate cases on restraint of competition acts. Since the VCC is directly under the Ministry of Industry and Trade, there is some concern that the current competition apparatus may lack independence when performing its functions. Additionally, the dual system has proven to be ineffective over time, which explains the introduction of the NCC under the 2018 LOC. Yet, for the time being, it is unclear when the NCC will be established to implement its regulatory functions.

Restraint of Competition Practices

Anti-Competitive Practices

By law, restraint of competition practices are the acts that exert or are likely to exert an anti-competitive effect, which eliminates, reduces, distorts or deters competition on the market. Anti-competitive practices include activities like price fixing, market division, predatory pricing and group boycott, which could be grouped into two types: (1) agreements to restrict competition; and (2) the act of abuse of dominance position and monopolisation.

Relevant Market and Market Shares

Defining the relevant market is crucial when looking at a restraint of competition case. The definition of 'relevant market' helps to identify and define products or groups of products subject to competition; it also navigates the geographic area in which the concerned parties have their competition behaviours. Relevant market also matters when it comes to the calculation of market shares known as a key indicator of market power. With the grasp of relevant market, those competitors who have actual market power will be identified and prevented from practising against fair and effective market practices.

Vietnam adopts the generally accepted definition of 'relevant market': the intersection of a relevant product market and a relevant geographic market. A relevant product market is constituted by all those products and/or services that are interchangeable or substitutable to a certain degree, by reason of the products' characteristics, their prices and their intended use. The

relevant geographic market comprises the area in which the products and/or services involved in the supply and demand are interchangeable with similar competitive conditions and be distinguished from neighbouring areas.

It can be seen that the definition of 'relevant market' in Vietnam is not very different compared to the one in the US ('1968 Merger Guidelines') and the EU ('European Commission') and common trends in competition legislation. Yet, the application of the relevant market on determination of market shares and thresholds of market shares to be identified as in the position of market dominance, varies among jurisdictions.

Upon identification of relevant market, market shares of a certain product and/or service will be established accordingly. Identifying relevant market and market shares will help:

- Apply appropriate treatments if there is any form of restrictive agreements.
- Decide whether or not there is an abuse of dominance.
- Supervise economic concentration practices.

Restrictive Agreements

By law, any forms of agreement among parties that restrain or are likely to restrain competition shall be deemed as restrictive agreements. The restrictive agreement prohibited by law shall fall into the following categories:

(1) *Per se illegal restrictive agreements:*

- agreements preventing, impeding, deterring market entry of other entities;
- agreements to kick the entities which are not parties to the agreement out of the market;
- collusion to let one or more parties win a bid for the supply of goods and/or service; and
- horizontal agreements involving price fixing, market sharing, output controlling.

(2) *Prohibited agreements if causing a significant restraint of competition:*

- vertical and horizontal agreements to:
 - restrain technical or technological developments or to restrain investment;
 - impose on other enterprises conditions for signing contracts for the purchase and sale of goods and services or to force other enterprises to accept obligations which are not related in a direct way to the subject matter of the contract;
 - not transact with other entities that are not parties to the agreement;
 - restrict consumer markets or the sources of supply of goods and services of other entities that are not parties to the agreement;
- vertical agreements involving price fixing, market sharing, output controlling; and
- other agreements which have or may have a competition restraining impact.

Example: On 25 May 2011, 12 insurers, accounting for 99.81 per cent of the market share of the student insurance market in the Khanh Hoa province, had signed an agreement to fix the premiums for student insurance. In this case, the VCA determined that the product market was student insurance and the geographic market was Khanh Hoa province, and concluded that the combined market share of 12 insurers had exceeded the threshold of 30 per cent. On 1 September 2011, representatives of the 12 insurance companies signed meeting minutes to voluntarily annul the initial agreement and they agreed to take remedial measures to prevent future violations of the competition law. The insurance companies were not required to pay a penalty but bore a fee of VND100,000,000 as a case handling fee.

Example: On 18 November 2008, 19 insurance companies had been investigated for an agreement directly fixing the price of insurance services in the automobile insurance market. The VCC determined that the act of signing an agreement by 19 enterprises was a prohibited

restrictive agreement under the law on the ground that the combined market shares of the 19 insurance companies participating in the agreement accounted for 99.79 per cent. Thus, the 19 businesses had eliminated competition on insurance premiums in almost the entire relevant market by signing the agreement. The parties to the illegal restrictive agreement were charged with a fine of VND1,807,000,000.

Abuse of Dominance and Monopolisation

To decide if an entity is in the position of market dominance, the 2018 LOC adopts a dual approach: (1) share-based dominance presumption; and (2) significant market power. An entity shall be deemed to be in a dominant position when accounting for at least 30 per cent of the market share in the relevant market. For a group of companies, the threshold may vary from 50 per cent to 85 per cent, depending on the number of companies joining the group.

In other jurisdictions like the UK, Canada and the US, although market share is taken into consideration when defining market dominance, they do not see market share as a non-rebuttable presumption of dominance. Taking the 1998 Competition Act of the UK as an example, there are no market share thresholds for presuming dominance. However, in some cases, the dominance can be presumed in the absence of evidence to the contrary if an entity has a market share persistently above 50 per cent.¹ In Vietnam, some commentators argue that the threshold of 30 per cent is quite low, inflexible in many situations, and may catch many firms which do not have any significant market power. Under the 2018 LOC, significant market power shall be reflected in various indicators:

- correlation of market share among enterprises in the relevant market;
- financial strength and size of the enterprise;
- entry barriers and market expansion to other enterprises;
- ability to hold, access and control the market for distribution and consumption of goods or services or the supply of goods and services;
- advantages in technology and technical infrastructure;

- the right to own, hold and access infrastructure;
- the right to own and use the object of intellectual property rights;
- the ability to switch to supply or demand for other related goods and services;
- specific factors in the industry or field in which the enterprise is operating.

In practice, the decision that an entity has significant market power requires a significant degree of judgment of the competition authorities. When it comes to the concept of market power, it is true that a sophisticated understanding of the economy plays a very key role in the finding of guilt or innocence in competition law. Similarly, a monopoly exists where an enterprise has no competitors in the relevant market.

Example: Tan Hiep Phat Trading Service Company Limited ('Tan Hiep Phat') is a beer manufacturing and trading enterprise. Vietnam Brewery Joint Venture Company ('VBL') is a competitor of Tan Hiep Phat in the alcoholic beverage market. VBL signed contracts with exclusive agents in which the agents were requested not to advertise or sell other beer brands, including the one of Tan Hiep Phat. Tan Hiep Phat filed a complaint on possible abuse of dominance of VBL. In this case, Tan Hiep Phat based its complaint on a narrower geographic market, while the VCCA considered that the relevant geographic market was national. The VCC determined that VBL's market share in the relevant market was below the threshold of 30 per cent. Therefore, VBL did not have a dominant position in the relevant market. The VCC ruled that no violation was committed by VBL.

Example: Jetstar Pacific Airlines Company Limited ('PA') and the Vietnam Air Petrol Company Limited ('Vinapco') signed a contract for the sale and purchase of aviation fuel JET A-1 No. 34/PA2008. Accordingly, the parties agreed on the fuel supply fee. Vinapco later requested to increase the price on the ground of global price fluctuations. PA agreed with the adjusted price on the condition that Vinapco had to apply the new price to

other companies, including Vietnam Airlines ('VA'), a competitor of PA. Vinapco refused to apply the same price to PA, which led to the rejection of PA. On 1 April 2008, many flights of PA were cancelled as a result of Vinapco's refusal to supply Jetstar with fuel. PA filed a complaint against Vinapco's conducts to the VCC. The VCC concluded that Vinapco had abused a monopoly in the aviation fuel market under competition law and imposed a fine of VND3,378 billion for violations and VND100 million for handling the case to Vinapco.

Economic Concentration

Under Vietnam law, economic concentration applies to mergers, consolidations, acquisitions, joint ventures and other forms of concentration. The law prohibits economic concentration transactions that cause or are likely to cause a significant restraint of competition.

Entities are under an obligation to inform the VCCA if the economic concentration transaction is caught by the regulatory thresholds. The thresholds imposed are based on the following indicators:

- total assets on the Vietnamese market of enterprises participating in the economic concentration;
- total revenue on the Vietnamese market of enterprises participating in the economic concentration;
- transaction value of the economic concentration; and
- combined market share in the relevant market of enterprises participating in the economic concentration.

However, the mentioned thresholds are not employed to decide if an economic concentration transaction is prohibited or not. Simply put, there is no per se prohibition for economic concentration under the 2018 LOC, instead economic concentration shall be assessed depending on whether it cause or may cause significant restriction of competition on Vietnam's market.

Example: In 2014, the Vietnam National Financial Switching Joint Stock Company and Smartlink Card Services Joint Stock Company,

which were companies active in the field of intermediary banks for payment, approached the VCCA with the proposal to merge the companies' operations. Since they were the only platforms which provided such a service, the merger would have certainly created a monopoly. Given the fact that the transaction would have been prohibited under the 50 per cent Market Share, the VCCA considered the parties' request for an exemption and submitted its report to the Prime Minister for consideration. An exemption with a period of five years was eventually granted. The exemption would be automatically renewed every five years on the condition that the post-merger entity fulfilled various conditions, including the requirement not to discriminate among customers and to comply with the State Bank of Vietnam's instructions and regulations when adjusting service fees.



Source: www.sbv.gov.vn

Example: On 25 March 2018, Uber Corporation and Grab Inc. signed a Purchase Agreement. Accordingly, Uber sold its business operations in eight markets in Southeast Asia, including Vietnam, to Grab Inc. In Vietnam, on 25 March 2018, GrabTaxi Co Ltd ('GrabTaxi') and Uber Vietnam Co Ltd also signed a contract of sale, transfer and acceptance of obligations for Uber Vietnam to sell assets, Uber's business operations and other benefits in Vietnam for GrabTaxi. From 23:59 on 8 April 2018 (Vietnam time), Uber's application in Vietnam was officially inactive. On 16 April 2018, the VCCA conducted a preliminary investigation of

the case of economic concentration. After examining relevant factors, such as market shares and relevant markets, the VCCA concluded that the transactions between the companies were not a prohibited economic concentration transaction.

Unfair Competitive Practices

To promote the efficiency of the market and secure the participants and customers, besides provisions to restrain competition and economic concentration, the participants of the market need to keep their business in line with legitimate competition practices.

Under the 2018 LOC, unfair competitive practices means 'practices by an enterprise which are contrary to the principles of goodwill, honesty, commercial practice and other standards in business and which cause or may cause loss and damage to the legitimate rights and interests of other enterprises'.

Unlike the case of restrictive agreements, all kinds of unfair competitive practices are *per se* prohibited regardless of market share. The prohibited unfair competitive practices include:

- *Infringement of business secrets*: (1) accessing or collecting business secrets by hacking security measures; and (2) disclosing or using business secrets without permission from the owner.
- *Coercion in business*: coercing customers or business partners to transact or cease a transaction.
- *Defamation*: defaming another enterprise by providing false information, which adversely impacts the enterprise's reputation, financial position or business activities.
- *Causing disruption*: causing disruptions that hinder or interrupt the lawful business activities of another enterprise.

Example: In July 2020, Hiep Thanh Co Ltd had a complaint on Bayer Vietnam's discriminatory behaviour when implementing different discount policies for agents (agents in An Giang province enjoyed larger discounts compared to other agents). Hiep Thanh Co Ltd is a distributor and trading agent of plant protection drugs in Ben

Tre province, provided by Bayer Vietnam Co Ltd. At the time of the complaint, Bayer Vietnam Company had a separate discount program with greater incentives for agents in An Giang province (more than 20 per cent) compared to other agents in the South. This had created an environment of unfair competition, resulting in damage to the agents. Hiep Thanh Co Ltd, representing a group of pesticide distribution agents in the southern provinces, asked Bayer Vietnam to respond and create a healthy competitive environment. Through inspection and assessment, the VCCA concluded that there was an unfair competition practice. Bayer Vietnam Company was requested to cancel the above preferential policy.

Conclusion

Although having a more recent development of a market economy, Vietnam has successfully built a legal framework on competition which basically covers the fundamental matters. However, the M&A wave in Asia and in Vietnam in the fields of real estate, technology and finance in recent years created many novel issues related to competition, which requires legislative action to catch up with the new trends.

In addition, to effectively monitor and handle the competitive environment, there is a strong urge to establish the National Competition Commission to take over the work of the VCCA and VCC, as provided in the 2018 LOC. To accomplish this task, proactive action from relevant ministries and the Government are required.

Notes

¹ Office of Fair Trading, Abuse of Dominance Position: Understanding Competition Law, Section 4.17; available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284422/offt402.pdf (accessed on 6 February 2022).



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Up Close and Personal: Caroline Berube



What did you dream of doing when you were a little girl?

I dreamed of becoming an explorer—I would say, 'I am Caroline, the Explorer'! I was five years old, and I knew I wanted to go explore the world. At that age, I saw California as being very far away from Quebec City and it was a goal to move there to live by the ocean! I also read, at a very young age, the story of Samuel de Champlain, a true explorer, sailing in the early sixteenth century all the way to the New World and founding Quebec, my hometown. I was also fascinated with the transat Quebec Saint-Malo, going to watch it with my parents, a sailing transoceanic race from Saint-Malo to Quebec, which started in 1984 (when I was eight!) to celebrate the 450th anniversary of Jacques Cartier's voyage—Jacques Cartier being another adventurous explorer. I even wrote a small booklet at the age of eight on the journey of these two explorers and sold editions of my handwritten booklets to neighbours—I was a young entrepreneur even back then! I dreamed and dream of adventures, new places, basically, new everything.

When I was 22, I decided to move across the world from Quebec to Singapore to study Chinese law. I continued my explorations and have lived on three continents in Singapore, Bangkok, Guangzhou and Johannesburg over the last 23 years and I was lucky enough to travel to so many exotic locations all over the world.

Adventures and curiosity are key for me. Exploring the world is still a mission for me and I use these experiences to explore my 'inner' Caroline. Human beings are so full of complexity and intricacies. Each adventure I have taken has allowed me to develop and understand more of this internal exploration with the hope to grow as a better person and give the best of myself every day!

What words of wisdom did your mother and grandmothers share with you?

I have been blessed with my family on many levels. Like most families, we did have some challenges, which will be for another article! But I feel I have been blessed because my mom, a professional working mom, believed in me, let me explore (even though as a mom it must have been difficult to see your first child exploring the world and I understand it now being a mother of three kids and having one studying across the world), and she made me believe that 'the sky is the limit'! If you want it with all your heart and soul and you put in the effort, you can do it!

My grandmother was also a very special woman—very strong headed with core values. She comes from Chicoutimi, a small-town north of Quebec City and she repeated to me many times that, 'No matter what you do, people will talk. Let them talk and don't spend your energy caring about what they say.' This is how I have lived and continue to live my life. If I genuinely believe

in what I am doing and think it is right, I don't even care about whether people will talk. My energy is on what I am doing and thinking—energy and time being a scarce commodity—especially for lawyers in private practice!

Who have been your role models/inspirations, personally and professionally, from among other women? Tell us about someone who has inspired you.

There are many women who inspire me for different reasons. Of course, some are famous. Hillary Clinton, a trained lawyer, evolved in the political sphere because of her husband and eventually ventured into politics herself. I am inspired by the fact that she was also a mom and a partner, travelling the world and juggling a personal and professional life. I am also a big fan of Michelle Obama, also a trained lawyer (!), for the amazing causes she embraces, such as education. I also like Sophie Gregoire-Trudeau, the wife of our Canadian Prime Minister. She is real, seems to remain grounded and she touches upon real life topics like mental well-being, aging, nutrition and diversity, among others.

Without sounding tacky though, the IPBA women and various businesswomen I have had the chance to interact with during my 23 years of legal and business practice are also inspiring! These women keep pushing

their limits at work, trying to be the best they can, embracing causes they believe in, fighting battles no one knows about, being a mother, being a partner ... and yet, remaining authentic and committed to show up. This is real life. I think we need to celebrate the success of these inspiring women daily. Sometimes, we do not need to go far to find individuals to inspire us—they are right beside us!

What does the idea of power mean to you? Have you ever been in a situation that made you think that women and power are two incompatible concepts?

My concept of power has evolved over the years ... When I was younger, power meant being a CEO, the one billing the most, etc. Over the years, probably due to more wisdom and experiences, I developed a different definition of power: knowledge is power, controlling my thoughts and feelings is power. I no longer see power as being the CEO or the best of an organisation—I want to be the best version of myself! Unfortunately, a lot of people see power based on a title someone has and based on the culture and society we live in, which is fine.

I have been lucky in many ways because I didn't experience many issues as a woman evolving in different organisations from the IPBA, IBA, ABA, YGL and now YPO. I had roles allowing me to contribute in real practical terms and this is what counts for me—being able to add value because of my knowledge and experience. Adding value to a business project or an organisation is power to me!

However, I had a shocking experience in 2015, which I now laugh about. I was offered the role of Chairman of a global accounting and legal organisation. I was going to be the first woman taking that role. This decision came up during a board meeting ... full of men! When the decision was announced, two men



asked me how I was going to combine this role and being a mother of three kids. I was stunned! I doubt this question would ever be asked to a man! I replied that I was going to continue doing the same thing that I have been doing during my entire career.

After that incident, I took a week to reflect and finally decided not to take that role. I wanted to use my time and energy for an organisation with no bias. I wanted to contribute to the growth of a group and not have to prove how good I was because I was already good enough! The YGL and IPBA roles came at the same time and the choice was easy! I decide to use my time, energy and ideas for constructive contribution and value for the IPBA and YGL community!

Given that IWD 2022 is coming up on 8 March, which focuses on #BreaktheBias, can you explain where your country stands on gender equality today for a sustainable tomorrow?

I believe Canada is doing quite well in terms of gender equality. If we look at the number of ministers appointed in the political sphere, there is a lot of diversity. There are also many policies helping families, allowing women to continue being active professionally.

I have spent considerable time in China and I have had constant dealings with many female government officers and female CEOs of SMEs since the late 1990s, and again, I have had many great business negotiations with these female leaders in the course of our M&A projects. And we successfully closed deals!

What opportunities does the IPBA offer women lawyers and how do you feel they have helped you?

The IPBA is a wonderful organisation offering equal opportunities to all lawyers. We have a very close-knit group of women led by a few fabulous women like Varya Simpson. We connect as much as we can during IPBA annual meetings, mid-year meetings and throughout the year pre-Covid. Some gentlemen, also IPBA members, join us and it is always good fun and the bonding is very strong. We do help and support each other professionally and personally. We can really count on each other, which is so valuable!



I have been very lucky in terms of opportunities within the IPBA. I have had wonderful sponsors like Gerold Libby and WaiMing Yap, among others, who put my name forward for the different roles I have had within the IPBA as Publications Committee Chair and Secretary-General. I enjoyed these roles and wanted to contribute with practical ideas, which I believe I did.

I have met incredible IPBA friends since 2008 when I attended my first IPBA Annual Meeting held in Los Angeles. Nearly 15 years later, the friendship continues and remains authentic! I am a lucky person to have this amazing strong network.

IPBA New Members December 2021 to February 2022

We are pleased to introduce our new IPBA members who joined our association from December 2021 to February 2022. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

Australia , Philip Bambagiotti 3PB Barristers	China , Dongqing Su Jinmao Partners
Australia , Adrian Smith McCullough Robertson Lawyers	China , Xun Sun Anli Partners
Canada , Shawn McReynolds Davies Ward Phillips & Vineberg LLP	China , Weilian Wang Shanghai Jinmao Kaide (Wuhu) law firm
China , Weitao Deng Shanghai Jinmao Kaide (Wuhu) law firm	China , Yan Wang Wintell & Co
China , Jiachi Gong Jin Mao Partners	China , Jing Wang Shanghai Jinmao Kaide (Wuhu) Law Firm
China , Jie Hu Jiangsu Yingshang Law Firm	China , Chang Xu Jiangsunankunlun Law Firm
China , Pingping Ji Shanghai Jinmao Kaide (Wuhu) Law Firm	China , Guang You Jin Mao Partners
China , Li Jinhua Shanghai Alshine (Suzhou) Law Firm	China , Bowen Zhang Jin Mao Partners
China , Huizhong Li Jiangsu Nankunlun Law Firm	China , (Zoey) Yue Zhang Jincheng Tongda & Neal Law Firm (Hefei office)
China , Min Li Jiangsu Nankunlun Law Firm	China , Jiawei Zhang Jiangsu Boaixing Law Firm
China , Yu Li Shanghai Jinmao Kaide (Wuhu) law firm	China , Yan Zhong Jiangsu Huidian Law Firm
China , Jie Lin Jiangsu Zhongjianhui Law Firm	China , Jimmy Zhong Jiangsu Jiangcheng Law firm
China , Zaichun Lu Shanghai Jinmao Kaide (Wuhu) Law Firm	China , Shuang Zhou Shanghai Jinmao Kaide (Wuhu) Law Firm
China , Qin Lv Shanghai Jinmao Kaide (Wuhu) Law Firm	China , Dinghao Zhu Shanghai Jinmao Kaide (Wuhu) law firm
China , Aaron Ma Wintell & Co	China , Guangzhong Zhu Shanghai Jinmao Kaide (Wuhu) Law Firm
China , Su Qi Guangdong Tianbing Law Firm	China , Huixin Zhuang Jin Mao Partners
China , Yueping Qiu Leadvisor Law Firm	Cyprus , Chrysanthos Christoforou Elias Neocleous & Co LLC
China , Tingting Shui Shanghai Jinmao Kaide (Wuhu) Law Firm	Cyprus , Christos Vezouvios Elias Neocleous & Co LLC

France , Simon Elliot <i>Three Crowns LLP</i>	Pakistan , Hamid Nawaz Awan <i>Vellani & Vellani</i>
France , Bernard Teze <i>DS Avocats</i>	Pakistan , Zakir Hussain Baig <i>Vellani & Vellani</i>
Germany , Carsten van de Sande <i>Hengeler Mueller Partnerschaft von Rechtsanwälten</i>	Pakistan , Nahl Eman Chamdia <i>Vellani & Vellani</i>
India , Amit Garg <i>Dainik Bhaskar Group</i>	Pakistan , Sand Shaikh Fikree <i>Vellani & Vellani</i>
India , Resham Jain <i>PSA</i>	Pakistan , Rohma Habib <i>Vellani & Vellani</i>
India , Ajay Joseph <i>Veyrah Law</i>	Pakistan , Afzal Khushal Khan <i>Vellani & Vellani</i>
India , Hiral Chandrakant Joshi <i>Chandrakant M. Joshi</i>	Pakistan , Fatima Mumtaz <i>Vellani & Vellani</i>
India , Shivpriya Nanda <i>J. Sagar Associates</i>	Pakistan , Erum Rasheed <i>Vellani & Vellani</i>
Indonesia , Fany Gumirlang <i>Gumirlang Law Office</i>	Pakistan , Maheen Shaikh <i>Vellani & Vellani</i>
Indonesia , WisnuWardhana <i>Assegaf Hamzah & Partners</i>	Pakistan , Srreaa Tahir <i>Vellani & Vellani</i>
Indonesia , Wisnu Wardhana <i>Assegaf Hamzah & Partners</i>	Peru , Jose Manuel Abastos <i>Hernández & Cía. Abogados</i>
Italy , Emanuela Truffo <i>Studio Lagale Jacobacci E Associati</i>	Peru , Frank Boyle <i>Estudio Muñiz</i>
Korea , Julie (H.J.)Chung <i>Markkorea Patent and Law Firm</i>	Poland , Joanna Bogdanska <i>KW Kruk&Partners Law Firm LP</i>
Kuwait , Yacoub Alsanea <i>Yacoub Abdulmohsen Alsanea Law Firm</i>	Poland , Jaroslaw Kruk <i>KW Kruk&Partners Law Firm LP</i>
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Pakistan , Waleed Bin Arshad <i>Vellani & Vellani</i>	Sri Lanka , Tekla Shyamalee Weliwatte <i>Counsel and Notary and Employed in House Counsel and Attorney</i>

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UAE , Fatima Hussein Ali Ahmad <i>Mahmood Hussain Advocates and Legal Consultancy LLC</i>	United Kingdom , Simona Peter <i>Bird & Bird LLP</i>
UAE , Salman Mohamed Ahmad Mohamed Altuweel <i>Mahmood Hussain Advocates and Legal Consultancy LLC</i>	United States , Jack Shaw <i>Procopio, Cory, Hargreaves & Savitch LLP.</i>
UAE , Nada Hamad Majid Ahmad <i>Diana Hamade Attorneys at Law</i>	Vietnam , Vinh (Richard) Luu <i>Asia Legal</i>
UAE , Diana Hamade <i>Diana Hamade Attorneys at Law</i>	

Members' Notes

Arya Tripathy, India



Arya Tripathy, an IPBA member since 2019 and Partner at PSA, a full-service Indian law firm, was selected as Co-Chair of the International Association of Privacy Professional's New Delhi KnowledgeNet Chapter in January 2022. In this role, she aims to conduct various academic and networking sessions, focusing on comparative data protection laws in Asia and Europe, with specific emphasis on India's upcoming data protection and other technology laws. In August 2021, she qualified as a Certified International Privacy Professional/Asia with IAPP and has been actively collaborating with international information technology and privacy experts on a variety of privacy and data policy matters.

Stephan Wilske, Germany



Stephan Wilske was a speaker at the Taipei International Arbitration Conference 2021 (27 October 2021) where he and his colleague Zelda Bank presented the following topic: 'Is There An (Emerging) Ethical Rule in International Arbitration to Strive for More Climate Friendly Proceedings?'. A paper with the same title has been published in Vol 14/2, pp 155–184 (November 2021) of the *Contemporary Asia Arbitration Journal*.



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