

# Asia-Pacific Competition Update

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**Competition Programme**  
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## IN THIS ISSUE



Entry Point - Editorial Note p. 3



News from Asia-Pacific Competition Authorities p. 4-7



Workshop on Competition Rules in the Transport Sector p. 8-12



Bilateral Seminar for OTCC (Thailand) p. 13-15



9<sup>th</sup> OECD/KPC Competition Seminar for Judges on Main Challenges in Adjudicating Competition Law Cases p. 16-19



The Growing Importance of Digital Markets in ASEAN p. 20-24



OECD Competition Committee Meetings p. 25-27



Lit Review August 2019 p. 28-29

The Competition Programme of the OECD/Korea Policy Centre provides education and training to officials of Asia-Pacific competition authorities in the field of competition law and policy, and OECD/KPC organises events for judges. This newsletter includes information about our work and the work of the OECD, as well as news, case studies and reports from competition authorities in the Asia-Pacific region.

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## Entry Point - Editorial Note

This newsletter discusses three recent workshops held by the OECD/KPC, two of which took place in Bangkok, Thailand during the month of May – a bilateral seminar for the OTCC (and some other ASEAN jurisdictions) and a Seminar for Judges organised with the Supreme Court of Thailand and ASEAN. You may read more about their content in the pages that follow.

The 9th Seminar for Judges was a particular highlight given the number of judges from ASEAN (nearly 50 judges were in attendance, most of them from ASEAN countries) as well as the new format that was used, composed of a very rich panel of 3 or 4 judges with competition experience for three different topics. This allowed for a very rich debate on a number of key areas when courts adjudicate competition cases. Discussions revolved around key challenges for judges in competition cases, admissibility and probative value of economic evidence, presumptions and standard of proof for evidence – all of which are very relevant topics for judges in all jurisdictions.

This edition also has an article prepared by Sophie Flaherty of the OECD and that looks at Digital markets and the competition issues that such markets bring, by looking at the topic of mergers and how the recent reviews that have been undertaken in a number of jurisdictions have looked at this. In sum, competition concerns in digital markets should be kept in mind when drafting or amending competition laws and guidelines, and competition authorities should also be ready to review their analytical tools and adapt them to the digital world. Under the ASEAN Competition Action Plan (2016-2025), ASEAN has agreed to draft a set of agreed principles by 2022. It may therefore be appropriate to consider competition concerns in digital markets here, with a view to harmonise approaches taken by competition authorities. This will be subject of debate also in the 3rd High Level Representatives Meeting of Asia Pacific Competition Authorities in Paris on 4th December 2019.

This is a timely article also as it comes just before one of our major workshops this year taking place in October 2019 in Tokyo in a joint effort with the JFTC: Competition Issues of Digitalisation. Digitalisation has led to the introduction of new markets, change of old ones, and a transformation in how consumers obtain information and make purchases. This Workshop will provide participants with an opportunity to explore the common competition issues and challenges arising from the digitalisation of economies. In particular, digital products and markets can exhibit some particular characteristics that affect market structure, including: strong digital platform network effects, substantial economies of scale and scope, significant user data, low or zero prices. This workshop will identify and develop those issues via analysis of the recent studies undertaken in a number of jurisdictions as well as through cases (vertical restraints, merger and/or abuse of dominance cases).

The last workshop of the year will look at investigative techniques, in particular of cartels. As highlighted by the OECD Recommendation on Effective Action against Hard Core Cartels adopted in July 2019, “cartels can only be stopped and prevented if laws, sanctions and enforcement procedures against them are effective,

appropriate and have a deterrent effect”. Seasoned competition enforcers will walk participants through the different steps of effective cartel investigations, from detection to the final decision.

I look forward to seeing you at one of our upcoming events!



Ruben Maximiano



# News from Asia-Pacific Competition Authorities\*

\* News items were provided or sourced from the respective Competition Authorities and are their own responsibility

## First Reports Upcoming on ASEAN/OECD/ UK Project on Competition Assessment of Regulations and SOEs in ASEAN Member States

In September 2018, the OECD launched a project in the logistics sector involving all ASEAN Member States. The project is part of the implementation of the ASEAN Competition Action Plan 2016-2025 and will consist of an OECD's independent study carried out in cooperation with the UK Government, the ASEAN Secretariat and the ASEAN Experts Group on Competition.

The OECD is currently working finalizing the country assessments on the first batch of countries that includes Brunei, the Philippines and Thailand. Draft reports have been sent to national stakeholders to all these countries for both SOE and the Prioritised Competition Assessment components of the project. The Thailand country assessment will be launched in October 3rd in Bangkok, in close cooperation with the OTCC and the UK FCO.

The second batch of countries for the project includes Malaysia, Myanmar and Vietnam where the OECD team is working hard on the draft country assessments. The next country in line will be Indonesia, with the mission of the OECD team to discuss with stakeholders taking place at the end of October 2019.

## HONG KONG



### First Judgements of the Competition Tribunal

On 17 May 2019 the Hong Kong Competition Tribunal ("Tribunal") handed down its judgment in the first two cases that were filed by the Competition Commission ("Commission"). They were for suspected breaches of the First Conduct Rule (Prohibition of anti-competitive agreements, concerted practices and decisions) of the Competition Ordinance. Out of the 15 respondents that were proceeded against, 14 were found to have contravened the First Conduct Rule by having engaged in cartel conduct.

In the Competition Commission v Nutanix Hong Kong Ltd. & Ors. case, the Commission alleged that, in order to facilitate BT Hong Kong Limited (R2) winning a tender organized by the YWCA, SiS International Limited (R3), Innovix Distribution (R4), and Tech-21 Systems

Limited (R5) had separately agreed with Nutanix Hong Kong Limited (R1) to submit “dummy bids” (i.e. bids without any genuine intention to compete) to the YWCA in order to make up the “minimum number of bids” requirement in the YWCA’s procurement policy.

Following a 13 day trial before the Tribunal, R1, R2, R4, and R5 were found to have contravened the First Conduct Rule. The Commission’s case against R3 and R1 (insofar as it related to its alleged agreement with R3) was dismissed on the grounds that the conduct of the relevant employee within R3 was not attributable to R3. Three of the respondents (R1, R2, and R4) have since filed a notice of appeal to appeal against the finding of the Tribunal. The appeal is expected to be heard in 2020.

In the Competition Commission v W. Hing Construction Co. Ltd. & Ors case, the Commission alleged that R1-10 - decoration contractors approved by the Hong Kong Housing Authority to be “Appointed Decoration Contractors” of Phase 1 of On Tat Estate (comprising of 3 newly completed blocks of residential flats) - had agreed with each other to share the “market” for decoration works with reference to the floor in which the prospective tenants were allocated and to fix the prices for certain standard decoration packages that were to be offered.

Following a 17 day trial before the Tribunal, all 10 respondents were found to have contravened the First Conduct Rule as alleged by the Tribunal. In doing so, the Tribunal specifically rejected the contention by some of the respondents (including from their economist) that the market sharing and price-fixing agreement in this context were economically efficient so as to be excluded from the application of the First Conduct Rule. One of the respondents (R4) has filed a notice of appeal to appeal against the finding of the Tribunal. The appeal is expected to be heard in 2020.

## KOREA



### The KFTC Sanctions International Cartel of Four Auto Parts Makers

The Korea Fair Trade Commission has decided to impose a total of 9.2 billion won in penalty surcharges against four auto parts suppliers for agreeing to allocate their automaker clients in advance when selling alternators and ignition coils. Among the four, the two were also referred for prosecution.

#### (1) Price fixing of alternators

The three global auto parts makers including Mitsubishi, Hitachi and Denso had colluded to allocate their clients in advance when selling alternators to global automakers. Several local automakers were also the subject of allocation and this practice lasted for 10 years from 2004 to late 2014.

When automakers had sent a request for quotation, sales personnel of the three firms gathered to discuss prices so that the agreement could actually take place. Hitachi had agreed with Mitsubishi Electric, which was an existing supplier of alternators for Renault Samsung’s QM5, to intentionally present higher prices than Mitsubishi Electric and carried out the agreement. As a result, automotive alternators from Mitsubishi were sold to Renault Samsung’s QM5 until the model’s production was discontinued in 2016.

Mitsubishi Electric and Denso allocated their clients in advance, and agreed that Denso would be a prospective winner at the four alternator tenders for Hyundai Motor’s Grandeur HG model, Kia Motor’s K7 VG model, etc. As a result, Denso’s alternators were sold based on the agreement until the models’ production was discontinued in 2017.



## (2) Price fixing of ignition coil

The three firms including Diamond, Mitsubishi and Denso had agreed on Denso's vested rights when selling ignition coils inserted to GM Korea's Malibu model. When automakers had invited bids for the parts for ignition coils, Diamond did not bid in order to respect the commercial supremacy of Denso while Mitsubishi had presented higher prices than those of Denso. As a result, Denso's ignition coils were sold until the production of Malibu model was discontinued in 2016.

The KFTC decided to impose 9.2 billion won penalty surcharges along with orders restraining further violations against the four companies including Mitsubishi, Hitachi, Denso and Diamond. The two corporations (Mitsubishi and Hitachi) were referred to the prosecution.

## JAPAN



### Antimonopoly Act's Leniency and Penalties Provisions Amended

The bill to amend the Antimonopoly Act (AMA) was approved by the Diet and enacted on June 19th, 2019. The purpose of the amended act is to deter "unreasonable restraint of trade" (cartels, bid rigging) more effectively, through increasing incentives for enterprises to cooperate in the JFTC's investigations and imposing an appropriate amount of surcharges according to the nature and the extent of the violations. The amendment shall come into effect on the date specified in the Cabinet order within 18 months from June 26th, 2019.

The content of the amendment is as follows:

#### (1) Amendment of the leniency program

- Introducing a new system which allows the JFTC to reduce the amount of surcharges when enterprises submit information which contributes to the fact finding of the case, in addition to the amount under the current system where reduction rates are determined according to the order of applications.
- Abolishing the current limit on the number of applicants

#### (2) Revision of the calculation methods for surcharges

- Expansion of the scope of surcharges, imposing surcharges to financial gains as a reward for not supplying the goods or services subject to cartels, as well as extension of the calculation term.

Furthermore, as an approach to so-called "attorney-client privilege", JFTC shall establish rules based on the Article 76 of AMA as well as related guidelines by the effective date of the amendment, from the perspective of making the new leniency program more effective, protecting confidential communication such as legal advice between an enterprise and independent attorneys substantially and ensuring appropriateness of administrative investigation procedures.

## The PHILIPPINES



### The PCC Expedites Merger Review Process

In line with Philippine government efforts to improve ease of doing business in the country, the Philippine Competition Commission (PCC) recently launched an expedited review process for mergers and acquisitions (M&As).

Under the rules that took effect on 2 July 2019, expedited review for qualified M&A transactions will take only 15 working days, down from the 30 calendar-day turnaround time for regular Phase 1 review prescribed by the Philippine Competition Act.

Based on PCC's experience in merger review for the past years, certain transactions are less likely to substantially prevent, restrict or lessen competition in their relevant markets. Expedited review will be available to four (4) types of transactions. These transactions involve (1) parties with no actual or potential overlapping business relationships; (2) foreign entities whose subsidiaries in the Philippines only act as manufacturers or assemblers of products, at least 95% of which are exported; (3) parties with a global scale but with negligible or limited presence in the Philippines; and (4) joint ventures formed purely for the construction and development of residential and/or commercial real estate projects. Merging parties may apply for the expedited review within 30 days after signing the definitive agreement on the deal, but prior to any acts of consummation.

In 2018, Phase 1 review of M&A transactions took an average of 23 calendar days. The full text of the PCC Rules on Expedited Merger Review can be accessed at <https://phcc.gov.ph/expedited-merger-review-rules/>.



## Busan (South Korea) - Workshop on Competition Rules in the Transport Sector



On 26-28 March 2019, the OECD/KPC organized its annual sector workshop in Busan. This year's event was devoted to competition rules in the transport sector.

Representatives from 12 Asian competition authorities (China, Chinese Taipei, Hong Kong, India, Indonesia, Malaysia, Mongolia, Pakistan, Philippines, Singapore, Thailand and Vietnam) attended the workshop and actively engaged in the discussions.

This was also a good networking opportunity for Asia-Pacific competition authorities that often face similar issues when dealing with cross-border cases, as happened with the acquisition of Uber by Grab that faced scrutiny in a number of

ASEAN countries (Malaysia, Philippines, Singapore, and Vietnam) with different approaches and outcomes.

The panel of invited speakers included Mr. Daniel Boeshertz (head of the European Commission unit dealing with antitrust in the transport sector), Mr. Jorge Nieto Rueda (Deputy Head of Public Aids and Draft Regulation Unit, Advocacy Department of the Spanish Competition Authority), Mr. Ruben Maximiano (Senior Competition Expert, OECD Competition Division) and Mr. Gaetano Lapenta (Competition Analyst, OECD Competition Division).

On the first day, Mr. Peter JK Kim (Director General, OECD/KPC Competition Programme) gave his opening remarks





and welcomed all participants to the workshop. Following his intervention and an introduction by each participant, Mr. Maximiano provided an overview of the main competition law issues in the transport sector. He highlighted what mainly differentiates today's transport sector from the past as well as from other sectors, namely disruptive innovation and the new business models characterised by network effects and multi-sidedness. Such innovative business models often face obstacles both in regulations that may be obsolete and give rise to unjustified barriers to entry (such as numerus clausus restrictions and licensing obligations), and by incumbents that raise claims of unfair competition (such as taxi drivers reacting to Uber and alike services). Regarding the specific competition analysis by antitrust watchdogs, he provided a sample of the challenges that they face with such new business models. First, concerning merger control, many of the transactions in digital markets escape merger notification as the current thresholds laid down in the law are mostly turnover-based and, for the purposes

of triggering a filing obligation, do not give relevance to the value of the transaction. Second, concerning, unilateral conduct, he explained that although exclusionary conducts, for instance via predatory pricing, are common means for attempting to drive disruptive firms out of the market, the latter have often managed to erode the demand of incumbents through innovation. Third, Mr. Maximiano highlighted that the development of algorithms and the use of data may facilitate collusion as well as the implementation of certain vertical restraints such as MFNs, RPM and territorial restrictions. Finally, he provided an overview of how disruptive business models have raised challenges for traditional analytical competition tools, for instance regarding market definition and the assessment of market power, due to the fast moving pace of these markets, the existence of non-price competition and their multi-sidedness.

Following this comprehensive introduction, Mr. Nieto Rueda gave two presentations on market definition and the assessment of market power in the ride-hailing sector. Through several real-



life examples in Spain, he explained how regulations sometimes contribute to the creation of market power in the form of legal monopolies, for instance by raising strong entry barriers, introducing quotas and minimum prices, thus guaranteeing strong monopoly rents. He then briefly summarised the ongoing battle in the EU regarding the nature of ride-hailing platforms (i.e., whether they should be considered as mere intermediaries or as transport operators as the European Court of Justice seems to suggest) and the role that platforms can have for anticompetitive purposes, acting as hub and spoke cartels.

Mr. Yogesh Dubey (CCI, India), Ms. Ethel Lin (CCCS, Singapore) and Ms. Devi Matondang (KPPU, Indonesia) shared with the participants the experience of their respective agencies. Mr. Dubey focussed on two cases regarding radio taxi services

that were eventually closed due to lack of evidence. Ms. Lin then extensively presented the Grab/Uber merger and the assessment conducted by CCCS. Following that, Mr. Jhe Hao Yang (Chinese Taipei FTC) shared his agency's experience the Taiwantaxi/Fanyataxi merger, with particular focus on the competitive analysis it conducted and the relevance given to pre- and post-transaction market shares, HHI and pro-competitive justifications brought by the parties (e.g., economies of scale, enhanced dispatch ability and shorter waiting times following the transaction). Finally, Ms. Matondang presented a number of cases that KPPU dealt with regarding taxi operators from and to the airport. The first day of the workshop finished with a hypothetical case prepared by the OECD where participants split into teams and simulated an oral hearing concerning an exclusive dealing and rebate case.





The second day of the workshop was dedicated to maritime transport. Mr. Boeshertz gave two presentations on European Union merger control of container liner shipping operators and block exemption regulations in the maritime sector. He provided a comprehensive overview of the assessment framework for maritime mergers as well as an explanation of some recent European Commission decisions (CMA CGM/CEVA, NYK/MOL K-Line, Cosco/OOCL). Then, he presented the work that the European Commission is conducting for reviewing its consortia block exemption regulation, before answering some questions posed by the participants many of whom are currently reviewing or have recently reviewed their block exemption regulations in this field. Mr. Michael Lee (KFTC, South Korea) then presented the experience of KFTC in the marine car carriers cartel, highlighting the issues, assessment and outcomes of the case.

In the afternoon, all participants had a cultural tour of Busan, before gathering for a dinner hosted by the OECD/KPC.

The last day began with a second hypothetical case study on a maritime transport operators' merger. The plenary was divided into two smaller groups to discuss and deal with the case, before presenting their preliminary findings and making proposals to a hypothetical board for future action and investigation. Then, the workshop continued with a session on competition authorities' advocacy efforts concerning transport sector regulations.

Mr. Lapenta presented the project that the OECD is currently conducting in all ten ASEAN countries in the logistics sector. First, he provided a short overview of the project, which consists of a competition assessment of laws and regulations in the logistics sector, and a study on the impact on competition of





SOEs that provide small package delivery services. Then, he introduced the OECD Competition Assessment toolkit, which is specifically designed for government and decision-making officials to assess the potential obstacles that old and new regulations can represent for competition. The OECD has already used this toolkit in several countries (Greece, Romania, Mexico, Portugal, and now Tunisia and ASEAN) and Mr. Lapenta provided a sample of the steps and analysis that the OECD conducted in its past projects. Following his presentation, Mr. Nieto Rueda presented the advocacy work that his division within the Spanish Competition Authority has done regarding the transport sector. All participants then actively discussed the difficulties faced when dealing with competition-restrictive regulations and shared tips and experiences that can help them move forward (e.g., market studies, regulatory reports, actions brought before national

courts). Mr. Norris Chan (Hong Kong Competition Commission) presented views and the Hong Kong experience on policy advocacy and enforcement in the transport sector.

This event allowed participants to explore a sector that is currently facing disruptive innovation and raises challenges for traditional competition analytical tools. Regulators around the world are faced with concerns of unfair competition (e.g., taxi drivers vis-à-vis Uber drivers), waves of consolidation (e.g., big liner shipping alliances) or difficulties in applying and possibly adjusting traditional analytical tools for the digital age. ASEAN and Asia-Pacific antitrust watchdogs are all dealing with this type of issues at the moment and this workshop was a good and timely occasion for sharing their experiences and learning from each other.



## Bilateral Seminar for OTCC (Thailand)



Under the Thailand Country programme 2 two-day OECD/KPC workshops were organised in Bangkok on the week of the 27th May 2019. One was organised for the OTCC (the competition authority) and the other for the Thai Judiciary, organised together with the Supreme Court of the Kingdom of Thailand. These were very timely considering the new Competition Law that came into force together with the new competition authority.

The first Bilateral workshop under the Thai Country Programme took place on 27th and 28th May and was divided into two, with the first day dedicated to the Senior Management of the OTCC (Commissioners and Chairperson) as well as for selected senior staff of Thai regulators with competition powers. In attendance were also senior officials from Lao PDR, Myanmar and Cambodia.

The second day was targeted to case handlers of the OTCC and so was more focusing on technical aspects of dealing with cases.

On the first day, there were initial remarks from Sakon Waranyuwattana (OTCC Chairperson), Peter JK Kim (Director General of the OECD/KPC Competition Programme) and Ruben Maximiano (Senior Competition Expert OECD).

The speakers were then Ruben Maximiano, Wouter Meester (Competition Expert OECD), Bill Kovacic (non-executive board member of the CMA, UK), Johannes Bernabe (Commissioner of Philippines Competition Commission) and Kirtikumar Mehta (Université de Fribourg, former Director Cartels, European Commission). The first topic on the menu was led by Bill Kovacic where he introduced and then discussed with participants the





management of the external politics of a regulator – dealing with stakeholders of all kinds. The discussion focused in particular on the challenges and opportunities of a new competition authority, in particular one that is independent but still needs to be part of the political system in order to make its voice heard. The experience of the Philippines provided valuable insights from an agency that has developed fast in the region and was brought by a Commissioner that sits on the Board of the Philippines Competition Commission since its inception, Johannes Bernabe. This was then complemented also by the perspective from the EU regarding its enforcement effectiveness, providing a history of enforcement and how it developed its practice over time and then some current cases and issues. The afternoon was dedicated to the discussion of management strategies

and prioritisation, in a session led by Bill Kovacic, that greatly benefited from the insights also from Johannes Bernabe from the Philippines, in particular offering the experience of the first steps of the agency and how it met internal challenges and prioritised its actions.

The final session was dedicated to the important role that competition guidelines can play. Given the complex economic and legal issues in competition law, competition laws require some sort of practical guidance to ensure the understanding of the various legal aspects of competition. For this reason, as well as to raise public awareness with regard to competition rules, the competition agencies, as part of their competition advocacy, may draft guidelines with regard to significant aspects of applying competition legislation. They aim at enhancing the competition





culture of both the business and the society as a whole with regard to specific issues. In the particular case of Thailand, the OTCC together with the OECD (under the Thailand Country Programme) have decided to focus on merger control rules. An OECD report will be issued by 2021 on merger guidelines to be prepared by the OTCC. This session provided for an opportunity for a first discussion of the possible content of those guidelines by making a comparative analysis with 6 other jurisdictions.

The second day was at a more technical level, with sessions dedicated to mergers, cartels and abuse of dominance, with case studies and with speakers including Ruben Maximiano, Wouter Meester, Kirtikumar Mehta, Jennifer Orr (Australian ACCC) and Derek Ritzmann (University of Hong Kong). This workshop had approximately 50 participants of competition officials from the OTCC, ie., most of the technical staff of the OTCC. Before the event the OTCC had made specific requests about the topics to be discussions which ensured that the topics

were relevant for the current status of discussions in Thailand. Derek Ritzmann provided a very valuable session that covered the basic economics at the core of competition law and set the foundations for the rest of the day. Wouter Meester then presented in detail the role that market definition plays in all competition cases, and Ruben Maximiano covered the merger control economic fundamentals. In the afternoon, Kirtikumar Mehta provided in depth look at how cartels are investigated and analysed in the European Union, and Jennifer Orr discussed a number of cases of abuse of dominance in Australia.

Overall, a bilateral event that was very complete in providing an overview at both the management level – fundamental to run a successful competition authority, as well as more technical level, allowing case handlers to have contact and understand how more experienced agencies deal with issues in the context of their cases in mergers, cartels and abuse of dominance.



## 9<sup>th</sup> OECD/KPC Competition Seminar for Judges on Main Challenges in Adjudicating Competition Law Cases



The ninth OECD/ Korea Policy Centre Competition Law Seminar for Asia-Pacific Judges took place on 30-31 May 2019 in Bangkok (Thailand) under the auspices of the OECD Thailand Country Programme and in close cooperation with the Supreme Court of Thailand and with the ASEAN Secretariat. This ninth edition of the Seminar for Asia-Pacific Judges dealt with Main Challenges in Adjudicating Competition Law Cases. It was attended by 25 judges from Thailand and 25 other participants from Asia Pacific jurisdictions, representing more than 15 jurisdictions.

The event was also an opportunity to disseminate an important tool for judges dealing with competition cases - the CLIP OECD Competition Primers for ASEAN judges. These Primers are a series of information sheets designed to offer practical guidance to members of the judiciary when analysing competition cases. The Primers bring together the Federal Court of Australia's technical knowledge and first-hand experience with the OECD's international experience working with judges and in the ASEAN region. Whilst made in the context of the ASEAN Competition Action Plan, these Primers may be useful for judges from all jurisdictions.



The Seminar started with opening speeches by Peter JK Kim (Director General of the OECD/KPC Competition Programme) and Ruben Maximiano (OECD). The Seminar included keynote speeches by Nopporn Bhotirung-Siyakorn (President, Intellectual Property and International Trade Division, Supreme Court of Thailand) on the newly-enacted competition law in Thailand, Frédéric Jenny (Chairman of the OECD Competition Committee) on the role of economics in courts, and José Luís da Cruz Vilaça (former Advocate General and Judge of the European Court of Justice and President of the Court of First Instance of the European Communities) on EU judicial review in the context of economic matters. The Seminar also included speeches by Woochan Kang (Chief Judge of the Cheonan District Court) on judicial review and economics in the Korean Courts. The key economic concepts were explained in special sessions led by Derek Ritzmann (Adjunct Professor, Hong Kong University) who also participated in a hypothetical case session as an “economic witness”.

Central to the Seminar were also three panel discussions that took place, with panellists from different jurisdictions. The panels were on:

- Key challenges for judges in competition cases
- Admissibility and probative value of economic evidence
- Presumptions and standard of proof for evidence

The first panel addressed the main challenges that judges face in competition cases. The discussion focused on the difficulties of decision-making in competition cases in various jurisdictions. Frédéric Jenny (speaking as former judge at the French Supreme Court), Paul Lomas (Ordinary Member of the UK Competition Appeal Tribunal) and Queeny Au-Yeung (Deputy President at the Competition Tribunal of Hong Kong) intervened in the discussion. The panel was moderated by Ruben Maximiano (OECD).

One of the main issues discussed and where there was considerable consensus among the speakers that the interaction and dialogue between judges and economists may give raise to





difficulties and that great effort should be put by the experts in the 'translation' of economic concepts for the judge.

The **second panel discussed the admissibility and probative value of economic evidence in competition cases.** The panel was composed of Jennifer Orr (Principal Economist, ACCC), Zhang Bo (Justice, Intellectual Property Division, Supreme People's Court China), Paul Lomas (Ordinary Member of the UK Competition Appeal Tribunal) and Sorawit Limparangsri (Judge in the Research Division of the Specialised Court of Appeal, Thailand). The panel was moderated by Matteo Giangaspero (OECD).

Some of the elements discussed included considerations on the importance for judges to take economics into the decision

making, as this is needed to ensure that the competitive process in the market is maintained and that in this context it is important and necessary for economic witnesses to be heard in the context of competition cases. However, whilst there was overall agreement that whilst it is important for the court to take into account economic expert witnesses given competition law is an economic law, it is for the judge to interpret and apply the law based on economic and other factual evidence.

The **third panel dealt with presumptions and standard of proof for evidence.** It addressed how economic considerations may inform the assessment, and the procedural devices affecting the burden and the standard of proof. To explore these issues, Cristina Volpin (OECD) moderated the panel and was joined by







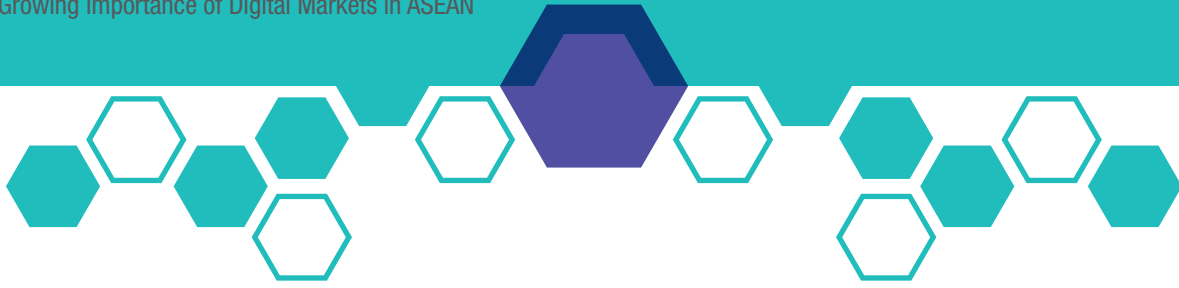
José Luís da Cruz Vilaça, Paul Lomas and Sorawit Limparangsri.

On presumptions these can serve as guidance to the judges as well as enabling economic actors to predict how rules would apply. An interesting element discussed was in the context of a relatively recent ASEAN jurisdiction such as the Thai competition regime where the judiciary may need more guidance to facilitate the adjudication of cases.

In **conclusion** the two day workshop provided judges with an understanding of fundamental competition economic concepts. It also allowed judges to understand how different jurisdictions adjudicate competition cases, in particular considering the importance played by economics and the role that economic

expertise and witnesses may play and how jurisdictions deal with these issues. This will allow judges of Asia Pacific to build their expertise on competition cases.





## The Growing Importance of Digital Markets in ASEAN: Considerations from recent research on competition in the digital economy

On 5 June 2019, the G7 Competition Authorities released a joint statement, noting their common understanding on ‘Competition and the Digital Economy’. The statement explains the benefits of the digital economy on innovation and growth,<sup>1</sup> and reaffirms the need for competition law enforcement, ‘in safeguarding trust in digital markets and ensuring that the digital economy continues to deliver economic dynamism, competitive markets, consumer benefits, and incentives to innovate’.<sup>2</sup>

Digitalisation is recognised as a driver for growth and development within the Association of South East Asian Nations (ASEAN) region. It has disrupted traditional markets and continues to deliver many benefits to consumers. However, recent and ongoing work highlights the potential competition concerns arising in digital markets, which should be considered by competition authorities in the region, in both their enforcement and advocacy roles.

The Competition and Consumer Commission of Singapore (CCCS) has taken the lead on digitalisation issues in ASEAN. Along with several specific research papers, it has published a handbook on Competition and E-Commerce in ASEAN, explaining that ‘to support the development of e-commerce markets across ASEAN and to facilitate cross-border trade, greater harmonisation across the region is required’.<sup>3</sup> According to the CCCS, in 2015, the six largest ASEAN countries had a combined e-commerce market

value of US\$7 billion and business to consumer e-commerce was expected to grow 17.1% annually.<sup>4</sup> Further, according to the Asia Development Bank, the cross-border e-commerce market in Southeast Asia is comparatively large, and is expected to increase significantly with the implementation of various ASEAN trade initiatives.<sup>5</sup> It is therefore important for ASEAN competition authorities to take a proactive approach and ensure regional co-operation to facilitate growth. It is acknowledged however that access to the digital economy in ASEAN remains uneven.<sup>6</sup> The difference in both the rates of digitalisation, and resources of the various competition authorities (some recently established) means that digital issues may not be a current regulatory or enforcement priority for all ASEAN Member States (AMS). Despite this, all AMS currently have government initiatives on e-commerce,<sup>7</sup> and competition authorities are becoming more and more active in the area. Recent merger activity, such as the ride hailing platform merger between Grab and Uber in Southeast Asia, which was subject to scrutiny by several ASEAN competition authorities, allows us to appreciate the growing importance of digital platforms in the region as well as the potential benefits of close regional co-operation.

1 For example, digitalisation has created new investment and business opportunities, offered new products and improved the quality of goods and services and decreased costs.

2 Common Understanding of G7 Competition Authorities on “Competition in the Digital Economy” Paris, 5 June 2019.

3 Competition and Consumer Commission of Singapore’s Handbook on Competition and E-Commerce in ASEAN (2017) (CCCS Handbook), page 5.

4 CCCS Handbook, page 142.

5 Asia Development Bank, *Embracing the E-commerce Revolution in Asia and the Pacific*, 2018 (ADB, *Embracing the E-commerce Revolution*) <<https://www.adb.org/publications/e-commerce-revolution-asia-pacific>>, pp 5-6. According to this report, cross border transactions make up 40% of transactions in e-commerce in Southeast Asia.

6 OECD, *Economic Outlook for Southeast Asia, China and India (Fostering Growth through Digitalisation)* 2018. See also, the UNCTAD B2C E-Commerce Index 2018, where for example, Singapore is rated second, Viet Nam sixty-ninth and Myanmar one hundred and twenty fifth in the Index.

7 CCCS Handbook, pages 162-168.



Since the publication of the CCCS Handbook in 2017, various inquiries, market studies and projects focusing on competition in the digital era, have been undertaken around the world. This article intends to provide a short overview of some of this recent work. While the reports consider several substantive topics, we focus on one of the main emerging concerns of competition authorities, anti-competitive mergers in digital markets, aiming to provide insight into the possible solutions discussed in the main publications reviewed.

## Brief overview of recent work on competition in digital markets

The following list provides examples of recent work that has been carried out in the Asia-Pacific region:

- Australia: In July 2019, the ACCC released its Digital Platforms Inquiry (ACCC Inquiry). The inquiry considered the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets. In particular, the inquiry focused on the impact of digital platforms on the supply of news and journalistic content and the implications of this for media content creators, advertisers and consumers.<sup>8</sup>
- Indonesia: In December 2017, the KPPU released a report on the digital economy in Indonesia, prepared by the Australian Indonesia Partnership of Economic Governance (AIPEG). The report analysed the impact of digitalisation, considered potential issues and flagged international best practices.
- Japan: The Japan Fair Trade Commission (JFTC) has released an interim report on trade practices of digital platforms (2019). Further, its Competition and Research Centre has published the following:
  - Study Group for the Maintenance of Business Circumstances involving Digital Platformers (2018)
  - Study Group on Data and Competition Policy (2017)
- Singapore: In partnership with other government bodies (such as the Personal Data Protection Commission and the Intellectual Property Office of Singapore) the CCCS has released the following research papers:
  - Data Portability (2019)
  - Data: Engine for Growth – Implications for Competition Law, Personal Data Protection and Intellectual Property Rights (2017)
  - Special Project on Government Advocacy and Innovation with the ICN (2016)
  - Rebalancing Competition Policy to stimulate innovation and sustain growth (2015)
  - E-Commerce in Singapore – How it affects the nature of competition and what it means for competition policy (2015)

Examples of recent work in Europe include:

- European Commission: The EU Commission released a Special Advisers' Report, 'Competition Policy for the Digital Era' in 2019 (Crémer Report).
- In 2017, EU released its 'Sector Inquiry into E-commerce' as part of the EU Digital Single Market Strategy, covering e-commerce of consumer goods and digital content.
- United Kingdom: In 2019, the UK released its 'Unlocking Digital Competition, Report of the Digital Competition Expert Panel' (Furman Report).
- The UK Competition and Markets Authority (CMA) carried out a market study into digital comparison tools (DCTs) (2017).<sup>9</sup>

<sup>8</sup> Letter from The Hon Scott Morrison MP to Mr Rod Sims, ACCC Chairman, setting out the Terms of Reference to the ACCC Digital Platforms Inquiry, 4 December 2017.

<sup>9</sup> DCTs are defined in the market study as 'digital intermediary services used by consumers to compare and potentially to switch or purchase products or services from a range of businesses'.



- Other CMA discussion papers and reports include:
  - Ex-post Assessment of Merger Control Decisions in Digital Markets (2019).
  - Economic Value of Data (2018)
- Italy: In 2019, the Italian Competition Authority (AGCM) released a joint report with the Authority for the Protection of Personal Data and the Authority for Communications.
- Portugal: In 2019, the Portuguese Competition Authority released an issues paper on Digital Ecosystems, Big Data and Algorithms.
- France and Germany: L'autorité de la concurrence and the Bundeskartellamt released a joint paper in 2016 on Competition Law and Data.

## Issues and Recommendations arising from key reports: convergences and differences

The reports identify various features common to digital platforms, such as network effects, economies of scale and scope and the control of consumer data, which may restrict competition and market entry. The implication of these market features is that in such markets firms compete for the market in what is often referred to as “winner takes most” dynamics. These characteristics, along with the prevailing business models, such as multi-sided platforms and zero-priced markets, have implications for competition policy and enforcement, and should be addressed at both a domestic and regional level.

Recent work indicates that the current competition framework may be adapted to address the challenges arising from the digital economy. There is a large amount of ongoing work in this area. Along with the publication of in-depth inquiries and reports, there is a global trend towards using market studies to better understand how

digital markets work and to identify potential issues.<sup>10</sup> Further work is ongoing: in July 2019, the US Department of Justice began its Big Tech Market Power Review and the UK announced that it would conduct a market study into Online Platforms and Digital Advertising.

It is also widely acknowledged that collaboration with consumer protection and privacy enforcement bodies is essential, given the complementary role of privacy and consumer protection laws, in combatting potential harms associated with digital platforms.<sup>11</sup>

## Anti-competitive mergers

This section will consider the CCCS Report, EU Crémer Report, the UK Furman Report and the ACCC Inquiry to merger enforcement in digital markets.

All of the reports encourage the prioritisation of mergers in digital markets. A particular concern raised in these reports is the risk that anti-competitive mergers will escape assessment or will be cleared unconditionally under the current rules. The term ‘killer acquisitions’ is often used, referring to the strategy of incumbent firms, especially in the digital or technology sectors, buying start-ups with new technology or large datasets in order to ‘kill off’ any potential competition by either absorbing it or shutting it down. Such firms could otherwise act as a competitive constraint on the behaviour of the dominant platform or firm.

The CCCS Handbook discusses whether existing merger rules adequately capture relevant transactions. It explains, firstly, ‘merger tests for notification may not capture mergers where there is an absence of current overlaps in products/services between the merging parties, or where revenues of one of the firms are low,

<sup>10</sup> Enforcement action was initiated in a number of cases in the EU due to the EU Sector Inquiry into E-commerce (2017), conducted as part of the EU Digital Single Market Strategy.

<sup>11</sup> All ASEAN countries have consumer protection legislation (Lao PDR and Cambodia have draft legislation) and six out of ten ASEAN countries have Privacy and Data Protection Legislation (Brunei Darussalam, Cambodia, Lao PDR and Myanmar do not have such legislation). Source: (ADB, Embracing the E-commerce Revolution, page 82).



and, therefore, fall below notification thresholds'. Secondly, 'the current analytical framework for review is largely based on a static approach which may not consider dynamic aspects of competition'.<sup>12</sup> There is also the specific concern of mergers motivated by Big Data, given the substantial value of data and its impact on a firm's ability to attain, sustain and potentially abuse its market power.

The reports generally split their assessment of the merger regime into two parts:

### 1. Identification of mergers & thresholds

In Australia, the UK and Singapore where there is no compulsory pre-merger notification process,<sup>13</sup> no change has been recommended to the voluntary regime generally. However, both the Furman report and the ACCC Inquiry have recommended that large digital platforms be required to notify intended acquisitions. The EU report made no recommendation to change its jurisdictional thresholds but advised to monitor the effects of the value of transaction provisions, introduced into the domestic merger regimes of certain EU countries, such as Germany and Austria.<sup>14</sup> No AMS has a transaction value threshold,<sup>15</sup> but the CCCS has noted its potential value. Given the high monetary value of data and other related acquisitions, such provisions will likely capture many Big Data or technology mergers that may not otherwise meet turnover thresholds.<sup>16</sup> The CCCS explains

<sup>12</sup> CCCS Handbook, page 105.

<sup>13</sup> AMS have varying notification requirements.

<sup>14</sup> These provisions are applied in addition to existing turnover provisions, with a view to ensure that high value mergers concerning undertakings with high potential but low turnover, are caught by the merger control regime.

<sup>15</sup> CCCS Handbook, page 108.

<sup>16</sup> CCCS Handbook, page 106. It is said that the German provisions would now capture the Facebook/WhatsApp merger (transaction value of US\$19 billion), which although reviewed by the EU Commission, was not captured by the turnover thresholds. As explained by the OECD, 'such transaction thresholds could help enable competition authorities to identify pre-emptive acquisitions intended to displace potential disruptive innovators (some of which may be data-driven innovators)': OECD, Big Data: Bringing Competition Policy to the Digital Era, 2016, page 20.

that 'AMS may wish to consider implementing a test on the transaction value in their merger control rules'.<sup>17</sup> However, like the EU, the CCCS stresses the importance of legal certainty and ensuring that the right threshold level is set,<sup>18</sup> in order to ensure the proper functioning of the merger regime and thus avoiding unnecessary administrative and transaction costs.

### 2. Substantive assessment

Reviewed reports agree that merger assessment in digital markets should consider certain factors of non-price competition, such as privacy and data,<sup>19</sup> as well as potential competition. The ACCC Digital Platform Inquiry recommends reform to the Competition and Consumer Act 2010 to explicitly allow the ACCC to consider: '(a) the likelihood that an acquisition would result in the removal of a potential competitor, and (b) the amount and nature of data which the acquirer would likely have access to as a result of the acquisition',<sup>20</sup> when assessing the likely competitive effects of a merger. The ACCC noted that while it already considers such factors as part of its assessment, legislative change would indicate the importance of these factors to merger parties and review bodies.<sup>21</sup> The CCCS, like the EU in the Facebook/WhatsApp merger, has considered features of 'data-driven markets' in its merger assessment,<sup>22</sup> for example, in the Seek Asia/Jobstreet merger,<sup>23</sup> and highlights the importance of data considerations in its Handbook.

<sup>17</sup> CCCS Handbook, page 119.

<sup>18</sup> CCCS Handbook, page 107.

<sup>19</sup> OECD, Big Data: Bringing Competition Policy to the Digital Era, 2016, page 18.

<sup>20</sup> ACCC, Digital Platforms Inquiry (Final Report) July 2019 (ACCC Inquiry), page 30.

<sup>21</sup> ACCC Inquiry, pages 10 and 106.

<sup>22</sup> CCCS, Data: Engine for Growth – Implications for Competition Law, Personal Data Protection and Intellectual Property Rights, 2017, page 84.

<sup>23</sup> This was a merger between two online job-search platforms.





Competition authorities otherwise agree that the substantive merger assessment tests do not require any immediate amendment. While no change is recommended to the SIEC test (whether a concentration would substantially impede effective competition), the Crémer report recommends greater scrutiny that would focus on whether there is an overall strategy from the incumbent to prevent competition (including in broader ecosystems) and raises the potential development of new theories of harm. The report suggests that where the acquisition of small start-ups by dominant platforms is likely part of a 'strategy against partial user defection from the ecosystem', the burden should be on merging parties to show that pro-competitive efficiencies offset any adverse effects on competition but notes that this would not constitute a presumption against the legality of such mergers.<sup>24</sup> The Furman Report recommended reforming the standard of review, raising a 'balance of harms approach', which would look not only at the likelihood of harm occurring but also the potential scale of such anticompetitive effects. The CMA however, in its Digital Markets Strategy, considered that the current regime was appropriate,<sup>25</sup> but is currently reviewing its merger assessment guidelines,<sup>26</sup> and has undertaken an ex-post assessment of mergers in digital markets. Some AMS are still developing their merger regimes.<sup>27</sup> It is therefore the right time to discuss special considerations for merger enforcement in digital markets and to consider an ASEAN wide approach. Domestic laws and regional guidelines and analytical tools may be adapted to account for possible threshold issues and non-price factors.

24 Crémer Report, page 124.

25 Competition and Markets Authority, The CMA's Digital Market Strategy, July 2019, page 9.

26 See, eg, <https://www.gov.uk/government/consultations/call-for-information-digital-mergers>.

27 For example, Malaysia does not yet have a merger control regime and Cambodia currently has a draft competition law.

## Conclusion

Digitalisation creates many exciting and new opportunities but to ensure society reaps the full benefits, competition authorities must be proactive in enforcement, advocacy and in ensuring regional and international co-operation.

The recent and on-going work on digitalisation is important and will likely guide future enforcement priorities and the legislative agenda of governments and competition authorities around the world.

Using market studies to better understand how digital markets work and to identify potential issues As Singapore has shown, such initiatives could be of great benefit to AMS.

Further, the recent reports have noted the importance of carrying out competition assessments of laws and regulations, which may unnecessarily restrict innovation and growth in digital markets.<sup>28</sup>

In sum, competition concerns in digital markets should be kept in mind when drafting or amending competition laws and guidelines, and competition authorities should also be ready to review their analytical tools and adapt them to the digital world. Under the ASEAN Competition Action Plan (2016-2025), ASEAN has agreed to draft a set of agreed principles by 2022. It may therefore be appropriate to consider competition concerns in digital markets here, with a view to harmonise approaches taken by competition authorities.



**Sophie Flaherty** (Competition Expert, OECD)  
with contributions from Pedro Caro de Sousa and Ania Thiemann

28 The OECD is currently updating its Competition Assessment Toolkit to consider digital issues.

# OECD Competition Committee Meetings, 3 - 7 June 2019

## Working Party No. 2 on Competition and Regulation

### Roundtable on Publicly Funded Education Markets

Competition agencies face serious challenges when advocating (and enforcing) competition rules in education markets, as numerous features of these markets can prevent, restrict or distort competition. For example, competitive incentives can be smothered by capacity constraints, uninformed passive consumers and a lack of exit risk, or distorted by competitive neutrality issues. Moreover, other policy goals are important to governments, e.g., providing equal opportunity for all, providing the skills required to fulfil an industrial strategy or prioritising the needs of the highest or lowest achievers. Competition authorities must ensure that their activities complement and do not contradict those goals. The roundtable allowed delegates and experts to share their experiences and views on how competition can best be used to help policymakers achieve their goals.

**Link:** <http://www.oecd.org/daf/competition/publicly-funded-education-markets.htm>

### Presentations on Tools for Addressing Competitive Neutrality

Participants from a number of delegations gave presentations on the tools that they use to address competitive neutrality issues in their markets. Through their presentations the delegates were able to demonstrate how they have effectively and comprehensively addressed different types of competitive neutrality problems. The discussion that followed the presentations considered the possibility of a revised set of principles on competitive neutrality and the steps that could be taken to develop them.

## Working Party No. 3 on Co-operation and Enforcement

### Roundtable on the Standard of Review by Courts in Competition Cases

Parties involved in competition cases should be able to seek judicial review of the decisions made in their cases. The availability of judicial review ensures that limits are placed on a competition authority's exercise of its powers; furthermore, it influences competition law enforcement in terms of the conduct of investigations and the collection of evidence, how economic concepts are interpreted and applied, and how decisions are substantiated.

The roundtable looked at the standard of review applied by courts in antitrust cases and the ensuing implications for competition authorities.

The Secretariat also presented a proposal for a Recommendation on transparency and procedural fairness to consolidate the extensive work already conducted by the OECD and the International Competition Network on this topic.

**Link:** <http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

### **Fighting Bid Rigging in Argentina**

In 2018, Argentina's competition authority (Comisión Nacional de Defensa de la Competencia) requested the Secretariat to review Argentina's federal rules for the procurement of public works and to provide recommendations for better competition, based on the OECD Recommendation for Fighting Bid Rigging in Public Procurement.

The Secretariat analysed Argentina's legal and institutional set up for the procurement of public works, identified good practices and challenges, and made recommendations for improvement. This was the first time that the OECD undertook a competition review of procurement for public works in a country. Throughout the project, the Secretariat and some delegations provided capacity building and presented good practices followed by competition authorities to prevent and detect bid rigging.

## **Competition Committee**

### **Roundtable on Competition Issues in Labour Markets**

The session explored the relationship between competition law and employment issues. It explored to what extent the existing competition law framework may be used to prevent the creation and abuse of monopsony power in labour markets, for example through mergers, no-poaching agreements or other anticompetitive practices. It analysed the factors contributing to the market power of employers, the question of why cases involving monopsony power have been so rare, its effects on workers and consumers, and the tools that might be used to counteract it. The impact of the digital economy on labour markets was also considered, in particular in light of the distinction between employees and self-employed contractors and the emergence of new intermediary forms of employment.

**Link:** <http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>

### **Roundtable on Digital Disruption in Financial Markets (FinTech)**

The Competition Committee has addressed the topic of Financial Markets and Competition several times and from different angles in the last 10 years. This session discussed issues related to financial stability, prudential regulation, systemic effects, too-big-to-fail, regulation and competition. The main focus of the discussion was the digital disruption resulting from the emergence of FinTech/BigTech operators in the provision of financial services, and their competitive relationship with traditional

financial institutions. The session also discussed how financial regulation could be adapted to deal with the particular challenges arising from a multi-layered and multispeed financial services environment.

**Link:** <http://www.oecd.org/daf/competition/digital-disruption-in-financial-markets.htm>

### **Roundtable on Licensing of IP Rights and Competition Law**

The treatment of IP rights and related business conduct by leading competition agencies has undergone far-reaching changes in recent decades, as knowledge-based capital has become increasingly prevalent in OECD economies and the interaction between competition and IP law has grown in prominence in tandem with increased digitalisation.

While the OECD Competition Committee has issued two Recommendations that specifically address the interaction between competition and IP law, the most recent one was issued in 1989. This session looked at the developments that have taken place concerning the competition treatment of the licensing practices pertaining to Intellectual Property (IP) rights since these OECD IP Recommendations were adopted, with the ultimate goal of identifying points of international convergence and disagreement as regards to the competition treatment of all types of licensing practices.

**Link:** <http://www.oecd.org/daf/competition/licensing-of-ip-rights-and-competition-law.htm>

### **Roundtable on Vertical Mergers in the Technology, Media and Telecom Sector**

The recent wave of high profile merger cases in the Technology, Media and Telecom (TMT) sector around the world provided the perfect setting for delegates to revisit, through the lens of these cases, the way in which competition authorities apply antitrust economics to vertical mergers and design remedies. The roundtable discussed how vertical integration and associated theories of harm can be an important concern in the particular context of the TMT sector. At the same time, both economic theory and empirical evidence suggest that vertical mergers have important efficiency effects and are often welfare enhancing. Remedies in problematic cases are often behavioural in nature as competition authorities try to eliminate anti-competitive effects while permitting the parties to reap substantial efficiencies. The roundtable thus revisited the assessment of vertical mergers in light of recent developments in economic theory and case law, illustrating the main challenges identified in some of the most important mergers in the TMT sector.

**Link:** <http://www.oecd.org/daf/competition/vertical-mergers-in-the-technology-media-and-telecom-sector.htm>



This issue of the Literature Digest for this 2019 issue of the OECD KPC Newsletter looks at a number of articles, expertly reviewed by Pedro Caro Sousa, a competition expert of the OECD. Both articles are in the Pharmaceutical sector.

**Margherita Colangelo and Claudia Desogus, 'Antitrust Scrutiny of Excessive Prices in the Pharmaceutical Sector: A Comparative Study of the Italian and UK Experiences' (2018) *World Competition* 41(2) 225**

This article describes recent Italian and UK case law on excessive pricing in the pharmaceutical industry. It analyses the methodologies and legal tests deployed in the cases, and identifies the key challenges of applying competition law to exploitative practices in the pharmaceutical sector.

A particular area of focus concerns the justification of competition intervention against exploitative high prices. On the one hand, it is argued that high prices should not be the subject of competition law intervention because such intervention may affect innovation incentives and dynamic efficiency; because high prices will attract competitors and, hence, will self-correct; because there are high probabilities and costs of mistaken intervention with nefarious effects on innovation and competition; and because regulating prices is a task best left to specialised regulators. On the other hand, it is argued that correcting high prices increases consumer welfare, which is the goal of competition law; that high prices are not always self-correcting, particularly where high and non-transitory barriers to entry exist; and that, where the unlawful acquisition of monopoly power is not caught by competition law, there is a gap that should be filled by sanctioning exploitative abuses.

The concerns raised by direct intervention against high prices have led to a cautious approach being adopted by antitrust agencies, which either do not pursue exploitative abuses at all (as in the US) or only intervene against excessive prices in exceptional circumstances (as in Europe). Recent intervention against excessive pricing by pharmaceutical companies in Italy and the UK were carefully preceded by an analysis of whether intervention was justified. In these cases, it was found that, exceptionally, it was. In each case, the investments made for the drugs' development had already been recouped and the underlying IP rights had long expired; there was no market competition because the drugs could not, for different reasons, be replaced by other medicines; the infringing companies pursued a business strategy that sought to maximise the revenue of old drugs used to treat diseases that have a low incidence in the population, and where incentives to competitive entry were low; and, crucially, regulation was ineffective.



**Sandra Marco Colino, Niamh Dunne,  
Knut Fournier, Sofia Pais, Derek  
Ritzmann 'The Lundbeck case and the  
Concept of Potential Competition' (2017)  
Concurrences n° 2-2017**

This article provides a good overview of recent excessive pricing cases in pharma in Europe. It should be of interest to anyone who wants to understand the factual background of the cases, the limited and exceptional circumstances where excessive pricing cases may be brought, and the challenges of bringing such cases.

Reverse settlement payments, or pay-for-delay agreements, are agreements between an originator and a generics manufacturer where the originator pays the generics manufacturer to settle a patent injunction and agrees conditions to delay generic entry into the market. This payment goes against the standard expectation that it is the (infringing) generics company that should pay an IP-holding originator to settle.

It may nonetheless be economically rational for both parties to enter into such an agreement because settling the dispute eliminates the potential for competition and allows the parties to share profits that would otherwise be eroded by lower prices. In other words, such settlement agreements can amount to market sharing when entered into between competitors which is anticompetitive by object. An important pre-condition for this is that the generics manufacturer is a (potential) competitor – and this is a doubtful proposition if the originator has a valid IP-right which, given that the patent suit was settled, will be the situation under IP law.

This paper contains contributions by numerous distinguished authors on recent EU cases on pay-for-delay, with a focus on the challenges that such practices raise particularly as regards the determination of whether a settling generics manufacturer is a potential competitor. It also compares the EU approach to that prevailing in the US, and engages with how the economics literature on topics such as probabilistic patent rights theory or contestable rights' theory can illuminate discussions on whether a generics company is a potential competitor.

I strongly recommend this paper to anyone interested in pay-for-delay, and particularly to anyone who may be working in this area. It not only provides a clear and interesting introduction to the topic and recent case law, but also highlights significant challenges in competition cases involving reverse patent settlement agreements and provides a framework to think about how to address those challenges.

# OECD/KPC Competition Programme 2019

26-28 March

Busan,  
Korea

## Sector Specific Workshop

Competition Rules in the Transport Sector

27-28 May

Bangkok,  
Thailand

## Bilateral Seminar for Thai Competition Commission

Cartel Investigations

30-31 May

Bangkok,  
Thailand

## 9<sup>th</sup> Competition Law Seminar for Asia-Pacific Judges

Main Challenges in Adjudicating Competition Law Cases

4-6 September

Ulaanbaatar,  
Mongolia

## In-country Event

Vertical Restraints

16-18 October

Tokyo,  
Japan

## In-country Event

Competition Issues in Light of Digitalisation

12-14 November

Seoul,  
Korea

## Competition Workshop

Conducting Unannounced Inspections / Questionnaires Best Practices

Notes: Dates are subject to change after discussion with hosting jurisdictions



# Asia-Pacific Competition Update

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- Twitter: OECD/KPC COMP

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