IPBA
Legal
Update

Competition Law in the Traditional and Digital World: Examining Anti-Competitive Behaviour and Abuse of Dominant Position

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

Introduction: The Role of Competition Law

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

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

An Overview of Prohibited Conduct

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

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

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

Introduction

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

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

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

Examples

(1) European Union

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

(2) Malaysia

A notable example of the Malaysian competition authorities' attempt at enforcing the prohibition against agreements that have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services was in 2014 where the Malaysia Competition Commission ('MYCC') found that a collaboration agreement entered into between AirAsia Berhad ('AirAsia') and Malaysian Airline System Berhad ('MAS') had infringed the prohibition under Section 4 of the Competition Act 2010 on grounds that it had found the collaboration agreement had the object of preventing, restricting or distorting competition by allocating markets (between AirAsia and MAS) and that there was no necessity to prove that the collaboration agreement had any anti-competitive effect. The MYCC proceeded to impose a fine of RM10,000,000 on both AirAsia and MAS.

AirAsia and MAS subsequently appealed to the Competition Appeal Tribunal ('CAT') where the CAT allowed the said appeal. In 2018, the High Court (on MYCC's application for a judicial review of the CAT's decision to the High Court) reversed the CAT's decision and found, *inter alia*, that by reason of the collaboration agreement having set out AirAsia and MAS routes and area of operation and without having to compete with each other as before (and therefore enabling AirAsia and MAS to control the pricing of airline business such as ticket price to the disadvantage of consumers), the collaboration agreement had an anti-competitive object which was prohibited under the Competition Act 2010.[9] Dissatisfied, AirAsia and MAS then appealed to the Court of Appeal who had in April 2021 set aside the High Court decision and reinstated the CAT's decision.[10] The MYCC subsequently sought leave to appeal the ruling of the Court of Appeal to the Federal Court and the matter is expected to be heard in 2022.

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

(3) United States

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

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

Competition Law in Traditional Economies: Abuse of Dominant Position

Introduction

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

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

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

Examples

(1) European Union

In 2005, the European Commission found that AstraZeneca had committed two abuses of dominant position which is prohibited under Article 102 of the Treaty on the Functioning of the European Union. In 2010, the General Court of the European Union confirmed the Commission's decision, which considered that AstraZeneca had abused its dominant position. AstraZeneca appealed to the Court of Justice of the European Union ('CJEU'). The CJEU upheld the General Court of the European Union's finding that AstraZeneca had abused its dominant position[17] by supplying misleading information to national patent offices and reiterated that the concept of 'abuse' is an objective concept and that European competition law prohibits a dominant undertaking from eliminating a competitor using other methods than competition on the merits. It further upheld the General Court's finding that an undertaking in a dominant position has a special responsibility to the market under Article 102 of the Treaty on the Functioning of the European Union and cannot use regulatory procedures to make entry of competitors on the market more difficult without a legitimate reason or an objective justification.[18]

(2) Malaysia

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

Competition Law in Digital Markets

The Rise of Digital Markets

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

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digital capabilities.[20] It has been estimated that global internet traffic in 2022 will exceed all the internet traffic up to 2016.[21] Digital platforms provide many benefits, but have also gained significant control of consumer data, which confers market power.[22] Concerns have been voiced regarding the increased concentration in certain industries, including technology, labour's falling share of income and growing income inequalities and some of these concerns have been related to insufficient competition and/or ineffective competition policies or enforcement.[23]

The increasing digitalisation of the economy raises the question of whether the existing approach to competition regulation is sufficient. To this, Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzerin had stated[24] that there is no need to rethink the fundamental goals of competition law in the light of the digital 'revolution' and that vigorous competition policy enforcement is still a powerful tool to serve the interests of consumers and the economy as a whole.[25] However, they have also acknowledged that the specific characteristics of platforms, digital ecosystems and the data economy will require the current established concepts, doctrines and methodologies to be adapted and refined.[26]

Challenges to the Competition Regime in a Digital Market

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

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

Anti-Competitive Agreements

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

Abuse of Dominant Position

Digital markets pose a challenge to competition authorities in that it is relatively more difficult to assess whether a firm has a dominant position and whether there has been abuse. However, this does not mean that a finding of abusive conduct is unlikely. As an example, in June 2017, the European Commission imposed a record fine on Google in the sum of €2,424,495,000 in light of its finding that Google had abused its dominant position in the market for online general search services in Belgium, Czech Republic, Denmark, Germany, Spain, France, Italy, the Netherlands, Austria, Poland, Sweden, the UK and Norway, by favouring its own comparison shopping service, a specialised search service over competing comparison shopping services. Dissatisfied, an action was brought by Google and Alphabet against the Commission's decision before the General Court of the European Union, but in November 2021 the General Court of the European Union upheld the fine.[34]

Recent Developments

UK

Among the proposals made by the Competition and Market Authority Market[35] is to introduce a pro-competitive regulatory regime which broadly consists of two parts: (1) a code of conduct whereby platforms deemed to have strategic market status will need to comply with, *inter alia*, the principles of fair trading, trust and transparency and open choices or risk having to pay fines (which the new regulatory body empowered to implement the regulatory functions will have the power to impose);[36] and (2) additional 'transformational' interventions under which the new regulatory body empowered to implement the regulatory functions will be able to, among other things, restrict a platform's ability to acquire default search positions, implement measures to increase transparency of fee and transaction data and require sharing of 'click-and-query' data with rival platforms to allow them to improve their algorithms.[37]

EU

In the EU, the European Commission had initiated an enquiry into the Internet of Things ('IoT') and issued a final report on 20 January 2022.[38] One of the main areas of potential concern which was raised by the stakeholders was regarding certain exclusivity and tying practices in relation to voice assistants.[39] With regard to the proposed follow-up actions to address such concerns, submissions to the public consultation appear to emphasise the need for enhanced competition law enforcement and regulation in relation to the identified concerns.[40]

Reflection

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

Notes

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[5] *Ibid*, p 71.
[6] European Commission 'Antitrust: Commission Fines Truck Producers €2.93 Billion for Participating in a Cartel' (19 July 2016), Press Release available at https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2582 (accessed 23 January 2022).
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[8] European Commission 'Antitrust: Commission Fines Scania €880 Million for Participating in Trucks Cartel' (27 September 2017), Press Release available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3502 (accessed 24 January 2022).
[9] *Competition Commission v Competition Appeal Tribunal & Ors* [2018] MLJU 2167 at para [83].
[10] *Malaysian Airline System Bhd v Competition Commission and Another Appeal* [2021] MLJU 2089.
[11] Department of Justice, Office of Public Affairs 'Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding' (5 November 2019), Press Release available at www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response (accessed 25 January 2022).
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[14] Organisation for Economic Co-operation and Development (OECD) 'Abuse of Dominance and Monopolisation', available at www.oecd.org/daf/competition/abuse/ (accessed 25 January 2022).
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[16] Robert Anderson, Timothy Daniel, and Alberto Heimler with Thinam Jakob, 'Abuse of Dominance' in RS Khemani, *A Framework for the Design and Implementation of Competition Law and Policy* (World Bank Publications 1999), p 70.
[17] Case C-457/10 P *AstraZeneca v Commission* [2012] ECLI:EU:C:2012:770.
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[25] *Ibid*, p 3.
[26] *Ibid*.
[27] World Economic Forum, *Competition Policy in a Globalized, Digitalized Economy: Platform for Shaping the Future of Trade and Global Economic Interdependence* (White Paper, 2019) 4.
[28] United Nations Conference on Trade and Development (UNCTAD), 'Competition Issues in the *Digital Economy*' (2019) TD/B/C.I/CLP/54, available at https://unctad.org/system/files/official-document/ciclpd54_en.pdf (accessed 25 January 2022).
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[30] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzerin, *Competition Policy for the Digital Era* (Publications Office of the European Union 2019) 44.
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