Antitrust Chronicle

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Asia Pacific: Opportunities & Challenges

CPI COMPETITION POLICY™ INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

This edition of the CPI Antitrust Chronicle sets out recent antitrust enforcement, policy and legislative developments and trends in the Asia-Pacific ("APAC") region. The APAC region represents one of the most dynamic geographic regions in the world economy in recent years, as it occupies an increasingly important role in global supply chains and world geopolitics. As a result, practitioners are well-advised to keep their finger on the pulse of developments in this region across all policy areas, including in particular antitrust.

Antitrust is a growth area in APAC. As **Ruben Maximiano**, **Wouter Meester** & **Leni Papa** outline, APAC includes a mix of well-established, experienced competition authorities, including those from OECD member countries (Australia, Korea, Japan, and New Zealand) and a larger number of younger authorities. As the authors outline, each authority is at a distinct stage in the maturity of the development of its competition enforcement practice, as is reflected in the activities of its authorities, particularly in terms of competition advocacy. In particular, as the authors set out in detail, APAC authorities' advocacy activities are becoming more pronounced as the region emerges from the worst effects of the COVID-19 pandemic.

APAC is no different from the rest of the world insofar as it is grappling with the conundrum of how to apply competition principles to the ever-dynamic tech sector. Perhaps unsurprisingly, APAC countries are taking inspiration from approaches adopted in the west, yet are nonetheless adopting their own somewhat distinct approaches, reflecting their own economic concerns. As **Bruce Gustafson** outlines, in the U.S., Europe, and recently APAC, governments are proposing new antitrust legislation targeting tech companies, and in particular "self-preferencing" by so-called digital platforms. But do these proposals threaten the business models that have made innovative products free to consumers? The jury is still out. Moreover, so-called "Big Data" is no less important to tech players in APAC than in other regions. As **Vivek Ghosal** sets out, authorities and policymakers in various APAC countries are challenges presented by Big Data, with particular reference to initiatives in Japan, South Korea, China, India, and Taiwan.

Mobile ecosystems form a key part of the tech sector, and they raise unique competition concerns in APAC just as they do in the rest of the world. As **Yusuke Zennyo** sets out, competition and transparency in the mobile ecosystem consists of various complex submarkets. The author develops the view, in light of recent policy developments in Japan, that antitrust policy ought to develop not only competition *within* individual submarkets of the mobile ecosystem, but also competition *across* multiple submarkets. Moreover, the author insists on the importance of transparency in the ecosystem for better decision-making by involved undertakings. Indeed, Japan has seen a number of recent policy developments and proposals that merit being followed in detail, as described by **Toshio Dokei**, **Hideo Nakajima** & **Takako Onoki**.

Finally, India is one of the largest and most important economies in the world. A piece by **Dhanendra Kumar** & **Abir Roy** provides valuable insight into developments in that increasingly vital jurisdiction by analyzing the extent to which recent government policies are conducive to the promotion of startups (which are essential to economic growth).

In sum, this Chronicle provides a fascinating and timely overview of the evolution of competition policy in APAC. By all accounts, this region will continue to be an engine of the global economy. As such, the pieces in this Chronicle are essential reading for any global antitrust practitioner.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team[1]

1 CPI thanks Google for their sponsorship of this issue of the Antitrust Chronicle. Sponsoring an issue of the Chronicle entails the suggestion of a specific topic or theme for discussion in a given publication. CPI determines whether the suggestion merits a dedicated conversation, as is the case with the current issue of the Chronicle. As always, CPI takes steps to ensure that the viewpoints relevant to a balanced debate are invited to participate and that the quality of our content maintains our high standards.

SUMMARIES

SUMMARIES

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Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

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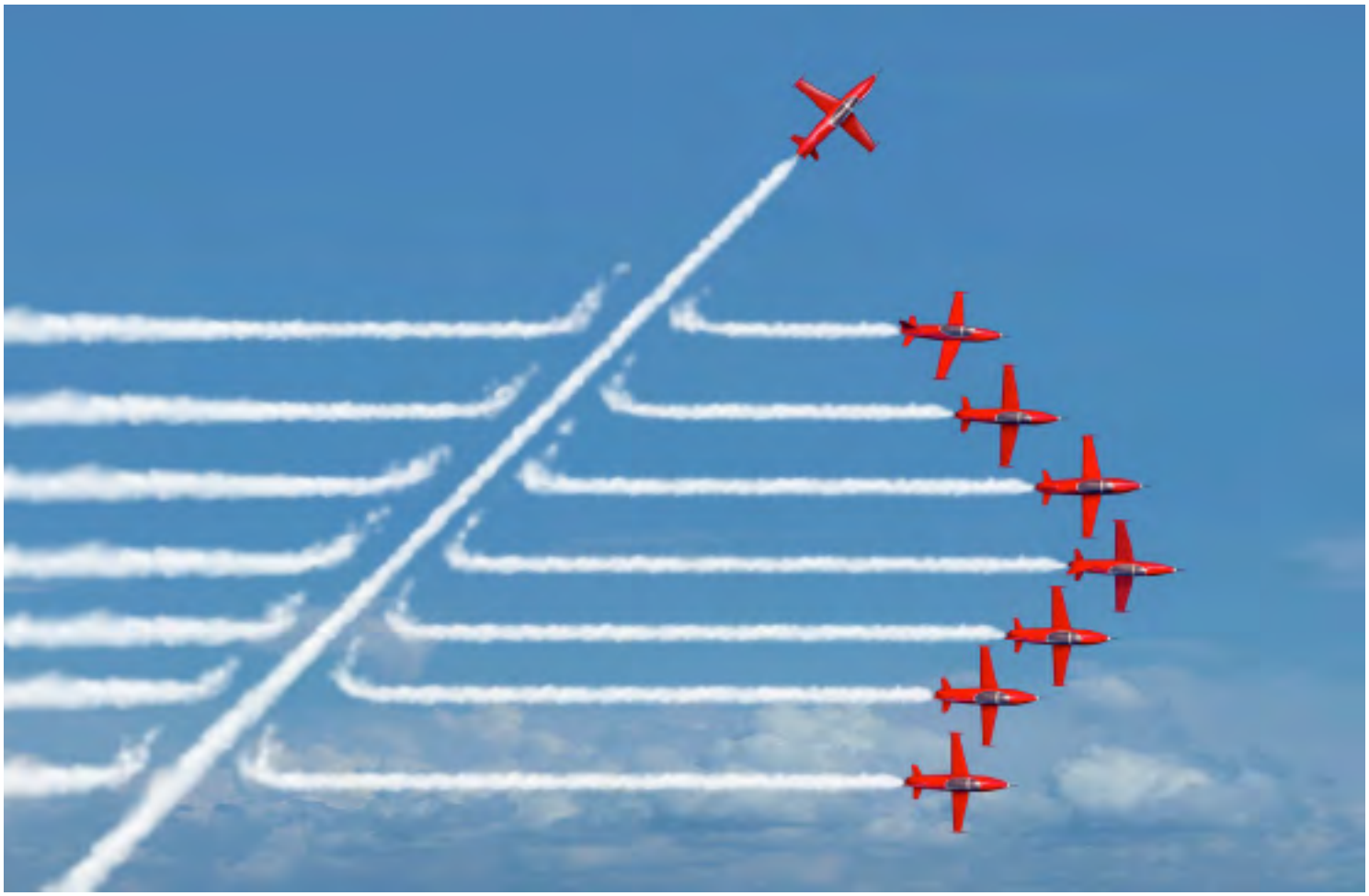


ASIA PACIFIC: OPPORTUNITIES & CHALLENGES – A GLOBAL CALL FOR COMPETITION POLICY

BY PRADEEP S. MEHTA[1]

1 The author is the Secretary General of CUTS International, a global public policy research and advocacy group. Vidushi Sinha and Ujjwal Kumar of CUTS International contributed to this article.

The Asia-Pacific region presents multiple opportunities as global supply chains are heavily dependent on it and in fact, now forms the center of gravity of the global economy.[2]

In economic terms, this region accounts for almost 37 percent of the world's Gross Domestic Product ("GDP"), at purchasing power parity[3] and being the largest regional economy, it is estimated to account for more than half the world's GDP.[4] Moreover, with the recent Regional Comprehensive Economic Partnership ("RCEP") of the Asia-Pacific, the trade effects are estimated to spiral by approximately two percent, i.e. to the tune of nearly USD 42bn.[5]

Since the region comprises diverse dynamic, transiting and developing economies which have been the frontrunners of global growth, an understanding of the competition landscape and economy at large of the Asia-Pacific region provides a strategic assessment of the roadmap for global growth and development.

I. BRINGING IN A COMPETITION ADVOCACY LENS

Competition in a nation's economy is of great importance in the functioning of the market economy.[6] The agility of the competition landscape is in fact an important determinant, which effectively gauges the growth potential of a nation, more so, in times such as these.

Especially in the aftermath of COVID-19, advocacy by competition authorities came handy for crisis management.[7] Even otherwise, amidst the dynamism in the market behavior and new-defined goals of business communities, it has been recognized that competition advocacy is required since it strengthens the competitive environment without enforcement measures[8] and seeks to create and develop active cooperation among stakeholders in the economy while focusing on increased cooperation on a macro level.

Furthermore, for transition economies, this necessity for competition advocacy increases multi-fold since a competition culture needs to be nurtured in them. In such economies, the propensity of a sense of biasness towards the government enterprises or state-owned enterprises ("SOEs") is higher since the boost of private participation is only a recent phenomenon. Additionally, there is a possibility that the law of the land may not be able to effectively cover the ever-changing needs of the regulatory landscape under its ambit. Not only this, the advocacy function of competition regulators also serves as a check on the enforceable competition regime of a country.

As has been highlighted by Timothy Muris, *"[p]rotecting competition by focusing solely on private restraints is like trying to stop the water flow at a fork in a stream by blocking only one channel. A system that sends private price-fixers to jail, but legalizes government regulations to fix prices, has not completely addressed the competitive problem. It has simply dictated the form that the problem will take."*[9]

Commenting on the role of the competition regulator to this end, a World Bank-OECD report states that:

> *"The competition office, therefore must also participate more broadly in the formulation of its country's economic policies, which may adversely affect competitive market structure, business conduct, and economic performance. It must assume the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace."*[10]

2 The growing importance of the Asia-Pacific region, Speech by Jean-Claude Trichet, available at https://www.ecb.europa.eu/press/key/date/2008/html/sp080225.en.html.

3 The growing importance of the Asia-Pacific region, Speech by Jean-Claude Trichet, available at https://www.ecb.europa.eu/press/key/date/2008/html/sp080225.en.html.

4 The future of Asia: Asian flows and networks are defining the next phase of globalization, McKinsey Global Institute, available at https://www.mckinsey.com/featured-insights/asia-pacific/the-future-of-asia-asian-flows-and-networks-are-defining-the-next-phase-of-globalization.

5 Asia-Pacific partnership creates new "centre of gravity" for global trade, UNCTAD, available at https://unctad.org/news/asia-pacific-partnership-creates-new-centre-gravity-global-trade.

6 Competition and Economic Growth: An Empirical Analysis with Special Reference to MENA Countries, available at https://meea.sites.luc.edu/volume16/pdfs/Gomaa.pdf.

7 UNCTAD, Competition Advocacy during and in the aftermath of the COVID-19 Crisis available at https://unctad.org/system/files/official-document/ciclpd58_en.pdf.

8 Competition Advocacy: Soft Power in Competitive Policy, available at https://www.sciencedirect.com/science/article/pii/S221256711300141X.

9 Competition Advocacy as a Tool for Promoting Competition Culture and Combating Public Restraint: The Case of Pakistan, Joseph Wilson, Competition Commission of Pakistan, CPI Antitrust Chronicle, Competition Policy International Aug 2014(1).

10 The World Bank, OECD: A Framework for the Design and Implementation of Competition Law and Policy, Chapter 6, at 93, 1998.

Therefore, while it is important to have advocacy and awareness on competition, it is equally imperative to have robust competition policy advocacy in place, which includes opinions and recommendations of regulators, rule-makers and the public at large as shown in the figure below. While these terms may seem to be similar, in terms of scope, they differ significantly.

Figure 1: The Interplay of Advocacy
Source: International Competition Network, Advocacy Working Group[11]

In fact, competition advocacy is regarded as one of the most useful tools for the spread of a competition culture.[12] A note by the UNCTAD secretariat highlights that competition advocacy entails:

> *"(a) promoting a competitive environment, (b) advising Governments and public bodies on legislative and regulatory frameworks and (c) raising awareness of the private sector and civil society on the benefits of competition for consumer welfare, economic growth and sustainable development."*[13]

Therefore, the scope and contours of competition advocacy are much broader than enforcement of competition law or merely raising awareness regarding the need for competitiveness in an economy. Granular and specific activities for each of the aforementioned sub-parts must be carried out to meet the objective of competitive advocacy effectively.

This article seeks to investigate the good practices of jurisdictions in the Asia-Pacific region, thereby drawing comparatives and highlighting success stories in the domain of competition advocacy.

II. PEEKING INTO JURISDICTIONS

There is no set and concrete method of carrying out competition policy advocacy. On a global scale, all jurisdictions follow differing principles and forms of advocacy. While some jurisdictions have set out objectives and clearly defined provisions to this effect, there are many jurisdictions which fail to recognize the concept altogether and have not incorporated any explicit competition advocacy provisions.

Countries such as Afghanistan and India make specific references to competition advocacy in their respective competition regimes. In Section 16 of the Draft Afghanistan Competition Act, 2011[14] and Section 49 of the Indian Competition Act, 2002[15] it is explicitly mentioned that

11 Advocacy and Competition Policy, International Competition Network, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_AdvocacyReport2002.pdf.

12 UNCTAD, Competition Advocacy during and in the aftermath of the COVID-19 Crisis available at https://unctad.org/system/files/official-document/ciclpd58_en.pdf.

13 UNCTAD, Competition Advocacy during and in the aftermath of the COVID-19 Crisis available at https://unctad.org/system/files/official-document/ciclpd58_en.pdf.

14 Available at https://cupdf.com/document/afghanistan-competition-act.html.

15 Available at https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf.

the competition regulator shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training on competition issues. In the Report of the Working Group on Competition Policy in India, it was recognized that there is need for competition advocacy, influence, and government intervention outside the ambit of competition law since even non-competition developments have a profound impact on the state of competition in an economy.[16]

Another trend widely followed by countries is conducting sectoral competition assessments in the form of formal market studies Market studies can assess whether competition in a market is working effectively by taking a deep dive into sectoral issues and assist in determining the way forward to address such issues identified.[17] Many countries have adopted this practice, including Australia, India, Hong Kong, New Zealand, Singapore, and Philippines.

The impact of such market studies is tremendous. To cite an example, the Australian Competition and Consumer Commission ("ACCC") undertakes in-depth market, sector or industry reviews with the aim of improving the sectoral understanding of industry practices and dynamics.[18] Among several focus areas, ACCC conducted inquires in the digital space, including on digital platforms[19] and advertising.[20] As a result of these market studies, it was found that the market study on digital platforms was particularly referred to by the Australian government while reviewing their Privacy Act of 1988. Further, a blunt statement on Google's dominant status as a service provider across the ad tech supply chain, served as a public clarification of ACCC's understanding of digital advertising and the digital platform sector and gave stakeholders a chance to analyze the evidentiary value of the statement.[21]

India, of late, is also showing some vibrancy with respect to competition advocacy. In 2011-12 several sector studies were undertaken by the Ministry of Corporate Affairs (the administrative ministry for Competition Commission in India) in order to inform drafting of National Competition Policy.[22] These studies were carried out by CUTS International in association with several institutions and experts.

Of the positive outcomes of the sector studies done in 2011-12, the one on civil aviation led to the Ministry of Civil Aviation asking for a more in-depth study from the same consultancy which had done for Ministry of Corporate Affairs. This was done and led to radical pro-competitive changes in the country's Civil Aviation Policy. For example, the condition of having at least 20 aircraft and five years' experience for an airline to get an approval to be able to fly abroad was dropped. This was a ridiculous barrier because any foreign airline operating flights to India did not need such a qualification. Apparently, such a provision was engineered by other incumbent private airlines who did not want an extra competitor.

Since 2017-18, the Advocacy Division of the Competition Commission of India has been coordinating competition assessments of several laws, bills, policies, regulations etc. applicable in priority sectors. But their implementation is not made public.

One particular form of advocacy carried out by this author along with the Competition Commission of India in the period of 2002-07 was to oppose a proposed amendment in the Post Office Act was that any letter or package below the weight of 100 grams could only be sent through the post office channels thus barring private couriers from this lucrative business. After much hue and cry made in the media and workshops, the government dropped the proposed amendment.

Other tools that are used for competition advocacy include policy notes, which are condensed versions of opinionated discussion papers. A comparative outlook on the policy notes, particularly for the sugar industry in Philippines and Pakistan, showcase differences in the concept.

16 Report of the Working Group on Competition Policy, Planning Commission, Government of India, available at https://niti.gov.in/planningcommission.gov.in/docs/aboutus/committee/wrkgrp11/wg11_cpolicy.pdf.

17 Using Market Studies to Tackle Emerging Competition Issues, OECD, https://www.oecd.org/daf/competition/using-market-studies-to-tackle-emerging-competition-issues-2020.pdf.

18 Market Studies Australian Competition and Consumer Commission, available at https://www.accc.gov.au/focus-areas/market-studies.

19 Digital Platforms Inquiry, Final Report, ACCC, available at https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf.

20 Digital Advertising Inquiry, Final Report, ACCC, available at https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf.

21 Market Studies: Making All the Difference?, available at https://www.competitionpolicyinternational.com/market-studies-making-all-the-difference/.

22 https://circ.in/circ-iica-sector-studies-project.

While in Philippines, policy notes provide an overview of the sector, highlight the value chain, and outline concise recommendatory measures, covering various sectors,[23] Pakistan's Competition Commission publishes more nuanced and specific policy notes.[24] For the sugar industry, the Philippines Competition Commission publishes a policy note with the disclaimer that these policy notes do not reflect the views of the Commission but rather the author.[25] Thus its gravity is lost.

In Pakistan however, for the sugar industry itself there are two documents available including a policy note on the fixing of price of sugar[26] and a policy note on the price-fixing agreement between All Pakistan Sugar Mills Association and Ministry of Industries and Production.[27] Further, Competition Commission of Pakistan also published their detailed opinion on the competition concerns in the sugar sector of Pakistan.[28]

In 2018, the Indian competition authority published a policy note entitled "Making Markets Work for Affordable Healthcare."[29] The policy note identified four key issues in the healthcare and pharmaceutical sectors, and made some valuable policy recommendations to deal with such issues. This did not result in any immediate changes but laid the foundation of a narrative to reform the health care market.

There is also a widespread practice of competition regulators of providing advice and/or opinions to the government or public authorities on competition matters in countries such as Singapore, Papua New Guinea, South Korea, Vietnam, Thailand, and Hong Kong.

Apart from these measures, there may be a plethora of activities that can be undertaken by competition regulators in order to further their advocacy agenda. This will include publishing regular newsletters such as "MyCompetition" as done by the Malaysian Competition Commission[30] or Hong Kong's "Competition Matters" newsletter. It would also include the entire bouquet of measures undertaken by Pakistan including international conferences, consultative groups, press releases, brochures, seminars, training sessions, advertisements, sessions with Ministries, celebration of World Competition Day, compliance through persuasion, policy notes and opinions,[31] among other things.

Therefore, from a bare perusal of the above, it becomes apparent that there is no specific way of operationalizing and ensuring an active advocacy function. However, considering the encompassing role that they have to play in shaping economies, all countries in the Asia-Pacific region must particularly operationalize an active competition advocacy toolkit.

With the abovementioned advocacy tools, it becomes apparent that advocacy tools other than spreading awareness about the need for a competition culture, have been recognized and must be implemented across all countries. Each of the tools has a specific way of informing regulatory action through active consultation and informed debate. By propelling these debates, the competition landscape will become more active, representative and be better equipped to serve the particular needs of the growing economies in a nuanced manner.

III. INCORPORATING COMPETITION POLICY

While separate tools of competition advocacy may be incorporated in competition regimes either explicitly as legal provisions or as a matter of conduct by competition regulators, the formalization of competition policy can also play a fundamental role.

23 Policy Notes, Philippine Competition Commission, available at https://www.phcc.gov.ph/category/resources/publications/policy-notes/.

24 Policy Notes & Opinions, Competition Commission of Pakistan, available at https://www.cc.gov.pk/index.php?option=com_content&view=article&id=21&Itemid=42&lang=en#.

25 Competition Issues in the Sugar Industry in the Philippines, Roehlando M. Briones, Philippine Competition Commission, available at https://www.phcc.gov.ph/wp-content/uploads/2020/09/Policy-Note-2020-03-Competition-Issues-in-the-Sugar-Industry-in-the-Philippines.pdf.

26 Policy Note, Fixing of Maximum Retail Price of Sugar by Government of Punjab, Competition Commission of Pakistan https://www.cc.gov.pk/images/Downloads/policy_notes/sugar_policy_note_2021.pdf.

27 Policy Note, Price Fixing Agreement, Competition Commission of Pakistan, available at https://www.cc.gov.pk/images/Downloads/policy_notes/ActionsPolicy_Notes_Policy_Note_on_Sugar-Price_Fixing.pdf.

28 Opinion, Competition Concerns in the Sugar Sector of Pakistan, Competition Commission of Pakistan, available at https://www.cc.gov.pk/images/Downloads/policy_notes/25_April_2018_sugar_opinion.pdf.

29 https://www.cci.gov.in/node/4184.

30 Newsletter, Ministry of Domestic Trade and Consumer Affairs, available at https://www.mycc.gov.my/newsletter.

31 Competition Advocacy as a Tool for Promoting Competition Culture and Combating Public Restraint: The Case of Pakistan, Joseph Wilson, Competition Commission of Pakistan, CPI Antitrust Chronicle, Competition Policy International Aug 2014(1).

A competition policy enables the outlining of broad governance principles for building a competition culture and simultaneously provides opportunity for infusing and dealing with flexible circumstances of the economy. By being applicable across different sectors, regulatory action is informed by such competition policy.

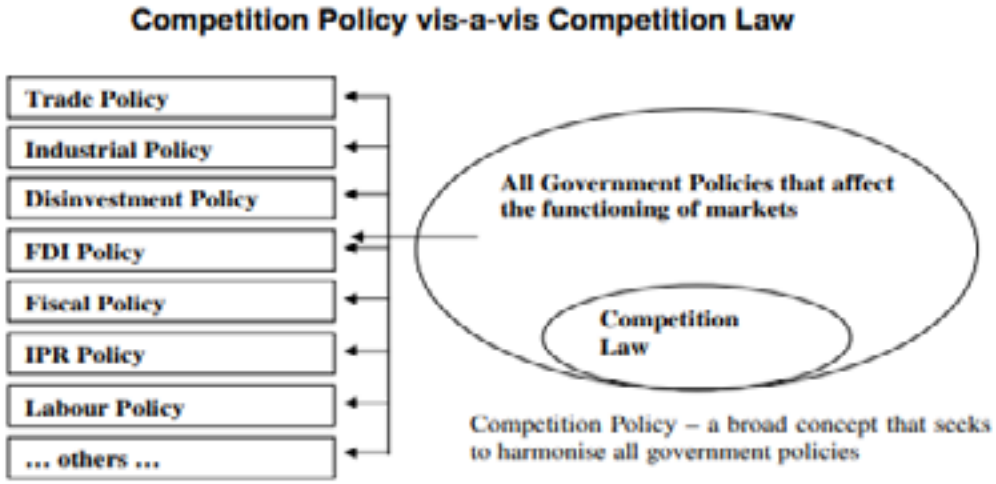


Figure 2: Competition Policy vis-à-vis Competition Law
Source: Time for a Functional Competition Policy and Law in India[32]

The set of these multilaterally agreed equitable principles and rules assist in controlling restrictive business practices and facilitate adoption and strengthening of laws and policies at both national and regional levels, while advocating for a unified competition culture.

Additionally, there is a direct linkage between competition policy and Sustainable Development Goals ("SDGs").[33] Accordingly, a fair and competitive market is necessary for overall development of the economy and the world at large. Economists such as Joseph Stiglitz assert that *"a strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies."*[34]

In countries like Australia, the most instrumental part of the competition advocacy initiative has been the implementation of a National Competition Policy ("NCP"). Australia's NCP was formulated to provide a comprehensive approach to reform across all levels of the government in the year 1995.[35] By conducting constant reviews of the NCP, it was found that the Australian NCP had delivered multi-faceted benefits to the economy by boosting the GDP by 2.5 percent and had significantly contributed to an improvement in the standard of living of Australians.[36] The NCP was administered by an exclusive body, the National Competition Council and not the ACCC. Currently, the NCC has been downsized as competition principles have sunk into governments at the federal and provincial levels.

While a few countries like Philippines have already followed suit and operationalized a NCP, which has reportedly been seen to improve market efficiency[37], in other developing economies like India and Bangladesh, competition law advocates opine that it is time for a comprehensive competition policy. In India, there has been advocacy for effective implementation of a competition policy[38] with a whole-of-government

32 Time for a Functional Competition Policy and Law in India: Mainstreaming competition principles into policy and legal framework is pro-development, Pradeep S Mehta and Manish Agarwal, CUTS International, available at http://www.cuts-international.org/pdf/compol.pdf.

33 The role of Competition Policy in the Attainment of SDGs, CUTS International, Ghana, available at https://cuts-accra.org/the-role-of-competition-policy-in-the-attainment-of-sustainable-development-goals-sdg-2/.

34 Competing over Competition Policy, Joseph E. Stiglitz, available at https://www.project-syndicate.org/commentary/competing-over-competition-policy.

35 Australia's National Competition Policy, available at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/ncpebrief.

36 Review of National Competition Policy Reforms, Productivity Commission Inquiry Report, Australian Government, available at http://ncp.ncc.gov.au/docs/PC%20report%202005.pdf.

37 National Competition Policy seen to improve market efficiency, available at https://www.bworldonline.com/national-competition-policy-seen-to-improve-market-efficiency/#:~:text=THE%20implementation%20of%20the%20National,Philippine%20Competition%20Commission%20(PCC).

38 National Competition Policy: An idea whose time has come?, available at https://cuts-ccier.org/national-competition-policy-an-idea-whose-time-has-come/.

approach.[39] In addition to this, in Bangladesh there has been advocacy for an effective competition policy targeting inclusive sustainable development and innovation.

For developing countries this economic recovery phase, serves as an opportune time for implementing competition advocacy tools and advocacy for a competition policy.

IV. THE WOES OF DEVELOPING COUNTRIES

In order to have a functional competition policy in place which has consumer and social welfare as its front-running goals, there are various challenges which must be overcome.

Firstly, there must be availability of adequate resources for ensuring independence of the competition policy. Secondly, the principles of transparency must be enshrined in the doctrine. Thirdly, there must be due consideration given to the ease of doing business in general and the business and investment climate in particular. Fourthly, proper competition advocacy tools must be employed to have a nuanced and active understanding of different sectors of the economy.

In the words of Dr. Mukhisa Kituyi, former Secretary General of the United Nations Conference on Trade and Development ("UNCTAD"):

> *"It is widely acknowledged that sustainable and inclusive economic growth requires higher levels of economic productivity through diversification, technology upgrading and innovation. Appropriate industrial and trade policies are necessary but not sufficient to achieve this. There remains a need for complementary and coherent policies that ensure countries benefits from free trade. Competition policy is one of these policies, which governments need to develop and implement in order to achieve the goals of the 2030 Agenda."*[40]

V. CONCLUSION

Asia-Pacific nations must collectively utilize the learnings from the dynamism witnessed due to their developing business landscape which was further bolstered by COVID-19 to adopt competition advocacy tools and a comprehensive competition policy.

While countries do not have uniform competition advocacy tools or a homogenous competition policy, it is widely accepted that the same is necessary for building a competition culture, in addition to the competition law regime. Even if specific provisions to this effect are not enshrined in the law, several countries, thought leaders, civil society and academicians opine that holistic competition advocacy automatically falls under the mandate of the competition regime.

Arguably, transition economies such as those in the Asia-Pacific should give all the more priority to advocacy over enforcement activities.[41] The reasons for the same are, firstly, since these countries do not have mature competition regulators with adequate experience and secondly, since the rule-making process is fairly fluid on account of the continuously changing industry segment. Resultantly, the need to have a broad competition governance structure in place, with adequate wiggle room to accommodate businesses' ever-changing trends, demands and conduct, is greatly felt.

The soft law opportunity that is provided by competition advocacy tools and competition advocacy must not be ignored. If such tools are incorporated in the formative years of a market economy, this shall prepare and pave the way for a robust economy for the years to come.

A holistic and comprehensive competition policy is the need of the hour. This policy should incorporate an array of competition advocacy tools as well. It is imperative that open dialogue with the public through competition advocacy tools such as seminars, informed policy notes, opinions, guidelines, articles is strived for and continued for a participative consultative competition culture.

39 Opinionl The relevance of a good competition policy to our aims, Pradeep S Mehta, available at https://www.livemint.com/opinion/columns/opinion-the-relevance-of-a-good-competition-policy-to-our-aims-11577377302114.html.

40 "Pursuing Competition and Regulatory Reforms for Achieving Sustainable Development Goals," CUTS International, Jaipur (2015).

41 Advocacy and Competition Policy, International Competition Network, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_AdvocacyReport2002.pdf.

Countries may seek guidance from advocacy toolkits such as that of the International Competition Network ("ICN"), which employs tools such as identifying competition advocacy issues, identification of and engagement with stakeholders, implementation and monitoring advocacy and assessment of the effectiveness of the initiative.[42] The OECD also has a comprehensive toolkit, and has supported many competition authorities in their endeavors with respect to competition advocacy. CUTS International has also developed toolkits to suit the needs of developing countries.[43] Such toolkits may also be developed region-wise, keeping the importance of regional integration.

Along with this, competition regulators must ensure that the competition law enforcement responsibilities are up to speed with global developments.[44]

42 Advocacy Toolkit: Advocacy process and tools, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_Toolkit1.pdf.

43 http://www.cuts-ccier.org/CoMPEG/pdf/CUTS-Competition_Impact_Assessment_Toolkit.pdf and http://www.cuts-ccier.org/CREW/pdf/FCR_Practitioners_Guidebook.pdf.

44 https://www.oecd.org/daf/competition/prosecutionandlawenforcement/32033710.pdf.

BIG DATA MARKETS AND COMPETITION LAW IN ASIA

BY VIVEK GHOSAL[1]

1 Rittenhouse Professor of Economics, and Department Head, Department of Economics, Rensselaer Polytechnic Institute, Troy, New York.

I. INTRODUCTION

E-commerce platforms and online retailers collect unique consumer data during search and transactions. Algorithms and machine learning techniques can analyze these data, which can then be used by the online platform itself as well as sold to third-parties for targeted advertising. The more are the data amassed by an online platform or retailer, the more likely it is to bestow the owner of the data a potential competitive advantage. An advantage is not guaranteed, and will depend on the nature and amount of data accumulated, actual and potential competitors, and market dynamics.

When such data collection takes place in truly massive amounts, it is referred to as Big Data. Many characteristics define and complement Big Data, such as the required technology for creating, storing, processing, and analyzing, among other aspects. Firms with the most advanced technologies in this dimension can use these data for modeling and predicting consumer behavior. Along with creating potential competitive advantage, Big Data can also significantly affect firms' innovation, new offerings of products and services, and growth. In recent years, there has been a marked shift in the behavior of consumers towards e-commerce. Worldwide, there are numerous e-commerce platforms, some with global reach while others are country or region specific. The sheer scale of data being collected and analyzed by firms is staggering, with potential competition concerns under specific instances.

Since a large number of papers and reports have provided detailed description of Big Data and e-commerce markets, and their potential to harm competition that may come with greater consolidation and anti-competitive behaviors, I will not repeat those issues here.[2]

Instead, in this article, I provide a broad overview of the size and scope of e-commerce markets in selected Asian countries, comment on the challenges presented by Big Data being collected, and present competition law initiatives related to it in selected Asian countries.

II. SIZE AND SCOPE OF ECOMMERCE MARKETS IN ASIA

In this section I provide a perspective on the size, scope and growth of ecommerce markets, and smartphone use and penetration rates in selected Asia countries.

Table 1 presents e-commerce revenues. The Projections for 2025 show China's e-commerce revenues to considerably exceed those of the U.S.; and South Korea's, for example, are comparable to France and Italy. Indonesia's projected revenues exceed Italy's.

Table 1. E-Commerce Revenues

Selected Asian countries	2017	2018	2019	2020	2021	2022	2023	2024	2025
China	1,015,370	1,052,679	1,097,993	1,260,402	1,368,457	1,412,109	1,482,246	1,538,348	1,625,784
Japan	94,226	104,592	115,233	142,629	187,958	215,113	246,426	282,621	324,601
India	28,770	36,283	45,773	64,773	85,423	99,438	116,694	138,218	165,428
South Korea	63,052	72,936	83,587	100,869	119,487	124,177	129,124	134,081	139,270
Singapore	1,616	2,218	2,993	4,573	6,284	7,293	8,464	9,834	11,448
Indonesia	9,010	14,652	22,407	35,342	55,975	62,593	70,258	79,306	90,192
Malaysia	2,270	3,176	4,285	6,155	8,591	10,119	11,950	14,154	16,834
Philippines	6,780	8,177	9,839	13,809	17,251	20,182	23,579	27,859	32,702
Thailand	3,896	5,383	7,421	11,139	19,550	22,201	25,335	29,074	33,577
Vietnam	3,643	5,025	6,709	9,525	12,842	14,814	17,195	20,107	23,705

2 Some insightful details are contained in: "Big Data: An Antitrust Perspective. CPI Antitrust Chronicle," (May) 2015. Stephen Dnes, "Big Data Protection: Big Problem? CPI Antitrust Chronicle (June) 2021. "OECD Handbook on Competition Policy in the Digital Age," 2022. "Common Issues Relating to the Digital Economy and Competition Report of the International Developments and Comments Task Force on Positions Expressed by the ABA Antitrust Law Section between 2017 and 2019," (February) 2020. Katherine B. Forrest, "Big Data and online advertising: Emerging competition concerns," CPI Antitrust Chronicle, (April) 2019. Alden F. Abbott, "Big Data and Competition Policy: A US FTC Perspective," (July) 2019. D. Daniel Sokol & Jingyuan (Mary) Ma, "Understanding Online Markets and Antitrust Analysis," Northwestern Journal of Technology and Intellectual Property, (Spring) 2017. Charlotte Slaiman, "How Big Data Fuels Big Tech's Anticompetitive Conduct and Gatekeeping Power," Promarket, (October 14, 2021). D. Daniel Sokol & Roisin E. Comerford, "Does Antitrust Have a Role to Play in Regulating Big Data?" Cambridge Handbook of Antitrust, Intellectual Property and High Tech, Roger D. Blair & D. Daniel Sokol editors, Cambridge University Press, 2017.

Selected developed countries									
United States	449,031	493,024	542,231	675,831	799,650	907,790	1,034,785	1,184,975	1,364,628
United Kingdom	125,422	129,054	134,152	163,388	177,517	199,873	225,009	253,358	285,555
Germany	65,298	71,785	79,053	102,435	127,501	141,161	156,898	174,834	195,451
France	49,484	54,206	59,382	80,306	92,709	102,815	114,446	127,764	143,200
Italy	17,325	20,838	25,116	36,822	47,365	54,953	63,886	74,458	87,042

Source: Statista. "Digital market outlook: eCommerce worldwide," 2021. Data are revenues in USD (millions). Data include actual revenues up to 2021, and projections for future years.

Examining projected retail e-commerce sales growth in 2022, some of the fastest growing countries are:[3] Philippines (25.9 percent), India (25.5 percent), Indonesia (23 percent), Vietnam (19 percent), Malaysia (18.3 percent) and Thailand (18 percent). To provide a contrast, the growth for United States is projected at 15.9 percent.

In combination, the data on the size and expected growth of e-commerce markets in Asia make them fertile for existing firms to grow, as well as facilitate entry and innovation with new products and services offered to consumers.

Consumer online behavior is a critical aspect of the development of e-commerce markets. Greater volume and frequency of e-commerce transactions facilitates development of the markets, and firms offering new products and services. Examining consumer behavior, we see stark difference. In terms of frequency of online shopping, the percentage of respondents who reported shopping 2-3 times per week or more online was:[4] China (72 percent), India (49 percent), Indonesia (47 percent), and Thailand (49 percent). Compare these to developed countries such as Australia (38 percent) and Japan (13 percent).

Table 2 presents data on the e-commerce share of retail. By a wide margin, Asia-Pacific dominates other regions.

Table 2. E-Commerce Share of Retail

	2020 (%)	2025 (%)
Asia-Pacific	51	61
Europe	16	19
Latin America	11	13
Middle East & Africa	7	10
North America	20	26

Source: Statista. "Regional e-commerce share of retail in 2020, with a forecast for 2025."

For the Asia Pacific region, data for 2018 show the following shares (in percent) of online marketplaces used by retailers Asia Pacific 2018 by platform:[5] Tmall (46 percent), JD.com (30 percent), Lazada (27 percent), Zalora (27 percent), Amazon (24 percent), Taobao (16 percent), Alibaba (15 percent), and Shopee (13 percent).

The totality of the information above suggests that the e-commerce markets in Asia are vibrant, and on track to show dramatic growth. Consumer behavior has become more attuned to online shopping compared to more traditional bricks-and-mortar, and COVID likely has accelerated the process. Given the nature of transactions on platforms and online retailers, the amount of consumer data being collected is growing dramatically. The greater the frequency and volume of transactions, the data in possession of the platforms and online retailers is growing almost exponentially.

3 Statista. "The fastest-growing retail e-commerce countries in 2022."

4 Statista. "Frequency of online shopping in selected Asia-Pacific countries in 2021."

5 Statista. "Share of online marketplaces used by retailers Asia Pacific 2018 by platform," 2018.

III. SMARTPHONES

Smartphones have increasingly become the main device consumers use to shop online. Table 3 presents data on the number of users and smartphone penetration rate. The sheer number of users is staggering, and with this comes voluminous data collected by online retailers and platforms.

Table 3. Smartphone Users and Penetration Rate

	Users (millions)	Penetration rate (%)
China	935	65
India	748	54
Indonesia	184	67
Japan	99	79
Philippines	79	72
Vietnam	69	71
Thailand	54	77
South Korea	47	92

Source: Data are from two Statista reports, 2021: "Smartphone users in Asia 2020, by country," and "Smartphone penetration in Asia 2020, by country."

The share of mobile phone website traffic in Asia was about 48 percent in 2015. In 2021, mobile phones accounted for approximately 64 percent of the total web traffic in Asia.[6] Focusing on smartphones is important as consumers have shifted towards using them as the main device for transactions. Smartphones not only provide a treasure-trove of transactions and characteristics data, but also location information which contributes to the growing Big Data problems and potential for anti-competitive behavior.

IV. BIG DATA AND COMPETITION LAW INITIATIVES IN SELECTED ASIAN COUNTRIES

The sheer size, ongoing growth, and scope of the e-commerce markets presents interesting and complicated challenges for competition law and enforcement. Use of Big Data and algorithms can affect virtually all aspects of competition concern: mergers and acquisitions, establishing dominant position in markets, anti-competitive behavior such as predatory pricing, collusive activity, among others.

Given the scale and scope of many of the economies in Asia, competition authorities have been active in studying the behavior of the key firms, domestic and foreign, and have moved to enact laws and restrain potential anti-competitive influences on markets. In this section I provide some highlights for selected countries.

A. Japan

The Japan Fair Trade Commission ("JFTC") has explored Big Data related issues and is of the view that e-commerce platforms have the potential of wielding significant market power based on the extent to which they possess and control data. Based on this, JFTC has potential concerns about M&As that increase the consolidation of such data. Their approach, consistent with other areas of competition law is to examine such issues on a case-by-case basis as opposed to any blanket judgement on digital platforms and e-commerce markets.

As noted by Dokei et al. (2018),[7] the JFTC is grappling with the complexities of Big Data and e-commerce markets, how to define them, and tests to delineate problematic transactions. For example, the report highlights:

> *"…that a digital platform comprises several layers of markets with different types of consumers or users (also referred to as a 'multilevel market'), where 'free' services might be provided in one market (for example, the social media service market) but compensation is paid in another (for instance, the online advertisement market). The report argues that the SSNIP test*

6 Source: Statista. "Share of mobile phone website traffic in Asia from 2012 to 2021."

7 Toshio Dokei, Hideo Nakajima & Takako Onoki, "Japan: Big Data and the big reveal," White and Case, 2018.

does not necessarily apply to this type of 'free' market, and suggests considering the substitutability of consumers and/or suppliers using another method, such as the SSNDQ (small but significant and non-transitory decrease in quality) test, which focuses on functionality and quality rather than price."

Considering the above, and that Big Data accumulation and corollary benefits likely take time to accrue benefits to the firm in terms of potential market power and innovations, the JFTC report discusses allowing it to scrutinize M&As and other transactions that may appear innocuous under traditional screens, but pose data-related concerns.

Finally, Japan's "Act to Improve the Transparency and Fairness of Specified Digital Platforms" was outlined in 2020. This Act compels firms to abide by data and information disclosure rules, and will likely have a meaningful impact on e-commerce platforms.[8]

The JFTC (2021)[9] report notes that:

"It is concerned that characteristics of digital markets such as network effects can enable digital platform operators, which accumulate huge amount of data, to monopolize/oligopolize markets, exclude rivals and deter new entrants However, it should be noted that interventions in response to these concerns must not be too excessive to harm innovation."

B. South Korea

The new Korea Fair Trade Commission ("KFTC") guidelines define Big Data as an information asset.[10] The information, or data, can be used by the firm for a wide range of its business operations. In the M&As context, the KFTC guidelines focus on consolidation and dominance in such information (i.e. Big Data) assets as it may lessen competition. This allows KFTC to focus not just on the more traditional price competition aspects, but also non-price competition. This information-based approach is in contrast to the more traditional approach of focusing on sales revenues-based market shares.

In addition, the KFTC, in its initiatives on Big Data and digital advertising markets, and in particular its efforts at better understanding competitive effects, has established greater investigative powers in its ICT taskforce.[11] The ICT team's powers cover a wide range, such as app markets, digital advertising, automobile software platforms, semiconductors, and intellectual property.

As an example of enforcement action, South Korea passed a law that mandated Apple Inc. and Alphabet Inc.'s Google to open their mobile app stores to allow alternative payment methods. Apple, subject to complaints by wireless carriers and consumers, had to take corrective action. Google was subject to a $177 million fine for hindering rivals' participation in the Android OS. In other actions, the KFTC ordered Delivery Hero SE to divest a local unit before acquisition of rival Woowa Brothers Corp.[12]

C. China

The urge to accumulate and control big data at the forefront of business behavior. In a large and rapidly growing e-commerce market like China, this can have significant repercussions and potential for competitive harm.

In November 2020, China's State Administration for Market Regulation ("SAMR") issued draft Antitrust Guidelines on the Field of Platform Economy soliciting public opinions related to big data and its role in monopoly agreements, abuse of dominance, and merger control.[13] Price discrimination driven by big data has also been the focus of China's regulators. The SAMR announced that it sought public comment on

8 Japan Fair Trade Commission. "Report of Study Group on Data and Competition Policy," 2017.
Toshiaki Takigawa. "Super Platforms, Big Data, and the Competition Law: The Japanese Approach in Contrast with the US and the EU," Journal of Antitrust Enforcement, 2021, 289–312.
Hideki Utsunomiya & Yusuke Takamiya, "E-Commerce Competition Enforcement Guide: Japan," Global Competition Review, 2020.

9 Japan Fair Trade Commission. "Report of the Study Group on Competition Policy for Data Markets," 2021.

10 Brian Tae-Hyun Chung, Miles Chung & Youngjin Jung. "KFTC Introduces Standards for Reviewing Innovation Market and Big Data Mergers," Kluwer Competition Law Blog, 2019.

11 Wooyoung Lee, "Antitrust, privacy regulators in South Korea in subtle competition over digital-ad regulation," MLex, 2021. Sohee Kim. "Top Antitrust Cop Steers Korea Away From Hard Tech Crackdown," Bloomberg, 2021.

12 Sohee Kim, "Top Antitrust Cop Steers Korea Away From Hard Tech Crackdown," Bloomberg, 2021.

13 Jet Deng & Ken Dai, "Big Data and Competition in China: Antitrust Regulation and Beyond," CPI Antitrust Chronicle, (March) 2021.

the draft rules. The penalty criteria for violations of laws and regulations are significant: *"…e-commerce platform operators would be subject to fines of between 0.1 percent and 0.5 percent of their sales income from the preceding year if they take advantage of big data analysis, among other technological means, to set different prices for the same product, per the draft rules."*[14]

In terms of antitrust actions, Meituan was fined CNY 3.4 billion for abuse of dominant position with an order to refund exclusive partnership deposits to online retailers and file annual compliance reports to SAMR for the next three years.[15] Alibaba was fined CNY 18 billion for abuse of dominant position on the e-commerce platform services market. Alibaba was accused of imposing punitive measures on online retailers. Among some of the other cases that related to e-commerce and big data, are the Alibaba versus SF Express data sharing; Tencent versus ByteDance; and Tencent versus Huawei.[16]

D. India

Data use was recognized as a competition law concern by the Competition Commission of India ("CCI") in 2012. The case related to Matrimony.com Ltd versus Google, where Matrimony alleged that Google had abused its dominant position in the online search advertising market. Google was accused of discriminatory behavior, where they displayed their own websites prominently in comparison to other search results. In 2017, the CCI investigated issues related to data aggregation in the Vinod Kumar Gupta versus WhatsApp Inc. case. WhatsApp was accused of predatory pricing, and using its dominant position by compelling users to share data and account details with Facebook.[17]

As of March 2021, the CCI has signaled a balanced approach to big data and market dominance and competition concerns. They stated: *"in a data-driven ecosystem, the competition law needs to examine whether the excessive data collection and the extent to which such collected data is subsequently put to use or otherwise shared, have anti-competitive implications…"*

E. Taiwan

In Taiwan, the "Personal Data and Protection Act" ("PDPA") provides guidelines for use of individuals' data. It requires the firm to notify individuals and obtain consent for storing, use and other criteria. For competition law enforcement purposes, Taiwan's Fair Trade Act ("FTA") focuses on use of Big Data in combination with AI algorithms for collusive activities, sharing information about markets, costs, and business strategy. In terms of Big Data markets such as digital platforms and online retail, there appear to be mixed views on potential competitive harm. This is mainly due to the relatively underdeveloped markets in this dimension, and the tradeoffs between market power and innovation. This discussion is ongoing, and there have been no specific initiatives to revise competition laws and address enforcement in Big Data markets.[18]

V. FINAL THOUGHTS

There is considerable concern that consolidation of power in online markets has the potential to create significant competition concerns. As the Korea Fair Trade Commission has noted: *"As platform companies grow big, some of them become gatekeeping monopolies and exploit that power, exerting a dual position as a judge and a player in the market …. Individual merchants cannot survive without online platforms. The balance of power has broken."*[19]

While the European Commission, and more recently the U.S., has started taking more aggressive actions against the dominant platforms, many other countries (some I noted above) have taken a more nuanced approach where they try to balance the potential anticompetitive aspects with the innovations such platforms and e-commerce firms may bring to their economies.

I end my discussion with comments about potential competition, as this is a crucial aspect of competition law. In India, in the battle between Amazon and Reliance, Reliance has apparently given Amazon a run for its money and disrupted its plans:

14 Global Times, "Big data-enabled price discrimination in China's regulatory crosshairs with fines of up to 0.5% of annual sales," (July) 2021.

15 Alexandr Svetlicinii & Xie Fali, "Main Developments in Competition Law and Policy 2021 – China," Kluwer Competition Law Blog, (January) 2022.

16 Ken Dai & Jet Deng, "China: Big Data and Antitrust Risks In Close-Up: From the Perspective of Real Cases," Mondaq, (November) 2020.

17 "Regulating Big Data: Contextualising CCI probe into WhatsApp's privacy policy," Rachael Israel, Sarangan Rajeshkumar & Dhanush Dinesh, VCCiRCLE, (April) 2021.

18 Robin Chang & Eddie Hsiung, "AI, Machine Learning, and Big Data Laws and Regulations: Taiwan," Global Legal Insights, 2021.

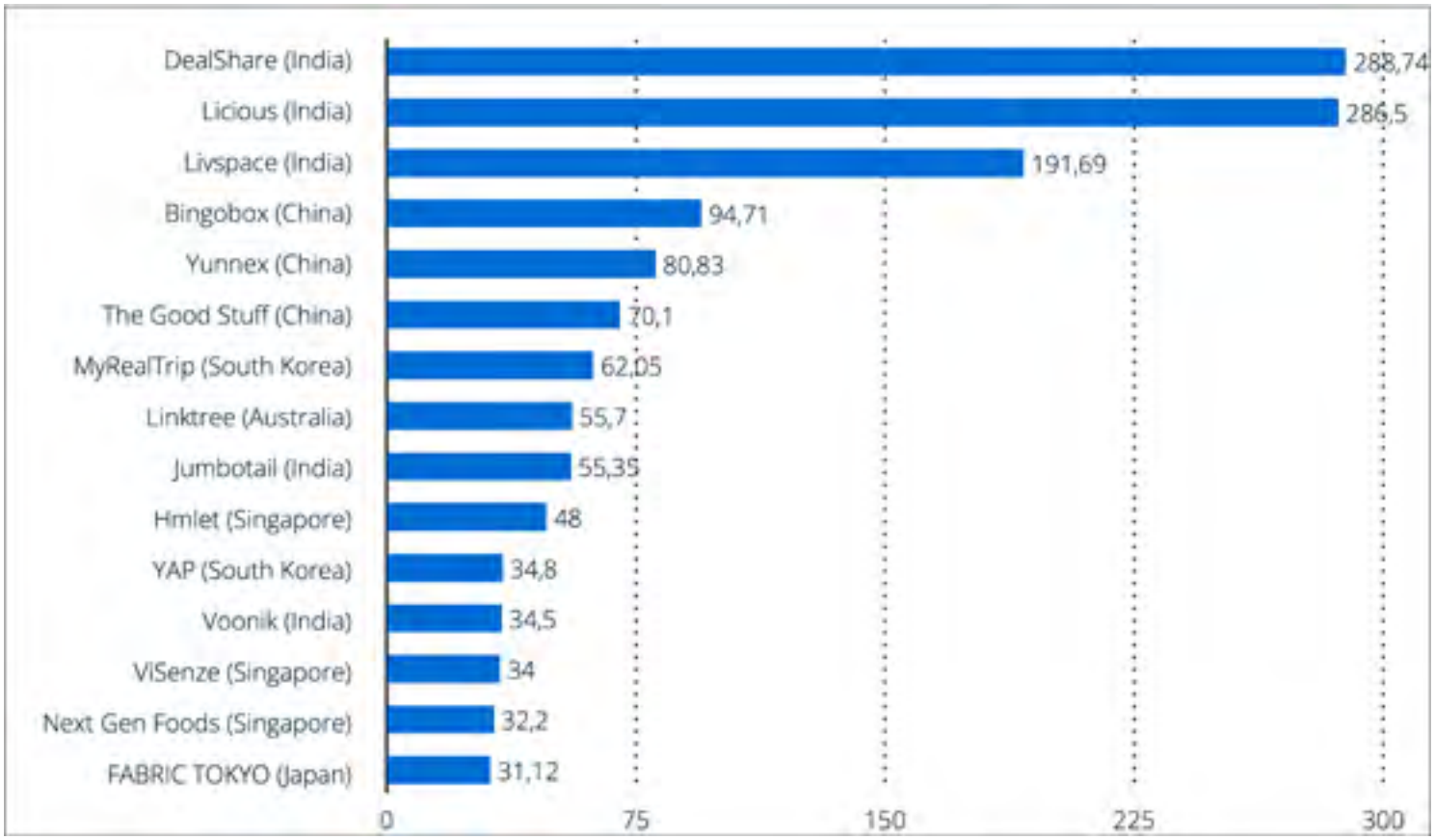
19 Sohee Kim, "Top Antitrust Cop Steers Korea Away from Hard Tech Crackdown," Bloomberg, 2021.

"Across India … India's biggest conglomerate run by Mukesh Ambani, the country's richest man, presses ahead with a shock de facto takeover of prized retail real estate that Amazon.com Inc has been keen to take part-ownership of. The high-profile bitter dispute between corporate titans in which Amazon has sought to block Reliance's planned $3.4 billion purchase of Future Group's retail assets is currently before India's Supreme Court….Reliance's sudden possession of the stores appears to have landed what some analysts are calling a coup de grace that spoils Amazon's chances of untangling the transfer of Future's assets to Reliance. That's despite a series of legal battles won by the U.S. e-commerce giant to date blocking the 2020 deal announced between the two Indian companies."[20]

This goes to show that global giants like Amazon can be challenged in different countries, with home grown firms offering significant competition.

Another aspect of potential competition is to examine e-commerce startups in the Asia-Pacific region. Figure 1 presents data for 2021. Startups and (potential) competition seem alive and well. Of the 15 startups listed, 5 are from India and 3 from China. The challenge for competition law in markets as large and fast growing as in Asia is to strike the right balance between minimizing anti-competitive behavior and promoting innovation that may help their economies.

Figure 1. E-commerce Startups in Asia-Pacific Region



Source: Statista. "Leading e-commerce startups in the Asia-Pacific region in 2021, by total funding." Data are in million U.S. dollars.

20 Aditya Kalra & Abhirup Roy, "The shops are gone: How Reliance stunned Amazon in battle for India's Future Retail," Reuters, March 6, 2022.

THE COVID-19 TAKE-OFF OF COMPETITION ADVOCACY IN ASIA PACIFIC

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I. INTRODUCTION

The COVID-19 pandemic has caused an economic recession in most countries around the world with global GDP declining by 3.4 percent in 2020 (OECD, 2021[2]). Governments have implemented far-reaching measures with the objective to contain the effects of the virus, mitigate its economic impact and boost economic recovery. Such measures have been diverse in scale, scope, and objectives. For instance, they have focused on specific industries or companies or on the economy as a whole and have, intentionally or not, temporary or long-lasting effects on the economy. Competition authorities, through their advocacy efforts, can play an important role in ensuring that these measures lead to a faster and more sustained recovery. Firstly, their expertise in how markets function positions them well to provide support in the development, implementation and phasing out of government measures by avoiding or minimizing competition distortions from state interventions. Secondly, competition authorities can advocate for competition enforcement to continue to be a relevant tool for well-functioning markets.

This article discusses the importance of competition advocacy in the recovery from the pandemic in Asia-Pacific and more specifically how the role of competition advocacy can be adapted post-COVID to ensure that competition policy plays a central role for well-designed, impactful, and effective state measures.

II. ADVOCACY INITIATIVES IN ASIA-PACIFIC BEFORE THE PANDEMIC

Although competition authorities´ impact is usually assessed based on the efficiency and effectiveness with which they enforce their competition laws, it is conventional wisdom that efforts to advocate for competition are as important for a successful competition regime. This is even more the case in jurisdictions where competition is not yet a part and parcel of the economic culture.

Competition advocacy consists of many different activities that competition authorities pursue to promote a culture of competition in their economies and markets (OECD, 2022).[3]On the one hand, this has traditionally meant raising public awareness of how policies may impact how market functions. On the other hand, it more recently came to mean participating in the formulation of a country's economic policies which may adversely affect competitive market structures, business conduct, and economic performance (OECD, 2005).[4]

Competition advocacy also tends to be especially important for developing countries as economic policies in these countries are undergoing fundamental changes. Such changing economic policies may include the opening up of markets, the privatization of government-owned incumbents and the development of regulation in certain industries. Such government policies or interventions may affect, intentionally or not, the level and type of competition in the marketplace. Competition authorities in these countries can help bring about government policies that stimulate competition, including levelling the playing field, lowering barriers to entry and minimizing unnecessary government intervention.

In Asia-Pacific, before the pandemic, many jurisdictions focused their competition advocacy on the traditional objectives of advocacy, i.e. the raising of public awareness for competition and the establishment of a competition culture.

Asia-Pacific includes a mix of well-established, experienced competition authorities, including those from OECD member countries (Australia, Korea, Japan, and New Zealand) and a larger number of younger authorities. On average, however, the age of a competition authority in Asia-Pacific is 16 years younger than that in the Americas and Europe (OECD, 2022).[5] For many of the younger authorities, enforcement activities are still relatively low, as their focus and priorities lie in advocacy and creating a culture of competition. Many are adapting and adjusting to new policy goals and assignments of functions in their laws, responding to circumstances and priorities as well as investing resources in advocacy and establishing a competition culture (OECD, 2021).[6] One example is the frequent use by younger authorities in Asia-Pacific of market studies as a tool to screen industries, build knowledge and ensure effective competition in those markets. During the period 2015 to 2020, Asia-Pacific

2 OECD (2021), OECD Economic Outlook, OECD Publishing, Paris, https://dx.doi.org/10.1787/16097408.

3 OECD (2022), OECD Competition Trends 2022 http://www.oecd.org/competition/oecd-competition-trends.htm.

4 Clark, John (2005), "Competition Advocacy: Challenges for Developing Countries," OECD Journal: Competition Law and Policy, Vol. 6/4. DOI: https://doi.org/10.1787/clp-v6-art10-en.

5 OECD (2022), OECD Competition Trends 2022 (http://www.oecd.org/competition/oecd-competition-trends.htm), page 19.

6 OECD (2021), OECD Asia-Pacific Competition Law Enforcement Trends, https://www.oecd.org/daf/competition/oecd-asia-pacific-competition-law-enforcement-trends.htm, page 21.

competition authorities have conducted approximately 5 market studies per year, which is more frequent than the average OECD jurisdiction, except for 2020 (OECD, 2021).[7]

III. ADVOCACY ACTIVITIES UNDERTAKEN BY ASIA-PACIFIC COMPETITION AUTHORITIES DURING THE PANDEMIC

The economic shock of the pandemic has prompted unprecedented government actions to prevent a wave of insolvencies of fundamentally viable companies and the destruction of the economic tissue that would make it much harder to recover economically from the crisis. During the first phase of the crisis (the emergency phase), the focus was on issuing immediate measures to avoid the liquidity crisis becoming a solvency one of enormous proportions. This was succeeded by the recovery phase, which focused on implementing anti-recession and recovery packages to minimize the medium-long term damage to the economy to shape future growth. Both phases required multi-dimensional policy responses ranging from fiscal policies, monetary policies, trade policies, and industrial policies.

Competition policy and competition agencies, with their wide range of powers of enforcement and advocacy, also played, and continue to play, an important role in the different phases of the crisis. The OECD has outlined in a policy note the actions that government authorities and competition agencies can adopt to help address the challenges raised by the pandemic while looking into the future.

For competition agencies, these actions include advocating for the non-suspension of competition enforcement, prioritizing the most effective enforcement and advocacy measures to deal with the crisis, helping governments implement state interventions without market distortions, monitoring closely significant and rapid price increases, providing guidance on lawful cooperation between competitors, continuing to look at mergers, minimizing the use of exceptions for public policy consideration in merger control, and looking for procedural flexibility.[8]

In Asia-Pacific, three-quarters of the competition authorities have indicated to having been involved with the design or development of an economic recovery package (OECD, 2021).[9]

A. Advocating for the Continued Enforcement of Competition Law

Knowing that competition plays a fundamental role in ensuring well-functioning markets that can help promote economic recovery, competition authorities in the region have advocated for the continued adherence to the principles and objectives of competition law enforcement, taking into account the changed realities brought about by the crisis.

China's State Administration of Market Regulation ("SAMR") announced that it would lawfully exempt certain cooperative agreements involving epidemic prevention and the continuation of work and production, such as agreements for the technological improvement of drugs and vaccines, medical devices, and protective equipment, and those that enhanced efficiencies and strengthened the competitiveness of small and medium enterprises.[10]

MyCC, the Malaysian authority, has taken the COVID-19 pandemic into consideration in the imposition of financial penalties. Citing the pandemic, MyCC reduced the financial penalties imposed on General Insurance Association of Malaysia by 25 percent and provided a 6-month payment moratorium.

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7 OECD (2021), OECD Asia-Pacific Competition Law Enforcement Trends, https://www.oecd.org/daf/competition/oecd-asia-pacific-competition-law-enforcement-trends.htm, page 21.

8 OECD (2020), COVID-19: Competition Policy Actions for Governments and Competition Authorities, available at: https://www.oecd.org/competition/COVID-19-competition-policy-actions-for-governments-and-competition-authorities.pdf.

9 OECD (2021), OECD Asia-Pacific Competition, Law Enforcement Trends 2021, https://www.oecd.org/daf/competition/oecd-asia-pacific-competition-law-enforcement-trends.htm.

10 SAMR on Supporting Epidemic Prevention and Control Announcement on Anti-monopoly Law Enforcement of Resumption of Work and Production, No. 13 of 2020, available at https://gkml.samr.gov.cn/nsjg/fldj/202004/t20200405_313859.html. See also https://www.samr.gov.cn/xw/zj/202107/P020210707589294998827.pdf.

B. Prioritization of Enforcement and Advocacy Actions on Measures Most Effective to Deal with the Crisis

Noting that the pandemic has created some of the most trying market conditions in Australian aviation history, the ACCC issued a report outlining the types of activities that could damage the airline sector.[11]

ACCC looked for conduct or other factors that may damage competition or make it difficult for new entrants to access the market. It proactively engaged with the government, recognizing that this severely affected industry is also one of strategical importance to the Australian economy.

C. Advocacy in Relation to Enforcing Price Controls, Enforcement Actions Against Price Gouging in Specific Products, Mostly from Health and Medical Markets

A number of competition authorities in the region undertook enforcement actions against anti-competitive price increases and used advocacy to underscore the risks of price control measures, especially in health and medical markets.

The Japan Fair Trade Commission made clear that it would take strict action against the conduct of businesses putting an unjustifiable disadvantage on SMEs or subcontractors and conduct such as price-fixing cartels impairing the interest of consumers by taking advantage of the shortage of pandemic supplies.[12]

The Bangladesh Competition Commission ("BCC")'s monitoring team oversaw the prices of essential medical and consumer goods and services, specifically PPEs, RT-PCR tests, private health care services, and medicines related to the treatment of COVID-19. Information gathered by the BBC were shared with different ministries related to the health sector.

The Chinese Taipei Fair Trade Commission ("CTFTC") worked within the Unit of the Disease Prevention Supplies Preparation of the Central Epidemic Control Center ("CECC") to monitor prices of disease prevention supplies (e.g. alcohol) and consumer goods (e.g. toilet paper), and take the necessary actions against hoarding or price gouging.[13]

The Philippine Competition Commission ("PCC") cautioned the government about the use of price controls, noting situations wherein this could be counterproductive and may deter the entry of other firms to produce essential goods.[14]

D. Competition Authorities Educated Businesses and Consumers About Their Rights and Obligations

Early on in the pandemic, ACCC took the approach of educating businesses and consumers about their rights and obligations, with an end view of resolving issues through direct engagement with businesses at an earlier stage over pursuing enforcement action. ACCC wanted to get quick changes in businesses' behavior and redress for impacted consumers in the most efficient way possible, rather than seeking compliance through slower court-based approaches.

E. Consultations With and Provision of Advice to Government Ministries and Departments on Various Policy Issues Such as Industry Support Measures Which Have Implications for Competition

Several competition authorities undertook advocacy efforts with their governments on the emergency measures (regulatory as well as state support measures) that have been taken in this period. This advocacy also involved consultations with or provision of advice to government ministries and departments on various policy issues such as industry support measures which have implications on competition.

The Office of Trade Competition Commission ("OTCC") of Thailand helped the government design COVID-19 stimulus packages, state aid, and related government policies based on competition principles to ensure that government interventions kept a level-playing

11 Australian Competition and Consumer Commission, "COVID Restrictions Bring Domestic Airline Industry to a Standstill" (*Australian Competition and Consumer Commission*, September 28, 2021) https://www.accc.gov.au/media-release/covid-restrictions-bring-domestic-airline-industry-to-a-standstill accessed February 17, 2022.

12 https://one.oecd.org/document/DAF/COMP/AR(2021)18/en/pdf.

13 Summary of discussion of the Roundtable on Competition Policy in the time of Covid-19. See https://one.oecd.org/document/DAF/COMP/M(2020)1/ANN7/FINAL/en/pdf.

14 Jenina Ibañez, "PCC Warns against Unchecked Price Controls" (*BusinessWorld Online*, May 20, 2020) https://www.bworldonline.com/pcc-warns-against-unchecked-price-controls/ accessed February 8, 2022.

field.[15] MyCC provided economic advice and inputs to relevant government ministries regarding the continuity and efficiency of supply chain operations.

The Hong Kong Competition Commission ("HKCC") focused its advocacy initiatives on providing comments on the detailed design of government aid. One example relates to the grants given to SMEs to purchase IT services to help them transition to remote working and online commerce. HKCC asked for bid data from the government and has worked on identifying potentially fraudulent bidding practices and collusions.

F. The Pandemic was Seen as a Time to Revisit Government Policies with Respect to Public Procurement

The pandemic also served as an opportune time to advocate for the review of government policies related to public procurement, especially as the government emerged as one of the biggest purchasers in the local market during the crisis.[16] As part of its Bid Rigging Awareness campaign, the Competition Commission of Brunei Darussalam ("CCBD") arranged collaborative workshops with ministries to discuss issues related to potential bid-rigging and urged the participants to provide more detailed information and substantive data in order to facilitate the assessment or investigation public tenders.[17]

G. Advocating for the Continued Examination of Mergers and Minimizing the use of Exceptions for Public Policy Consideration in Merger Control

In the Philippines, legislators passed economic stimulus bills that included a provision on the effective suspension of merger reviews for two years in the interest of facilitating business transactions during the pandemic. PCC had little opportunity to express its concerns with the merger review suspension, since the stimulus bills were all passed with urgency. This experience highlighted the need to change the notion among some policymakers that merger review is an added cost or a mere bureaucratic step in doing business. PCC continued advocating competition principles among policymakers and conduct workshops on competition for the legislative staff of the Senate, House of Representatives, and local government units. Its efforts later proved beneficial as PCC successfully pushed for the immediate adoption of the National Competition Policy, which will steer state policies and administrative regulations toward the promotion of fair market competition.[18]

H. ASEAN OECD Logistics and Small Package Delivery Project

On top of country-specific advocacy activities during the pandemic, and to support the ASEAN member states' agreement to implement significant reforms towards market liberalization and elimination of competition distortions as part of the ASEAN Competition Action Plan 2016-2025, the ASEAN Secretariat, with funding from the UK Government, tasked the OECD to assist with the implementation of two advocacy initiatives requiring an assessment of the impact of competition law and policy on the markets of all 10 ASEAN member states. The two parallel components are the competition assessment reviews of specific logistics sub-sectors and competitive neutrality reviews of small-package delivery services. The non-binding policy recommendations to ASEAN governments are expected to help the industry boost overall growth and expedite its recovery from the negative economic impact of the COVID-19 pandemic.

OECD's meetings and the constant interaction with different levels of government and stakeholders promoted a wide understanding of the importance of conducting competition assessments of rules and regulations and of competitive neutrality. In this way, the OECD encouraged governments to develop processes that integrate a competition assessment and competitive neutrality frameworks when developing new or changing existing laws, policies and/or regulation.

The Project complemented this increased awareness by helping ASEAN officials with effective capacity-building in the ability to conduct competition assessment and competitive neutrality assessment in line with international best practices. During the Project, the OECD team shared knowledge of techniques and methods of measuring competition restrictions. This allowed the ASEAN officials to continue the work on pro-competitive reforms and competition assessment of regulations and policies, becoming champions of competition assessment and competitive neutrality assessment in their respective institutions.

15 Contribution of the OTCC during the OECD Meeting of High-Level Representatives of Asia Pacific Competition Authorities – Competition in Times of Covid-19 held on July 15, 2020.

16 https://app.parr-global.com/intelligence/view/intelcms-mwq9mz.

17 https://www.asean-competition.org/read-news-ccbd-launches-bid-rigging-awareness-campaign.

18 The Philippine National Competition Policy, which requires all national government agencies, state-owned enterprises, and local government units to adopt pro-competitive policies and interventions, foster a level playing field between public and private sector businesses, and assist the PCC in enforcing the Philippine Competition Act, was adopted via Administrative Order No. 44 (s 2021) on October 20, 2021. See https://www.phcc.gov.ph/press-releases/ncp-ao44/#:~:text=The%20NCP%20provides%20the%20framework,uneven%20playing%20field%20for%20businesses.

The OECD produced twenty country reports, two for each ASEAN member state (one per project component), and two regional reports that summarized the commonalities and differences in the region. Each country report was presented to the public and private stakeholders in the country, while the regional reports were launched by ASEAN and the OECD at the ASEAN Economic Ministers' meeting.

IV. THE ROAD AHEAD: UPSCALING THE ROLE OF COMPETITION ADVOCACY POST-COVID

A. Competition Should be a Guiding Principle in Designing Recovery Measures

Recent empirical work demonstrates that market power can affect the effectiveness of fiscal and monetary measures. The intuition is relatively straightforward: if profit margins are higher, a government's financial stimulus will be partly absorbed by the firms with market power and thus less widely distributed in the economy. It also will change firms' incentives to invest, for if mark-ups are already high then the impact of monetary policy on investment incentives is not as high. At a moment when fiscal and monetary space is tighter due to the significant public support around the globe, ensuring competitive markets that are increasing productivity and growth is ever more important.

Competition policy, in particular advocacy, can therefore be expected to play a part in the whole-of-policy response for the recovery in many jurisdictions. This may require more resources for competition authorities as they ramp up their dual role of watchdog (enforcer) and guide-dog (advocate for competition).

Enforcement will be crucial to ensure that market power is not created nor abused by firms, and certain sectors with a weightier bearing on the recovery will be prioritized, such as for example digital markets. Enforcement actions will not be sufficient, however, as they are case-specific and can take long to investigate and reach a conclusion.

Advocacy actions by competition authorities can be expected to continue to ensure that rescue packages are deployed in a competition-friendly way. They can also be expected to help ensure that industrial policy measures are more competition friendly and that pro-competitive structural reforms are undertaken as countries exit the crisis. This will be even more crucial since countries will be debt-laden and will need to take razor-sharp policy measures to use limited resources efficiently.

To be at the policymaking table agencies will have to advocate for competition and the role it can play in economic recovery drawing from the lessons of the past – from the Depression to the Global Financial Crisis but also to lessons from other countries from the current crisis.

B. Advocating for Competition-friendly Industrial Policies

As regards Industrial Policy, it can be expected that advocacy should focus on promoting measures that allow for firm entry and competition in the medium term and not around promoting or building moats around national champions. When national champions are defended by policymakers then the latter should be made aware of the trade-offs between the alleged benefits and the harm from competition distortions.

Drawing upon robust empirical work that shows that insulating firms from competition do not make them stronger, competition authorities should therefore advocate with policymakers that there is clear evidence that such a policy would lead or provide a path to the establishment of returns to scale, and even when the likelihood of such a path is high, that the cost for competition and dynamic effects be taken into account in the final decision. Competition authorities may thus advocate that true national champions arise from a stable macroeconomic environment with competitive and stable policies, where firms have access to high-quality infrastructure and utilities and where they can operate under competitively neutral regulation.

This approach was discussed during the OECD Meeting of High-Level Representatives of Asia-Pacific Competition Authorities held in December 2021.[19] In that forum, a number of jurisdictions defended that industrial policies can be relevant to combat market failures, for the common good, but can also be made competition compatible.

To respond to economic consequences from the Covid-19 crisis and beyond, competition agencies should therefore enhance the pro-competitive environment and opportunities for businesses at all levels, helping ensure that industrial policies are competition friendly whenever possible.

19 https://www.oecd.org/daf/competition/high-level-representatives-meeting-of-asia-pacific-competition-authorities.htm.

C. Competition Authorities Need to Retool their Skill Sets and Market Know-How: The Example of the Digital Economy

To be able to participate actively in such advocacy efforts, competition authorities will need to make not just general statements on the benefits of competition (although in many instances that in itself will be beneficial), but to make concrete, data-based analysis. To do so, competition authorities will rely, in some instances, on their expertise in certain markets from their enforcement activities. In other instances, they will rely on market studies that will allow them to understand industry characteristics, dynamics, and eventual competition issues. To fully capture these features of markets, competition authorities can be expected to devote more attention to such market study activities, and to equip themselves with more economists to obtain a better understanding of market dynamics and businesses' incentives and behavior.

Recently in the region, many competition authorities have been investing resources in such market studies, often then providing input to policymakers for legislative or rule changes. A clear example, which can provide a blueprint for other sectors, are the numerous market studies in the digital economy space. This section will thus focus on the digital economy as it also of particular import for the Asia Pacific's recovery. An example is Australia that has used market studies as part of a comprehensive, methodical approach to understanding the impact of digital platforms on its market economy.

1. The Emerging Role for Market Studies

A recent 2021 report has stated that the value of the internet economy in Indonesia, Malaysia, Singapore, Thailand, the Philippines, and Viet Nam is expected to have exceeded USD170 billion in 2021 and reach USD360 billion by 2025 and USD 1 trillion by 2030.[20] During the meeting of the OECD High-Level Representatives Meeting in December 2021 a number of agencies stated that the pandemic led to the rapid growth of digital platforms in sectors such as food delivery platforms and e-marketplaces in the region. This explains why the competition authorities in the region have been up-skilling on the digital economy, widely using market studies to equip themselves with the knowledge to advocate with policymakers on possible regulatory and other policy actions. A few examples are below:

- In Australia, the ACCC has been analyzing competition and consumer issues arising from digital platforms since 2017. It is currently undertaking a 5-year inquiry into Digital Platform Services to be finalized in 2025. To date this has led to four reports focused on search, social media, and online private messaging services, app marketplaces, provision of web browsers and general search services, choice architectures and the supply of digital advertising services. A report on the general online retail marketplaces is due at end of March 2022.

- The CCCS' conducted a Market Study on E-Commerce Platforms that was finalized in 2020 with a view to providing the authority with a greater understanding of the business models as well as how e-commerce platforms operate and compete. This has led to updated enforcement guidelines (see below).

A number of other jurisdictions have announced plans to undertake their own market studies:

- In Malaysia, MyCC has announced plans to conduct a market review of the digital sector with the view to issuing guidelines to be completed by the end of 2022. The focus will be on e-commerce, food delivery platforms and online travel agents.

- In Thailand, the OTCC plans to conduct three market studies in the digital sector in 2022

2. The Setting Up of Specialized Digital Units

Together with the importance of the digital transformation of markets as well as the specificities of the digital economy's functioning, in particular that of digital platforms, based on a number of closely interconnected characteristics of network effects, cross-network externalities, the importance of data and feedback loops means that these markets require specific skill sets and experience. This explains why there is a current trend to create digital market units or groups within many competition authorities.[21] One of the main roles of these units is to assist and provide support to case teams that are undertaking investigations in digital markets.

Within the Asia-Pacific region, the JFTC has created the Office of Policy Planning and Research for Digital Markets, while the ACCC has set up a specialist Digital Platforms Branch to conduct work related to digital platform markets.

20 Google, Temasek and Bain, e-Conomy SEA 2021.

21 Outside of the Asia-Pacific Region there are recent examples, which include the UK's CMA, Mexico's COFECE, and Portugal's Autoridade da Concorrência.

3. Competition Authorities Should Reach Out to and Foster Linkages with the Regulators Involved in the Digital Space

Key to the digitally driven products and services is data. Many countries have specialized data protection agencies with specific know-how and powers over data regulations. Given this expertise of data protection agencies, many competition authorities are collaborating closely with them to ensure that both enforcement actions as well as regulations are both pro-competitive and respectful of data protection.

An example from the region is found in Singapore, where the CCCS has been collaborating with the Personal Data Protection Commission (PDPC). One result of this collaboration was the introduction of data portability under the Personal Data Protection Act ("PDPA").

Working closely with consumer protection agencies is also proving invaluable for competition authorities in the region. For example, MyCC reached out to the Ministry of Domestic Trade and Consumer Affairs to engage with the two biggest food delivery platforms.[22]

4. Advocating for Amendment of Competition Laws or *Ex Ante* Regulation to Address Perceived Gaps in Addressing the Anti-competitive Practices of Digital Platforms

Equipped with the know-how from market studies, creating digital teams and working closely with specialized regulators has allowed competition authorities in the region to be active in the ongoing dialogue of policymakers around the regulation of digital markets.

Indeed, the specificities of markets in the digital economy have meant that in many jurisdictions there are ongoing calls for ex ante specific regulation of digital platforms and markets. Creating the digital units and undertaking market studies can help build the understanding as to how best to react to such calls, and to be ready to make proposals or feed into such regulatory pushes. This is particularly important given the rising relevance of the digital transformation across industries and markets, and how regulation can affect market dynamics, sometimes in unexpected and unintended ways.

Getting the "right" regulatory environment in place will be key to maintain the main substantial benefits that digitalization can bring, while ensuring that anti-competitive enforcement practices are well adapted to the rapid-scale up of digital platforms that lead to winner takes all dynamics built around eco-systems.

A few examples from the region are the following:

- The SAMR has noted the importance of ensuring up-to date antitrust regulations for digital platforms and has currently pending a proposal to amend the Anti-Monopoly Law ("AML"). The current proposal, if adopted, would mean that a dominant operator that uses data and algorithms, technologies, and platform rules to create obstacles to competitors would amount to an abuse of dominance. The draft amendment to the AML was made available for public comment in October 2021 with proposed changes being adopted potentially already in 2022

- A proposal for ex ante regulation has been made by Japan's JFTC. Its objective is to better monitor situations of data hoarding by the big tech.

- In Australia, the government introduced in 2021 the News Media Bargaining Code to address bargaining power imbalances between Australian news media businesses and digital platforms, following work by the ACCC under the Digital platform services inquiry 2020-2025.

- Also in Australia, at the end of February 2022, the ACCC has started a consultation process with stakeholders on a number of potential measures to address anti-competitive conduct (e.g. self-preferencing and access to data) for a possible new regulatory framework to promote competition and increase consumer welfare in digital platform services.[23]

- Following the market studies outlined above, the CCCS issued updated guidelines at the end of 2021 to provide further clarity on issues arising from the market power and potentially abusive conduct in digital markets.

22 https://app.parr-global.com/intelligence/view/intelcms-qjkx9x.

23 https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/september-2022-interim-report.

5. Cooperation with Other Competition Authorities is Increasingly Important

Finally, international collaboration is more important than ever, especially when it comes to the borderless digital economy. One of the main issues in digital markets is the inherently global nature of the markets, the digital market players, and their conduct. As a result, competition authorities will need to enhance co-operation between national competent agencies to address competition issues that are increasingly transnational in scope (OECD, 2021[24]). By collaborating closely, authorities can develop a common approach when dealing with cases. For instance, multi-jurisdictional mergers between digital platforms raise similar challenges for competition authorities, for instance the need to adopt consistent remedies in response to the concerns raised. Given the geographic scope of digital platforms and the flow of data across different countries, mechanisms for information sharing and coordinating investigations would be beneficial for enforcement actions in these markets (OECD, 2019[25]).

Different co-operation initiatives in the Asia-Pacific region may serve as platforms to enable competition authorities to share good practices about their enforcement activities. Such platforms can include the ASEAN Australia New Zealand Free Trade Area ("AANZFTA"), the ASEAN Competition Enforcement Network ("ACEN"), the OECD meeting of Heads of Asia-Pacific Competition Authorities, the ASEAN Expert Group on Competition ("AEGC").

V. CONCLUSION

Advocacy has traditionally played an important role for competition authorities in the Asia-Pacific region, especially for the newer competition regimes. It first focused mainly on advocating for a competition culture and for the importance of competition, mainly to reduce anti-competitive conduct by the business community. During the Covid-19 pandemic, this role was more and more broadly intended as, or expanded to, not only advocate for competition generally but for specific policy actions, sometimes helping the design of the recovery packages.

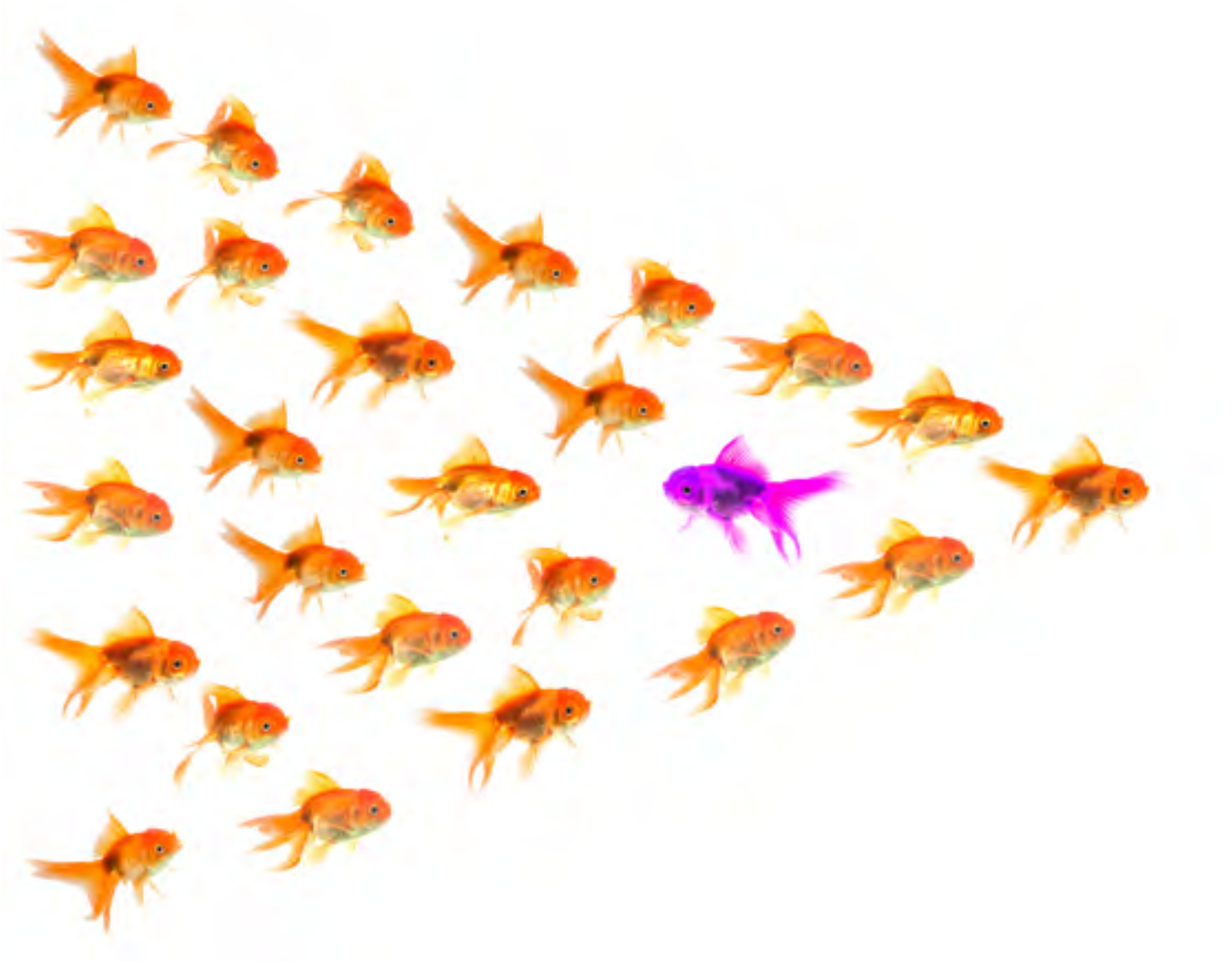
This role of advising policymakers on policy and rulemaking can be expected to increase in the Region. This will require close knowledge of markets to enable agencies to offer pragmatic usable advice that is data-based. The digital economy provides a good proxy for competition authority actions, where a number of authorities have undertaken market studies, created specialized teams and intensified their cooperation with regulators that are active in the particular field.

The competition authority's skill set is unique in the region. Such agencies can be therefore expected to be able to provide specific and effective advice at the policymaking table.

24 OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in-competition-enforcement-2021.htm.

25 Background note to the Third OECD Meeting of High Level Representatives of Asia-Pacific Competition Authorities: Practical approaches to assessing digital platform markets for competition law enforcement, December 4, 2019.

AUSTRALIA'S MERGER CONTROL REGIME: *EX POST* MERGER REVIEWS, CONTINUED PUSH FOR RADICAL CHANGES TO MERGER CLEARANCE PROCESS, PROPOSED SECTOR SPECIFIC RULES



BY KIRSTEN WEBB[1]

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The ACCC says that its proposed merger law reforms will bring Australia's merger clearance regime and rules for digital platforms into alignment with international models. However, those reforms will add more complexity and cost to clearance processes in Australia and potentially, if all of the ACCC's changes were adopted, could lead to more deals being blocked.

There have been a number of mergers in recent years that were originally opposed by the ACCC but ultimately cleared by the Federal Court of Australia or the Australian Competition Tribunal. Part of the ACCC's petition for reform is that the current test is too high of a bar for the ACCC to effectively prevent anti-competitive deals in court proceedings. An *ex post* review of these cases could test this argument.

I. INTRODUCTION

In his eleventh and final speech to the Committee for Economic Development Australia ("CEDA") on March 3, 2022,[2] outgoing ACCC Chairman Rod Sims outlined the ACCC's areas of particular focus for the year ahead.

Mr. Sims noted the surge in M&A activity in Australia and globally, reporting:

- In 2021, 472 mergers were notified to the ACCC, up 41 percent on the previous year and 63 percent higher than the average over the last five years, including global mergers with significant transaction value; and

- The ACCC is seeing an increase in the number and complexity of public reviews in sectors such as ports, container handling equipment and services, rail transport, aviation, health, and pharmaceuticals.

In that context, Mr. Sims used his speech to continue to advocate for merger law reform in Australia. Over the past few years, Mr. Sims has argued that Australia's informal merger review model is out of step internationally, and the current legal test restricts the ACCC's ability to prevent anti-competitive mergers.

In August 2021[3] the ACCC announced a range of radical proposals designed to re-engineer the merger clearance process which, if implemented, would include replacing the existing voluntary and informal clearance process with a mandatory and suspensory notification regime. This is an agenda that the ACCC will continue to push over the next year.

If the ACCC is successful in agitating for merger law reform, it would fundamentally alter merger clearance in Australia with the ACCC's legislative reform wish list including a mandatory filing regime and a ban on the parties closing the deal until the ACCC has granted clearance. Ultimately, the ACCC's passion alone will not be enough to force legislative change with the debate likely to continue and the final say coming down to the Commonwealth Government.

II. *EX POST* MERGER REVIEW

This continued push for merger law reform followed the publication of the ACCC's first *ex post* review of merger cases.[4] That review focused on identifying lessons that can be learned from past cases to inform and improve the ACCC's current investigative and decision-making processes.

However, while the *ex post* review work was conducted independently of the law reform proposals, the ACCC has used it as another opportunity to advocate for reform. In particular, the report raises concerns about the factual accuracy and completeness of information provided by parties in past cases, arguing that this is a weakness of the current informal regime.

2 Rod Sims, Chair, Australian Competition and Consumer Commission, ACCC's enforcement and compliance policy update 2022-23, Committee for Economic Development of Australia (CEDA) (March 3, 2022) https://www.accc.gov.au/speech/acccs-enforcement-and-compliance-policy-update-2022-23.

3 Rod Sims, Chair, Australian Competition and Consumer Commission, Protecting and promoting competition in Australia, Speech at the Competition and Consumer Workshop 2021 - Law Council of Australia (August 27, 2021) https://www.accc.gov.au/speech/protecting-and-promoting-competition-in-australia.

4 Australian Competition and Consumer Commission, *Ex-post Review of Merger Decisions* (February 25, 2022) https://www.accc.gov.au/publications/ex-post-review-of-accc-merger-decisions.

A. Outline of Current Merger Control Regime

Section 50 of the Competition and Consumer Act 2010 (Cth) ("CCA") prohibits a corporation from directly or indirectly acquiring shares or assets if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market.

Currently, there is an informal merger clearance process that enables merger parties to seek the ACCC's view on whether the ACCC considers a proposed acquisition is likely to have the effect of substantially lessening competition. This is an informal process that is not underpinned by legislation that has developed over time, to provide an avenue for merger parties to seek the ACCC's view prior to completing a merger.

While there is no mandatory ACCC notification requirement, the ACCC has the power to commence proceedings in the Federal Court of Australia seeking an injunction to restrain a proposed merger, as well as penalties and other orders if the Court determines that the merger is likely to have the effect of substantially lessening competition in breach of Section 50.[5] Merger parties also have the ability to seek a declaration from the Federal Court of Australia that a merger is not likely to substantially lessen competition and until recently could also commence proceedings in the Australian Competition Tribunal seeking authorization of a proposed merger.

B. Mergers Reviewed by ACCC in Ex Post Review Report

The ACCC conducted detailed ex post reviews of six mergers[6] which it originally reviewed, and did not oppose, between 2017 and 2019. This compares to 78 public merger reviews appearing on the ACCC's register in the same period (this number excludes numerous others that would have been confidentially cleared (or "pre-assessed") in the same period) and the increased numbers of mergers notified to the ACCC in 2021 outlined in Section I above.

The cases were selected based on a range of criteria including the nature of the issues raised and relevance to future reviews, availability of information and data, and the time that had elapsed since the merger.

There have been a number of mergers that were originally opposed by the ACCC but approved by the Federal Court of Australia or Australian Competition Tribunal, none of which were the subject of the ex post review.[7] The ACCC has flagged the possibility of conducting an *ex post* review of such mergers. Specifically, the report noted that the ACCC has received complaints from industry about some of those mergers.[8]

Part of the ACCC's petition for reform is a proposal to lower the threshold for deals to be blocked, on the basis that current forward looking test – and the requirement to satisfy the civil standard of proof – is too high of a bar for the ACCC to effectively prevent anti-competitive deals in court proceedings. In recent contested merger cases determined by the Federal Court of Australia, examination of witnesses has produced compelling evidence as to why a merger should be permitted. An *ex post* review of cases the ACCC opposed but were approved by the Federal Court of Australia or Australian Competition Tribunal, could test the ACCC's argument.

C. Core Findings from the Ex Post Review

Despite the very small sample size, the ACCC seeks to draw some broad conclusions. Its core findings include that:

- There is a need to look beyond market shares (which may underplay competitive effects) and closely examine other market conditions. In particular, the ACCC found that the removal of a vigorous and effective competitor can have a significant impact on competition, even where market shares are low and other vigorous and effective competitors remain. The ACCC based this finding on a merger where the parties' combined share post-merger was only 11 percent and a number of other competitors remained in the market. However, a detailed ex post review of pricing data revealed a quantifiable reduction in price competition post-merger attributable to the removal of the target.

5 *Ibid.* p.2

6 Caltex Australia's acquisition of assets from Milemaker Petroleum (Caltex/Milemaker); Platinum Equity's (Winc) acquisition of OfficeMax Australia; Complete Office Supplies' acquisition of Lyreco; Emergent Cold's acquisition of AB Oxford Cold Storage Company; Propel Funeral Partners' acquisition of Gregson & Weight Funeral Directors; and the remedy package in Landmark's acquisition of Ruralco.

7 In the past 10 years: *AGL/ Macquarie Generation* (2014); *Sea Swift/ Toll Marine* (2016); *Tabcorp/Tattersalls* (2016-2018); *Pacific National/Aurizon* (2018-2020); *TPG/ Vodafone* (2020).

8 *TPG/ Vodafone* (2020), *AGL/ Macquarie Generation* (2014) and *Sea Swift/ Toll Marine* (2016).

- The benefit of competitive constraints on a particular segment or class of customers will not necessarily carry over to other segments. The ACCC found that some mergers have resulted in significant price increases for particular segments of customers, and this can be a particular issue where some classes of customers have less available alternative suppliers and/or are unable to self-supply. The ACCC appears to base this finding on one merger where the ACCC found that, following the merger, large customers were able to prevent price rises due to effective countervailing buyer power, but mid-sized customers faced more significant price increases.

- Claims about the likelihood of new entry and expansion, and the ability of third parties to exercise countervailing power, need to be scrutinized closely as these are routinely exaggerated by both merger parties and third parties. While numerous claims about new entry were made by both merger parties and industry participants in original review processes, the ACCC found that in almost none of these cases had any entry actually transpired since the merger. Similarly, the ex post review identified several instances where market participants were overly confident about their ability to prevent the merged entity from raising prices and may have underestimated the capital and labor commitment required.

- Both merger parties and third parties have distorted or omitted critical information relevant to the ACCC's analysis. Examples included the ACCC receiving directly contradictory information about the viability of a competitor in separate review processes, weeks apart; sanitized internal documents downplaying forecasted post-merger price increases; definitive submissions on post-merger expansion plans that never eventuated; and the failure to disclose a subsequent and imminent transaction which impacted the ACCC's assessment of market dynamics.

D. Continued Petition for Reform of Informal Merger Clearance Regime

The findings of the report have already been leveraged in support of the introduction of a new mandatory and suspensory regime. In announcing the report, outgoing ACCC Chair Rod Sims expressed concerns about the current informal and non-suspensory regime, highlighting that the ACCC often has to negotiate with parties over the information they will provide, frequently under time constraints and, in some cases, threats to complete.[9]

III. PROPOSED CHANGES TO AUSTRALIA'S MERGER REGIME

The ACCC has been vocal in pushing for reform of Australia's merger regime on the basis that Australia's merger control is out of step internationally and not "fit for purpose." Concerned about increased market power and concentration in industry in Australia, the ACCC is proposing a radical overhaul to enhance the ACCC's ability to prevent consolidation.

The ACCC acknowledges it has not been successful in preventing mergers that it deems problematic – and so is pressing for radical change that it says will bring the Australian regime closer to that seen in other jurisdictions. While the ACCC has said that it is, by proposing a regime, intending to start a debate in Australia about change, it is clear that the ACCC proposal has been meticulously thought through – right down to particular wording.

Specifically, the ACCC is looking to have three key changes implemented in Australia:

1. A new formal merger review process, with a mandatory filing regime and a ban on the parties closing the deal until the ACCC has granted clearance which would be the only means by which clearance could be granted;

2. Changes to the mergers test in Section 50 of the current law to lower the threshold for deals that can be blocked to cover cases where there is a possibility of competition being reduced; and

3. Reforms to deal with acquisitions by large digital platforms.

9 Press Release: Australian Competition and Consumer Commission, ACCC examines competition impact of past mergers (February 25, 2022) https://www.accc.gov.au/media-release/accc-examines-competition-impact-of-past-mergers.

A. Change #1: A new Mandatory Merger Notification Process

Currently, there is an informal merger clearance process outlined in Section II.A above. There is no mandatory merger notification requirement.

The new formal merger review process proposed would introduce mandatory notification of all deals above a defined threshold. A suspensory regime would also be implemented, preventing closing without ACCC clearance as well as a set time period for review.

To complement the thresholds, which the ACCC acknowledges would need to be carefully set, the ACCC is also proposing a "call in" power for those transactions that are "potentially problematic" but which fall below the thresholds. This power would bring these transactions under the formal process and, in the ACCC's view, discourage transactions being structured in ways to avoid notification. The ACCC has not unveiled its preferred time period for the "call in" power to be operative – but has said that the period should be a matter for debate.

The ACCC would like to retain some aspects of the current voluntary merger clearance regime – i.e. for acquisitions that fall below the thresholds, merger parties would continue to be able to request ACCC clearance based on the current pre-assessment process. The ACCC is also proposing a "notification waiver" for acquisitions which are above the thresholds, but which are unlikely to raise serious competition concerns.

Of significance, while the ACCC would be obligated to provide substantive reasons for its decision to clear, or decline to clear, proposed acquisitions, its decisions would be subject to limited merits review by the Australian Competition Tribunal. That is, the Federal Court would no longer be directly involved in any aspect of the merger clearance process.

The ACCC also proposes that on review of ACCC decisions to block a transaction the Tribunal would only be able to have regard to the material which was before the ACCC when it made its decision. This would ramp up the filing obligations and costs for the merger parties to make sure they provide the ACCC with a fulsome analysis of the competition issues affected by the transaction, because they will be limited on appeal to that material.

This limited review process would eliminate what has been a fruitful underpinning of Federal Court decisions to permit mergers, namely cross examination of both the merging parties' witnesses and those that give evidence for the ACCC. In all recent contested merger cases determined by the Federal Court of Australia, examination of witnesses has produced compelling evidence as to why a merger should be permitted. The ACCC no longer wants this avenue to be available – although it will retain its own right to undertake examination of witnesses as part of its merger clearance process.

B. Change #2: Changes to the Merger Test

The ACCC argues that the current regime (outlined in Section II.A above) overly favors merger parties by placing too much of an evidentiary burden onto the ACCC to convince the Federal Court to uphold ACCC decisions and block questionable transactions.[10]

The ACCC says that the requirement to prove the likely future state of competition "with and without" the merger to the civil standard of proof presents unacceptable challenges. Third parties likely to be adversely affected by the transaction are often reluctant to provide evidence; executives from merger parties are self-interested and internal documents carefully curated.

Under the proposed formal regime, the applicable test would be whether the ACCC is satisfied the proposed acquisition is not likely to have the effect of substantially lessening of competition. The word "likely" appears in the current test in s50. It is not defined but has been interpreted in case law to mean, at time of writing, "a real commercial likelihood."

The ACCC proposes that a definition be included in statute and that the threshold be reduced; "likely" should be defined as "a possibility that is not remote." This would, in the ACCC's view, make it clear that, for a breach of the merger law to be established it is not necessary for the ACCC or Tribunal on review to be persuaded on the balance of probabilities that there is a real commercial likelihood of a substantial lessening of competition. All that would be required is a possibility that is not remote. This would firmly move the burden to the parties to show no significant possibility of a loss of competition. That is a substantive change to the existing law and has potential ramifications for other prohibitions of conduct that is likely to substantially lessen competition, such as concerted practices.

10 Rod Sims, Chair, Australian Competition and Consumer Commission, Protecting and promoting competition in Australia, Speech at the Competition and Consumer Workshop 2021 - Law Council of Australia (August 27, 2021) https://www.accc.gov.au/speech/protecting-and-promoting-competition-in-australia.

Currently, Section 50 of the CCA sets out a number of factors that must be taken into account in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market (known as the merger factors) as follows:

- the actual and potential level of import competition in the market;
- the height of barriers to entry to the market;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- the extent to which substitutes are available in the market or are likely to be available in the market;
- the dynamic characteristics of the market, including growth, innovation, and product differentiation;
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
- the nature and extent of vertical integration in the market.

The ACCC is also proposing that:

- the existing merger factors in Section 50 be revised to focus on the structural conditions for competition that are changed by the acquisition to the detriment of competition. The precise changes sought have not been notified;
- an acquisition by an acquirer which has a position of substantial market power be deemed to be problematic if, as a result of the acquisition, that position of substantial market power would be likely to be entrenched, materially increased, or materially extended. The precise language of "entrenched, materially increased or materially extended" has been proposed by the ACCC and has no precedent in any other provisions of the existing law; and
- to the extent that merger parties enter into ancillary agreements as part of their transaction, the competitive effects of such agreements be considered together with the merger as part of the assessment. This amendment is intended to prevent "parties taking steps to change the counterfactual or take advantage of the anti-overlap provisions in order to get anti-competitive mergers cleared."[11]

C. Change #3: Digital Platforms

The ACCC is not convinced that the proposals outlined above "go far enough to enable us to scrutinise and, if necessary, block certain critical acquisitions by large digital platforms."[12]

Accordingly, the proposal is that special rules would be introduced to regulate acquisitions digital platforms propose including acquisitions of nascent firms.

In a discussion paper released on February 24, 2022,[13] the ACCC outlined 6 options for special merger rules for digital platforms (in addition to the ACCC's proposed economy wide reforms) as follows:

1. **Pre-defined criteria linked to market power or strategic position**: any new tailored merger rules for digital platforms would only apply to digital platform firms that meet pre-defined criteria linked to their market power and/or strategic position (including, potentially, their role as gatekeepers) in one or more digital platform markets. The ACCC intends that only a few of the largest digital platforms that benefit from entrenched and substantial market power would be subject to the bespoke merger regime.[14]

2. **Bespoke notification regime**: The ACCC is considering whether a bespoke notification regime is required for acquisitions by digital platforms that meet the relevant criteria, noting that it may be appropriate for a specific notification threshold to apply to acquisitions by the largest digital platforms.[15]

11 *Ibid.*

12 *Ibid.*

13 Australian Competition and Consumer Commission, *Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services* (February 24, 2022) https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf.

14 *Ibid.* at 8.6.1.

15 *Ibid.* at 8.6.2.

3. **Lower probability threshold**: The ACCC says that applying a lower probability of competitive harm threshold to acquisitions by those digital platforms that meet the relevant criteria would enable the ACCC to intervene in circumstances where there may be a low probability that the acquisition would substantially lessen competition, but where the impact of any substantial lessening of competition is likely to be very substantial and long-lasting (i.e. to account for low probability but high impact competition effects).[16]

4. **Reversal of onus of proof**: If the broader economy-wide merger reform outlined above is not implemented, the ACCC says it may be appropriate to consider an option to reverse the onus on proof specifically in relation to acquisitions by large digital platforms that meet the relevant criteria, or to introduce a rebuttable presumption that certain acquisitions by large digital platforms that meet the relevant criteria would result in competitive harm.[17]

5. **Enhanced deeming provision**: in addition to focusing on those situations that entrench, materially increase, or materially extend a position of market power, a digital platform-specific deeming provision could also focus on acquisitions by such digital platforms that raise barriers to entry for rivals; or that remove or weaken a source of future competitive constraint or partial competitive constraint.[18]

6. **Prohibition**: The ACCC notes a suggestion that it may be appropriate to prohibit digital platforms that meet the relevant criteria from acquiring any business in certain categories, such as those businesses operating in the same or adjacent markets, or businesses that may allow a digital platform firm to extend, expand or entrench its market power. However, the ACCC recognizes that this particular option could severely restrict the ability of digital platforms to acquire other businesses and seeks stakeholder feedback on whether such an approach is warranted and any potentially adverse impacts of such an approach on competition and efficiencies in the long term.[19]

The ACCC states that "*alignment across jurisdictions will help promote regulatory certainty and reduce regulatory burden for affected digital platforms. Regulatory coherence will also assist Australian consumers and businesses to benefit from law reform implemented globally to improve competition and consumer protection.*"[20] However, different jurisdictions have different models and the form of regulation in one jurisdiction may not readily be transplanted to a different jurisdiction. Australia has a long-standing prosecutorial model, which separates investigation from adjudication. The ACCC's proposed changes would result in a shift to an administrative model, with the ACCC as decision-maker as well as investigator with limited review rights. These two models have been hotly debated in other jurisdictions and a similar debate should take place in Australia, as these proposed reforms are considered and developed.

The ACCC is seeking stakeholder views on these proposals as well as a range of other potential competition and consumer law reforms relating to digital platforms outlined in the Discussion Paper. The ACCC's Digital Platform Services Inquiry Interim Report No. 5 is due to be provided to the Treasurer by September 30, 2022.

The debate is therefore likely to continue throughout the coming year, with the final say coming down to the Commonwealth Government.

16 *Ibid.* at 8.6.3.

17 *Ibid.* at 8.6.4.

18 *Ibid.* at 8.6.5.

19 *Ibid.* at 8.6.6.

20 *Ibid.* at pp 6-7.

REGULATORY HUMILITY: SHOULD LEGISLATORS RETHINK PLANS TO OVERHAUL ONLINE MARKETPLACES?

BY BRUCE GUSTAFSON[1]

1 Bruce Gustafson, CEO of the Developers Alliance. I'd like to thank the generous friends and colleagues who contributed to this work.

Legislators across the world have been struck by the urge to dictate how online marketplaces are run. In December 2020, the European Commission proposed the Digital Markets Act ("DMA"), which proposes to regulate everything from how online services can conduct rankings to what services they must make interoperable. In 2021, both houses of the U.S. Congress followed suit with a barrage of legislative proposals, some based on the DMA and others adding new restrictions and requirements.

Regulators in Asia show signs of following suit. In August 2021, South Korea's National Assembly amended its Telecommunications Business Act to prevent app store operators from requiring use of their in-app purchasing systems. In the same month, China issued new competition guidelines, banning behaviors that regulators claimed could harm internet users and limit market competition, including blocking competitors' products and discriminatory pricing.

Many of these proposals seek, in some form, to limit "self-preferencing" by tech companies on digital platforms. Others seek to constrain tech companies with online platforms from merging with or acquiring other online products and services. All are reactions to criticism that tech companies have used their size and popularity to limit competition.

These proposals are also often broad and unclear in scope (e.g. is it self-preferencing if Google shows its own restaurant reviews, but only links to Yelp's?). And they are likely to be disruptive. Since China began targeting competition by its most successful tech companies, those companies have collectively lost roughly one trillion dollars in value.[2] That situation is unique in some respects, but these are not adjustments at the margins.[3] Before moving forward with further proposals, legislators may want to consider whether the current system needs fixing and whether these proposals actually make things better.

This article discusses this regulatory spree from two perspectives: that of consumers and that of software developers. We find that the current system is marked by high levels of innovation, and seems to benefit both consumers (who get valuable products for free) and developers (who have easy access to users through uniform operating systems, and benefit from acquisitions as an exit option). Subsequently, we examine legislative and regulatory trends through the lens of two pieces of proposed legislation in the U.S., namely the AICOA and PCOA, and find that the bills will make things worse and not better.

I. THE *STATUS QUO*: CONSUMERS GET GREAT PRODUCTS FOR FREE

The prevalence of proposals to regulate tech companies suggest that politicians believe tech companies are problematic. But, do their constituents feel the same way? The average reader may be surprised to learn that as an empirical proposition, they don't.

The survey results above put this into stark relief.[4] From a 2021 sample of over 1,000 respondents, 90 percent viewed Google favorably, with other major tech companies trailing just behind (in an interesting contrast, the U.S. Congress, responsible for much of the pending tech regulation, lags much further behind with a favorability rating of 23 percent).[5]

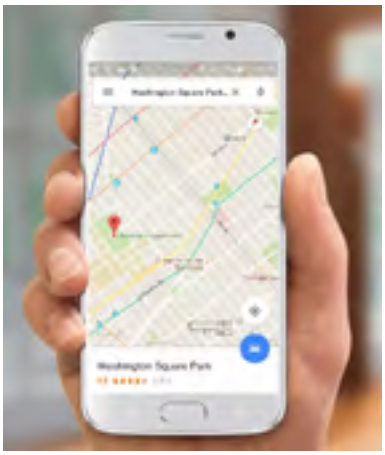
The reasoning behind this discrepancy is likely practical in nature. Over the past couple of decades, tech companies have created products that make people's lives easier, and in most cases have found a way to make those products free to consumers, with other companies (i.e. advertisers) footing the bill. Anyone old enough to have had to print out mapquest directions, or (God forbid) consult a road atlas, understands how far technology has come in a relatively short period of time.

2 Jing Yhan, Keith Zhai, & Quentinn Webb, China's Corporate Crackdown Is Just Getting Started. Signs Point to More Tumult Ahead, Wall Street Journal (Aug. 5, 2021) ("From a peak in February, some $1.1 trillion of market value has vanished from the stocks of six top Chinese technology companies, including Alibaba and Tencent. That is a drop of more than 40%.").

3 Among other things, Jack Ma, the CEO of one of China's largest tech companies, Alibaba, went conspicuously missing during the relevant period. Liza Lin, Where Is Jack Ma? Alibaba's Founder Has Kept a Low Profile Since October, Tech entrepreneur was last seen publicly when he criticized Chinese regulators for stifling innovation in the financial industry, Wall Street Journal (Jan. 5, 2021).

4 Elizabeth Lopatto, Verge tech survey 2021, (Oct. 6, 2021).

5 Congress and the Public, Gallup (Dec. 2021).



Put more quantitatively, tech companies have created vast amounts of consumer surplus. Consumer surplus is the difference between how much consumers pay for a product and what they are willing to pay for it (representing the value consumers get from a transaction). Empiricists have quantified that the median consumer values digital maps at $3,648 per year.[6] Over a billion people use Google Maps and Apple Maps actively.[7] Since both products are free to consumers, this suggests that every year Apple and Google together create over a trillion dollars in consumer surplus through their map apps. Not bad

6 Erik Brynjolfsson, Avinash Collis, & Felix Eggers, Using massive online choice experiments to measure changes in well-being, PNAS (April 9, 2019).

7 Dane Glasgow, Google Maps updates to get you through the holidays (Nov. 17, 2020) ("Even in a pandemic, more than 1 billion people still turn to Google Maps to navigate their new normal."); Apple delivers all-new Apple Maps across Canada (Dec. 10, 2020) ("Maps helps hundreds of millions of people in over 200 countries and territories discover new places, navigate, and explore the world.").

for two companies that were not in the navigation market two decades ago (or in Apple's case, even a decade ago). Look at the home screen of an average smartphone (or for the more quantitatively inclined, the data below) and it is apparent that this is one example of many.[8]

Low levels of competition result in increased prices, and reduced supply, quality, and innovation.[9] By contrast, tech today seems to be characterized by rapid innovation and low-to-zero cost products that are made widely available – all markers of a thriving competitive environment. Should policy makers believe there is a dearth of competition in tech, they should produce tangible evidence before taking disruptive actions.

II. PENDING ANTITRUST LEGISLATION MAY DISRUPT BUSINESS MODELS THAT HAVE MADE THESE PRODUCTS FREE TO CONSUMERS

Policymakers should also ensure that proposed solutions don't cause more harm than good. As noted above, many tech products are currently made free to consumers, because tech companies are able to recoup their investments and turn a profit through other avenues, such as selling ads. But the pending legislation may disrupt this business model. For example, Google search is free and, as demonstrated by the chart above, produces significant consumer surplus. Google recoups its investments by selling access to ads through their ad products. Google ad products also allow advertisers to place ads on other sites and apps, making them general online advertising competitors.

Under pending legislation under discussion in the U.S. Senate (discussed in greater detail below), Google's practice of displaying ads served by its ad products on Search, but not third-party ads, could be challenged as self-preferencing under the latest legislative proposals.[10] This could disrupt a business model that has provided substantial value to consumers. More generally, broad prohibitions against established business models risk restricting tech companies' ability to monetize products through cross-product initiatives (that often make those products free to consumers) - something vertically integrated firms do regularly.

III. PENDING ANTITRUST LEGISLATION MAY DISRUPT BUSINESS MODELS THAT BENEFIT DEVELOPERS

If the current system is not hurting consumers (and proposed solutions risk harming consumers), what other concerns might these proposals be addressing? The logical next possibility is that the proposals will help protect developers who operate on big tech companies' platforms (and form another side of the marketplace). To evaluate whether developers will benefit, it's worth taking a closer look at two pieces of legislation recently introduced in the U.S. Senate: The American Innovation and Choice Online Act (the AICOA) and the Platform Competition and Opportunities Acts (the "PCOA").

The American Innovation and Choice Online Act ("AICOA") Risks Harming Developers by Increasing Fragmentation. The AICOA prohibits "self-preferencing," as well as a number of other specific types of conduct (e.g. pre-installing applications and preventing users from uninstalling them).[11] The prohibition on self-preferencing is broad, preventing companies who own "covered platforms" (i.e. the so-called "GAFAMs") from using them to "preference" their own products and services "in a manner that . . . materially harm[s] competition."[12,13] Defendants found to have self-preferenced, or to have violated the other prohibitions, can defend their actions through affirmative defenses

8 How much would you pay to keep using Google?, Many internet services are free to consumers, but still valuable, The Economist (April 25th, 2018).

9 Bruce Hoffman & Garrett Shinn, Self-preferencing and antitrust: harmful solutions for an improbable problem, CPI Antitrust Chronicle (June, 2021) p.7 ("An 'anticompetitive' outcome means that one of several possibilities is occurring in the market: overall, prices are rising, output is falling, or innovation or quality is decreasing.").

10 This business model could be challenged under a number of provisions in the American Online Choice and Innovation Act ("AICOA"), which was recently voted out of the Senate Judiciary committee, and which is discussed in greater detail below. Particularly, it could be challenged under AICOA Sec. 3(a)(1), which prohibits companies who own "covered platforms" from using them to "preference" their own products and services "in a manner that . . . materially harm[s] competition." And it could be challenged under AICOA Sec. 3(a)(5), which would prohibit Google from "condition[ing] access to [Search] on the use of [other Google products]."

11 AICOA Sec. 3(a).

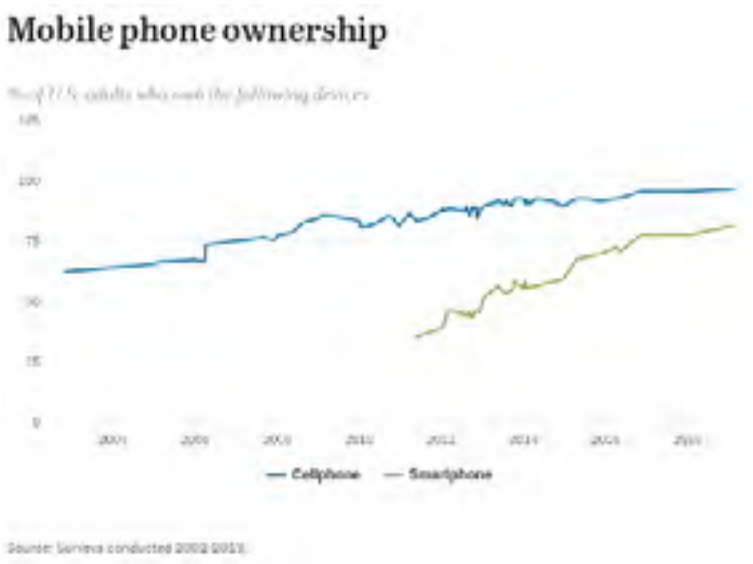
12 A "covered platform" is an online service, owned by a large company, that has a large number of active regular or business users. AICOA Sec. 2(a)(5). Practically, the term applies to (most) products and services owned by Google, Amazon, Facebook, Apple, and Microsoft (the GAFAMs).

13 AICOA Sec. 3(a)(1).

(e.g. showing that actions were taken to "enhance core platform functionality"), but as defined, those defenses are likely to be of limited value.[14]

But what exactly constitutes preferencing? Is it "preferencing" if Google shows its own Restaurant reviews, but only links to Yelp's? And how will this change the status quo for developers? The answer is that it will likely impede innovation by reducing consistency and compatibility.

To see why, it's worth looking at the evolution of mobile operating systems. While smartphones are ubiquitous today, that has not always been the case. Instead, smartphones are largely a product of the last decade.[15]



One of the factors responsible for this rise has been the (relatively) recent standardization of mobile operating systems. Before the rise of smartphones, the most popular mobile operating system was Symbian OS.[16] But Symbian OS was not a single operating system. Symbian OS was often customized, and as a result was varied by OEM and sometimes device. This fragmentation prevented developers from building out the robust ecosystem of apps that make smartphones what they are today.[17]

Particularly, developers could not rely on a consistent set of APIs and SDKs to build their applications. Symbian was said to be so disjointed that Google had to develop around 300 different versions of Google Maps for it (purchasing hundreds of devices so that it could test each version manually). This was surely burdensome for Google, even if it could afford to devote hundreds of developers to maintaining compatibility. But start up and mid-size development shops do not have the same vast scale or staffing budget. For them, the cost of keeping up with Symbian's fragmentation would have been prohibitive. Unsurprisingly, during this period, mobile applications were relatively primitive. In the mobile ecosystem today, users can hail cars and order groceries on their phone; back then, Snake was the cutting edge of mobile tech.

Freeing up developers to concentrate on coding has generated rapid innovation (and saved developers from technical frustration). Smartphones started taking off in 2011, as iOS and Android — both of which are uniform — began to surpass Symbian.[18] As developers were able to maintain compatibility with orders of magnitude fewer resources, they were able to spend more time building great apps. As smartphones acquired more great apps, more people bought them.

14 AICOA Sec. 3(b) contains exceptions for conduct that falls into certain delineated categories (e.g. protecting user privacy or enhancing core platform functionality), but requires defendants to show that their conduct was "narrowly tailored" (not overbroad), "nonpretextual," and "reasonably necessary" to achieve one of the delineated purposes. The "narrow tailoring" language evokes the "strict scrutiny" standard of review applied in constitutional law cases, where courts require the government to show that there are no less restrictive means of achieving an underlying government interest. While the expression is likely no longer precisely accurate, for many years "strict scrutiny" was considered "strict in theory, fatal in fact." *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996) ("It used to be thought that subject to strict scrutiny was a euphemism for absolutely forbidden (strict in theory, fatal in fact, was the refrain)"). In all events, it is a difficult standard to meet.

15 Mobile phone ownership over time Pew Research Center (showing smart phone ownership taking off from 2011 onwards).

16 Worldwide smartphone sales, Wikipedia (showing Symbian as the most popular mobile operating system until late 2010).

17 The Developers Alliance highlighted the impact of fragmentation on developers in our 2021 Android intervention before the General Court of the European Union.

18 *Id.*

The AICOA presents a threat to this uniformity. Under the AICOA, iOS and Android would be prohibited from "preferencing" their own apps and services.[19,20] This may hamper Apple and Google's ability to distribute basic device functionality to end users. The statute seems to prohibit Apple and Google from pre-installing first-party apps (e.g. a navigation app or a calendar app) on their operating systems, limiting consumer functionality out of the box. More importantly for developers, the text of the statute also seems to apply to component services and related APIs within mobile operating systems.

For example, the AICOA could prevent Apple and Google from offering out of the box location services (which might be construed as foreclosing third-party location service providers, and preferencing first-party location services, or as requiring OEMs to take location services with the mobile operating system).[21] The AICOA exacerbates this problem by offering no guidance on where a "covered platform" ends and other "apps and services" begin: Which category do the APIs and SDKs within an OS fall into?

As a result, under the AICOA, Apple and Google would face legal risk for all first-party APIs and SDKs attached to their mobile operating systems, where a third-party may want the opportunity to provide those services instead. Incorporating a first-party service in lieu of a third-party service arguably preferences that first-party service over potentially competing third-party services.

So what happens if Android and iOS no longer come with default first-party services? Following the 2020 EC Android decision barring pre-installation of Google search, Google added choice screens for users to pick their own default search engines.[22] The AICOA may mean more choice screens (for mobile operating system component services that Apple and Google are no longer able to provide as first-party defaults) and by consequence, more fragmentation (as user selections could vary by device). While a handful of developers may profit by getting to provide previously first-party services, the majority of developers may again end up having to deal with a fragmented ecosystem. This threatens the compatibility that has fueled the mobile ecosystem over the last decade.

In addition to fragmentation costs, developers also face uncertainty over whether third parties will be able to seamlessly replace first-party services (or whether they will be forced to work with inferior alternatives). Where third parties are not currently providing services, they will have to build offerings from scratch. While they get up to speed, developers will be forced to handle the resulting quality issues.

If replacing first-party services with third-party services results in longer-term quality issues, developers will have to handle those as well. *Ex-ante*, it is not certain that third-party services will ever catch up to the first-party alternatives developers currently rely on. In fact, the incentives underlying vertical platform integration suggest that where Apple and Google have chosen to rely on first-party services, it is because they believe they are better able to provide those services.[23]

Take iOS as an example, iOS helps connect iPhone users with app developers. Users find iOS valuable because of the applications it makes available. And developers find iOS valuable because it provides them a means of distributing their applications to users. This value is characterized by positive feedback loops (and corresponding negative feedback loops as well). As more people use iOS, it becomes more valuable to developers (who can reach more users) and as more developers make iOS apps, it becomes more valuable to users (who get a greater selection of high quality apps). The reverse is true as well, if users begin leaving iOS (perhaps because app quality or selection falls), the incentive for developers to build iOS apps decreases, and a negative feedback loop could result.

So given these incentives, why does Apple choose to offer certain APIs and SDKs as first-party services? It is unlikely that Apple is using this as a tactic to leverage iOS's market power to siphon off profits that could otherwise be earned by third-party services. Where iOS possesses market power, there are easier ways for Apple to translate that market power into increased earnings (e.g. by raising the price of an iPhone or offering more subscription services).

19 Both iOS and Android would be considered covered platforms under the AICOA. AICOA Sec. 2(a)(5).

20 AICOA Sec. 3(a)(1).

21 his practice could be challenged under a number of provisions in the AICOA. Particularly, it could be challenged under AICOA Sec. 3(a)(1), which prohibits companies who own "covered platforms" from using them to "preference" their own products and services "in a manner that . . . materially harm[s] competition." And it could be challenged under AICOA Sec. 3(a)(5), which would prohibit Apple and Google from "condition[ing] access to [their mobile operating systems] on use of [their other products and services]."

22 Sam Schechner, Some Google Search Rivals Lose Footing on Android System (Sept. 28, 2020) ("Since March, Alphabet Inc. owned Google has been showing people in Europe who set up new mobile devices running the company's Android operating system what it calls a 'choice screen,' a list of rival search engines that they can select as the device's default.").

23 Where indirect network effects are present, declines on either side of the market can accelerate due to negative feedback loops. E.g. Catherine Tucker, Network Effects and Market Power: What Have We Learned in the Last Decade?, Antitrust (2018).

Instead, it is more likely that Apple believes offering these APIs and SDKs as first-party services will increase the value of the platform to users or developers, which will result in more users and developers, which will create a positive feedback loop increasing iOS's overall value (and by consequence iOS's market power and Apple's profits). If Apple believed offering those services as first-party decreased the platforms' value to either users or developers, the stick of negative feedback loops would amplify Apple's incentives not to provide such services.

In sum, Apple's incentive is to only offer services as first-party where it believes it can do a better job than third-party alternatives. Similarly, Android — which is also a platform characterized by indirect network effects — is also only incentivized to offer services as first-party where it believes it can do a better job than third-party alternatives. Despite Apple and Google's incentives to use first-party default services where they will benefit users and developers, and the benefits of standardization, the AICOA limits both companies' abilities to design their products as they see fit. This will likely make life more difficult for developers, and will decrease the value of phones to users as well.

IV. THE PCOA RISKS INCREASING THE COST OF CAPITAL FOR DEVELOPERS AND CHILLING INNOVATION

In the U.S., some legislative proposals attempt to rein in merger and acquisition activity among the biggest tech companies. One such proposal is the Platform Competition and Opportunity Act (PCOA), a bill introduced in both the Senate and the House of Representatives. Under the PCOA, all acquisitions by covered platforms are presumed to be unlawful, and the burden is on the defendant to prove that it falls into a few narrow exemptions.[24] If passed, the PCOA would drastically reduce the number of acquisitions undertaken by covered platforms.

To block a merger under current U.S. law, the government must demonstrate that the merger may "substantially . . . lessen competition."[25] This requires the government to have a basis for blocking transactions, but is not overly exacting. Over the past twenty years, the federal government has challenged approximately 780 mergers.[26] It has lost eleven times.[27] In other words, the status quo is already that the government usually wins in merger cases.

The PCOA would take this a step further, blocking most, if not all, reportable mergers valued at or over 50 million dollars by Google, Amazon, Facebook, Apple, and Microsoft (the GAFAMs).[28] The PCOA establishes a presumption that any such acquisition by a GAFAM company is unlawful. To overcome that presumption, the company has to establish, by clear and convincing evidence (a high bar):

1. That the acquired assets do not compete with any of their covered platforms (i.e. most of their products and services) and are not a nascent or potential competitor to any of their covered platforms;[29] and

2. That the acquired assets would not enhance or increase any of their covered platforms' market position or ability to maintain its market position.[30]

24 As in the AICOA, a "covered platform" under the PCOA is an online service, owned by a large company, that has a large number of active regular or business users. In practice, it applies to most products and services owned by Google, Amazon, Facebook, Apple, and Microsoft (the GAFAMs).

25 Clayton Act Sec. 7 (15 U.S.C § 18).

26 Coalition Letter on Mergers and Acquisitions, (Oc. 5, 2021) ("When the government chooses to intervene, it almost always wins. Over the past twenty years the federal enforcement agencies have challenged approximately 780 mergers. In that same period, the merging parties have won in court only eleven times.").

27 *Id.*

28 Like the AICOA, the PCOA applies to "covered platform operators," i.e. companies that own "covered platforms." The definition for "covered platform" is the same in the PCOA. As noted above, it applies to any online service, owned by a company with a market cap over $550 billion, that has a large number of active regular or business users. In practice it applies to most products and services owned by Google, Amazon, Facebook, Apple, and Microsoft (the GAFAMs), and nothing else.

29 PCOA Sec. 2(b)(3)(A)-(B).

30 PCOA Sec. 2(c)(3)(C)-(D).

Competition and Potential Competition. In addition to shifting the burden of proof from the plaintiff to the defendant, this prohibits many mergers that would be legal today. Current law prohibits mergers and acquisitions that "substantially lessen competition."[31] Under that standard, competitors and potential competitors can combine, as long as the effect is not a substantial lessening of competition in the market. By contrast, under the PCOA, the GAFAMs could not acquire any competitor or potential competitor–regardless of whether the net effect on competition would be positive or negative.

Further, the PCOA construes competition broadly, stating that the term includes competition "for a user's attention."[32] What is the definition of a "user's attention," and how can users' attention be quantified (without infringing on privacy)? More importantly, this definition of competition expands the scope of relevant markets. People often switch rapidly between various apps on their phones, checking messaging apps, scrolling social media, playing games, reading the news, and checking the weather. If user attention is used to draw the boundaries of relevant markets, apps serving entirely different functions might be grouped together. Under the PCOA, where acquisitions of any competitor (or potential competitor) are prohibited, such a broad market definition would make acquisitions difficult, if not impossible. The situation is compounded by global regulators extending the "nascent or potential competitor" logic and applying it to acquisitions that are not yet even present in their markets. Under this logic, a nascent competitor a world away, with no aspirations to compete in the regulator's jurisdiction, can be locked out of an acquisition.[33]

Enhance, Increase, Maintain Market Position. Compounding the issue, the PCOA prohibits the GAFAMs from engaging in any acquisition that would maintain or enhance the market position of any of their covered platforms (i.e. most of their products) or of any of their products or services offered on or directly related to one of their covered platforms (i.e. almost all of their products). By definition, a product's market position increases as it becomes more successful. As such, the PCOA would essentially prohibit the GAFAMs from making any acquisitions that could make any of their products more successful.

Further, the PCOA states that an acquisition that "results in access to additional data may, without more," enhance or increase the acquiring company's market position or ability to maintain market position. This is extremely broad. As developers are aware, nearly every online product or service results in some access to data: Every time a user accesses a web page, makes an online purchase, taps "like" on an image in a photosharing app, sends an email, or watches a video, data is generated. It's difficult to imagine any tech acquisition–and certainly any acquisition valued at 50 million dollars or more–that would not result in access to additional data.

If acquisitions that will make companies more successful are prohibited (including any acquisitions that increase the purchaser's access to data), it is hard to imagine what acquisitions will be left. Particularly, it is hard to imagine what acquisitions will be left that the companies would want to engage in. In effect, the PCOA may ultimately prohibit the GAFAMs from making any large tech acquisitions.

Effect on Developers. Why does this matter for developers? There are really only three possible outcomes for a tech-startup: get acquired, scale up (and throw off cash or go public), or fail. If a tech company chooses to scale up, the goal is generally to launch an IPO. This process can be long and painstaking, requires significant capital investment, and a very different set of management skills for an entrepreneur. As a result, many start-ups rely heavily on mergers and acquisitions as a more efficient way to seek exit–allowing them to pay back investors, turn a profit, and move on to new innovation.

When it comes to mergers and acquisitions, the GAFAMs are an important set of buyers. Between 2010 and 2020, Amazon, Apple, Facebook, and Google collectively acquired over 400 companies.[34] The PCOA effectively eliminates this M&A exit option for developers whose products are successful enough to achieve a valuation of 50 million or more. Even if developers find another buyer, the substantial loss of competition from the GAFAMs could result in lower bids and a deflated sale prices.

As a corollary, the existence of M&A as an exit path incentivizes start-up investment. Without M&A as an exit option, investors may not see a clear path to recouping their investment in start-ups, and may therefore be reluctant to invest in them. This would make fundraising more challenging for developers, which would chill innovation and new company formation.

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31 Clayton Act Sec. 7 (15 U.S.C § 18).

32 PCOA Sec. 2(c) ("For purposes of this Act, competition, nascent competition, or potential competition for 'the sale or provision of any product or service' includes competition for a user's attention.").

33 The Developers Alliance is an intervenor in the UK's Competition Appeal Tribunal regarding the *Meta/Giphy* merger.

34 House Subcommittee on Antitrust's "Investigation on Competition in Digital Markets."

The Developers Alliance recently issued a statement opposing the PCOA for this very reason:[35]

> "In our February 2021 polls of the developer community, we found that more than half of developers believe being acquired is beneficial to them, and an even larger percentage see the benefits to acquisition, even if they aren't currently pursuing it. Congress however believes they know what is better for small businesses than the developers who run these companies. While developers believe in a robust FTC and antitrust provisions and the need to enforce them, this bill shows there is a fundamental misunderstanding of the beneficial role acquisition plays in a thriving, dynamic, and highly competitive tech ecosystem."

Mergers and acquisitions are essential to healthy competition and innovation in the digital start-up ecosystem, and in turn, to developers.[36] By restricting large companies' ability to acquire start-ups, the PCOA denies developers access to critical potential buyers. This artificially deflates the financial rewards of successful innovation, which will chill such innovation.

V. CONCLUSION

Over the past several decades, tech companies have innovated to provide great products to consumers for free. While most people are happy about this, politicians seem not to be. Driven by the perception that tech needs fixing, in the U.S., Europe, and recently Asia, politicians have begun proposing disruptive antitrust legislation targeting tech companies. These proposals threaten the business models that have made these great products free to consumers, and risk harming developers by increasing fragmentation and raising the cost of capital. Before it is too late, policymakers should step back to consider the consequences of their actions.

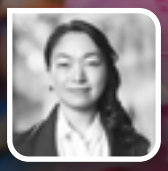
35 The statement can be attributed to Sarah Richard, Policy Counsel & Head of US Policy at the Developers Alliance.

36 See, generally, Sam Bowman & Sam Dumitriu; Better Together: The Procompetitive Effects of Mergers in Tech, (Oct. 2021).

RECENT DEVELOPMENTS IN COMPETITION POLICY IN JAPAN

BY TOSHIO DOKEI, HIDEO NAKAJIMA & TAKAKO ONOKI[1]





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I. COMPETITION POLICY FOR THE DIGITAL ECONOMY

The digital economy continues to grow massively worldwide, and agencies around the world have been exploring options for greater regulation in the digital economy, including for digital platforms. Recently, thirteen competition authorities, including those of the G7 and four guest authorities, have worked together to discuss respective approaches to promoting competition in digital markets and published the "Compendium of approaches to improving competition in digital markets" in November 29, 2021.[2] Japan was part of that. The following are some of the major developments in competition policies related to the digital economy in Japan.[3]

A. Act on Improving Transparency and Fairness of Digital Platforms (the "TFDPA")

On December 24, 2021, the Ministry of Economy, Trade and Industry (the "METI") held the first session of the Monitoring Meeting on Transparency and Fairness of Digital Platforms (the "Monitoring Meeting") in order to promote mutual understanding between the specified digital platform providers and the stakeholders and to improve the transparency and fairness of the Specified Digital Platforms ("SDPs").[4] The meeting was held in accordance with the TFDPA, which is often called the Digital Transparency Act or simply the Transparency Act.

The TFDPA was enacted on May 27, 2020 and came into force on February 1, 2021.[5] It stipulates that digital platform operators should voluntarily and proactively take the initiative to improve transparency and fairness, and that government involvement should kept to a minimum. It adopts a so-called "co-regulatory" approach, in which the general framework of regulations is established by law, while the details are left to the voluntary efforts of businesses (i.e. digital platform operators).

Under the TFDPA, the Minister of METI designates digital platform operators that require greater transparency and fairness in transactions as SDPs; SDPs are subject to discipline under the TFDPA. Accordingly, the Minister of METI designated SDPs on April 1, 2021: Amazon Japan G.K., Rakuten Group, Inc., and Yahoo Japan Corporation as "Digital platform providers of comprehensive online shopping malls selling goods," and Apple Inc., iTunes K.K. and Google LLC as "Digital platform providers of application stores."[6] The SDPs are required to disclose certain information, such as terms and conditions, develop procedures and systems to ensure their fairness, and submit a report with a self-assessment of the measures taken and the outline of the business every year.

The TFDPA stipulates that the Minister of METI review and evaluate the transparency and fairness of the SDPs and make the results of the evaluation public. In preparation for the evaluation, the METI started holding the Monitoring Meeting last December, as mentioned above. An annual report will be submitted by the SDPs by the end of May of this year, and the Monitoring Meeting will compile its evaluation around Fall 2022.

The SDPs designated by the Minister of METI previously did not include digital platform operators that provide digital advertising. However, discussions have been held on whether platform providers of digital advertising should also be subject to regulation (see the next section as well). On June 18, 2021, the Cabinet made the decision to add digital platform operators that provide digital advertising as SDPs to those subject to the regulation under the TFDPA.[7] The Minster of METI has not yet designated any digital platform operator providing digital advertising as an SDP as of February 15, 2022.

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2 https://www.jftc.go.jp/houdou/pressrelease/2021/nov/Compendium.pdf.

3 A summary of the JFTC's efforts in the digital market "Approaches in the digital market" is available in English on the JFTC website at https://www.jftc.go.jp/en/policy_enforcement/digital/index.html.

4 The METI press release of December 21, 2021, is available in Japanese at https://www.meti.go.jp/press/2021/12/20211221001/20211221001.html; some meeting materials from the December 24, 2021, session are available in Japanese at https://www.meti.go.jp/shingikai/mono_info_service/digital_platform_monitoring/001.html.

5 The Key Points of the TFDPA is available in English at the METI's website: https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/tfdpa.html.

6 Please see the METI press release of April 1, 2021, in English at https://www.meti.go.jp/english/press/2021/0401_001.html.

7 The June 18, 2021, Cabinet decision of the "Basic Policy for Economic and Fiscal Management and Reform 2021" is available in English at https://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/2021/2021_basicpolicies_en.pdf; its overview is available in English at https://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/2021/summary_en.pdf; "Action Plan of the Growth Strategy" is available in English at https://www.cas.go.jp/jp/seisaku/seicho/pdf/ap2021en.pdf.

B. Digital Advertising

Digital advertising has been one of the particular digital areas that has been the subject of debate as to whether it should be regulated and if so, how it should be regulated.

On February 17, 2021, the Japan Fair Trade Commission (the "JFTC") published a final report regarding digital advertising.[8] Subsequently, on April 27, 2021 the Secretariat of the Headquarters for Digital Market Competition under the Cabinet Secretariat of Japan ("Digital Headquarters") published a final report on the "Evaluation of Competition in the Digital Advertising Market."[9]

Previously, the Government of Japan established the Digital Headquarters on September 27, 2019, in order to implement policies to promote competition and innovation in the digital market in a timely and effective manner.[10] The Headquarters hosted the Digital Market Competition Council and Digital Market Competition Working Group in order to study and deliberate on important matters concerning the digital market.

Both the JFTC and Digital Headquarters, respectively, conducted research in the field of digital advertising and published interim reports on April 28, 2020 and June 16, 2020, respectively, and then published a final report, as mentioned above.

In principle, the reports recognize that digital advertising provides benefits. For example, digital advertising creates opportunities for a variety of businesses, including small and medium-sized companies ("SMEs"), to reach out to customers they could not reach otherwise. Consumers also benefit from digital advertising. They are able to use various services on the Internet for free because of revenues from digital advertising.

However, at the same time, both reports indicate that the digital advertising market has some issues. In recent years, it is said that oligopoly has been progressing in the digital advertising market globally by vertical mergers. Accordingly, concerns about transparency and fairness in the digital advertising market, as well as anti-competitive conduct in the digital advertising market, have been raised. In addition, there are concerns about the collection of personal data used for profiling consumers' attributes and preferences.

As mentioned above, digital advertising will be subject to regulation by the TFDPA.

C. Cloud Services

The JFTC started market research on Cloud services in April 2021.[11] It is part of the JFTC's continuous market research project in the digital area; it published reports on online malls and app stores in October 2019 and on digital advertising in February 2011, as mentioned above. Cloud services are becoming the foundation of business activities, due in part to the trend toward digital transformation and the promotion of remote work in the COVID-19 pandemic. At the same time, it has been pointed out that there may have been a growing oligopoly of a few digital platform operators. Therefore, the JFTC thought it necessary to understand the market situation and to analyze potential issues from the perspective of improving the competitive environment. Accordingly, the JFTC set up an information desk to collect information on a wide range of Cloud services, and also recruited an expert in the field of Cloud computing.[12] The JFTC will likely be publishing the results of its market research.

D. Mobile Operating Systems ("Mobile OS")

In October 2021, the JFTC started market research on the mobile operating system ("mobile OS").[13] It is also part of the JFTC's continuous market research project in the digital area, as mentioned in the previous paragraph. The JFTC investigates the market structure and competitive

8 The JFTC press release of February 17, 2021. in English is available at https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217.html; English translation of the report is available at https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217_3rev2.pdf; a one-page overview in English is available at https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217_2rev2.pdf; a 24-page summary in English is available at https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217_3rev2.pdf.

9 The report is available in Japanese at https://www.kantei.go.jp/jp/singi/digitalmarket/kyosokaigi/dai5/siryou3s.pdf; an English summary is available at https://www.kantei.go.jp/jp/singi/digitalmarket/kyosokaigi/dai5/siryou2_e.pdf.

10 The website of the Headquarters in English is available at https://www.kantei.go.jp/jp/singi/digitalmarket/index_e.html.

11 The Secretary General of the JFTC's briefing on April 14, 2021, is available in Japanese at https://www.jftc.go.jp/houdou/teirei/2021/apr_jun/210414.html.

12 *Ibid.*

13 The Secretary General of the JFTC's briefing on October 6, 2021, is available in Japanese at https://www.jftc.go.jp/houdou/teirei/2021/oct_dec/211006.html.

pressures of the mobile OS market and the app distribution market in Japan, respectively, and if there is no effective competition in these areas, seeks to understand the cause and the harm caused by this.[14] The JFTC will likely publish the results of its market research.

In addition to the JFTC, the working group of the Digital Headquarters also discussed the competitive environment for mobile OS, including at its September 7, 2021 and November 12, 2021 meetings.

E. Data Markets

On June 25, 2021, the Competition Policy Research Center (the "CPRC") of the JFTC issued a report by the Study Group on Competition Policy for Data Markets.[15]

The CPRC is a research center at the JFTC that was established in 2003 to conduct research on competition policies jointly by legal scholars, practitioners, and economists.[16] The Study Group was established on November 13, 2020, to discuss measures to stimulate more active competition in data-driven businesses from the perspective of competition policy. In the rapidly changing digital age, competition is shifting from "cyberspace," where online platform-type businesses provide services, to "Second Stage," where businesses are expected to compete in the "fusion of cyber and physical," using data analyzed in cyberspace to enhance business in the physical space, such as with automated driving, medical and nursing care and agriculture.[17]

II. "NEW CAPITALISM" BY THE KISHIDA ADMINISTRATION

On October 4, 2021, Fumio Kishida was appointed the 100th Prime Minister of Japan, and was reelected the 101th Prime Minister of Japan on November 11, 2021. The Kishida Administration established the New Capitalism Headquarters to achieve the "New Capitalism," based on the concept of "a virtuous cycle of growth and distribution" and "the development of a new society after the COVID-19 pandemic," and started discussions on October 26, 2021.

On November 8, 2021, the Kishida Administration announced "The Urgent Proposal – 'New Capitalism' for the Future and its Launch" (the "Proposal").[18] The Proposal consists of two core pillars: Growth Strategies and Distribution Strategies.

A. New Capitalism Urgent Proposal

1. Growth Strategies

Promotion of Digital Transformation ("DX") is one of the Growth Strategies. As part of it, the Proposal suggests improving the cashless payment environment by making settlement fees transparent. Interchange fees (i.e. fees paid by a settlement company that contracts with a store to a settlement company that contracts with a user when payment is made by credit card) apparently account for 70 percent of credit merchant fees. The JFTC is conducting a fact-finding survey on the status of standard rate disclosures, etc., and will submit a report on whether there are any competition policy issues by the end of this fiscal year (i.e. March 2022). In addition to the JFTC, other relevant ministries and agencies (e.g. METI) will examine effective ways to disclose information to expand the cashless payment society.

With regard to the revival of the dynamism of Japanese companies and provision of thorough support for startups, the Proposal aims to strengthen competition policy to promote fair competition. In order to advance the New Capitalism, it is important to create a prosperous middle class, including SMEs, subcontractors, and startups. The effectiveness of the advocacy function of the JFTC should be strengthened, including as to appropriate transactions for startups and SMEs as well as in the infrastructure sectors, such as digital markets (e.g. telecommunications) and energy markets (e.g. electricity). The JFTC should be strengthened in a focused and systematic manner by qualitative

14 *Ibid.*

15 The JFTC press release of June 25, 2021, in English is available at https://www.jftc.go.jp/en/pressreleases/yearly-2021/June/210625.html; a tentative English translation of the report is available at https://www.jftc.go.jp/en/pressreleases/yearly-2021/June/210812.pdf; an outline of the report in English is available at https://www.jftc.go.jp/en/pressreleases/yearly-2021/June/21062502.pdf.

16 The CPRC's website in English is available at https://www.jftc.go.jp/en/cprc/index.html.

17 The November 13, 2020 JFTC press release is available only in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201113_2.html.

18 The Proposal is available in Japanese at https://www.cas.go.jp/jp/seisaku/atarashii_sihonsyugi/pdf/kinkyuteigen_honbun_set.pdf.

enhancement (e.g. improvement of professional knowledge) as well as quantitative enhancement (e.g. a drastic expansion of organizations and personnel).

Previously, the JFTC and METI jointly formulated the "Guidelines on Business Partnership Contracts with Startups" on March 29, 2021.[19] The Guidelines aim to present ideal approaches to contracts concluded with startups. Further, on December 23, 2021, the JFTC and METI issued a draft of "Guidelines for Business Collaboration with Startups and Investment in Startups" and sought comments from the public.[20] The finalized guidelines have not been published yet as of [February 15, 2022.]

In addition to the above, the Proposal aims to promote transparency and fairness in the digital advertising market, including adding digital platform operators that provide digital advertising to the subject of the TFDPA (see above as well).

Further, consideration of the initial public offering ("IPO") process and special purpose acquisition company ("SPAC") system is also one of the Growth Strategies with regard to reviving the dynamism of Japanese companies, providing thorough support for startups, the leaders of innovation. Currently, Japan's listing system is not friendly to entrepreneurs who would like to take on new changes. It has been pointed out that the Japanese listing system is structured in such a way that customers of securities companies, not startups, make money and there is not enough money going to startups. Specifically, in the case of IPOs, a share price on the first day of listing (opening price) tends to be significantly higher than the price ("IPO price") at which entrepreneurs sold their shares, and the entrepreneurs tend to earn less money compared to foreign countries. In light of this situation, the JFTC should work to understand the reality of the situation regarding the process of setting IPO prices. Accordingly, on January 28, 2022, the JFTC published a report called "Understanding the reality of the public offering price setting process in the initial public offerings (IPOs)."[21]

2. Distribution Strategies – Strengthening Investment in "People" that will Bring Security and Growth

One of the Distribution Strategies is strengthening distribution to non-regular workers by new legislation to protect freelancers. The COVID-19 pandemic has had a major impact on freelancers. In order to create an environment where freelancers can work with peace of mind, a new law for protecting freelancers will be submitted to the Diet as soon as possible. At the same time, the JFTC's enforcement structure should be developed accordingly.

In this regard, previously, the JFTC and METI, along with the Cabinet Secretariat, the Small and Medium Enterprise Agency and the Ministry of Health, Labour and Welfare (the "MHLW") issued the "Guidelines for Creating a Safe Working Environment as a Freelancer" on March 26, 2021.[22]

B. Measures to Facilitate Pass-on for Value Creation through Partnerships

As a part of the New Capitalism, on December 27, 2021, the New Capitalism Headquarters at the Cabinet Secretariat of Japan, the Consumer Affairs Agency (the "CAA"), the MHLW, the METI, the Ministry of Land, Infrastructure, Transport and Tourism (the "MLIT") and the JFTC jointly published the "Package of Measures to Facilitate Pass-on for Value Creation through Partnerships" (the "Proposed Measures").[23]

With the aim of achieving a virtuous cycle of growth and distribution, wage increases are expected as much as possible at labor-management negotiations, based on each company's own ability to pay. Due to the impact of the COVID-19 pandemic, some industries continue to be adversely affected while others (e.g. manufacturing businesses) may have recovered to pre-pandemic levels or higher; performance recovery varies by industry. In order for SMEs to secure the resources to raise wages, the Government of Japan will take the Proposed Measures to create

19 The METI's press release of "Guidelines on Business Partnership Contracts with Startups Formulated" (March 29, 2021) is available in English at https://www.meti.go.jp/english/press/2021/0329_003.html; the Guidelines are available only in Japanese at https://www.meti.go.jp/press/2020/03/20210329004/20210329004-1.pdf.

20 The JFTC's press release of December 23, 2021 is available in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2021/dec/211223pressrelease.html; the draft of guidelines subject to the public comment is available in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2021/dec/211223_pressrelease2.pdf.

21 The JFTC press release of January 28, 2022, is available in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2022/jan/220128_IPO.html; the Report is available in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2022/jan/220128_IPO/220128_report.pdf; a summary of the Report is available in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2022/jan/220128_IPO/220128_summary.pdf.

22 The JFTC press release of March 26, 2021, is available in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2021/mar/210326.html; the Guidelines are available in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2021/mar/210326free03.pdf.

23 The Package of Measures to Facilitate Pass-on for Value Creation through Partnerships is available only in Japanese at https://www.cas.go.jp/jp/seisaku/atarashii_sihonsyugi/pdf/partnership_package_set.pdf.

an environment in which SMEs can appropriately pass on increases in labor, material and energy costs through partnerships among all business partners.

Measures to be taken by the JFTC are: (i) establishing a scheme to facilitate price pass-on; (ii) clarifying the application of the Anti-Monopoly Act (the "AMA"); (iii) conducting a survey and strengthening enforcement against "abuse of superior bargaining position" ("ASBP") under the AMA; (iv) taking measures to avoid "abuse of buying power" under the Subcontract Act,[24] (v) conducting a survey on transactions between large companies and startups and strict enforcement; (vi) strengthening systems of related government agencies; and (vii) amending the JFTC's "Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act"[25] (the "ASBP Guidelines").[26]

III. MERGER CONTROL

There was a change in the JFTC's merger review organizational structure and authority in April 2021. One additional post was added to the previous two positions of Senior Officer for Merger and Acquisition, bringing the total to three.[27] The Merger and Acquisition Division now has authority to investigate matters; it needed to involve the Investigation Bureau previously, including when dealing with a cease-and-desist orders (e.g. blocking a merger), a reporting order, and/or commitment procedures.[28]

The digital market is one of the areas upon which the JFTC, including the Merger and Acquisition Division of the JFTC continues to focus. Globally, how competition authorities treat transactions involving nascent competitors, or so-called killer acquisitions, has been the focus of attention, and the same goes for Japan. In December 2019, the JFTC amended the "Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination" (the "Merger Guidelines") and the "Policies Concerning Procedures of Review of Business Combination" (the "Merger Policies"), mainly in order to conduct reviews appropriately in accordance with developments in the digital market.

The amended Merger Policies clarify that the JFTC conducts reviews of merger cases, including for those where notifications are not required, but when the transaction value is large (i.e. more than JPY 40 billion, which is approximately USD 370 million) and is expected to affect domestic consumers. Further, the amended Merger Policies suggest the parties consult with the JFTC voluntarily when the transaction value exceeds JPY 40 billion and when one or more of the following factors is met: (i) when an acquired company has an office in Japan and/or conducts R&D in Japan; (ii) when an acquired company conducts sales activities targeting domestic consumers, such as providing its website and/or pamphlet in the Japanese language; or (iii) when the total domestic sales of an acquired company exceed JPY 100 million (approximately USD 8.6 million).

24 An English translation of the Subcontract Act is available at https://www.jftc.go.jp/en/legislation_gls/subcontract.html.

25 An English translation of the ASBP Guidelines is available at https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/101130GL.pdf.

26 Please also refer to the White & Case Client Alert at https://www.whitecase.com/publications/alert/new-capitalism-japan-measures-facilitate-pass-value-creation-through.

27 Article 3 of the Rules of the JFTC Secretariat Organization.

28 Article 14 of the Order for the JFTC Secretariat Organization.

MOBILE ECOSYSTEMS: COMPETITION AND TRANSPARENCY

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I. INTRODUCTION

Mobile ecosystems have become increasingly complicated, consisting of various submarkets such as mobile telecommunication, operating systems, device manufacturing, app stores, and digital advertising. These submarkets are closely connected because major players are active in several submarkets. Both Google and Apple are engaged in the development of mobile operating systems (Android OS and iOS), sales of smartphone devices (Pixel and iPhone), and operation of app stores (Play Store and App Store). Additionally, Google runs advertising intermediaries such as AdSense and AdMob. In contrast, although Apple earns advertising fees from application (app) developers to improve their search results in the App Store, it has currently run no intermediaries for in-app advertising since iAd was terminated in 2016..

Recent concerns related to competition policy mainly emphasize advertising and app stores. Concerns about digital advertising have been reported by competition authorities in Japan (Cabinet Secretariat, 2021),[2] the UK (Competition & Markets Authority, 2020),[3] and Australia (Australian Competition & Consumer Commission, 2021),[4] whereas app stores have been investigated by Dutch and UK authorities (Autoriteit Consument & Markt, 2019;[5] Competition & Markets Authority, 2021).[6] Both the advertising and app stores markets are also described in the Digital Market Act proposed by the European Commission in December 2020 (Digital Markets Act, 2020).[7]

A policy concern for the app stores market is the rise of their dominant market power. Because consumers are locked into an app store once they buy an Android or Apple device, Google and Apple behave as monopolistic gatekeepers to app developers for access to the user bases of their respective operating systems. Because of their gatekeeper position, they can charge a monopolistic 30 percent commission on app sales. Recently, pressure is growing for the app stores to reduce their commissions, as typified by the recent Epic Games lawsuit.

Also in mobile advertising, market concentration has come to pose difficulties. According to the reports produced in Japan, the UK, and Australia described above, Google holds a nearly monopolistic position. For example, Competition & Markets Authority (2020) estimated that at least 35 percent of the fees paid by advertisers are extracted by advertising intermediaries. In addition, some observers have warned of a lack of transparency in digital advertising (Cabral et al., 2021;[8] Jeon, 2021).[9] The market is so opaque that not all chains of payment can be followed. Invariably, some money is lost in calculation.

In Japan, the Act on Improving Transparency and Fairness of Digital Platforms began to be enforced on February 1, 2021. According to the Ministry of Economy, Trade and Industry (2021), "[the Act] adopts a 'co-regulation' approach that stipulates the general framework under laws and leaves details to businesses' voluntary efforts."[10] Two app stores (the Apple App Store and the Google Play Store) were selected as targets of the Act, in addition to three e-commerce platforms: Amazon.co.jp, Rakuten Ichiba, and Yahoo! Shopping. On June 18, 2021, the Cabinet approved the addition of the digital advertising market to the target of the Act. However, selection of specific target businesses has not yet taken place.

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2 Cabinet Secretariat, "Final Report on the Evaluation of Competition in the Digital Advertising Markets," April 2021. Secretariat of the Headquarters for Digital Market Competition, Japan. Available at https://www.kantei.go.jp/jp/singi/digitalmarket/kyosokaigi/dai5/siryou2_e.pdf.

3 Competition & Markets Authority, "Online Platforms and Digital Advertising," July 2020. Market Study Final Report. Available at https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study.

4 Australian Competition & Consumer Commission, "Digital Advertising Services Inquiry," January 2021. Interim Report. Available at https://www.accc.gov.au/focus-areas/inquiries-finalised/digital-advertising-services-inquiry/interim-report.

5 Autoriteit Consument & Markt, "Market Study into Mobile App Stores," April 2019. Available at https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store.

6 Competition & Markets Authority, "Mobile Ecosystems," December 2021. Market Study Interim Report. Available at https://www.gov.uk/government/publications/mobile-ecosystems-market-study-interim-report.

7 Digital Markets Act, "Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Contestable and Fair Markets in the Digital Sector," 2020. Available at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=COM:2020:842:FIN.

8 Cabral, Luis, Justus Haucap, Geoffrey Parker, Georgios Petropoulos, Tommaso Valletti, & Marchall Van Alstyne, "The EU Digital Markets Act: A Report from a Panel of Economic Experts," July 2021. Publications Office of the European Union. Available at https://publications.jrc.ec.europa.eu/repository/handle/JRC122910.

9 Jeon, Doh-Shin, "Market Power and Transparency in Open Display Advertising — A Case Study," 2021. Expert Group for the EU Observatory on the Online Platform Economy: Final reports.

10 Ministry of Economy, Trade and Industry, "Key Points of the Act on Improving Transparency and Fairness of Digital Platforms," 2021. Digital Market Policy Office, Information Economy Division, Commerce and Information Policy Bureau, Japan. Available at https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/tfdpa.html.

Mobile apps play a crucially important role in both advertising and app stores markets. Broadly speaking, app developers have two revenue channels, app sales and in-app advertising, both of which are driven by distinct platforms. The former is operated by app stores such as Apple App Store and Google Play Store, where developers can sell their apps to users. The latter revenue channel is facilitated by advertising intermediaries (also called ad tech and ad exchange), enabling app developers to sell their ad inventory to advertisers through real-time auctions. Platform intermediaries of different kinds support app developers in monetizing their apps. Hereinafter, the terms "app-platform market" and "ad-platform market" are used to denote those platform markets, respectively.

The remainder of this article is dedicated to providing a comprehensive view of the mobile ecosystem across both the app-platform and ad-platform markets. In Section II, not only competition *within* each of the two submarkets but also competition *across* them is discussed, with consideration of the presence of network externalities. Section III specifically examines how important enhancing market transparency is for building desirable competitive environments in the mobile ecosystem.

II. COMPETITION

Competition is usually perceived as desirable from policy perspectives. Competition usually incentivizes firms to lower prices to attract consumers from rivals. Nevertheless, if a few firms have dominant power in a market, then they can exercise it to charge high prices. High prices reduce the total quantity traded in the market, thereby creating a deadweight loss. Increasing the number of competitors is expected to enhance both consumer welfare and social welfare.

The desirability of competition is not necessarily the case in markets with network externalities among consumers. Tirole (1988, p. 405) describes that "[p]ositive network externalities arise when a good is more valuable to a user the more users adopt the same good of compatible ones."[11] Market concentration to a monopoly firm might enable the formation of a huge network, through which consumers can enjoy large network benefits. The same applies to cross-side network externalities in two-sided platforms. Regarding an app store as an example, an increase in the number of users participating in the app store raises the expected profit of app developers; then it facilitates the increased entry of apps into the app store. The increased entry of apps can attract more users to participate in the app store to purchase apps. A positive feedback loop between the two sides of the app platform matters not only for the platform itself but also for the participants (i.e. users and developers of apps).

Greater competition associated with an increased number of competing platforms might divide participants into small networks, which hinders them from enjoying large network benefits. When losses from the shrinking network size become greater than the benefit associated with the reduction in price, enhancing platform competition might be detrimental to participants (Tan & Zhou, 2021).[12] Additionally, market segmentation might increase users' costs for seeking apps and developers' costs for listing on multiple app stores, as has actually occurred in China's Android OS ecosystem (Cabral et al., 2021).[13] Prohibition of Google's Play Store has caused the emergence of many competing app stores, leading to proliferation of numerous low-quality apps in the mobile ecosystem.

Competition not only occurs in individual markets. It also takes place across multiple markets. In the mobile ecosystem, cross-market competition occurs between app-platform and ad-platform markets (Zennyo, 2021).[14] App platforms and ad platforms compete in commission to attract app developers' revenue sources. Developers decide, after observing app commissions and ad commissions, through which mode to earn revenues. Some rely on revenue from selling apps (e.g. pay-per-download fee, subscription fee, and in-app purchasing), with part of that revenue paid for the app platform's commission. Other developers earn revenue from in-app advertising through matching services provided by ad platforms. A percentage of the fees paid by advertisers is collected by the ad platforms as commission. Cross-market platform competition occurs because, for example, a reduction in app commissions (or an increase in ad commissions) will encourage more developers to rely on the sales of apps rather than relying on in-app advertising, which can increase the commission revenue of the app platform at the expense of ad platforms.

Even if each submarket is highly concentrated or monopolized, the presence of cross-market competition is expected to inhibit the exercise of dominant market power while not reducing the benefits from the formation of large networks. In the current state of mobile ecosystem, as described in Section I, market concentration has been a policy concern in both app-platform and ad-platform markets. This concern can be

11 Tirole, Jean, "*The Theory of Industrial Organization*," MIT Press, 1988.

12 Tan, Guofu and Junjie Zhou, "The Effects of Competition and Entry in Multi-sided Markets," *Review of Economic Studies*, 2021, 88 (2), 1002–1030.

13 Cabral, Luis, Justus Haucap, Geoffrey Parker, Georgios Petropoulos, Tommaso Valletti, and Marchall Van Alstyne, "The EU Digital Markets Act: A Report from a Panel of Economic Experts," July 2021. Publications Office of the European Union. Available at https://publications.jrc.ec.europa.eu/repository/handle/JRC122910.

14 Zennyo, Yusuke, "Cross-Market Platform Competition in Mobile App Economy," CPRC Discussion Paper Series, 2021, CPDP-83-E.

resolved when cross-market competition between them takes place in a preferred manner. This approach is expected to have some advantages over one that pursues promotion of within-market competition because a large network becomes constructed in each submarket.

The preceding discussions suggest the necessity of looking at competition in mobile ecosystems from a more pluralistic view, to some degree. However, that has yet to be accomplished because policy debates for app-platform and ad-platform markets have been made completely separately. There might be room for argument about cross-market platform competition.

III. TRANSPARENCY

Market transparency is fundamentally important to enable better decision-making by parties involved in the market. In opaque market environments, they are forced to make decisions based on limited information. In the context of cross-market platform competition in the mobile ecosystem, the lack of transparency in mobile advertising might lead app developers to make an incorrect decision that they would never select with full information. For example, a developer who should have chosen to earn from the sale of apps might choose to rely on in-app advertising. Such wrong choices about business models might actually be occurring.

Recently, there is a growing pressure on app stores for reduction of their commissions, as exemplified by the backlash by Epic Games to Apple in August 2020. In response, on January 1, 2021, Apple reduced its commission from 30 to 15 percent for app developers whose annual sales were less than USD 1 million. Subsequently, Google followed its rival by reducing the commission to 15 percent for the first USD 1 million of revenue that developers earn each year.

Although antitrust lawsuits by major app developers such as Epic Games and Spotify have added fuel to the flames, the 30 percent commission has actually been paid only by a minority of app developers. According to a report by Statista Inc. (2021), 93.4 percent of iOS apps and 96.9 percent of Android apps were delivered free of charge as of July 2021.[15] Instead, they earn revenues from in-app advertising, which is not subject to the payment of commission to app stores. In other words, app stores receive no commissions for their intermediation services from approximately 95 percent of app developers.

Why do most app developers rely on in-app advertising? Are ad commissions low? That does not seem correct because Competition & Markets Authority (2020) estimated that the actual ad commission is, on average, at least 35 percent, which is higher than the 15–30 percent of the app commission. Australian Competition & Consumer Commission (2021) has also reported a similar estimation result that 28 percent of advertiser expenditures are captured by ad tech services in Australia. The 28–35 percent commission might not be sufficiently low to explain the very high adoption rate of in-app advertising among app developers.

Market opacity could be a reason for this phenomenon. As Cabral et al. (2021) pointed out, not all chains of payments in advertising intermediaries can be followed. Some money is "lost" in calculation.[16] More problematically, in most cases, app developers do not know who paid how much for their ad space. It remains possible that in-app advertising is a much more efficient means of monetization for developers than the sale of apps, even if they must pay the 28–35 percent commission. Even if true, the lack of transparency presents a special difficulty in itself, which should be addressed as soon as possible.

Enhancing transparency in the advertising market is expected to support app developers in their decision-making, especially in business model choices. Currently, a vast majority of mobile apps deploy an ad-funded business model, which exposes users to a storm of advertisements (i.e. ad creep). Such advertisements are often uninformative and annoying, generating disutility to users, on average (Ghose & Han, 2014).[17] Although recent technological advances have enabled personalized and targeted advertising, they create a different difficulty related to the abuse of user privacy (e.g. Goldfarb & Tucker, 2012).[18] Excessive ad creep might be associated with the lack of transparency of the advertising market.

15 Statista Inc., "Distribution of Free and Paid Apps in the Apple App Store and Google Play as of July 2021," 2021. Available at https://www.statista.com/statistics/263797/number-of-applications-for-mobile-phones/ Retrieved on January 28, 2022.

16 Cabral, Luis, Justus Haucap, Geoffrey Parker, Georgios Petropoulos, Tommaso Valletti, and Marchall Van Alstyne, "The EU Digital Markets Act: A Report from a Panel of Economic Experts," July 2021. Publications Office of the European Union. Available at https://publications.jrc.ec.europa.eu/repository/handle/JRC122910.

17 Ghose, Anindya & Sang Pil Han, "Estimating Demand for Mobile Applications in the New Economy," *Management Science*, 2014, 60 (6), 1470–1488.

18 Goldfarb, Avi & Catherine Tucker, "Shifts in Privacy Concerns," *American Economic Review*, 2012, 102 (3), 349–353.

Transparency in the advertising market might bring another benefit. It can enhance cross-market platform competition between app platforms and ad platforms. Even if a few platforms dominate each of the two submarkets, cross-market competition can be promoted between those dominant platforms. To achieve it, market opacity might be a drag. Ensuring transparency enables app developers to make better decisions about their business model, which can in turn enhance cross-market platform competition. Therefore, the issue of increasing transparency is associated with the promotion of cross-market platform competition.

IV. CONCLUSION

In this article, competition and transparency in mobile ecosystems are discussed. Not only competition within individual submarkets but also competition across multiple submarkets should be considered because of the close connection among submarkets in the ecosystem. Especially, this article specifically emphasizes cross-market platform competition between app-platform and ad-platform markets. A possible policy direction is to allow market dominance within each of the submarkets for purposes of expanding network externalities while facilitating cross-market competition between those dominant platforms.

Toward this end, ensuring market transparency in mobile ecosystems also matters. Currently, concerns about the opacity of advertising markets have been raised around the globe. Especially, this article raises concerns about advertising opacity distorting app developers' business model choices. Wrong decision-making associated with market opacity can be expected to impede the promotion of cross-market platform competition. Two issues should be addressed in a coordinated manner: promotion of cross-market competition and enhancement of advertising transparency.

COMPETITION POLICY AND START-UPS IN INDIA

BY DHANENDRA KUMAR & ABIR ROY[1]

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I. INTRODUCTION

India is witnessing its start-up moment. As mentioned by Finance Minister Nirmala Sitharaman in her Budget Speech on February 1, 2022:

> *"Start-Ups have emerged as the drivers of growth for our economy. Over the past few years, the country has seen a manifold increase in the number of successful start-ups."*

As the Economic Survey Report of 2021-2022 (the 2022 Report) points,[2] start-ups in India have grown remarkably over the last six years. India has become the third largest start-up ecosystem in the world after the US and China which added 487 and 301 unicorns respectively in 2021. It is notable that as of January 14, 2022, India has 83 unicorns with a total valuation of US$ 277.77 billion.

It is imperative to note that, to facilitate the growth of any burgeoning business, the laws regulating the market must not only be facilitative, well-equipped but also be agnostic and efficient in ensuring level playing field in the market. The new age start-ups are not only budding innovators but also competitors who can challenge the status-quo for the benefit of consumers with new products and competitive prices. Therefore, to augment the future success of business on fair terms, the antitrust law has a pivotal role to play.

The Department for Promotion of Industry and Internal Trade, Ministry of Commerce, and Industry organized the first-ever Startup India Innovation Week during January 10 to 16 where Over 150 startups had been divided into six working groups based on themes including growing from roots, Nudging the DNA, from local to global, Technology of Future etc. The Prime Minister announced National Startup Day on January 16 every year and recognizing the role of technology in this regard, called it a "techade." The aim of the government and policy makers is to understand how startups can contribute to the national needs by innovation and technology in various domains, healthcare, pharma, agri-tech, defense, Edutech, infra, logistics, etc. and how government can assist the same. The time in India is ripe to seize the opportunity and showcase innovative solutions.

In this article, we delve into the role of Competition Law and Policy in ensuring a conducive business environment for start-ups in India. While defining the operation of new age market in general, the article discusses the policy measure taken to promote competition and innovation in the digital market. We also discuss the position of law and the measures that can be taken to hone our competition law policy for scalability of start-up business in India.

II. START-UP AND THE UPSURGE OF DIGITAL MARKET

The Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry defines *"startup"*[3] as an entity incorporated as a private limited company, registered partnership firm or as a Limited Liability Partnership in India with period of existence and operations not exceeding 10 years from the date of incorporation. The entity should have an annual turnover not exceeding INR 100 Crore for any of the financial years since its incorporation and it should work towards development or improvement of a product, process, or service and/or have scalable business model with high potential for creation of wealth & employment.

India's capital markets, have done exceptionally well and have allowed record mobilization of risk capital for Indian companies. The year 2021-22 so far has been an exceptional year for the primary markets with a boom in fundraising through IPOs by many new age companies, tech start-ups and unicorns. In April-November 2021, Rs. 89,066 crores were raised via 75 IPO issues, much higher than in any year in last decade.[4] The exuberance associated with the listings manifested in huge oversubscriptions by retail, High Net worth Individuals and institutional investors and stellar listing gains have pushed more and more companies to tap the markets. The tremendous response by all categories of investors in IPOs of companies was reflective of not only the confidence in markets, but also that in corporate sector performance and prospects of the economy in the long run.

In India, more than 61,400 startups have been recognized in India as of January 10, 2022. Further, a record 44 Indian startups have achieved Unicorn status in 2021 taking the overall tally of unicorns in India to 83, and most of these are in the services sector. The 2022 Report has also observed a change in trend, where Bangalore being the Silicon Valley of India, has been taken over by Delhi for hosting the greatest

2 Page 336 of 2022 Report.

3 See here https://www.startupindia.gov.in/content/sih/en/startup-scheme.html.

4 Page 29, 118, 138 of 2022 Report.

number of start-ups. Over 5,000 recognized startups were added in Delhi while 4,514 startups were added in Bangalore between April 2019 to December 2021. The numbers have also rallied from the presence of startups in just 121 districts to 555 districts as of 2021 showing greater spread and inclusivity.

Recently, the Union minister of Commerce and Industry, Shri Piyush Goyal said while chairing the fourth roundtable with global VC funds that global venture capital funds should focus more on startups from tier-II and tier-III cities, for investing, promoting, and protecting the intellectual property created by startups. They should also provide expertise to startups to scale up, and explore greater capital infusion, including risk capital.[5]

A. The Policy Impetus and Boosting Competitiveness in the Market

The world has seen a tectonic shift exacerbated by the pandemic which has necessitated the shift from physical aisles to virtual carts. Such technological disruption has been driven by increasing internet and technology penetration, proliferation of mobiles, growth of logistics and warehouses, modernization of payment systems, changes in consumer spending and preferences among other factors, which have enabled e-commerce, electronic payments system and other new disruptive technology services to be more efficient and accessible than ever before. The digitization of the global and domestic economy owing to increasing internet user base and favorable market conditions, reiterates the continuing potential of the Indian start-up ecosystem. Let us discuss few Policy hand market highlights that can trigger innovation and competition in the market:

1) As the 2022 Report highlighted, there been growth in the number of start-ups engaged in the space technology sector. Just in the last three years number of startups in the space sector has increased from 11 in 2019 to 47 in 2021 with a total of 101 startups commanding their presence in the space technology sector.[6] While opening the accessibility of space sector and to trigger innovation, the government has also setup an independent nodal agency under the Department of Space, Indian National Space Promotion and Authorization Centre ("IN-SPACe"), which shall act as the promotor and regulator of space activities in India by NGPEs (Non-government/ private entities).

2) Additionally, the heavy regulation around the creation, acquisition, and use of geospatial data, including maps have been drastically simplified by the release of new guidelines by Department of Science and Technology on February 15, 2021. The guidelines are more focused to facilitate Indian companies and start-ups operating in this sector and make data available for them to innovate and compete on merits.

3) The Indian start-ups in the technology sector are also constructively utilizing their innovation towards creation of intellectual property assets. There has been gradual increase in the filing and granting of patents in India. The number of patents filed in India has gone up from 39,400 in 2010-11 to 58,502 in 2020-21 and the patents granted in India has gone up from 7,509 to 28,391 during the same time period. Consequently, India's ranking in Global Innovation Index has climbed 35 ranks, from 81st in 2015-16 to 46th in 2021. The objective of protecting IP assets and promoting innovation and competition is furthered by the insertion of Section 4A in the Competition Amendment Bill, 2020 which focuses on protection to holders of intellectual property rights.

4) Furthermore, in August 2021 the Ministry of Electronics & IT ("MeitY") launched the SAMRIDH program.[7] It is known that MeitY has various programs to facilitate start-ups, but with the SAMRIDH program the focus is to aid start-ups to enhance their software products by providing fiscal incentives and assisting in securing investments for scaling their business. This is imperative as the barriers to entry in the market on funding constraint under competition law will be subsided and start-ups will get the initial boost to innovate.

5) Additionally, the Union Financial Budget of 2022 gave boost to Gaming Industry, with the government deciding to promote AVGC (Animation, Visual Effects, Gaming, and Comics) by setting up task force to recommend steps for promotion of AVGC in meeting global demands. It is imperative to note that India presently commands around 10 percent of the global AVGC market and has the potential to reach 20-25 percent by 2027. The move will propel and give thrust to young businesses in tapping the potential of international market and will promote indigenous competition also.

5 https://www.livemint.com/companies/start-ups/invest-in-startups-from-tier-2-3-cities-piyush-goyal-asks-global-vc-funds-11642153647602.html.

6 Page 334 of the 2022 Report.

7 https://www.meity.gov.in/writereaddata/files/SAMRIDH%20Scheme%20Document.pdf.

III. THE COMPETITION LAW REGIME IN INDIA

The antitrust law in India has successfully forayed into uncharted sectors of digital market and has stood the test of present time, which is characterized by multi-sided markets. The endeavor of the Commission has always been to promote competition and innovation in the technology driven markets where each and every player, whether it be big companies or a start-up gets access to market on fair and equitable terms. The Competition Commission of India in its Workshop (CCI Workshop) dated February 04, 2022 on "Start up Ecosystem and Competition" has stated that, *"Every possible market, be it retail, e-commerce, food, groceries, payments, deliveries, entertainment, wealth management, trading, healthcare, education, or utilities, has undergone digital transformation, and digital startups have played a key role in this journey."*

The Competition Act, 2002 (the "2002 Act") and the Competition Commission of India ("CCI") are well equipped to effectively deal with any distortionary conduct of any entity that can possibly create adverse effect on competition in the market. The very objective of the 2002 Act is captured in following terms[8]:

> *"It shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India."*

It is trite that digital markets are the epicenter of technological progress and innovation. The CCI in the past has taken steps to remedy conducts in the market so that it promotes innovation. In the operation of non-compete clause in mergers market, CCI has generally taken the position that non-compete obligations should cover only products, either being manufactured or in the process of development, and be reasonable in respect of duration, normally 3 years.[9] The objective is to ensure that the mergers do not adversely affect innovation and introduction of better or new products. The antitrust enforcement goals in digital markets must be to strike an appropriate balance between static efficiencies and the longer-term gains that arise from innovation. The CCI has approached every market conduct case, whether it be SEP disputes or online platform market related disputes, with a very nuanced approach to usher innovation and keep the idea of fair competition intact. The Policy measures are also reflecting in the proposed Competition Amendment Bill, 2020 which seeks to add granular details to better regulate digital market in terms of enforcement as well as merger control measures.

The enforcement powers under Section 3 of the Act deals with anti-competitive agreements in both horizontal and vertically linked markets having appreciable adverse effect on competition in the market.[10] Additionally, Section 4 of the 2002 Act aids in keeping check on possible abusive behavior of any dominant entity in the market. With its tool of enforcement and advocacy, the CCI is continuously endeavoring to promote the start-up environment in India. The Commission has undertaken detailed study and released market reports under its advocacy program in various sectors which includes, E-Commerce, Telecom and Pharma Industry.

IV. GUARDING AND PROMOTING THE START-UP BUSINESS OPERATION UNDER LAW AND POLICY

A start-up starting its business operation often collaborates and work with multiple market players. The digital market design is also such that multiple players are involved, some operate in the upstream market. In a given business situation, a start-up may operate in a vertical agreement with an entity having significant market power[11] or even a dominant position.[12] The start-up may be belonging to an upstream market and the downstream market may belong to the end-consumer. Most of the digital market business have such business arrangements operating on the thrust of vertical agreement, and a multitude of agreements operate between a big company and a start-up. In this context, it is pertinent to point that as the start-up ecosystem in India evolves and matures, the startup/big tech interface is set to grow in importance. In such a situation, the competition law has a pivotal role to ensure that market operates and competes on fair terms. Speaking from the perspective of antitrust law, these kinds of agreements can be captured either under Section 3(4) or Section 4 of the Act. Mergers and Acquisitions under sections 5 and 6 are also efficiently and expeditiously reviewed, including many under newly introduced "green channel" route acclaimed globally.

8 Section 18 of the Competition Act, 2002.

9 See https://www.cci.gov.in/sites/default/files/speeches/Address-World%20Competition%20Day%20Speech.pdf?download=1.

10 See Section 3, 19(3) of the Competition Act, 2002.

11 For analysis of vertical agreements, EU guidelines clearly points that a market share above 30 percent requires examination. Refer EU Guidelines, Paragraph 110(3).

12 Section 4, Explanation (a) of the Act defines "dominant position."

The regulatory need to maximize the full growth potential of the startup industry is to ensure that there is adequate unbundling of services, to increase the contestability in the entire value chain. Internationalization of R&D has resulted in companies becoming eager to build on India's initial advantage in software development and engage in both technology deepening and technology widening activities. There is potential for immense value creation resulting from the complementarities between the strengths of big technology companies operating these platforms and startups. India, slated to produce well over new 100 unicorns by 2025 (presently, in 2022 one unicorn in every 5 days) is likely to witness increased interface between big tech and startups.

A. Competition Amendment Bill, 2020

In order to cater to the needs of digital market, which mainly deals in "provision of services," the proposed Competition (Amendment) Bill, 2020 has also proposed to feed Section 3(4) clause (a) to (e) with the word "services," to capture the transforming digital market. This is a step in the right direction to provide a protected and properly regulated environment for start-ups to grow and compete on merits in the market. For the promotion of constructive exploitation of intellectual property assets by start-ups or any other enterprise the Bill seeks to insert section 4A.

B. Analyzing Start-up Business Under Section 3

A Section 3 analysis must consider the actual market conditions, economic and legal context of such agreements, cumulative effect of several similar agreements must be considered holistically[13] since market can be distorted owing to cumulative effect of multiple similar agreements; an agreement which has the purpose of reducing competition is anti-competitive.[14] Section 3 of the Act is couched in negative terms, which signifies its wide coverage.[15] Furthermore, Section 3(4) of the Act is an inclusive definition, thus agreements which do not fall within clause (a) to (e) of Section 3(4) can also be analyzed as a standalone conduct under Section 3(4). Therefore, competition law in India is well equipped to capture all kind of anti-competitive conduct and furthermore to promote innovation and competition in the market.

C. Asymmetry in Bargaining Power and Bundling of Services

The aspect of asymmetry in bargaining power has been also highlighted by CCI Chairperson in its Workshop speech.

The need of market is to unbundle the innovation quotient which is evident in government projects and initiatives which are said to be revolutionary in terms of digital technology use in public space. These includes the operation of UPI, Account Aggregator framework and Open Network for Digital Commerce ("ONDC)."

D. Fair Play in the Market by Data Repositories and Promoting Data Interoperability

In India, presently the consumer data privacy as a concept is statutorily governed by Section 43A of the Information Technology Act, 2000 ("IT Act") read with the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 ("SPDI Rules"). Now in regards to sharing of information of customers of these e-commerce entities with third-parties, Rule 6(1) of SPDI Rules poses the strict requirement of taking consent in the privacy policy in explicit terms. Furthermore, Rule 4 of the SPDI Rules state that body corporate collects, receives, possess, stores, deals or handle information of provider of information, shall provide a privacy policy for handling of or dealing in personal information including sensitive personal data or information and they shall also provide for purpose and usage of specific kinds of data collected.

The CCI Workshop has also highlighted that another area of concerns in terms of use of data by in the absence of interoperability and data portability,[16] disproportionate control over data may make leveraging easier and increase the possibility of exclusionary conduct and it impact the start-ups severely. Right to data portability is expected to increase competition and the range of options for consumers and also startups in digital markets. Data portability makes it easier for consumers to switch between providers and for new providers to offer tailored products or services based on prior information. Several markets in the digital economy are characterized by a high degree of concentration, and data portability is likely to limit switching barriers in these markets, and thus, help increase competition. As has also been highlighted in CCI Workshop, the pro-competition instruments of data interoperability and portability across platforms, too, have multi-dimensional implications spanning across

13 Case C-234/89, *Stergios Delimitis*, Paragraph 19, 20.

14 Case C32/11, *Alianz Hungaria*, Paragraph 16, 24-44

15 *Excel Crop Care Ltd. v. CCI*, (2017) 8 SCC 47, paragraph 41.1

16 As recognized under GDPR, the right to data portability allows individuals to obtain and reuse their personal data for their own purposes across different services.

critical aspects of privacy, data security, etc. The process of defining and maintaining common standards for portable and interoperable data may also be relevant.

In the light of foregoing discussion, what is important to note that, the contours of a subject matter law cannot be restrictive rather it has to be complementary. This will aid the growth of tech enabled start-ups who feed on data which they either retrieve directly from consumer or through intermediaries. Data Privacy and use of data is not confined to Privacy law alone rather it is steadily becoming a competition law issue and has been rightly recognized by regulators in India[17] as well as abroad[18]. If regulated and dealt judiciously, the fair usage of data will revolutionize the industry.

E. Promoting a Competitive Environment for Start-ups

India is the only country which has a digital public infrastructure that broadly comprises Aadhar and the India Stack, enabling private entrepreneurs to create startups quickly and at affordable costs. In fact, the central government, through recent initiatives for the Open Network of Digital Commerce, seeks to facilitate the creation of shared digital infrastructure, as was previously done for identity (i.e. Aadhar) and payments (i.e. Unified Payment Interface). These measures will spur innovation and help facilitate the roll-out of services by start-ups in an efficient manner.

The UPI framework in India has been christened on the touchstone of encouraging competition and promoting innovation. At present there are monthly more than 4.5 billion transaction per month through UPI. UPI through its enabling framework of interoperability allows every bank and financial institution to participate as approved by Reserve Bank of India ("RBI"). The problem of interoperability and data portability from the perspective of end consumer is by design built in the system. Its inherent pro-competition framework is a booster for any start-up in the financial market to reap benefits on innovation and merits. The digital payment system in India through UPI is already an epitome of huge success world over, as far as any government public projects are concerned. Similarly placed is the Account Aggregator framework initiated by RBI. The framework allows consumer to leverage their own data to access funding and provides interoperability. This not only promotes interoperability but also allows young lending platforms to better profile their customer needs who approach for availing service with their data. The ONDC framework has also been designed to promote entry of new players in the upstream market and also promote business efficiency and viability of sellers in the marketplace platforms. These initiatives will promote young start-ups and businesses in India with ease in customer acquisition as well as consumers switching among service providers thus promoting competition.

V. CONCLUSION

The rapid digitization and meteoric expansion of digital market has challenged the status-quo of many existing laws and their effectiveness in addressing the market concerns. Competition Law and Policy in India has been agnostic with the market needs after the overhaul of earlier Monopolistic and Restrictive Trade Practices Act, 1969. Even today, where many other sectoral laws may have failed to scale up the regulatory environment, competition law has been at the forefront (for e.g. *addressing various overlapping concerns on consumer trust and protection, data privacy, e-commerce regulation etc.)*. Needless to say, start-up ecosystem has been the engine of growth for the digital economy in India. The interplay of technology, data and law evidences that the start-up ecosystem in the country is really on the rise, thus the legal & policy instruments must be to ensure that spirit of innovation and contestability is kept intact. The Competition law in India is acting as a facilitator in growth of the overall market on merits and on fair and equitable terms where the interest of start-ups as well as established players are balanced in the interest of accelerated economic development. The CCI has played a proactive role in conducting investigation in various digital market issues and carrying out market studies and advocating discussions with stakeholders around issues which pre-empt the market from tapping its full potential. The Competition amendment Bill, 2020 which is expected to be taken up soon, when enacted would definitely provide granularity to the provisions of antitrust law in India and would better serve the need of start-ups and growing digital market.

17 *Suo Moto* Case No. 01 of 2021.

18 Bundeskartellamt, B6-22/16, 6th Decision Division.

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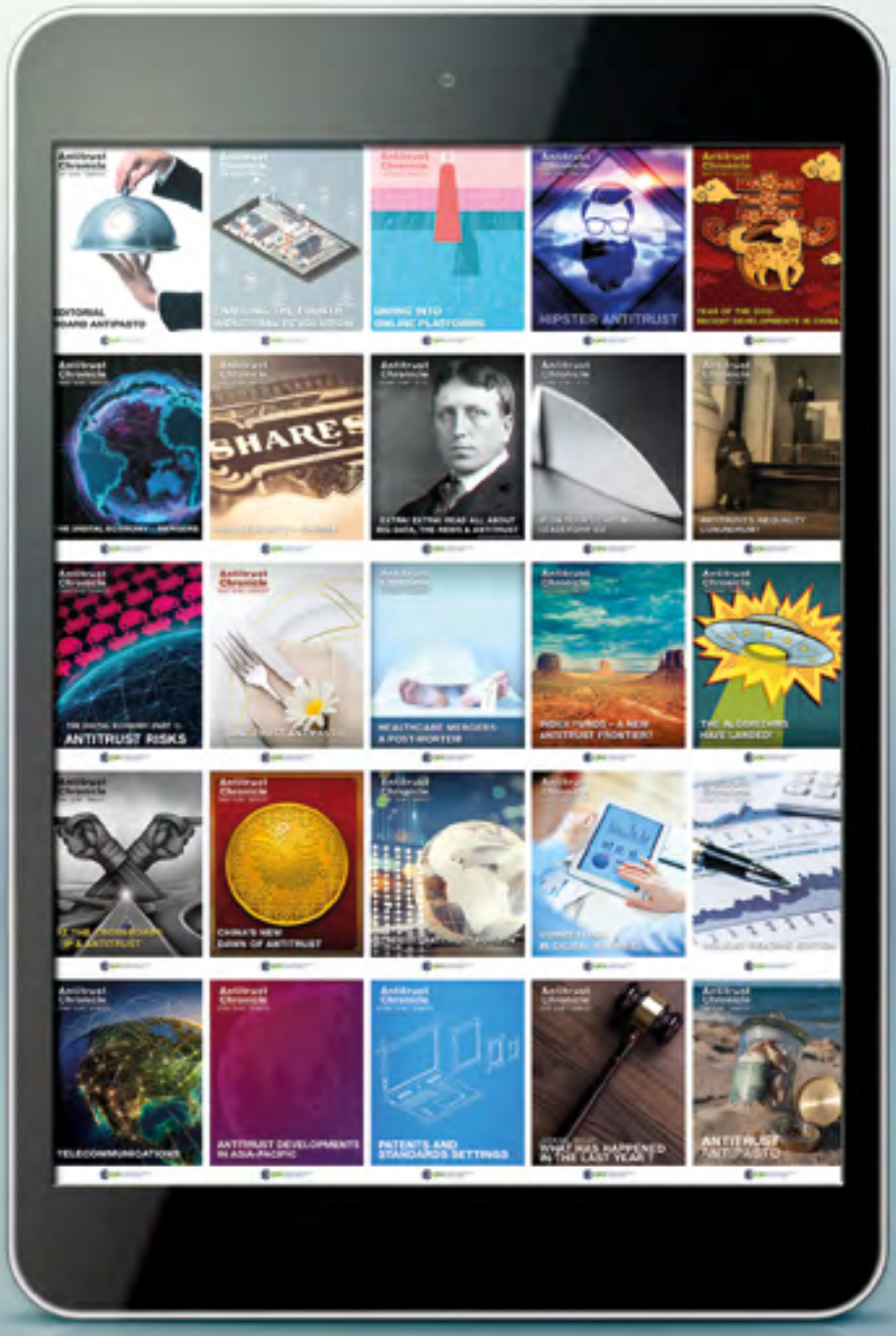


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