

Agenda
Regional Antitrust Seminar on
--- E-Commerce and Competition ---

September 26-27, 2018
 Bali, Indonesia

First Day (Wednesday, September 26th, 2018)

Time	Content
09:00~09:30	Registration
09:30~09:40	Welcome Remarks <ul style="list-style-type: none"> ● Dr. Shaw-Jiin Perng Vice Chairperson, Taiwan Fair Trade Commission ● Dr. Kurnia Toha Chairman, Commission for the Supervision of Business Competition (KPPU)
09:40~10:00	Taiwan's Competition Law Enforcement in the Digital Era Dr. Shaw-Jiin PERNG Vice Chairperson, Taiwan Fair Trade Commission
10:00~10:20	Digital Economy in Indonesia Mr. Ukay Karyadi Vice Chairman, Commission for the Supervision of Business Competition (KPPU)
10:20~10:30	Photo session
10:30~10:40	Coffee Break
10:40~12:40	Session I: Market Definition <i>Electronic commerce is the business transactions primarily over the Internet. When defining the relevant product and geographic markets, competition authorities may face challenges due to the characteristics of two-sided markets and the ubiquitous Internet in the e-commerce sector. The purpose of this session is to explore how competition agencies adapt suitable tools to define the relevant market in E-commerce.</i> Moderator: Mr. Tzu-Shun Hu Deputy Director Taiwan Fair Trade Commission
10:40~11:20	Dr. Robert Ian McEwin Foundation Director Centre for Law and Economics, Australian National University
11:20~11:40	Mr. Izzat Muhaimin Aziz Pauzzi Assistance Director Malaysia Competition Commission (MyCC)

Time	Content
11:40~12:00	Mr. Orlando Polinar Director IV Philippine Competition Commission (PCC)
12:00~12:20	Ms. Phuong Tra My Nguyen Official Vietnam Competition and Consumer Authority (VCCA)
12:20~12:40	Q&A
12:40~14:00	Lunch at BZ Restaurant, 1 st Floor
14:00~16:20	Session II: Abuse of Dominance <i>Within the e-commerce sphere, an operator with significant market power may have the ability to engage in anti-competitive unilateral conduct by abusing its dominant position. This session will mainly discuss anti-competitive practices and cases that are commonly observed in the on-line environment as well as the difficulties largely encountered by competition authorities.</i> Moderator: Dr. Robert Ian McEwin, Foundation Director, Centre for Law and Economics, Australian National University
14:00~14:40	Mr. Pedro Cardoso Pereira Silva Gonzaga Competition Expert Organization for Economic Co-operation and Development
14:40~15:00	Ms. Sukhbat Lkham State Inspector The Authority for Fair Competition and Consumer Protection of Mongolia (AFCCP)
15:00~15:20	Coffee Break
15:20~15:40	Ms. Pei Rong Rachel Lee Assistant Director (Enforcement) Competition and Consumer Commission of Singapore (CCCS)
15:40~16:00	Mr. Saurabh Mishra and Mr. Venkataswamy Sriraj Competition Commission of India (CCI)
16:00~16:20	Q&A
18:00~	Dinner at Sembilan Restaurant, 1 st Floor

Second Day (Thursday, September 27th, 2018)

Time	Content
09:30~11:30	<p>Session III: Non-Price Restraints <i>It is notable that the scope of online vertical restraints has been seen as a hot topic by the competition jurisdictions recently. The goal of this session is to focus on types of non-price restraints, such as exclusive and selective distribution models, online sales bans, geo-blocking, etc.</i></p> <p>Moderator: Mr. Pedro Cardoso Pereira Silva Gonzaga Competition Expert Organization for Economic Co-operation and Development</p>
09:30~10:10	<p>Mr. Max Zhuo Wei LIU Senior Competition Law Officer Competition Bureau of Canada</p>
10:10~10:30	<p>Mr. Timothy Ker & Mr. Dickie Mok Competition Commission (Hong Kong)</p>
10:30~10:50	<p>Coffee Break</p>
10:50~11:10	<p>Ms Jing-Hui TSAI Specialist Taiwan Fair Trade Commission</p>
11:10~11:30	<p>Q&A</p>
11:30~13:00	<p>Lunch at BZ Restaurant, 1st Floor</p>
13:00~15:00	<p>Session IV: Price Restraints <i>Comparing to the non-price restraints, the areas of price-based restraints are behaviors covering retail price maintenance, dual pricing, most-favored-nation clauses, restriction on price comparison, and so on. Invited officials are encouraged to share their views and experiences in this session.</i></p> <p>Moderator: Mr. Max Zhuo Wei LIU Senior Competition Law Officer Competition Bureau of Canada</p>
13:00~13:40	<p>Mr. Daiki IKEDA Chief Investigator Japan Fair Trade Commission</p>
13:40~14:00	<p>Mr. Urajitt Chittasevi Acting Director for the Foreign Affairs Division Office of Trade Competition Commission, Thailand</p>
14:00~14:20	<p>Coffee Break</p>
14:20~14:40	<p>Ms Su-Yen YEH Inspector Taiwan Fair Trade Commission</p>

Time	Content
14:40~15:00	Q&A
15:00~15:20	General Discussions
15:20~15:30	Closing Remark <ul style="list-style-type: none"> ● Mr. Taufik Ariyanto Head of Legal, PR and Cooperation Bureau Commission for the Supervision of Business Competition (KPPU) ● Dr. Shaw-Jiin PERNG Vice Chairperson Taiwan Fair Trade Commission
18:00~	Dinner at the Garden Pool area

Dr. Shaw-Jiin PERNG
Vice Chairperson
Taiwan Fair Trade Commission

Outlines:

- The Key Points in Enforcing the Taiwan Fair Trade Act in Recent Years
- Recent Amendments to the Taiwan Fair Trade Act
- The Outlook for the Taiwan Fair Trade Commission's Future Enforcement
- Conclusion

Taiwan Fair Trade Act

- Promulgated on February 4, 1991
- Implemented on February 4, 1992
- the purposes:
 - maintaining trading order
 - protecting consumers' interests
 - ensuring free and fair competition
 - promoting economic stability and prosperity

A. The Key Points in Enforcing the Taiwan Fair Trade Act in Recent Years

- 1. Strengthening the implementation of the Taiwan Fair Trade Act

52,155 cases
processed

- case conclusion ratio: 99.6%
- cumulative administrative fines: around US\$1.72 billion

E-commerce
in Taiwan

- anti-competitive conduct: RPM, MFN, online sales bans, etc.
- unfair competitive conduct: false or misleading advertising and so on

A. The Key Points in Enforcing the Taiwan Fair Trade Act in Recent Years

- 2. Improving the role of economic analysis
 - the Information and Economic Analysis Office
 - the merger between Advanced Semiconductor Engineering, Inc. and Siliconware Precision Industries Co., Ltd.
 - ✓ GUPPI and UPPI → the unilateral effects
 - ✓ CPPI → the coordinated effects

A. The Key Points in Enforcing the Taiwan Fair Trade Act in Recent Years

- 3. Enhancing international cooperation in anti-competitive cases

2016:

A merger case

• USFTC

2015:

the capacitor cartel

• US, EU and Singapore

A. The Key Points in Enforcing the Taiwan Fair Trade Act in Recent Years

- 4. Actively conducting advocacy activities

Government Bodies

- e.g. the draft Digital Communications Act

Business Community

- the antitrust compliance program

the Public

- Seminars, workshops, multi-media channels, FTA App

B. Recent Amendments to the Taiwan Fair Trade Act

- FTA has been amended eight times since its promulgation in 1992. The recent key changes:

merger control

- business conglomerates
- review period
- hostile takeover

cartel

- leniency program & the increase in administrative fines
- the Anti-Trust Fund
- circumstantial evidence

exemption from the petitioning procedure

C. Outlook for the Taiwan Fair Trade Commission's Future Enforcement

- 1. Paying attention to the development of the digital economy and drafting appropriate countermeasures
 - setting up “Task Force for the Digital Economy on Competition Policy”
 - issuing report on Taiwan's E-Commerce and Competition

C. Outlook for the Taiwan Fair Trade Commission's Future Enforcement

- 2. Reviewing and amending competition laws and regulations as well as establishing a complete competition law enforcement system
 - the suspension of the period of limitation with respect to the power to impose sanctions
 - expanding the scope of the rewards for reporting illegal anticompetitive conduct
 - increasing administrative fines on gun-jumping and illegal mergers
 - enhancing investigation tools or increasing administrative fines on serious offenses related to monopoly and concerted actions

C. Outlook for the Taiwan Fair Trade Commission's Future Enforcement

- 3. Enriching the industrial database and deepening the economic analysis in competition law
 - conducting industrial market structure surveys, collecting and using related industrial statistics
 - carrying on research projects with experts and scholars as well as organizing training programs
 - studying analytical tools of market definition

C. Outlook for the Taiwan Fair Trade Commission's Future Enforcement

- 4. Enlarging international interaction in competition law and strengthening international cooperation mechanisms
 - participating in various international competition conferences and activities
 - providing a platform for regional competition agencies

C. Outlook for the Taiwan Fair Trade Commission's Future Enforcement

- 5. Intensifying competition advocacy on emerging issues
 - promoting knowledge and awareness of competition law
 - shaping the competition culture in Taiwan

Conclusion

- continuing to enforce the Taiwan Fair Trade Act
- replenishing related regulations
- building a competition culture via multiple channels
- refining administrative measures
- dialoguing with the foreign counterparts
- providing a platform to competition colleagues

**Thank you
For your listening**

Digital Economy in Indonesia

Mr. Ukay Karyadi | Vice Chairman of KPPU



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In the epoch of globalization,

technological advances are inevitable and undeniable, including the use of technology that has become part of the economic activities of human being.

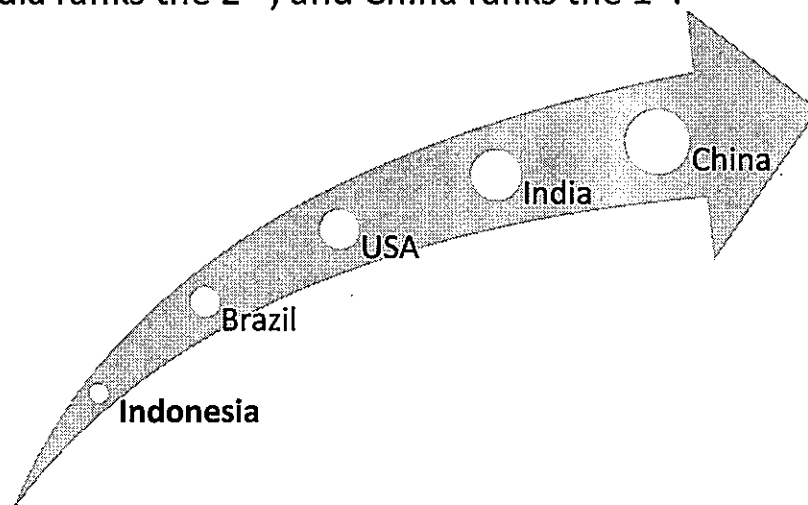
With technology,

markets have become borderless and we may fulfill the economic needs of human being by merely using a “button” and one “Click”. The activities that we do not realize contribute significantly to the turn of the wheel of economy which today we call as digital economy.

The emergence of the buy and sell transaction in the market of digital economy was not immediately handed over to the market mechanism. There are several government regulations intended to give legal certainty to all parties engaged or affected by the activities that utilize the internet, among other things, Law No. 11 Year 2008 regarding Information and Electronic Transactions (Amendment to Information and Electronic Transactions Law No. 19 Year 2016) and Law No. 7 Year 2014 regarding Trade that regulates E-commerce.

A Presidential Regulation on the Roadmap for THE National E-Commerce System 2017-2019 was also released in August 2017. The Roadmap provides guideline for Indonesia's digital economy sector and in so doing regulates various technology, covering further issues such as logistic, cybersecurity, taxation, human resources development and consumer protection. The roadmap also prioritize the development of the National Payment Gateway (NPG).

Based on the trend of e-commerce development up to December 2017, Indonesia has become the 5th largest country out of 20 countries with the most number of the Internet users, namely 143 million people, while Brazil ranks the 4th, USA ranks the 3rd, India ranks the 2nd, and China ranks the 1st.¹



¹InternetWorldStats, www.internetworldstats.com, 2018

COMPETITION ISSUES IN THE DIGITAL ECONOMY MARKET

1. Digital Monopoly that may hinder Competition and Innovation:

- Large Providers that have market dominance may control the market and consumers (lock-in) as well as create entry barrier;
- Dominant Providers acquire start-up companies that have strong innovation aimed at eliminating their business competitors.

2. Digital Monopoly may Monopolize other markets:

Providers develop their businesses by way of integrating and synergizing several platforms. With this strategy, dominant providers may control other providers and may even set the price of the rent for other providers integrated with them. This strategy may also obstruct competition because one provider may monopolize facilities, inputs, platforms, as well as data and other important information.

3. Digital Monopoly has a force to conduct lock-in:

The integration of several platforms may create separate profits for providers and consumers, but at the same time, it may create a lock-in for consumers. With this lock-in, consumers who have intention to shift to other platforms will be subject to switching cost. This may create a barrier to consumers to shift to other platforms.

4. Unfair Competition Behaviors:

Business actors play a double role as platform providers and platform users that may result in a vertical integration (E.g.: Android and Google search);

Tacit-cartel: takes place because of the low-price dispersion wherein the choice of goods highly varies;

Some competition potentials (antitrust) include: price setting, limitation of online sales and advertisements, territorial limitations, control of exclusive matters, and the like.

THE CHALLENGES

1. **Market in a digital economy constitutes a two sided or even multi-sided market**

where not only sellers are categorized as business actors, but there are also "shadow" business actors commonly known as platforms which may also be categorized as sellers. Competition does occur not only among sellers but also among platforms. The definition of market will become grey for there is an overlapping role of the sellers-platforms.

2. **Transformation of the Structure-Conduct-Performance to a new paradigm,**

In the previous (traditional) paradigm, structure will only affect conduct and conduct will only affect Performance. The impacts will only have one-direction-arrow. However in the market of digital economy, structure will not only affect conduct, as conduct may affect structure. Similarly, conduct will not only affect performance, and performance may directly affect structure.

3. **Other Challenges namely in the definition of Market Structure as well as setting the Market Power.**

a. Market Structure becomes hard to identify due to the following:

- Platform/market that is close to each other and even overlaps;
- A very dynamic market where the market changes so rapidly and even in a count of days;
- The existence of more than one relevant market;
- Variative products;
- World-wide geographical market. Unlimited access and doable to all people in the world.

b. Market Control

- Strong innovation that results in the emergence of new industry/market with new business actors that replace the previous industry and business actors;
- Industry that creates a Platform for other economic activities;
- The shift of paradigm to become data centric and the capability to control consumer data;
- Goods or services sold in an e-commerce market are worth zero or even free of charge;
- Market power is identified not only based on one relevant market, but based on several relevant markets;
- Competition will take place not only among platforms but also between platforms and non-platforms;
- The use of market control analysis tool such as SSNIP test or diversion ratio becomes irrelevant.

THE ROLES OF KPPU IN THIS DIGITAL-ECONOMY ERA

1. Prevent monopolistic practices and unfair competition conduct, in the form of :

- Discriminatory Behavior: The granting of certain facilities so as to be able to enter the market and/or in the development of innovation to other integrated platforms.
- Exploitation from platform to supplier or among platforms.
- Exclusive agreement to create market in a platform integration.
- Predatory pricing behavior: with very various types of goods or services traded and very low-price dispersion.
- Abuse of dominant position: The behavior of dominant providers that conducts lock-in to consumers.
- Pre-emptive merger behavior, where large providers acquire small-scale/start-up companies that have innovation and could be their potential competitors.

2. Issuing policy recommendations to the government.

Several KPPU's Policy Recommendations which related to digital economy are:

- Policy Recommendation to the Minister of Transportation of the Republic of Indonesia with regard to the online-based motor vehicles.
- Policy Recommendation regarding Policy on Electronic Road Pricing (ERP).

3. Conducting market study periodically with regard to digital economy as conducted by KPPU in 2017.

It is expected that the role of KPPU in ensuring sound growth of digital economy will become more significant, including in the enforcement of competition cases in this sector.



KOMISI PENGAWAS PERSAINGAN USAHA

<http://www.kppu.go.id>

<http://eng.kppu.go.id>

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Regional Antitrust Seminar on E-Commerce and Competition

Dr R. Ian McEwin

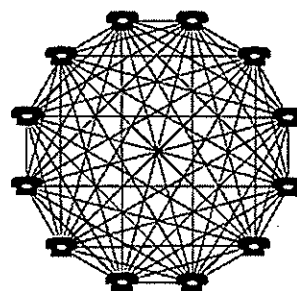
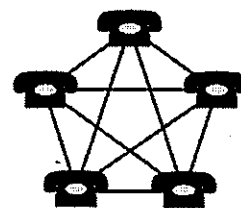
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Network Effects

- ▶ **Direct Network Effects** - a kind of externality where value of the product changes with number of users e.g. telephone
- ▶ **Indirect Network Effects** are the basis of two-sided markets where one side of the market exerts an externality over the other side e.g. in a night club subsidise women to attract men – this leads to disconnect between costs and prices in each separate market
- ▶ Subsidise side where demand is more elastic and which generates externalities over the other side – means pricing decided by platform and so no bargaining (side-payments between customers on each side)
- ▶ Increasing size (scale) of network effects business
 - Costs fall with increasing scale (size)
 - Value to users increases (more people to call, connect with in bar etc.)

Could lead to dominance

Direct Example
Telephone Networks





Examples of Indirect Network Effects

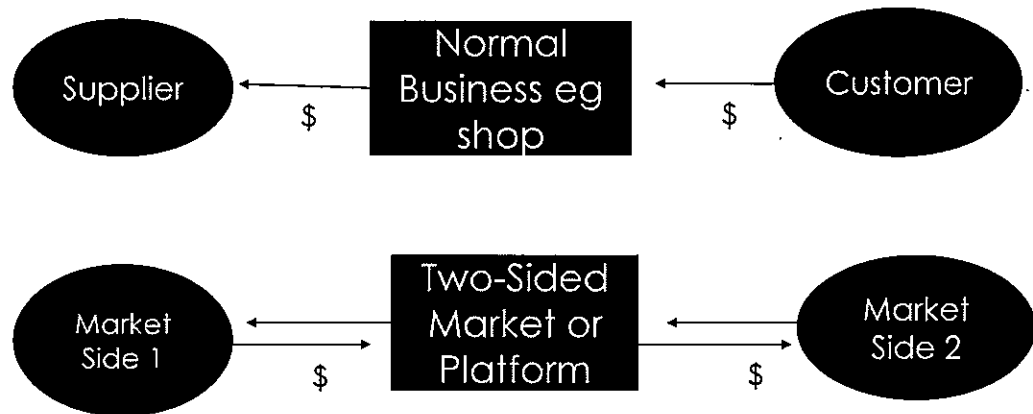
- **Credit cards:** Two sides = merchants and card holders, Platform = payment system (2 banks) => « four-sided market
- **Real estate agencies:** Two sides = buyers and sellers, platform = website, physical agency
- **Operating systems:** Two sides = users and developers, platform = operating system
- **Media:** Two sides = readers and advertisers, platform = newspaper, search engine, TV channel
- **Search engines:** Three sides at least : internet users, content providers and advertisers



Two-Sided Market Overview

- Involves two distinct groups of consumers where a platform provides consumers of one group with access to the other group of consumers
- Indirect network effects (externalities) exist between those two groups so the **demand for platform services (eg Amex, Grab etc)** by one group of consumers depends on the demand of the other group of consumers
- The value that consumers of the good or service on one side of the market increases with the number of consumers on the other side of the market

Difference Between Normal Markets and Two-Sided Markets



**Two-sided markets or platforms provide each other
With beneficial indirect network effects (positive externalities)**

Example: Uber (or Grab)

- A traditional firm buys "raw materials", makes products and sells them to consumers. e.g. Apple makes computers and sells them to consumers.
- A two-sided (or multi-sided) platform firm recruits one type of customers, and makes those customers available to another type of customers. e.g. Uber brings drivers and passengers together
- The demand by one group of customers depends on the demand by the other group of customers on the platform (e.g. Uber). Passenger demand depends on the availability of drivers. Driver demand depends on the availability of passengers.

Implications of Pricing Below Cost

- ▶ **Traditional Firms:** Price less than marginal cost does not maximize short-run profits—it is consistent with a firm trying to drive rivals out of business to secure long-run monopoly.
- ▶ **Two-Sided (or Multisided) Firms :** Price less than marginal cost of one group of customers does maximize short-run profits on that side because aim is to get customers on the other side —so should not necessarily cause any competition concerns.
 - ▶ e.g. free newspapers (zero price below cost of production) is subsidized by advertising. Advertising revenues are greater the more newspapers are read
 - ▶ So give away newspapers to increase the number of customers that advertising can reach
- ▶ So need to consider both markets together for competition analyses

2009 OECD Policy Roundtable Report (p.11)

- ▶ "(1) *There is not yet a universally accepted definition of a two-sided market. However, a consensus about the fundamental aspects of firms operating in these markets is starting to emerge.*
- ▶ *Firms operating in two-sided markets are more aptly called "two-sided platforms" because of their differences with firms that operate in one-sided markets. A two-sided platform is characterized by three elements.*
 - ▶ *The first element is that there are two distinct groups of consumers who need each other in some way and who rely on the platform to intermediate transactions between them. A two-sided platform provides goods or services simultaneously to these two groups.*
 - ▶ *The second element is the existence of indirect externalities across groups of consumers. That means that the value that a customer on one side realizes from the platform increases with the number of customers on the other side. For example, a search platform is more valuable to advertisers if it is more likely that it will reach a larger number of potential buyers. At the same time, it is more valuable to potential buyers if the platform has more advertisers because that makes it more likely that a buyer will see a relevant advertisement.*
 - ▶ *The third element is non-neutrality of the price structure, i.e., the price structure of the platform affects the level of transactions. The price structure is the way prices are distributed between consumers on the two sides of the market. The platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount. Since the price structure matters, the platform must design it so as to induce both sides to join the platform."*

An Extension of Coase?

“Interestingly, in section VI of his 1960 paper, Coase envisioned alternatives to government regulation and private bargains when the cost of market transactions is high. As early as 1937, Coase had already stated in the *Nature of the Firm* that vertical integration could be an alternative. And in his 1960 paper, he exhorted economists “to study the work of the broker in bringing parties together”, as a possible alternative. Though the reference is subtle, it is clear that Coase had foreseen, though in embryonic terms, **the role of platforms as a “social arrangement” likely to resolve externalities. The point is that two sided markets are a special version of the private ordering mechanisms anticipated by Coase to address transaction cost problems.** Schmalensee and Evans say just this when they contend that two-sided markets create value by “*solving a coordination – and transaction cost – problem between the groups of customers*”... Both views might not be mutually exclusive though. Two-sided markets exist because of costs that would otherwise prevent parties from concluding direct bilateral transactions. They are thus a **Coasian “social arrangement” that solves parties’ inability to conclude “bilateral transactions”**. In turn, this social arrangement can lead to a series of Coasian bargains between users on each side of the platform, **if users re-engineer the platform’s pricing decisions (when this is the case, there is no two-sided market)**. Clearly, the theory of two-sided markets owes much to the work of Ronald Coase.

Dirk Auer and Nicolas Petit “Two-sided Markets and the Challenge of Turning Economic Theory into Antitrust Policy” (2015) *The Antitrust Bulletin* pp 10-11

An Example of Where a Market Appears to be a Two-Sided Market, But is Not

- **Price discrimination between customer groups on a platform. e.g. Cinemas**
- Commonly discriminates on price between customer groups. So a platform, with a number of customer groups (e.g. pensioners, students, adults), and
- Where overall volume is sensitive to the price structure and so different demand elasticities used to price optimally.
- But no significant cross-group externalities: the platform is not more valuable to one group because of the increased presence of one of the others. Therefore, not a two-sided platform.



Implications for Pricing and Market Power

- Prices charged to both sides may differ
- One side may face a zero price - or even may be paid to participate in the market to increase the value of the platform
- During the introductory period of the good, prices may be very low in order to attract users and make the platform attractive in the future.
- A platform with an installed base may hold a competitive advantage
 - First mover advantage
 - Magnitude of the advantage depends on the ability to belong to many platforms (multi-homing or single-homing)
 - This may intensify competition in the initial period to attract the installed base.



Amex (U.S.) - District Court 2015

- In 2010 the U.S. Department of Justice (and seventeen states) took competition law (antitrust) action against credit-card networks including Visa, MasterCard, and American Express (Amex)
- The DOJ challenged the defendants' use of "non-discriminatory provisions" (NDPs) that prohibit merchants from "steering" customers toward using less expensive or otherwise preferred payment-card networks
- Visa and MasterCard each entered into a consent decree with the U.S. government, pledging to eliminate NDPs from their agreements with merchants
- Amex proceeded to trial and in February 2015, Judge Garaufis of the U.S. District Court for the Eastern District of New York found that Amex's use of NDPs violated section 1 of the Sherman Act and the court permanently stopped Amex from enforcing its NDP
- REMEMBER: for normal situations defining the relevant markets focuses on identifying products that are substitutable (interchangeable) with the product being examined. The aim is to identify whether consumers will switch to other products if the price of the product being examined goes up and also to identify the firms that sell them.

Amex (U.S.) - District Court 2015

- In the Amex case while Judge Garaufis accepted the two-sided nature of the market he only defined the market as one of the sides i.e. the market for “general purpose credit and charge card network services” **offered to merchants**—a market in which Visa, MasterCard, Amex, etc. also compete.
- Amex had argued the focus should be on **the market for transactions** to take account of both the merchant side and the cardholder side – not the market for network services.
- Garaufis said that, because “the customer neither sees nor pays the additional cost when networks increase the price of network services to merchants (other than in the form of higher retail prices[]) . . . **the customer cannot be expected to initiate substitution** in the first instance.”

Amex (U.S.) – Appeal to Second Circuit 2016

- On appeal in In September 2016, the Second Circuit, reversed and remanded the case with instructions that the district court enter judgment in favor of Amex.
- The Second Circuit found that the district court incorrectly defined the relevant market and said that, **by focusing the analysis on only the merchant side of the market**, while ignoring implications for the cardholder side of the market, the district court did not properly account for the **interdependence between the two sides** of the market.
- It also found that the “erroneous market definition” led the district court to conclude incorrectly that the challenged practice had an anticompetitive effect on the relevant market.
- The Second Circuit said that separating the two sides of the markets could erroneously penalize “legitimate competitive activities.”

Above is paraphrased from Sidak and Willig “Two-Sided Market Definition and Competitive Effects for Credit Cards After *United States v. American Express*”. (2016) 1 *The Criterion Journal on Innovation* p. 1301.

Amex (U.S.) – Appeal to Second Circuit 2016

- "In sum, the Second Circuit recognized that, in defining a relevant market, proper application of the HMT must capture the effects that a SSNIP would have on both sides of a two-sided market. A one-sided HMT in a two-sided market ignores the hypothetical monopolist's *net* price and therefore distorts the analysis of the effect that a SSNIP would have on a hypothetical monopolist's profits." (p. 1306)
- "Hence, the cardholders' insistence on using Amex's cards is not evidence of market power, but rather evidence of competitive benefits to the cardholder side of the two-sided market and, consequently, evidence of the concomitantly resulting competitive benefits to merchants that accept American Express cards." (pp 1307-8)

Above is paraphrased (and reproduced) from Sidak and Willig "Two-Sided Market Definition and Competitive Effects for Credit Cards After *United States v. American Express*" (2016) *The Criterion Journal on Innovation* p. 1301.

Amex (US) – Appeal to Supreme Court 2018

- Supreme Court agreed with Second Circuit. The majority argued that antitrust cases involving such "two-sided platforms" must consider the effects of a company's policies on both markets.
- The court's four liberal justices, led by Justice Stephen Breyer, dissented. In addition to arguing that "nothing in antitrust law" justified different treatment for two-sided platforms, Breyer also raised concerns about the implications of such a ruling for other such businesses as follows:

"I particularly fear the interpretive impact of the majority's discussion of what it calls 'two-sided platforms,' in an era when that term might be thought to apply to many Internet-related goods and services that are becoming ever more important."

Amex (US) – Appeal to Supreme Court 2018

From: *Pacific Standard*, June 27, 2018 at <https://psmag.com/economics/the-supreme-court-handed-a-huge-win-to-american-express>

- "Interestingly, it's this element of the ruling that may have the most far-reaching effects. A number of the biggest Internet companies—Google, Amazon, and Facebook, for example—are two-sided platforms. **Advocates for more rigorous antitrust enforcement in the United States are concerned that the decision will make it harder to challenge anticompetitive practices of big tech companies.**"
- Here, for example, is what Lina Khan, the director of legal policy at the Open Markets Institute, which advocates for stricter antitrust enforcement, had to say on the topic in a recent op-ed for the *New York Times*:

If the Supreme Court ratifies the Second Circuit's approach, platforms will be able to engage in anticompetitive activity with one set of users, so long as they can plausibly claim that harmful conduct enabled them to benefit another group." Say, for example, that Uber prohibited its drivers from also serving rivals like Lyft, suppressing driver income. Under the current approach, these exclusive agreements would likely violate antitrust law. But under the Second Circuit's analysis, the case would go nowhere unless plaintiffs could show that this practice also harmed riders."

- Will this decision apply to all two-sided platforms? Will countries differ?

Finally


- Should the relevant antitrust market for a two-sided platform
 - Always include the side of the platform on which the conduct has occurred and *always excludes* the other side of the platform conflicts with sound economics? or
 - Be treated as a single market that treats the platform and the markets associated with it as a single market because there is only a single service (subject to competition from other platforms)
- Answer depends on whether really a two-sided market or not which depends on whether there are:
 - Indirect network effects between groups of customers
 - No bargaining between customers



MyCC Malaysia Competition Commission

**MARKET DEFINITION
E-COMMERCE AND COMPETITION
IN MALAYSIA PERSPECTIVE**


BY:
IZZAT MUHAIMIN AZIZ BIN PAUZZI
BUSINESS & ECONOMICS DIVISION
MALAYSIA COMPETITION COMMISSION



MyCC Malaysia Competition Commission

PRESENTATION OVERVIEW


- Part 1: E-Commerce Development in Malaysia**
- Part 2: Market Definition by Competition Act 2010**
- Part 3: Case by Malaysia Competition Commission (MyCC)**



MyCC Malaysia Competition Commission

PART 1
E-COMMERCE DEVELOPMENT IN MALAYSIA

3



MyCC Malaysia Competition Commission

E-Commerce Definition in Malaysia

Any trade transaction (anything related to supplying or changing of goods, services, agencies, investment, finance, banking and insurance) made electronically.

Section 5, Electronic Commerce Act 2006

Source: Ministry of Domestic Trade & Consumer Affairs

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Malaysia Competition Commission

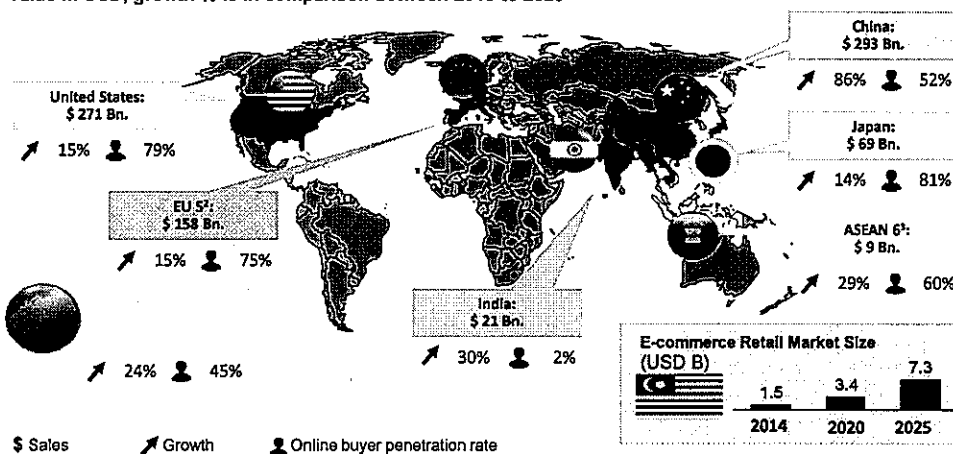
E-Commerce Trend in Malaysia

- E-commerce sector is growing rapidly in Malaysia.
- Malaysia is expected to gain contribution by e-commerce sector to USD 3.4 billion in 2020.
- Estimated number of internet users in Malaysia on 2016 is 24.5 million (76.56% of total Malaysian population).
- 3,469 respondents from the Internet Users Survey 2017 reported that:
 - Top 3 devices to access internet are smartphone, laptop and desktop.
 - Among the online activities by Malaysian internet users are for communicating by text, social networking, getting information, financial activity, government services, job application, online shopping etc.
- The Government of Malaysia acknowledged the importance of e-commerce on current global trade. Initiatively, the government has established the National E-Commerce Council, National E-Commerce Strategic Roadmap and Digital Free Trade Zone.

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Global E-Commerce Development

Business to Customer (B2C) growth
Value in USD, growth % is in comparison between 2015 to 2020



Source: AT Kearney

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MyCC Malaysia Competition Commission

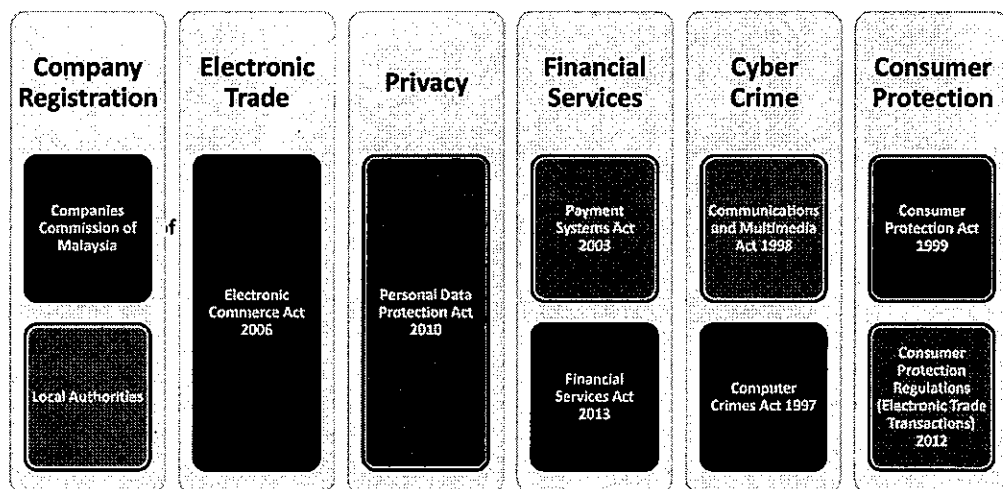
Infrastructures Contributing to the Development of E-Commerce in Malaysia

Commercial Sector	Public Service Delivery
<ul style="list-style-type: none"> - Malaysia ranked the second highest on credit card penetration rate in ASEAN region. - The existence of e-commerce platforms among local and international players. - The emergence of logistic players with new fulfillment. - Comprehensive e-commerce laws in Malaysia. 	<ul style="list-style-type: none"> - E-government in the Vision 2020. - Government initiative undertaken by the Malaysian Administrative Modernization & Management Planning Unit (MAMPU). - Soft-infra and hard-infra established by MAMPU. - Examples of soft-infra: E-procurement and E-payment services by the government. - Example of hard infra: Data center.



MyCC Malaysia Competition Commission

Regulatory Bodies for E-Commerce Sector in Malaysia





Malaysia Competition Commission

PART 2 MARKET DEFINITION IN COMPETITION ACT 2010

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Malaysia Competition Commission

Market Definition in Malaysian Law

Section 2 of the Competition Act 2010 (CA 2010) defined market as:

- A market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those good or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

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 **MyCC** Malaysia Competition Commission

Market Definition Principles


Substitution (Demand vs. Supply)

- Identifying relevant market

Types of markets

- Product market
- Geographical market
- Time


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Economic Tools for Market Definition

- Hypothetical Monopolist Test (HMT)
- Critical Loss Analysis
- Natural Experiment
- Impact Evaluation


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The Importance to Define Market


- To identify the enterprises who compete against others
- To determine significant anti-competitive effect in a market
- To determine conducts by enterprises which abuse the dominant position
- To take into account the firm turnover in assessing the amount of penalty

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 **MyCC** Malaysia Competition Commission

**PART 3
CASE BY MyCC**


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MyCC Malaysia Competition Commission

Case on E-Government Services - MyEG

Industry	Online Foreign Workers Permit Renewal (FWPR) application
Case Name	My E.G Services Berhad (MyEG)
Date of Decision	24 June 2016
Type of Alleged Infringement	Abuse of dominant position (Section 10 of Competition Act)



MyCC Malaysia Competition Commission

Case on E-Government Services - MyEG

Facts of the Case

- In 2015, MyEG was appointed by the Government of Malaysia as the sole service provider for Foreign Worker Permit Renewals (FWPR).
- 3 types of mandatory insurances are required to be purchased for FWPR. Prior to appointment, MyEG was the agent of a local insurance company (RHB).
- Initially MyEG had made it compulsory for one of the insurances to be purchased only through them.



MyCC Malaysia Competition Commission

Case on E-Government Services – MyEG

Facts of the Case (Cont')

- Subsequently, MyEG informed the applicants that the FWPR process would be easier and faster if the insurances were purchased from them.
- FWPR process was slower if insurances were purchased from other insurance companies that the MyEG is not an agent of.
- MyCC found out that the MyEG's conduct had distorted competition in the ancillary market for FWPR mandatory insurance via its position as sole service provider for FWPR by imposing different conditions to equivalent transactions.

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MyCC Malaysia Competition Commission

MyCC Decision on MyEG Case

Outcome

- The MyCC imposed financial penalty of RM6.41 million on the MyEG.

MyCC Direction to MyEG

- Cease and desist; and
- Provide efficient gateway.

Current Case Status

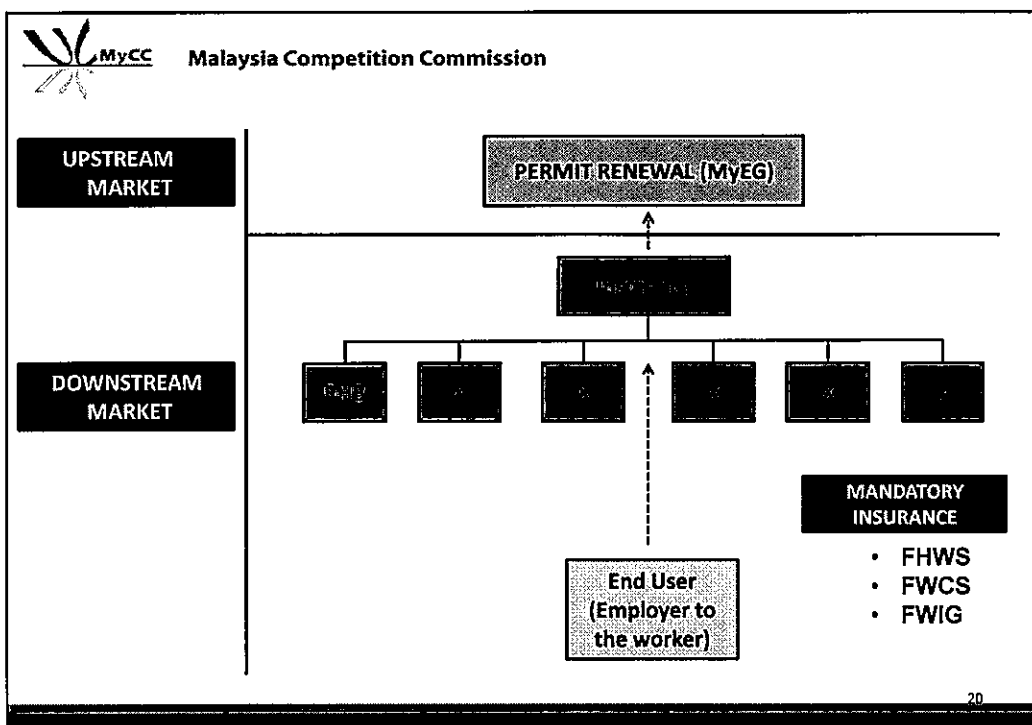
- Competition Appeal Tribunal (CAT) reaffirmed MyCC decision.
- MyEG proceeded with the Judicial Review at High Court to review CAT's decision.

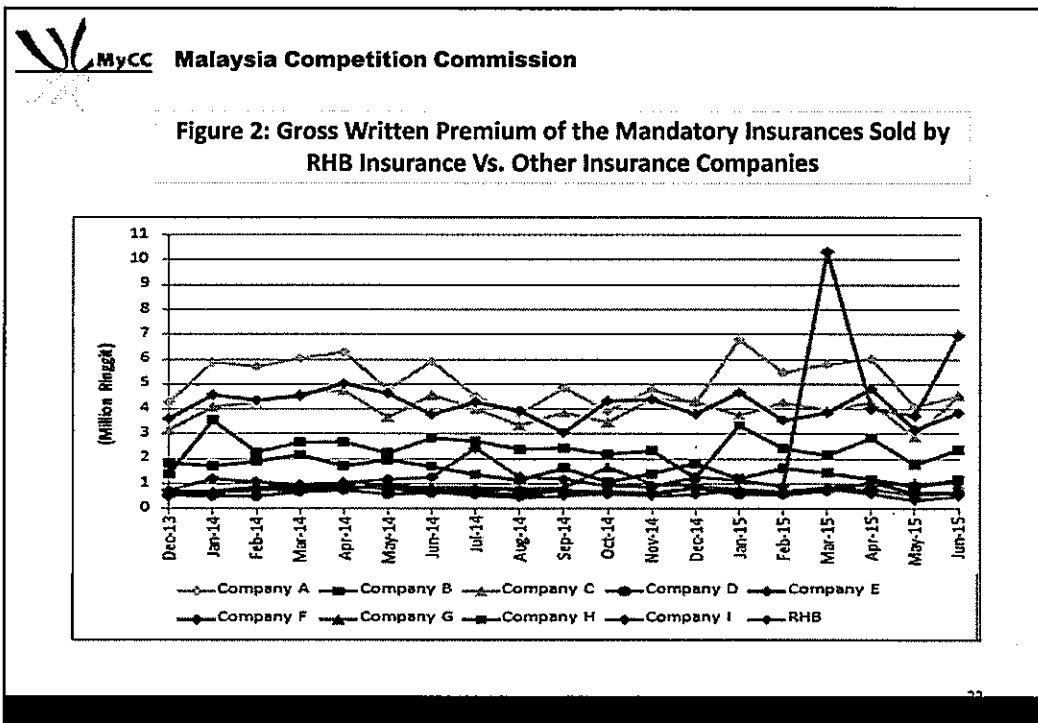
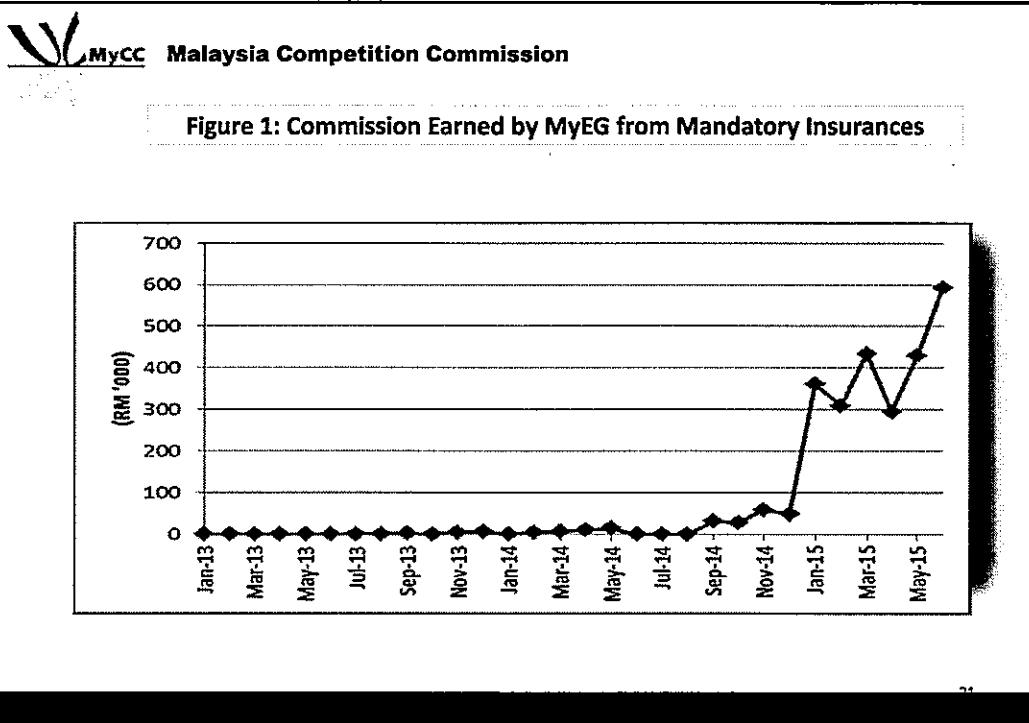
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MyCC Malaysia Competition Commission

Defining Relevant Market for MyEG Case

<p style="text-align: center;">Relevant product market</p> <ul style="list-style-type: none"> • Upstream: Permit Renewal • Downstream: Insurance (FWPR) 	<p style="text-align: center;">Relevant Geographic Market</p> <ul style="list-style-type: none"> • Peninsular Malaysia
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------





MyCC Malaysia Competition Commission

Final Remarks

- Competitive development of e-commerce sector in Malaysia.
- Limitation to apply economic tools in market definition.
- MyCC is committed to address challenges in enforcing competition law for e-commerce sector in Malaysia.

International Sites	Online Marketplace	B2C / Specialty Store
amazon, 淘宝网, ebay, Alibaba.com, 天猫 Tmall.com, BISV	LeLong.my, ebay, Qoo10, Rakuten.com.my, easy.my, youbell	Lozza, ZALORA, Lamer.com, DELL, Superbuy, thepoplook.com, HISHOP, mphenline.com, ShaShinKI, FASHION VALET
Tickoting / Travel	Deal Sites	Luxury Shopping
AirAsia, agoda, Malaysia, Expedia.com.my, Booking, AsiaRooms1	GROUPON, MYDEAL.com.my, livingsocial, DealMates, StreetDeal, milkAdeal	MYSALE, KBBONZ, HAUTLAVENUR.COM
Lifestyle Shopping	Online Grocery	Online Food Delivery
White, dsur, kwerkee	TESCO, GOODMETER, presto, Penny Auction	foodpanda, noon, myrice
	Penny Auction	Online Classified
	SOL.my, Penny Auction, G2B.my	mudah.my, OLX

MyCC Malaysia Competition Commission



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**PHILIPPINE
COMPETITION
COMMISSION**

Ensuring businesses compete and consumers benefit

Grab - Uber Case

**(Acquisition by Grab Holdings, Inc. and MyTaxi, Inc.,
of Assets of Uber B.V. and Uber Systems, Inc.)**

Orlando P. Polinar

Director, PCC Enforcement Office

*2018 Regional Antitrust Seminar on
"E-Commerce and Competition"*

26-27 September 2018

Bali, Indonesia

Introduction

- ❑ Regulatory Framework of TNC and Transport Network Vehicle Service (TNVS) in the Philippines
- ❑ Uber's exit from the Philippine market
- ❑ Jurisdiction of the Philippine Competition Commission
- ❑ PCC's considerations in defining relevant market

Relevant Market

Relevant Product Market: *"The market for on-demand private transportation online booking service through a mobile ride-hailing application."*

Relevant Geographic Market: Metro Manila and Cebu City, Philippines

Defining the Relevant Product Market

- Overwhelming majority of riders would choose to continue using on-demand car-based private transportation online booking service through their mobile ride-hailing application when faced with a hypothetical price increase of 5-10%;
- Prices of GrabCar and Uber are generally higher compared to other modes of public transportation, including regular taxis;
- Several qualitative differences between on-demand car-based private transportation online booking service through their mobile hailing applications and other modes of public transportation;

Defining the Relevant Product Market

- Public pronouncements of the Parties show that they differentiate their services from taxis and that they view each other as their sole competitor;
- Riders and other market participants consider on on-demand car-based private transportation online booking service through their mobile hailing application separate and distinct from other modes of transportation, even those whose bookings are facilitated through a mobile app; and
- Regulatory regimes applicable to TNCs and TNVS vis-à-vis other modes of public transportation (including taxis) significantly differ.

Defining the Relevant Geographic Market

- Metro Manila Philippines
- Cebu City Philippines

Undertakings: *To address competition concerns*

- Grab not to introduce any exclusivity provision in its agreements with drivers and operators;
- Grab to improve customer experience;
- Grab to ensure fare transparency; and
- Compliance with the Undertakings shall be monitored by an impartial third-party.



**PHILIPPINE
COMPETITION
COMMISSION**

Thank You

Experience in Vietnam

Nguyen Phuong Tra My
Unfair Trade Practices Investigation Board
Vietnam Competition and Consumer Protection Authority

(Views expressed in this presentation is of own the author and do not necessarily reflect the view of the VCCA)

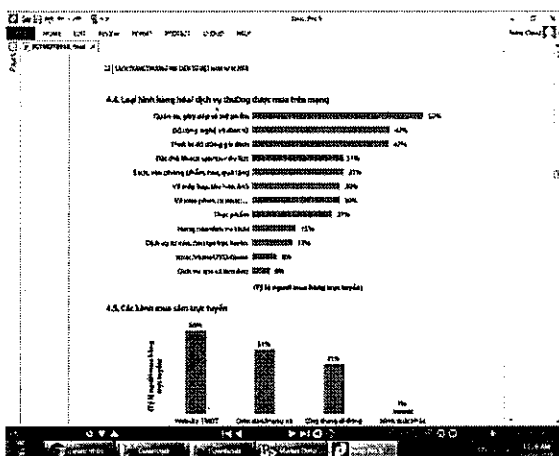
Content

- * 1. Overview of E-commerce in Vietnam
- * 2. Market Definition
- * 3. Challenges for Authority
- * 4. Grab Case in Brief

AN OVERVIEW OF E-COMMERCE IN VIET NAM

- * Population: over 90 Million
- * E-commerce market size:
 - Estimated online-consumers: 33.6 Millions
 - Online consumed value 186 usd/person
- * Porportion of total revenue B2C in total retailing value: 3.6%
- * Expectant to continue online shopping next year: 98% “yes” respond.

popular online –shopping chanel:



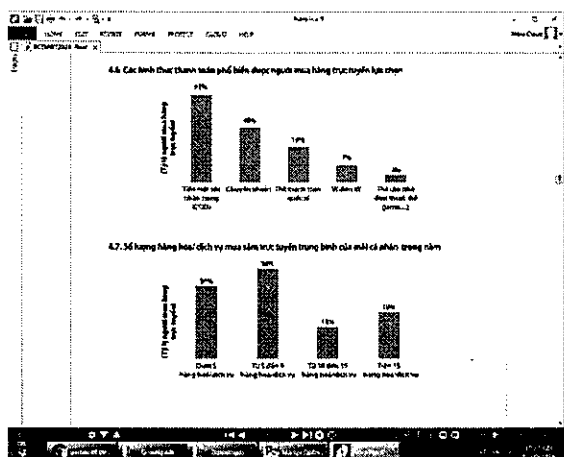
Popular products and service:

- * Clothings, footwear and cosmetics
- * IT stuffs
- * Homedecors
- * Booking and travel tours
- * Books and stationaries, gift
- * Transport ticket: airticket, train and bus tickets
- * Movie and concert tickets
- * Foodstuffs
- * Other goods and services
- * Consulting service: online courses
- * DVD, CD-s, Games
- * Beauty and spa

Popular shopping channels:

- * Websites
- * Forums,
- * Mobile applications
- * Others

MARKETING INFORMATION



1. Popular payment methods: Cash (COD), transfer, Visa-master card, electronic-wallet, prepaid mobile cards.

2. Online shopping product/services for each person per year in Vietnam:

- * Under 5 million VND: 30%
- * From 5 to 9 million VND: 38%
- * From 10-15 million VND: 13%
- * Above 15 million VND: 19%.

PROFITABLE BUSINESS MODELS

		Consumer of good or service	
		Consumer	Business
Provider of good or service	Consumer	Consumer-to – Consumer (C2C): facebook.com	Consumer-to- Business (C2B): vietnamworks.vn, freelancers' website to businesses
	Business	Business-to – Consumer (B2C): tiki.vn, adayroi.vn	Business –to- Business (B2B) : manufacturers' website to retailers
	Government	Government-to- Consumer(G2C) www.chinhphu.vn	Government to Business (online tax declering, online business registration)

B2C and C2C websites and platforms



Challenges in e-commerce

- * Low Cyber security
- * Unfinished Regulatory/legal barriers
- * Infrastructure: Logistics, payment system, capital funding
- * Low quality human resources.
- * Brick-and- mortar shopping culture
- * Product reliability
- * Biased advertising
- * Predatory pricing

INDICATORS FOR COMPETITION

*** Structural risk:**

- * New source of market power
- data and technology

*** Behavioral risk:**

- * Abuse of dominance
- * Coordinating prices or supply conditions
- * Discrimination between users/buyers

Current Market definition in Competition Law 2005

Relevant Product Market: Relevant market consists of relevant product market and relevant geographical market. Relevant product market means a market comprising goods or services which may be substituted for each other in terms of characteristics, use purpose and price.

Relevant Geographical Market: means a specific geographical area in which goods or services may be substituted for each other with similar competitive conditions and which area is significantly different from neighbouring areas.

The relevant Product market and Relevant Geographical market are interpreted detailly in Section I Chapter II Decree 116/2005/ND-CP interpreting some article of Competition Law

Market Definition in Amended Competition Law 2018 (will be official from 01. July.2019)

Relevant Product Market: Relevant product market means a market comprising goods or services which may be substitutes for each other in terms of characteristics, use purpose and price

Relevant Geographical Market: means a specific geographical area in which goods or services may be substituted for each other with similar competitive conditions and which area is significantly different from neighbouring areas.

Currently, VCCA are drafting a decree to interpret detailly some articles relating to the relevant market and market shares, combined market shares.

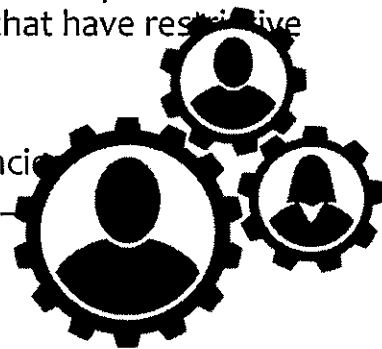
2.1.1.2. Competition enforcement in e-Commerce

* Regulations:

- Defining markets, multi-sided markets, and assessing market power, merger control
- Anti-competitive practices: the unlawful competition practices encompass all the practices that have restrictive effects on competition

* Authority:

- * Better coordination with relevant agencies
- * Faster responses: the new technology – new ways to regulate



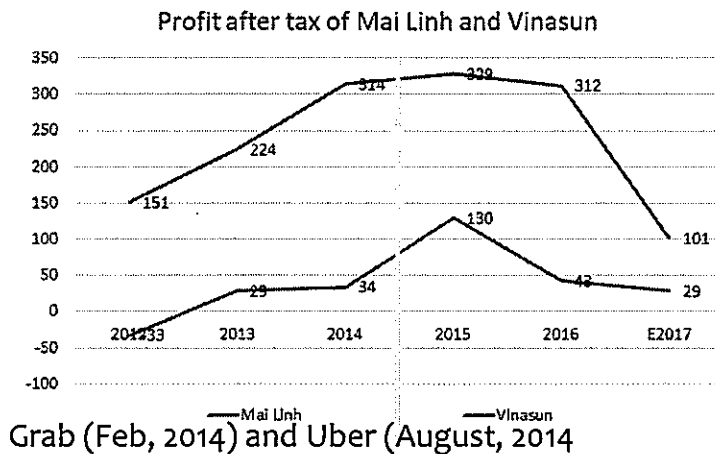
2.1.1.3. Regulating the applications

* Taxi market before 2014:

- * - **Market:** Passenger transportation business by taxi with schedule as booked by passengers; the fare calculated by the taximeter, including actual distance and waiting period
- * - **02 biggest incumbents:**
 - * Mai Linh (Hanoi and HCM City): about 11,302 vehicles (2014)
 - * Vinasun (HCM City): about 5,708 vehicles (2014)



After 2014



NEW MARKET

- * **From the authority:**
- * **A new definition of market?** Companies doing business in providing passenger transportation services via a new form that applies high-tech
- * **Promotion in order to unfair competition?**
- * **Coordination with Ministry of Transportation:** Define the nature of business operation in passenger transportation market via hi-tech applications

Grab Case

- * Case overview: After Grab announced that they had bought Uber in Asean Market, including Vietnam by receiving ridesharing and food delivering into Grab's multimodal transportation and fintech platform, VCCA took proper action to initiate the case: collecting information and directly conversated with both Grab and Uber. VCCA then started the preliminary investigation with Grab. The result of preliminary investigation had showed **sign of violation** regarding to Vietnam Competition Law 2005 (Section 2, Chapter III of the Law)
- * Official Investigation: The official investigation started form May 2018 and is on going process.

THANK YOU VERYMUCH!



Abuse of Dominance in E-Commerce

Pedro Gonzaga (Pedro.Gonzaga@oecd.org)

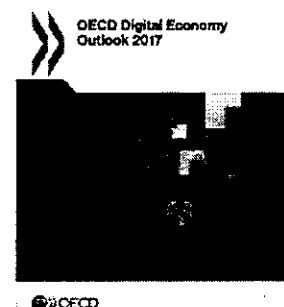


The OECD horizontal project Going Digital

- In 2017 and 2018 the OECD has been examining how the digital transformation affects policymaking across a large spectrum of policy areas.
- Led and co-ordinated by the OECD's Committee on Digital Economy Policy (CDEP), the project will draw on and connect the expertise of 13 other OECD committees, including:



- **Competition Committee**
- Committee on Consumer Policy
- Committee on Industry, Innovation and Entrepreneurship
- Committee on Scientific and Technological Policy
- Employment, Labour and Social Affairs Committee
- Trade Committee
- ...



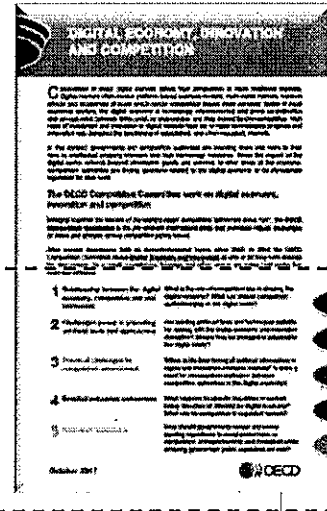
<http://www.oecd.org/going-digital/>



Work on the digital economy within the OECD Competition Committee

The Digital Economy is a long-term strategy theme of the Competition Committee. Work on the following five streams is now underway:

1. Relationship between the digital economy, competition law and innovation
2. Challenges posed to prevailing antitrust tools and approaches
3. Practical challenges to competition enforcement
4. Detailed industries and sectors
5. Review of regulations



<http://www.oecd.org/competition/digital-economy-innovation-and-competition.htm>



Recent work of the OECD Competition Committee

On-going work (2018 – ...)

- Personalised Pricing in the Digital Era
- Quality Considerations in the Zero Price Economy
- Review of the OECD Competition Assessment Toolkit in light of Digitalisation

Recent work (2015 – 2017)

- Implications of E-Commerce for Competition Policy (2018)
- Blockchain and Competition Policy (2018)
- Algorithms and Collusion (2017)
- Rethinking the Use of Antitrust Tools in Multi-Sided Markets (2017)
- Big Data: Bringing Competition Policy to the Digital Era (2016)
- Work stream on disruptive innovation in the digital economy (2015 - 2017)
 - Disruptive Innovations (2015), The impact of Disruptive Innovation on Competition Law Enforcement (2015), Competition and Disruptive Innovation in Financial Markets (2015), Disruptive Innovation in Legal Services (2016), Radical Innovation in the Electricity Sector (2017)



Agenda

- 1. Opportunities and challenges of e-commerce**
- 2. Competition tools to assess abuse of dominance**
- 3. Categories of abuse of dominance in e-commerce**



Opportunities and challenges of
e-commerce

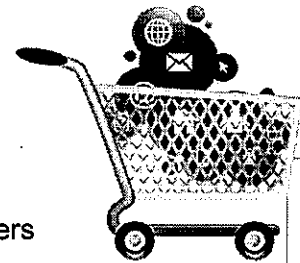


The digital economy & e-commerce

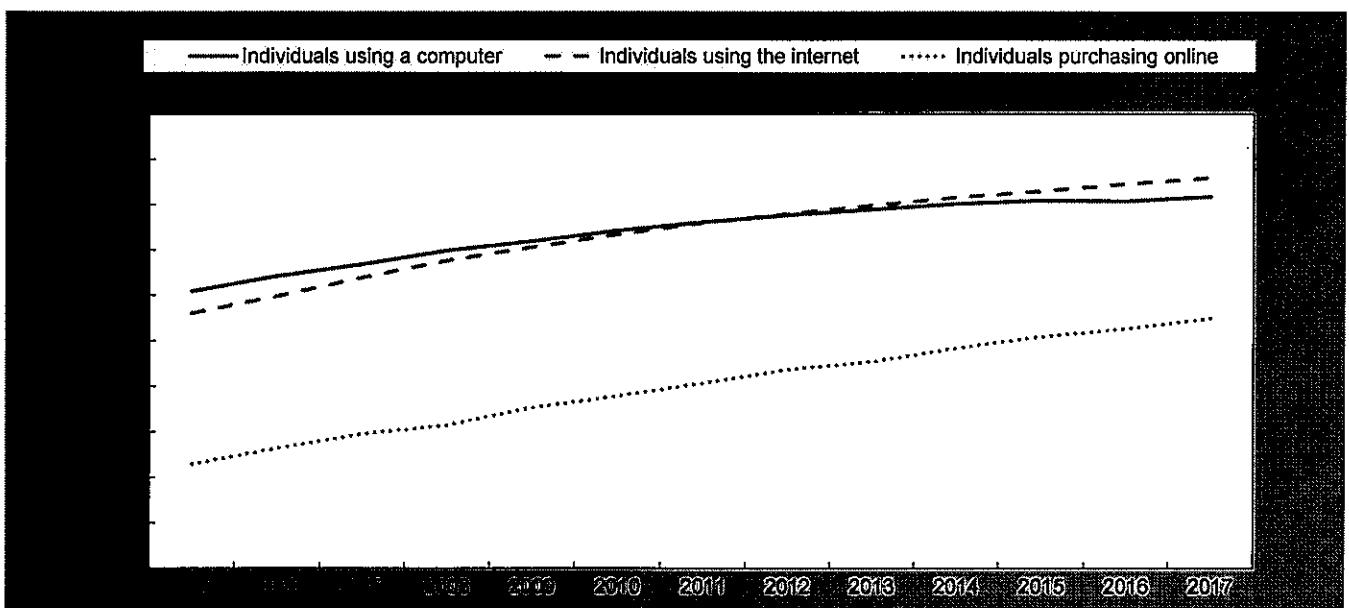
- The digital economy is comprised of markets based on digital technologies that facilitate the trade of goods and services (OECD, 2012):

- E-commerce (narrow sense)*
- Online sale of goods and services:
 - **Tangible goods** (clothing, computer equipment, cosmetics)
 - **Services for offline consumption** (hotel bookings, tickets)
 - **Digital content** (videos, e-books, online courses)

- E-commerce (broad sense)*
- Other online activities:
 - Online marketing
 - Collection and processing of data
 - Payment systems
 - Intermediation services to online retailers



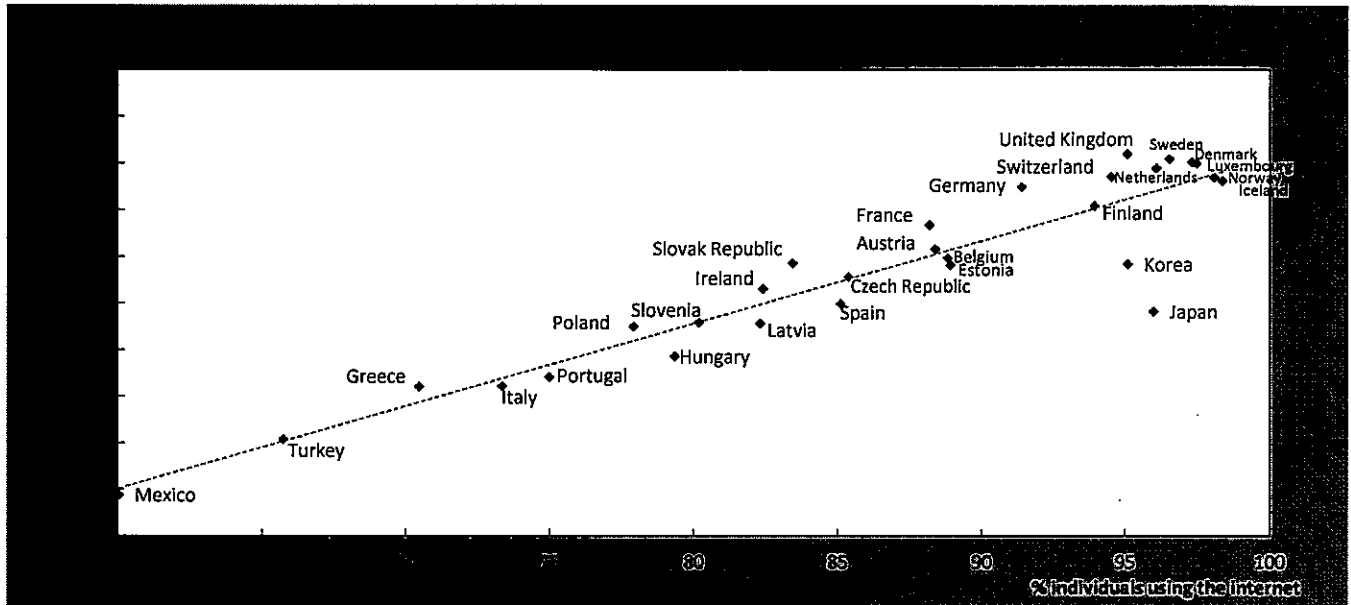
E-Commerce is facilitated by the growing access to ICTs in OECD countries



Source: OECD (2018), "ICT Access and Usage by Households and Individuals", OECD Telecommunications and Internet Statistics (database), <http://dx.doi.org/10.1787/b9823565-en>.



Positive correlation between internet penetration and e-commerce in OECD countries in 2017



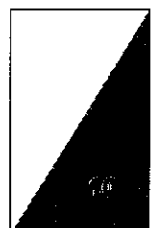
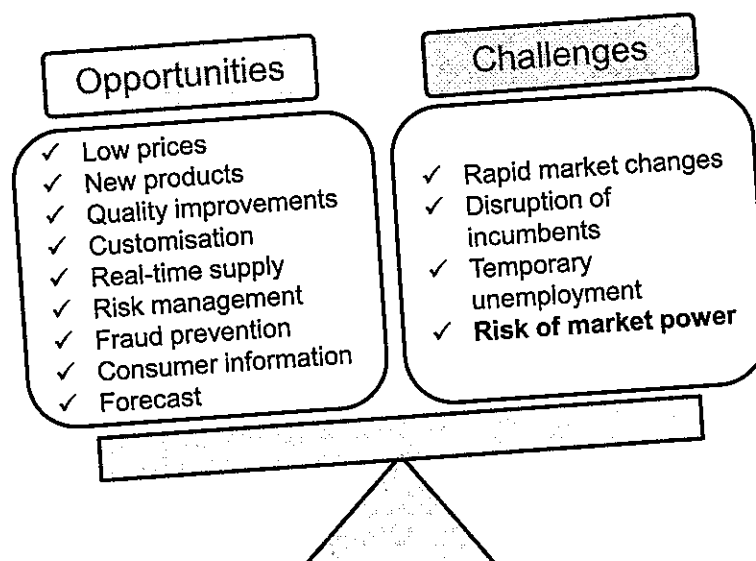
Source: OECD (2018), "ICT Access and Usage by Households and Individuals", OECD Telecommunications and Internet Statistics (database), <http://dx.doi.org/10.1787/b9823565-en>.

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E-commerce has implications for competition

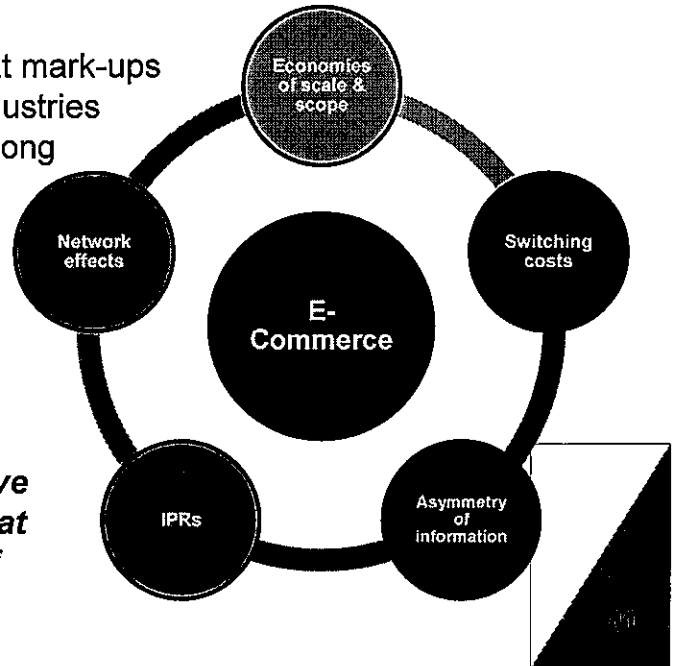
- E-commerce leads to market integration, promotes international trade and enables new data-driven business models that promote competition, create **economic growth opportunities**, but also pose **new challenges**.





Is there a risk of market power in e-commerce markets?

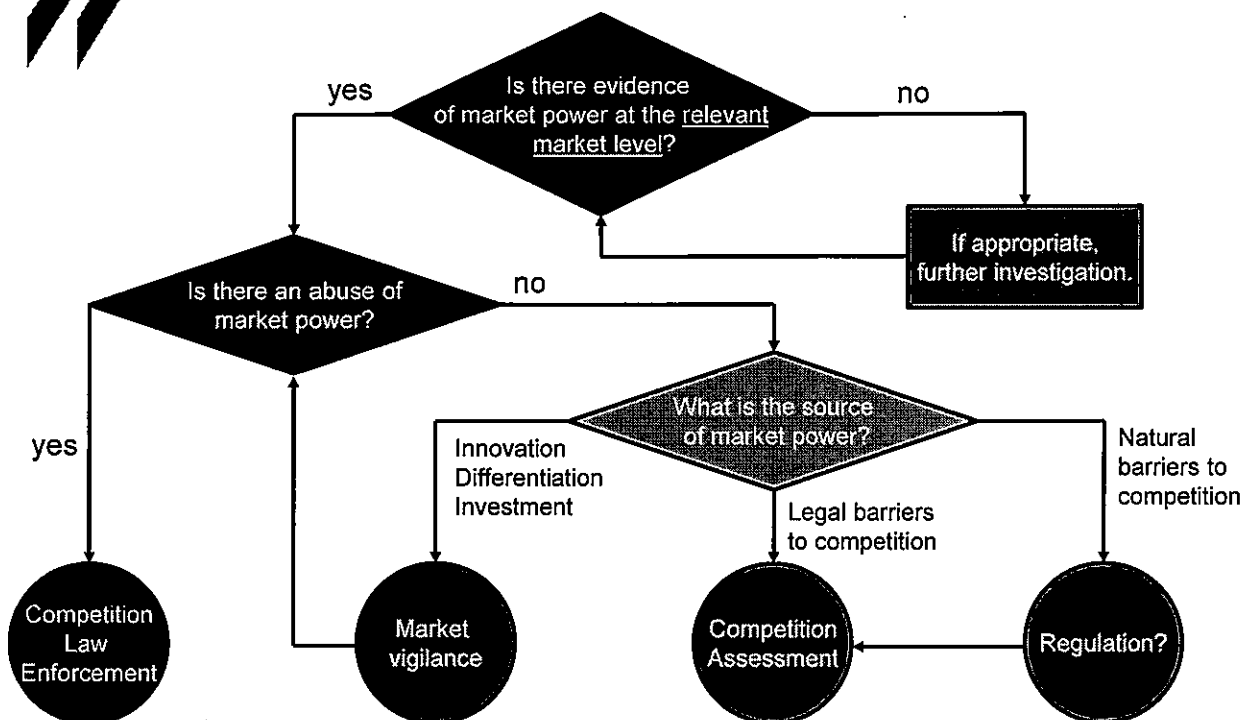
- Evidence suggests a moderate increase in broad measures of concentration, at least in the US and Japan, though not in European countries (OECD, 2018).
- OECD industry-level data shows that mark-ups have increased mostly in service industries (including high tech), particularly among “fringe” firms.
- **BUT...** Concentration at the aggregate or industry level is not a sufficient condition for concentration at the market level!



Do e-commerce markets have structural characteristics that can lead to the creation of market power?



When does market power pose policy concerns?

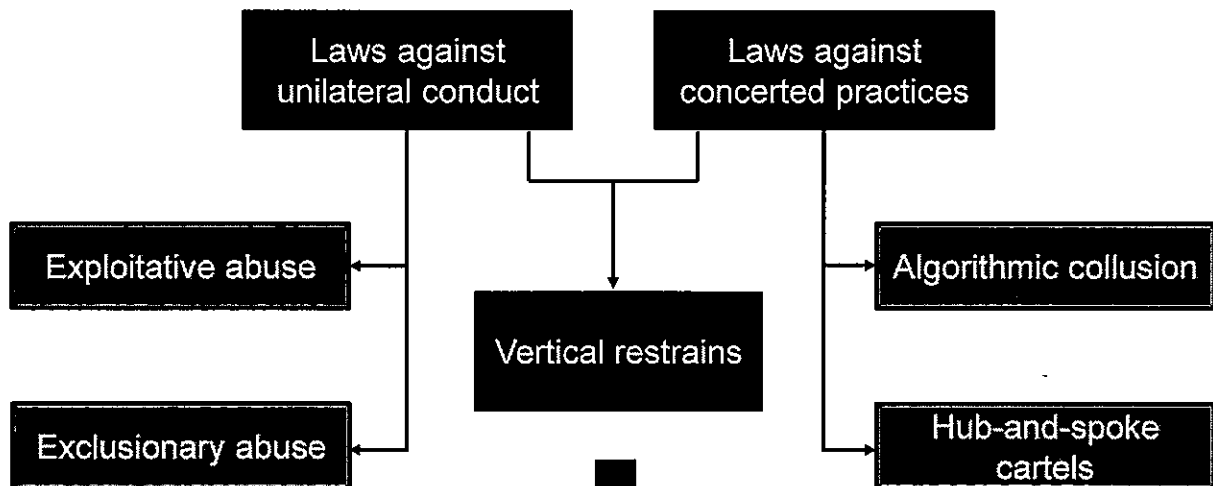




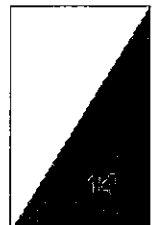
Competition tools to assess abuse of dominance



Competition enforcement tools in e-commerce markets



The bulk of enforcement to date has focused on vertical restraints





Can traditional competition tools capture anti-competitive behaviour in e-commerce markets?

- Consistent finding in OECD Competition Committee roundtables:

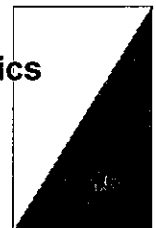


- *Fundamental competition rules and analytical framework are generally sufficient to assess and sanction anti-competitive behaviour in the e-commerce sector*
- However, competition law enforcement remains highly context-specific and the application of the tools may have to be adapted to the new market reality:

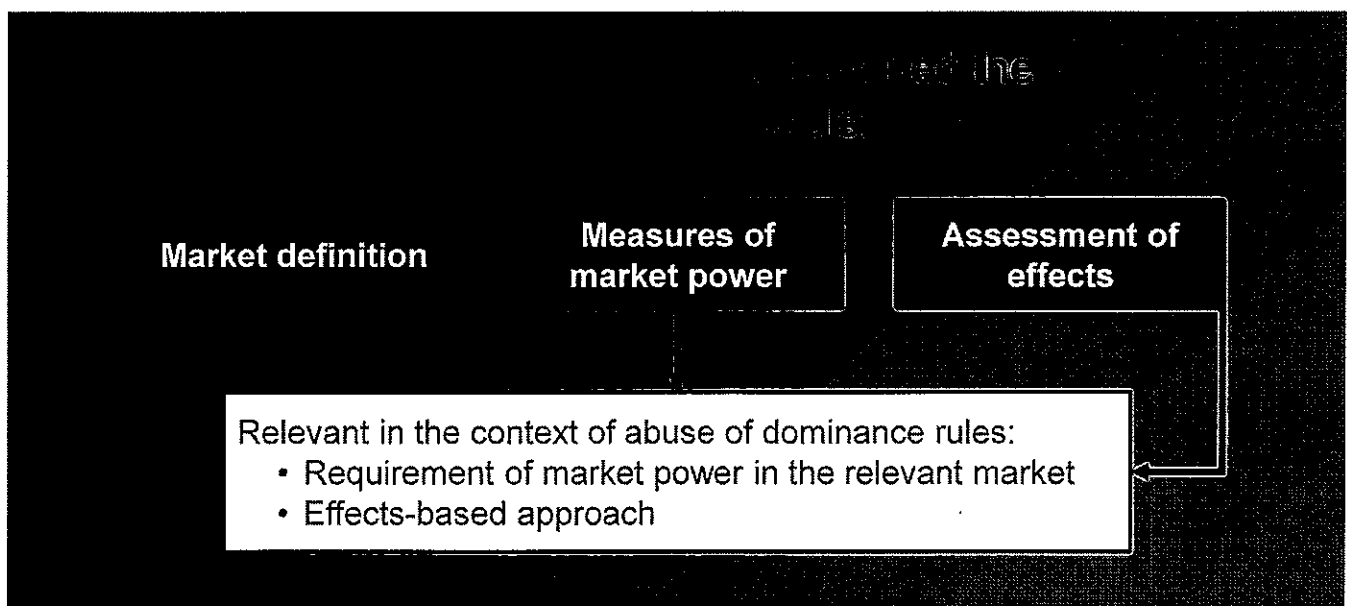
Tools

- Information-gathering practices
- Assessment tools
- Remedies

- ✓ Disruptive innovation
- ✓ Network effects
- ✓ New competition dynamics
- ✓ Algorithmic pricing
- ✓ Big data

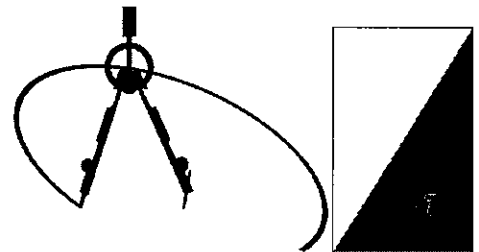


Can traditional competition tools capture anti-competitive behaviour in e-commerce markets?



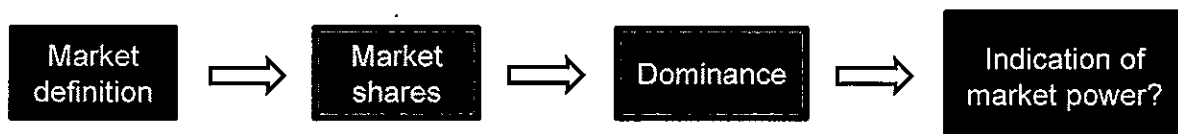
Complexity of the market definition exercise in the e-commerce sector

- The relationship between offline and online retail channels is not always clear and must be assessed on a case-by-case basis:
 - Consumer preferences
 - Business model
- The market definition exercise for e-commerce platforms requires one to consider:
 - Cross network externalities
 - Optimal price structure across market sides
 - Quality measures in zero-price sides of the market
- Dynamic effects play an important role in market definition:
 - Likelihood of new entry
 - Competitive pressure exerted by potential entrants



Limitations of concentration as a measure of market power of e-commerce platforms

- The main purpose of defining a market is to determine whether a firm is dominant.



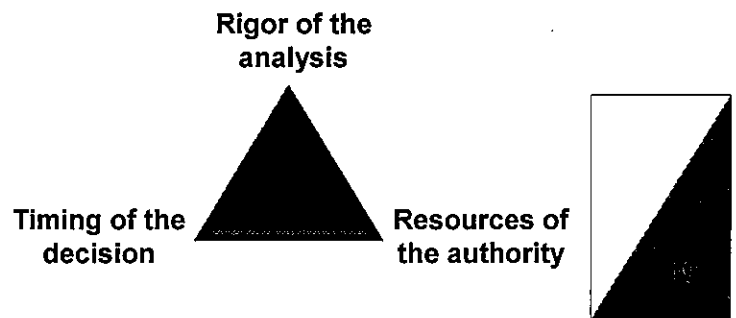
- But... Concentration is not necessarily a good measure of the market power of *e-commerce platforms*.
 - Importance of focusing on market **contestability**:
 - **Supply side**: are there significant entry costs for new entrants?
 - **Demand side**: are there significant switching costs for consumers?

There are proposals to decrease the focus in market definition and market power, while increasing emphasis on establishing a solid theory of harm...



Challenges in assessing the effects of a conduct in the e-commerce sector

- Businesses models in e-commerce are often complex and differentiated. As a result, any effects-based analysis should:
 1. **Understand how the business model works**
 - Could the firm make money without engaging in the conduct?
 2. **Consider the business rational for anti-competitive conduct**
 - What is the theory of harm? Is there an exclusionary purpose?
 3. **Assess any positive effects on innovation**
 - Is the conduct likely to result in efficiency effects that will be passed through to the consumers?

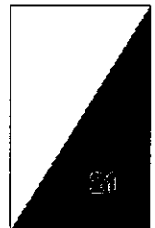
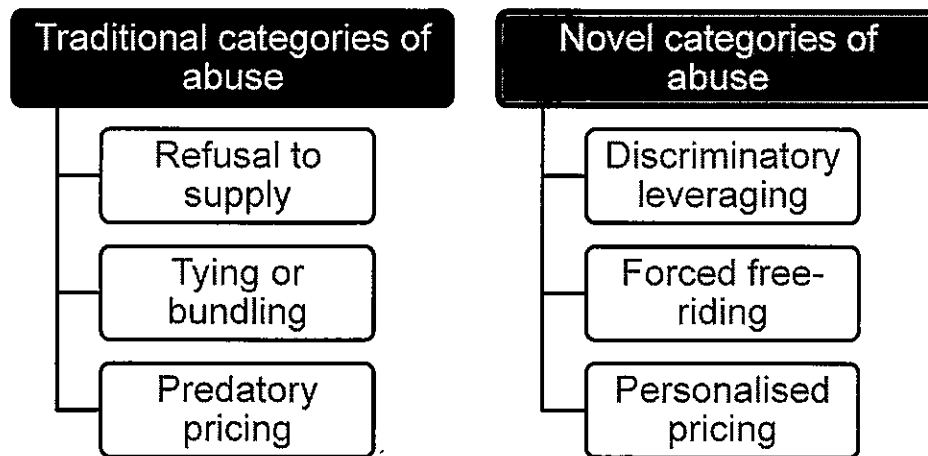


Categories of abuse of dominance in e-commerce



Categories of dominance within e-commerce

- As dominance in itself is not prohibited by competition law, but only its misuse, it is necessary to identify a relevant category of abuse.
- To date, there has been little enforcement against abuse of dominance in the e-commerce sector, but this may change with the emergence of large e-commerce platforms.



Refusal to supply within e-commerce



- Refusal to supply occurs when access to an essential input is either refused outright or offered on unreasonable disadvantageous terms.
- Narrowly construed category of abuse, due to risks of eliminating incentives to innovate. It usually applies to:
 - Natural monopoly infrastructure
 - Government-financed facilities
 - Property protected by a legal monopoly (IPRs?)

⇒ *What might be considered an essential input in the e-commerce ecosystem?*

Online platform?

- Online marketplace
- Price comparison tools
- Search results

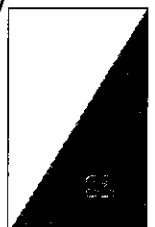
Physical network?

- Delivery network
- Distribution network
- Data centres

Consumer data?

- Purchases history
- Search queries
- Location data

Are there any actual or potential substitutes? If not, can competitors duplicate the input in the foreseeable future?





Tying or bundling within e-commerce



- Tying or bundling refers to sales practices whereby customers are required or incentivised to buy two or more products as a combined package.
- Concerns about tying may arise when dominant platform operators offer multiple services:
 - Retail listing
 - Advertising services
 - Delivery services
 - User reviews
 - Price comparison tools
 - Software
- **Risk of foreclosure** through the extension of market power from one market segment to another Vs **Efficiencies**

- Should zero-price services be treated as a separate discrete service?
- When should similar online products be treated as discrete services?
- In what circumstances are customers actually “coerced” to consume additional services?



Predatory pricing within e-commerce

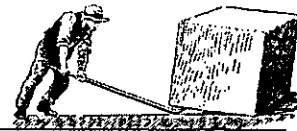


- Predatory pricing entails pricing below a relevant measure of a firm's costs – usually the variable average cost – in order to drive a rival out of the market.
- Allegations of predatory conduct are often raised against e-commerce firms, who are accused of undercutting their offline counterparts. However, price differences may be explained by lower costs due to **disintermediation** and better **technology**.

Important considerations when assessing predation in e-commerce markets:

- In multi-sided platforms, price below average cost might be the result of (efficient) cross subsidisation between market sides.
- The test for predation should be premised upon a relevant measure of the defendant's costs, not of its rivals.
- In many jurisdictions, predatory pricing is only problematic when followed by a recoupment strategy, which might be hard to implement in e-commerce markets.

Discriminatory leveraging



- Discriminatory leveraging occurs when a dominant company gives discriminatory treatment to its own subsidiary products, in order to leverage its dominance into an adjacent segment.
 - Within e-commerce, there is a concern that dominant platforms attempt to foreclose complementary or vertically related product segments where they do not possess significant market power.
- Discriminatory leveraging has raised controversy as a new category of abuse:
 - Competition rules forbid firms from discriminating against trading partners.
 - But there are generally no obligations to supply or treat competitors in the same way as the firm's own subsidiaries.

Is discriminatory leverage a construed category of refusal to supply?



Legal test in
Oscar Bronner

"HB's contention that the legal principles laid down in Bronner were wrongly applied is manifestly unfounded, inasmuch as (...) the contested decision does not oblige HB to transfer an asset or to enter into agreements with persons with whom it has not chosen to contract."

EC in response to an argument in Unilever Bestfoods v Commission

Forced free-riding



- Forced free riding occurs when a dominant firm appropriates innovation by other firms that depend on the dominant player for access to consumers.
- In the e-commerce context, there is a concern that forced free riding by a dominant platform would discourage future downstream innovation.
- Potential instances of forced free-riding:
 - Content "scraping" of webpage content or news.
 - Online marketplace operator copying the design of goods sold by third parties.
 - Operating system appropriating software developed by programmers.
 - App store replicating best third-party apps and selling them as own products.



Intellectual Property
Rights Law

But

Forced free riding may occur in
the absence of IPRs
(e.g. scraping of news / facts)

Personalised pricing



- Personalised pricing consists in the practice of price discriminating final consumers based on their personal characteristics and conduct, resulting in prices being set as an increasing function of consumers' willingness to pay.
- Personalised pricing poses concerns about distribution outcomes & fairness that must be balanced against static and dynamic efficiency.

Limitations of addressing personalised pricing through competition policy:

- Exploitative abuses are not investigated in several jurisdictions.
- It is unclear whether competition rules against discrimination cover business-to-consumer relationships.
- Rules on abuse of dominance only apply to dominant firms \Rightarrow though arguably personalised pricing is more problematic under market power.



Alternative approaches:



Consumer protection

Data protection



Abuse of Dominance in E-Commerce

Pedro Gonzaga (Pedro.Gonzaga@oecd.org)





**THE AUTHORITY FOR FAIR COMPETITION AND CONSUMER PROTECTION
(AFCCP)**

ABUSE OF DOMINANCE

S.Lkham, State Inspector
Authority for Fair Competition and Consumer Protection of Mongolia

September 26-27, 2018



OVERVIEW

GENERAL PROVISIONS

LEGAL PRINCIPLES OF DETERMINING DOMINANT POSITION ENTERPRISER

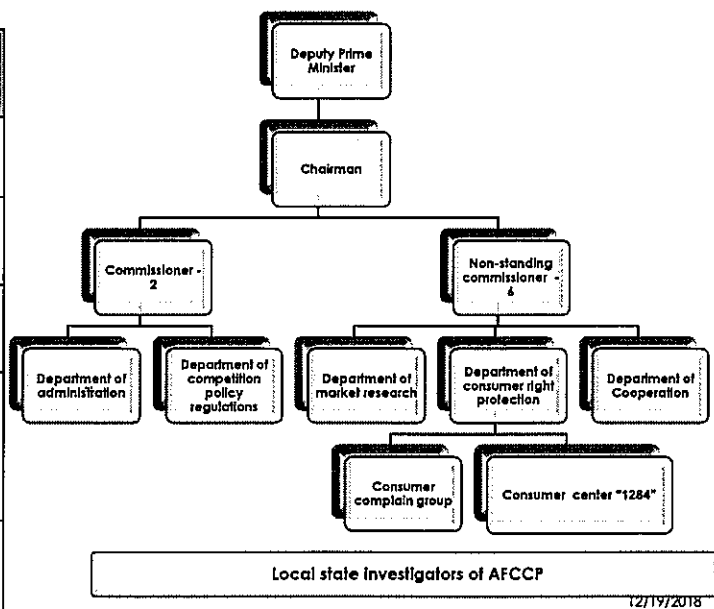
PROHIBITION OF ILLEGAL USE OF DOMINANT POSITION

CASE STUDY



The Authority for Fair Competition and Consumer Protection is a state administrative body responsible for enforcing competition legislation, implementing a competitive policy at the national level, and protecting the entities and consumers.

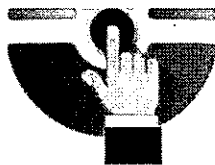
The Authority for Fair Competition and Consumer Protection	
Establishment	2004
Status	Regulating agency of the Deputy Prime Minister
Location	Ulaanbaatar /No local branches/
Law of Implementation	<ol style="list-style-type: none"> 1. Law on Prohibition of Unfair Competition - 1993 2. Law on Competition - 2010
Human resources	36 officials



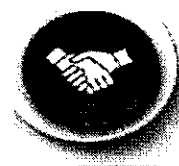
OBJECTIVE OF COMPETITION LAW



To regulate matters related to creation of conditions for fair competition in the market for entities conducting business activities



Prohibition, restriction and prevention of any activities impeding competition



To regulate matters related to identification and implementation of legal and organizational basis.



LEGAL PRINCIPLES OF DETERMINING DOMINANT POSITION ENTERPRISER

- **Article 15.1.6 of Law on Competition**

Determining dominant position enterpriser, and checking its activity

- **Decree 298 of the Government. 2010.11.17**

Renewed the regulations of determining dominant position enterpriser.



LEGAL PRINCIPLES OF DETERMINING DOMINANT POSITION ENTERPRISER

Article 5.2

It shall be considered as dominance when a single enterpriser acting alone or in a group of business entities or related parties acting together, account for over one third of the manufactures, sales and purchases of certain kind of products in the market.

Article 5.3

Even under percentage stipulated in article 5.2 of this law, if enterpriser can hinder condition of coming on the market of other enterpriser and can drive other enterpriser from market, he will be dominant by scope of product, geographical limit of market, concentration of market and power of market.

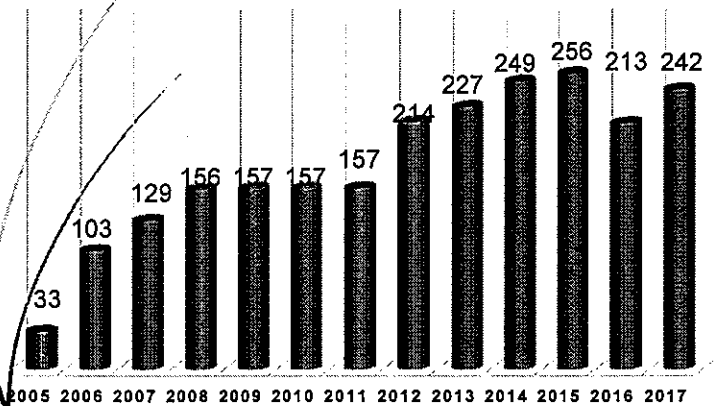




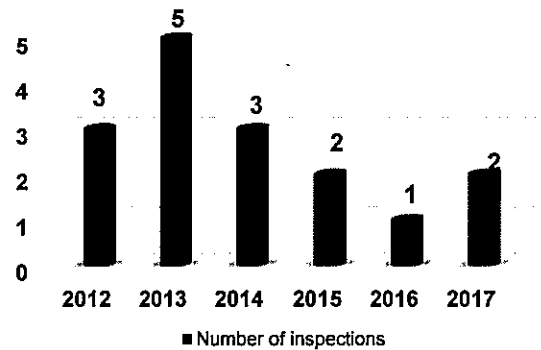
NUMBER OF DOMINANT ENTERPRISES

ENTERPRISER

■ Enterpriser



NUMBER OF INSPECTIONS MADE ON ILLEGAL USE OF DOMINANCE



AN ENTERPRISER IN A DOMINANT POSITION IS PROHIBITED TO CONDUCT THE FOLLOWING DOMINATING ACTIVITIES:

- Halting or restricting production or sale of goods in order to create an artificial shortage
- Fixing price and establishing territories within which resell goods
- Insisting on condition not to buy goods and products of his/her competitors as a condition for sale of its goods and products
- Attaching goods that are not included in a set in selling goods and products
- Selling goods and products at lower than cost prices in order to prevent other enterpriser from entering that market or to drive them out from the market
- Demanding without due cause from enterpriser to transfer his/her financial means, assets, their rights and labor force to him/her
- Requiring additional condition of products from enterpriser, selling similar kind of products by differential price in market, refusing to sell unreasonably. It shall not be referred to changing price of products which concerned location of region and calculated realization cost of transportation and to promotion which giving to wholesale and retail purchaser from manufacturer or supplier



PENALTIES IMPOSED ON PERSON VIOLATED THE LEGISLATION ON COMPETITION

Article 9

If the legal dominant employer has been used illegally and using the law prohibited by law, the damages and reimbursement shall be deducted and the legal enterpriser shall be fined for four percent of the sales revenue of the previous year's goods.



CASE STUDY

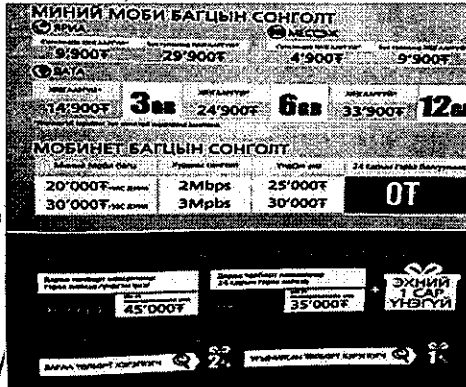
Relevant Attendance: Mobicom Corporation LLC/
Mobicom Corporation is a dominant enterpriser in the telecommunications sector.



Mobicom Corp. announced a promotional product "My MOBI Package" /calling card/ in November 2017. In order to sell products, the Mobicom Corporation announced this incentives for consumers outside of capital city of Mongolia.



Mobicom Corporation is a dominant enterpriser in the telecommunications sector



This incentives including a product which was costs 25,000 MNT and 30,000 MNT for the purchase or become a new customer and get free 2 year home internet with 2 Mbps, 3 Mbps speed and unlimited use of data cellular from Mobicom Corporation LLC. To purchase this product, consumer firstly have to register phone number on official website <https://www.mobicom.mn/en/> , subscribe and can online payment. After that, consumers can get their incentives with 'My Mobi package'.

12/19/2018



Violation

- 1. Mobicom Corporation is an entrepreneur engaged in telecommunication industry. There are 8 companies operating in telecommunication service in Mongolia. Mobicom Corporation was established as a dominant entrepreneur of telecommunication industry in 2006.
- Promotion work in November, 2017 was aimed to imposing rural area entrepreneurs from the market of telecommunication industry of Mongolia.
- 2. Mobicom corporation was in the telecommunications industry but their incentives including the 2 years use of Internet access. The subsidiary of "Mobicom Corporation" LLC is "Mobinet" LLC which is operates internet services. Mobicom Corporation has been offering free products from subsidiary Mobinet LLC.

12/19/2018



Violation

- Current act violated Article 7.1.4 Selling goods and products at lower than cost prices in order to prevent other enterpriser from entering that market or to drive them out from the market
- 7.1.12 Attaching goods that are not included in a set in selling goods and products

Actions made according to inspection

- In violation of Mobicom Corporation LLC's regarding on violation law of Mongolia, "4% of the sales revenue of the legal entities reduced year sales.
- Sales revenue for 2017: 59 billion
- Rates: 4 percent
- The penalty amount: 2.36 billion



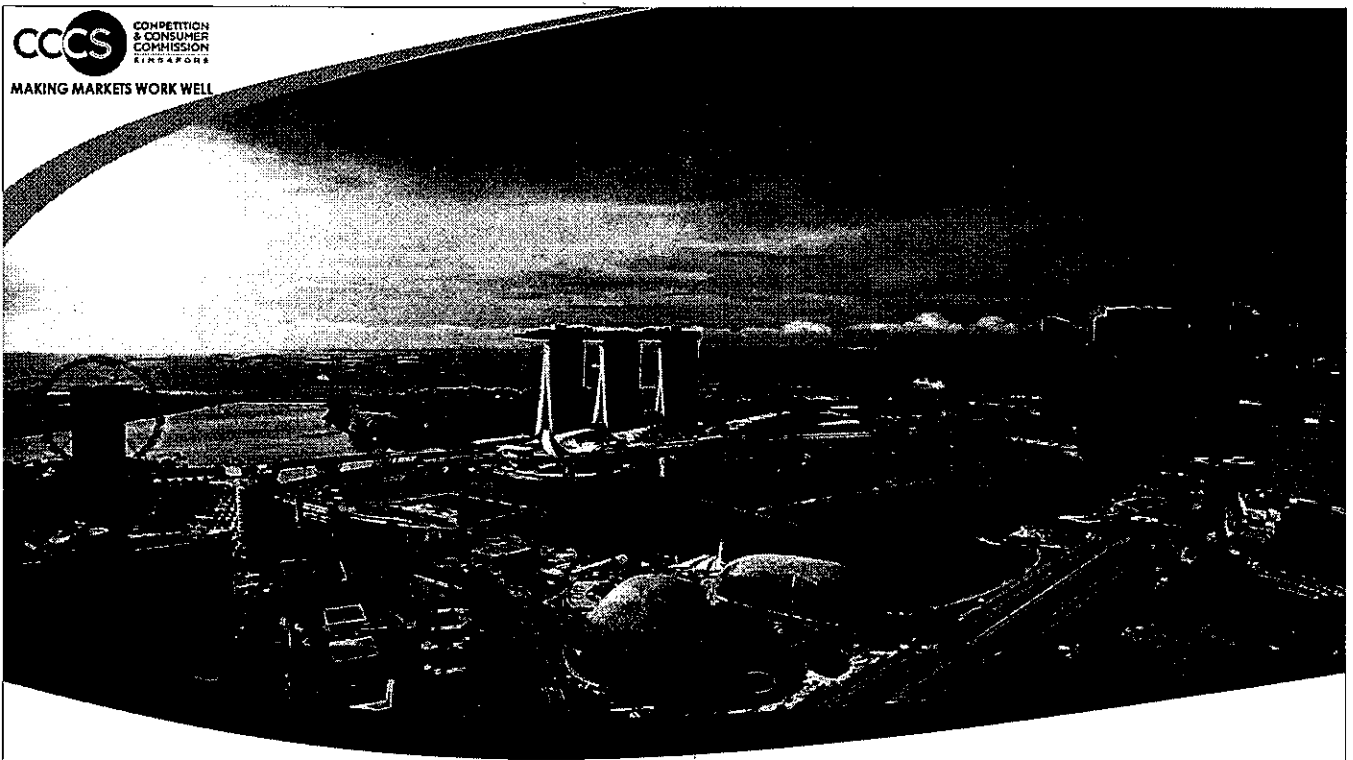
► **THE AUTHORITY FOR FAIR COMPETITION AND CONSUMER PROTECTION (AFCCP)**

► ABOUT US

- Website: www.afccp.gov.mn
- Email: Lhamaa@afccp.gov.mn



► THANK YOU FOR YOUR ATTENTION



Regional Antitrust Seminar : E-Commerce and Competition Enforcement in the Era of E-commerce

26 September 2018

Outline of Presentation

1.

Introduction to Competition Act

2.

Studies into E-Commerce and Data Landscape in Singapore

3.

Key Competition Issues in Digital Economy

4.

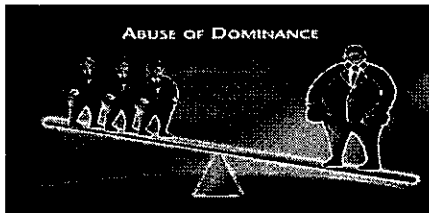
CCCS's Case Examples

Introduction to Competition Act

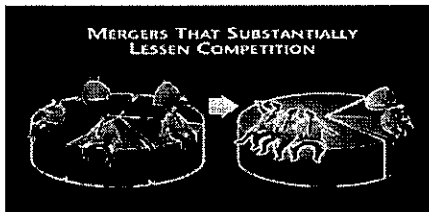
Key Prohibitions



Section 34 prohibition covers agreements between undertakings which have the object or effect of restricting competition within Singapore



Section 47 prohibition covers conduct by one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore



Section 54 prohibition covers mergers that have resulted, or may be expected to result, in a substantially lessening of competition within any market in Singapore

Introduction to Competition Act

Section 47 Prohibition

- Prohibits **abuse** of dominant position – does not prohibit undertakings from having a dominant position or striving to achieve it
- Two-step test:
 - » First, CCCS will assess whether the undertaking is dominant in a relevant market, whether in Singapore or elsewhere → involves an assessment of the extent to which there are competitive constraints on the undertaking's ability to sustain prices profitably above competitive levels.
 - » If the undertaking does indeed occupy a dominant position, CCCS will determine whether the conduct of the undertaking amounts to an abuse of the dominant position in a market in Singapore.
- Not necessary for the dominant position, abuse and effects of abuse to be in the same market

Introduction to Competition Act

Legal Test for Abuse of Dominance

- Section 47(2) of Competition Act provides an illustrative list:
 - » Predatory behaviour towards competitors
 - » Limiting production, markets or technical development to the prejudice of customers
 - » Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage
 - » Making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts
- CCCS will undertake an economic effects-based assessment in order to determine whether the conduct has, or is likely to have, an adverse effect on the process of competition

Introduction to Competition Act

Section 54 Prohibition

- Substantial lessening of competition (“SLC”) test is applied by comparing the extent of competition in the relevant market with and without the merger situation
- Merger situation could lead to SLC if it creates, maintains or enhances the following types of market power:
 - » Raises or leads to non-coordinated effects
 - » Raises or leads to increased scope for coordinated effects

CCCS Study on E-Commerce in Singapore

Study commissioned in 2015 in view of increasing number of E-commerce platforms in Singapore

- Purpose of study:
 - » To better understand the development and characteristics of E-commerce
 - » To identify the specific competition issues which E-commerce activities can give rise to
 - » To determine the implications for competition policy and law in Singapore
- Study identified several features and issues which are likely to be more prevalent in online markets which may require particular attention when CCCS conducts its assessments

CCCS Study into Data Landscape in Singapore

Joint research project done in 2017 to better understand the data landscape in Singapore

- Aligned with government efforts to build strong digital capabilities and harness data as an asset, CCCS embarked on a joint research study with Personal Data Protection Commission (PDPC) and Intellectual Property Office of Singapore (IPOS)
- Purpose of study:
 - » Better understand the Big Data and data analytics landscape in Singapore
 - » Explore opportunities and challenges for businesses arising from data analytics, data sharing and data monetisation
 - » Assess the implications on competition policy and law, personal data protection and intellectual property rights

Key Competition Issues in Digital Economy

Treatment of data as an asset and a source of market power

- Customer data may become an important source of market power as new entrants may find it difficult to replicate information collected by incumbents
- When assessing market power in data-driven industries, must consider whether the data can be replicated under reasonable conditions by competitors and whether the use of data is likely to result in a significant competitive advantage
 - » For example, information collected by incumbents in some circumstances may constitute an “essential facility”, if there is no alternative information available, and may thus be considered as a significant entry barrier.
- Accumulation of data can reinforce network effects, and increase barriers to entry and expansion for new or smaller firms

Key Competition Issues in Digital Economy

Market may “tip” in favour of a small number of large digital platforms

- While there are benefits from having large online platforms, the strong network effects may mean that the market becomes more concentrated
 - » Most successful online platform is rewarded as the market tips in its favour, making it difficult or even impossible for new entrants to compete against the incumbent
- Once number of users reaches a critical mass, the market could tip in favour of one digital platform
- Smaller players will find it challenging to compete effectively with the leading platform as they do not have access to the same quantity and quality of data

Key Competition Issues in Digital Economy

Practices which discourage multi-homing may raise competition concerns

- Mere accumulation of large amount of data by a business per se, does not equate to the occupation of a dominant position
- Dominance may be strengthened by network effects, but may be weakened due to existence of multi-homing
- If consumers frequently multi-home, this could facilitate the entry and expansion of competing platforms
- Where incumbent digital platforms engage in practices to discourage multi-homing, this may raise competition concerns

Key Competition Issues in Digital Economy

Discriminatory access to data may raise competition concerns

- Discriminatory access to data for competitors may also be achieved through vertical integration
 - » For example, there is a possibility that e-commerce platforms which operate both the platform and their own online retail arm, could restrict data available to other online retailers operating on the same platform
 - » This gives the vertically-integrated e-commerce platform a competitive advantage over other online retailers, as it would have access to richer datasets on consumer preferences and buying patterns
- Must consider the ease of access to data and the substitutability of data

Case Examples

CCCS Investigation into Grab-Uber Transaction (as of 5 July 2018)

- Sale of Uber's Southeast Asian business to Grab in consideration for Uber holding a 27.5% stake in Grab
- Ride-hailing platform services market in Singapore is a two-side market connecting drivers on one side and riders on the other
 - » Interdependence of drivers and riders give rise to indirect network effects
- Substantial percentage of the private hire car and taxi fleet were exclusive to Grab, and Grab's fleet partners
 - » Effectively prevent drivers from multi-homing and reinforces the network effect possessed by the parties
 - » Greatly increase the time and upfront expenditure needed for a new potential entrant to build up a driver network and rider network similar in scale and size to the parties

Case Examples

CCCS Investigation into Grab-Uber Transaction (as of 5 July 2018)

- Market for the rental of the private hire cars is characterised by considerable barriers to expansion
 - » Significant amount of time and upfront capital expenditure to build a car rental network of sufficient scale
 - » Higher cost of maintaining private hire vehicles as compared to normal rental vehicles
- Rental companies may not be able to expand and compete effectively without a tie-up with a ride hailing platform
- Post-transaction, CCCS was of the view that Grab would be in a strong position to put in place exclusive arrangements with the private hire rental companies and the drivers who rent from these companies in order to reinforce its position in the ride-hailing platform services market

Case Examples

CCCS Investigation into Online Food Delivery Market

- Investigation into online food delivery market in Singapore
 - » Alleged anti-competitive practice, where an online food delivery provider had entered into exclusive agreements with certain restaurants
 - » Prevented restaurants from multi-homing
- Exclusivity agreements could also potentially reinforce network effects and foreclose entry of new players or restrict expansion of existing players
- At that point in time, CCCS noted that presence of exclusive agreement had not harmed competition
- Issued media release to remind online food delivery provider that exclusive agreements may risk infringing competition law if the online food delivery provider becomes dominant

Case Examples

SEEK-Jobstreet Merger

- Merging of online recruitment platforms operated by JobsDB Singapore and JobStreet Singapore
 - » Includes merging of jobseeker databases
- Quality jobseeker databases would take time to build up, and this was not something which a new entrant could collect overnight
- New entrant would have to invest heavily in advertising and marketing to garner critical mass of jobseekers and recruiters to its platform, to overcome significant network effects enjoyed by the merging parties
 - » Significant barrier to entry for new entrant

Case Examples

SEEK-Jobstreet Merger

- CCCS was concerned that the proposed transaction would result in the following non-coordinated effects:
 - » Ability/incentive to change the structure of the market by demanding exclusive “lock-in” contracts, which prevent customers from switching away from the merged firm
 - » Ability/incentive to bundle and tie products across its two brands which would have the effect or likely effect of preventing customers from switching away from the merged firm
 - » Ability/incentive to impose price increases post-merger
- Behavioural commitments were offered by merging parties
 - » To address the concern that customers would no longer be able to multi-home on other online recruitment platforms, the merging parties committed not to enter into exclusive agreements with employer and recruiter customers
 - » Retain existing practice of multi-homing by customers, and ensure that competing platforms can continue to enter and expand

Conclusion

Digital sector, including e-commerce, will remain one of CCCS's focus areas

- CCCS's current efforts are directed at:
 - » Deepening our understanding of the technological and market developments
 - » Reviewing whether our assessment toolkit is relevant and sufficient to meet the new business models that abound in the digital sector

Thank you



**A VIBRANT ECONOMY WITH
WELL-FUNCTIONING AND INNOVATIVE MARKETS**



Abuse of Dominance in e-commerce (Indian Experience)

**Regional Antitrust Seminar on "E-Commerce and Competition",
Sep 26-27, 2018, Bali**

By

Saurabh Mishra & V. Sriraj
Competition Commission of India

1



Predation in App-based Taxi Aggregation service

2

Abuse of Dominance: App-based Taxi Aggregation service

Facts of the Case

•Allegation: ANI Technologies Pvt. Ltd (Ola) an app-based taxi aggregation service (OP) provided discounts and incentives to its customers and drivers which amounts to predatory pricing is in contravention of Section 4 of the Act and resulted in foreclosure of market for new entrants.

3

Abuse of Dominance: App-based Taxi Aggregation service

Issues for Investigation

- Whether the OP held dominant position in the relevant market?
- Whether the conduct of the OP amounts to a predatory pricing as prohibited under Section 4(2) (a)(ii) of the Act?

4

Abuse of Dominance: App-based Taxi Aggregation service

Finding

- Relevant Market: Market for services of Radio Taxi in Bengaluru as no demand side and supply side substitutability of Radio taxi to other modes of transport due to their unique features
- Market Share: The criteria to determine the market share of a company was the number of trips/ride and not the fleet size of a company as it may lead to double counting

5

Abuse of Dominance: App-based Taxi Aggregation service

Finding

Market Share:

- The market share of the OP was which had touched a peak of 75.49% in January 2015, declined to 57.52% by September 2015.
- Uber which is next important competitor whose market share in January 2015 was mere 6.04% has been able to increase it to 36.35% in September 2015.

6

Abuse of Dominance: App-based Taxi Aggregation service

Conclusion

- For any player to be considered dominant, it should be able to hold its market share for a reasonable period of time. This does not seem to be the case here as Ola's market share was declining very quickly as Uber which entered the relevant market almost three years after Ola, was posing a significant competitive threat to Ola.

7

Abuse of Dominance: App-based Taxi Aggregation service

Conclusion (Cont.)

The Commission, while assessing alleged dominance of the cab operator also took into consideration

- that the competitive process in the relevant market was still unfolding
- market was growing rapidly, effective entry had taken place thereby leading to gradual decline in the operator's market share

8

Abuse of Dominance: App-based Taxi Aggregation service

Conclusion (Cont.)

- there existed countervailing market forces that constrained its behaviour and also the nature of competition in dynamic, innovation-driven markets.
- Based on these collective considerations, the Commission held the view that OPs dominance in the relevant market remains unsubstantiated.

9

Abuse of Dominance: App-based Taxi Aggregation service

Conclusion (Cont.)

- The Commission does not fully disagree with the Informants that the low prices of OP are not because of cost efficiency, but because of the funding it has received from the private equity funds. But there is no evidence that the access to such funding was inequitable and that the market for financing was not competitive and had aberrations.

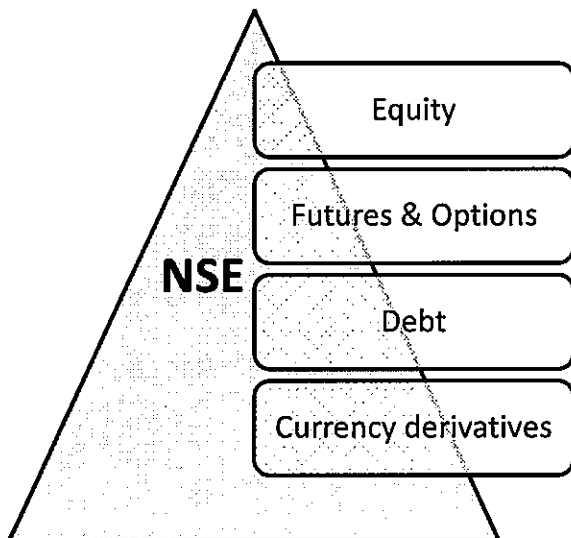
10

Predation in stock exchange services

(MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd.)

11

Allegation



MCX, an entrant in stock exchange platform for trading in currency derivatives (CD) alleged NSE of indulging in predatory pricing in CD segment to kill competition, by way of waiver of:

- transaction fees,
- annual subscription charges,
- data feed fees

Cross-subsidization of losses in CD segment from monopoly profits in other segments

12

Relevant Market

- | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> • NSE: <ul style="list-style-type: none"> – Market for CDs including OTC products • MCX: <ul style="list-style-type: none"> – Market for stock exchange services | <ul style="list-style-type: none"> • CCI: <ul style="list-style-type: none"> – Characteristics of futures and forwards – Underlying purpose of trading in OTC segment and – Regulatory framework for OTC trade and exchange traded contracts – Characteristics of different exchange traded derivatives – Settlement process for different contracts <p>Relevant Market - exchange traded currency derivatives</p> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

13

Dominant Position of NSE

Market Share	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10
NSE	57.26	66.54	76.97	86.25	87.33	88.68	90.16	90.14	92.52	94.05
BSE	42.74	33.46	23.03	13.75	12.67	11.32	9.84	9.86	7.48	5.95

Based on the volume of different contracts traded

Size of the Indian SE* Services Market (Apr 08 – Mar 09) (Rs. In Crores)						
Stock Exchange		NSE	BSE	MCX-SX	Size of the Segment	Share of each segment in SE services* (%)
Turnover	Equities	2752023	1100074	-	3852097	25.2
	F&O	11010482	12268	-	11022750	72.1
	CD	162563	868	148826	312257	2.0
	Debt	50029	38058	-	88087	0.5
Total Turnover		13975097	1151268	148826	15275191	
Market share in SE* services (%)		91.4	7.5	0.9		

* SE = Stock Exchange

Table prepared on the basis of data provided in SEBI Bulletin September 2009.

Ability to sustain zero pricing for a sustained period

14

Abuse

(Appropriate cost standard for determining predation)

- Predation in evolving network markets
- Use of AVC or AAC in stock exchange services (Advertisement costs)
- LRAIC: appropriate measure in stock exchange services
- LRAIC same as AVC in the present case
- ATC: appropriate measure in cases of cross subsidization and predation pricing by multi-product firm
 - Cost of single product firm vs. multi product firm
 - Zero pricing for a sustained period of around three years –below cost under any standard

15

Abuse

(evidence of intent to predate)

- Standard of proof: *“with a view to reduce competition or eliminate competitor”*.
- Concurrent waivers - all revenues streams of CD segment
- Repeated and completely opaque waivers
- Habitual predation
- Data-feed fee waiver despite Board’s approval
- Zero pricing in itself is evidence of predatory intent

16

Abuse

(objective justifications)

- Promotional pricing – penetrative strategies
- Indispensability of waivers

NSE found guilty of unfair pricing – Penalty of 5% on the turnover of NSE (INR 55 Cr.)

17

Thank You

18



Non-Price Restraints – Canadian Framework and Case Studies

Competition Bureau Canada
Bali, Indonesia – September 26-27, 2018

Canada

Outline

- The Competition Bureau's **Competition Law Framework** and assessment of **Vertical Non-Price Restraints**
- **Case Studies:**
 - Toronto Real Estate Board
 - MasterCard and Visa
 - Contact Lenses – Advocacy

Competition Bureau

- The Competition Bureau, as an **independent law enforcement agency**, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace
 - Headed by the Commissioner of Competition, the Bureau is responsible for the administration and enforcement of the **Competition Act**, the Consumer Packaging and Labelling Act (except as it relates to food), the Textile Labelling Act and the Precious Metals Marking Act
-

3

Competition Tribunal

- As an investigative body, the Competition Bureau does not have the power to impose remedies on parties
 - Matters concerning **vertical restraints** and other restrictive trade practices are instead brought before the **Competition Tribunal**, an independent and specialized adjudicative body
 - Power to issue orders and impose **remedies**, including **administrative monetary penalties**
-

4

Vertical Restraints Under the Competition Act

Under the *Competition Act*, there is no specific definition of **vertical restraints**:

- Conduct that can be considered vertical restraints are not per se illegal and are instead assessed as part of an **effects-based analysis**
- Challenge lies in assessing the impact of this conduct as vertical restraints can be **pro-competitive or anti-competitive**
- Anti-competitive conduct that does not result in an adverse effect or substantially lessens or prevents competition in a market **will not raise concerns**

5

Abuse of dominance provision in Canada (Section 79)

Three-part test for abuse of dominance in Canada:

- a) Dominance: the firm must have **substantial market power**;
- b) the firm must have engaged or is engaging in **a practice of anti-competitive acts**:
 - practice: more than an isolated act, or an act that is sustained and systemic, or that has a long-term effect on the market
 - anti-competitive act: requires evidence of an anti-competitive intent; evidence of pro-competitive or efficiency-enhancing business justifications is taken into account
- c) The practice has had, is having, or is likely to have the effect of **substantially preventing or lessening competition** in the market.

6

Other Provisions to Examine Vertical Restraints

- **Section 75:** Refusal to deal
 - **Section 77:** Exclusive dealing, tied selling, and market restriction
 - **Section 76:** Resale Price Maintenance (primarily deals with price restraints)
 - Conduct addressed in the provisions above can however be **pro-competitive** or have **efficiency-enhancing business justifications**
-

7

Vertical Restraints in the Digital Economy

The *Competition Act* is **technologically neutral**

- Applies to the sale and distribution of products and services irrespective of **brick-and-mortar** or **online channels**
 - Vertical restraints in the **digital economy** can give rise to specific considerations when assessing the pro-competitive or anti-competitive nature of the conduct
 - In the digital economy, anti-competitive behaviour can create particularly significant roadblocks to **innovation and disruption**
-

8

Toronto Real Estate Board

- The largest real estate board in Canada
 - Owns and operates the **Toronto MLS system**, which contains current property listings and historical information about residential real estate purchases and sales
 - Commissioner's case focused on **vertical non-price restrictions** that TREB imposed on new and innovative real estate brokerage models
 - **Virtual Office Websites** (VOWs) are a platform through which innovative brokerages can deliver their services **online** – models that pose a **competitive threat** to TREB members operating in more traditional ways
-

9

Toronto Real Estate Board

Litigation **commenced in 2011:**

- In 2011 the Commissioner filed an abuse of dominance application with the Competition Tribunal
 - Following a hearing in 2012, the Tribunal **dismissed** the Commissioner's application
 - The Commissioner **successfully appealed** this decision before the Federal Court of Appeal (FCA), and the case returned to the Tribunal for a redetermination hearing in fall 2015
 - On April 27, 2016, the Competition Tribunal **ruled in favour** of the Commissioner
 - On December 1, 2017, the FCA **upheld** the Tribunal's decision
 - On August 23, 2018, the Supreme Court of Canada **dismissed** TREB's application to seek leave to appeal the FCA's decision
-

10

Toronto Real Estate Board

- Data excluded from electronic feed to VOWs:
 - **Sold** and “**pending sold**” sales
 - Withdrawn, expired, suspended or terminated listings
 - Commissions to “cooperating brokers”
 - Prohibitions on:
 - **Display** on a VOW of the data excluded from the electronic feed
 - **Use** of electronic data to provide innovative analytical tools
-

11

Toronto Real Estate Board

Key Considerations:

- Can **section 79** be applied to TREB if it controls a market but does not compete in that market?
 - Were TREB’s restrictions adopted for an **exclusionary** purpose or were there **legitimate business justifications**?
 - Did these restrictions result in a **substantial lessening or prevention of competition**?
 - The Commissioner’s case relied on **non-price effects** arising from TREB’s vertical restraints
 - Were these restrictions a mere exercise of **copyright**?
-

12

Toronto Real Estate Board

- The order issued by the Tribunal requires TREB to **remove restrictions** on its member agents' access to important data, including historical listings and sale prices, for **display online** through VOWs
 - TREB's member agents are permitted to use the data in innovative ways to offer consumers the convenience of **data-driven insights** into home sales prices and trends via the web and to improve the **efficiency** and **quality** of their services
 - The Supreme Court's August 2018 decision brings **finality** to the seven year litigation
-

13

MasterCard and Visa

- The Commissioner filed an application (section 76) against MasterCard and Visa to address **restrictive anti-competitive terms** imposed on merchants who accept their credit cards, which included:
 - Discouraging the use of more expensive credit cards by customers in favour of lower-cost methods of payment;
 - Declining to accept certain credit cards, such as those with higher card acceptance fees; and/or
 - Applying a surcharge to transactions where the customer uses more expensive credit cards
-

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MasterCard and Visa

- In the Bureau's view, the vertical restraints imposed by MasterCard and Visa constrained competition for credit card network services, including competition with respect to **credit card acceptance fees**
 - Instead, credit card acceptance fees are passed down to customers in the form of **higher retail prices** for goods and services
 - In two-sided markets, such as **credit card payment networks** that are instrumental in driving online sales, these issues are further exacerbated by **network effects**
-

15

MasterCard and Visa

- On July 23, 2013, the Tribunal **dismissed** the Commissioner's application
 - The legal requirements under section 76 were **not met**
 - However, an alternative analysis carried out by the Tribunal determined that, if it erred in its legal interpretation, there had in fact been an **upward influence on prices** and an **adverse effect on competition**
 - Any remedy would be better addressed through **regulation** as opposed to a court order
-

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MasterCard and Visa

- On November 4, 2014, MasterCard and Visa submitted separate voluntary proposals to the **Minister of Finance** reducing their credit card acceptance fees to an average effect rate of **1.5%** for five years
 - The Bureau has continued to advocate for regulatory and other changes in the payments industry that enhance **consumer switching** and allowing merchants to **opt out** of emerging payment methods that have additional or increased fees
-

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Competition Advocate – Contact Lenses

- The Bureau has a strong history of advocating for increased competition and innovation in the **health care sector**
 - Consistent with its enforcement mandate, the Bureau believes that competitive markets lead to more **innovation**, increased consumer **choice** and **lower prices**
 - Advocating to **governments, regulators and other decision-makers** can be an effective and efficient means to enhance competition
-

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Competition Advocate – Contact Lenses

- The growing prevalence of online retail channels in the eyewear industry has been met with some resistance from **provincial regulatory bodies**
 - The Bureau recognizes that regulators have legitimate **public interest mandates**, including health and safety considerations, that are the basis for regulations
 - At the same time, the Bureau believes an **appropriate balance** needs to be struck with competition considerations, which can bring significant consumer and patient benefits (access in rural areas)
-

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Competition Advocate – Contact Lenses

- The Bureau's recent efforts focused on identifying **existing limitations** that potentially restrict the manner in which contact lenses and prescription eyewear may be **sold online**
 - In certain provinces, only certain licensed professionals may "**dispense**" eyewear and this may limit the ability of online retailers to sell these products to consumers
-

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Competition Advocate – Contact Lenses

- Important to emphasize that the Bureau is not advocating for the removal of regulatory safeguards that are necessary to **protect the public interest**
 - Rather, the Bureau is advocating that regulators consider **less restrictive measures** that can both facilitate online sales, which are growing in all respects of the economy, and maintain patient health and safety
 - Regulation should be used only where **market forces** will not achieve public policy objectives, and even then, only to the extent necessary
-

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Conclusion

- The *Competition Act* provides the Bureau with an array of enforcement tools necessary to examine vertical non-price restraints in a manner that evolves with the digital economy
 - Vertical non-price restraints are assessed under an effects-based analysis and can be pro-competitive and efficiency enhancing
 - Where regulations governing certain industries are the basis of vertical restraints, the Bureau may advocate for less restrictive regulations that do not inhibit legitimate competition
-

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Canada 

E-Commerce and Competition: A Hong Kong Perspective on Non Price Restraints

Hong Kong Competition Commission

Timothy Ker
Senior Adviser
(Advisory & Int'l Policy)

Dickie Mok
Legal Counsel

Antitrust Regional Seminar on
E-Commerce and Competition
September 26-27, Bali

Outline

1. The Hong Kong Competition Commission
2. E-Commerce in Hong Kong
3. Competition issues in e-commerce

The Hong Kong Competition Commission

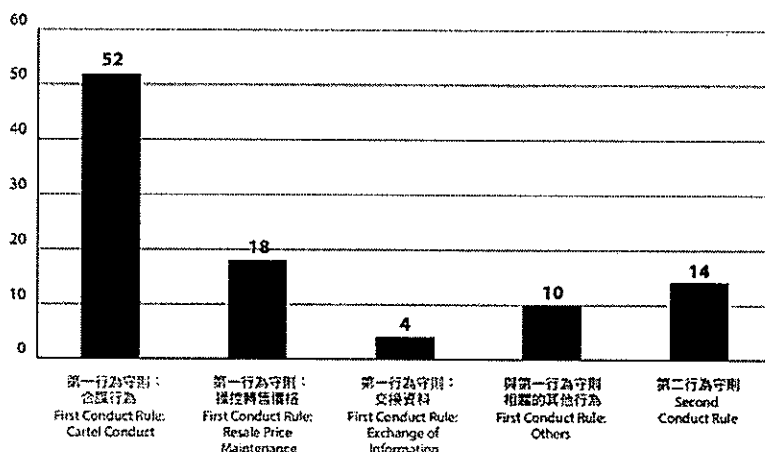
The Hong Kong Competition Commission

- Competition law came into force December 2015
- 55 employees
- Prosecutorial model
 - 3 cases in the Tribunal
 - Approx. 30 investigation
 - 3,200 complaints since we started
- Substantive law modelled on the EU
- Primary focus of enforcement activity is on cartel conduct

The Hong Kong Competition Commission

- Focus of the Commission's enforcement activity has thus far been on cartel conduct.

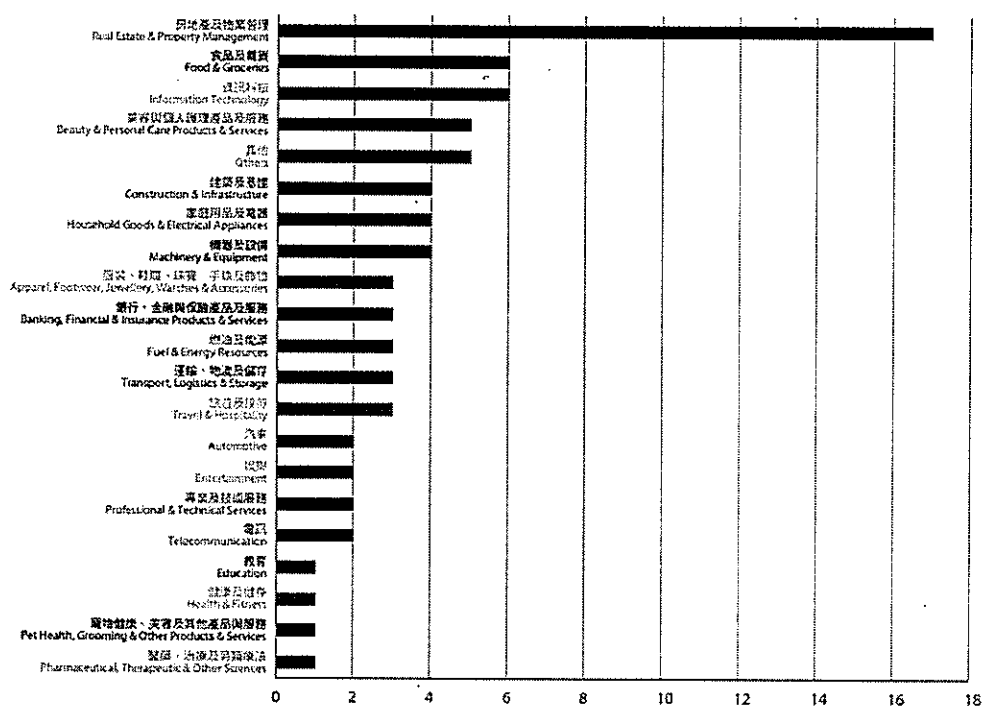
Investigation and Initial Assessment cases (2016/2017)



5

Commission's Enforcement Activity

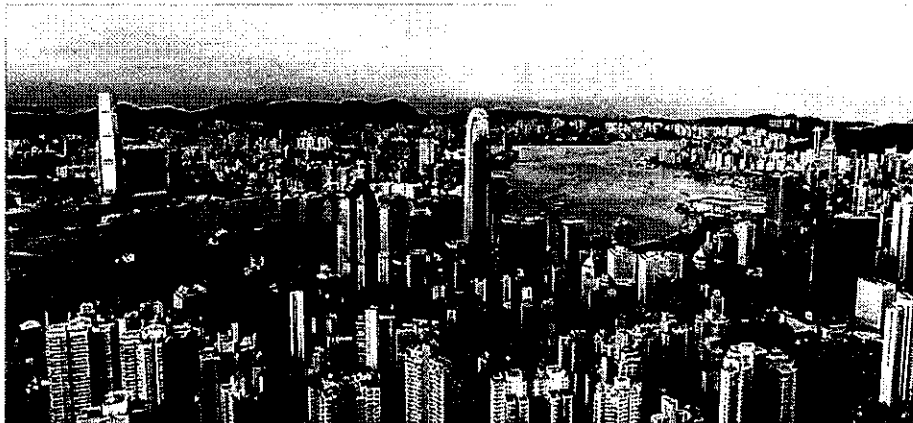
Investigation and Initial Assessment cases (2016/2017)



6

E-Commerce in Hong Kong

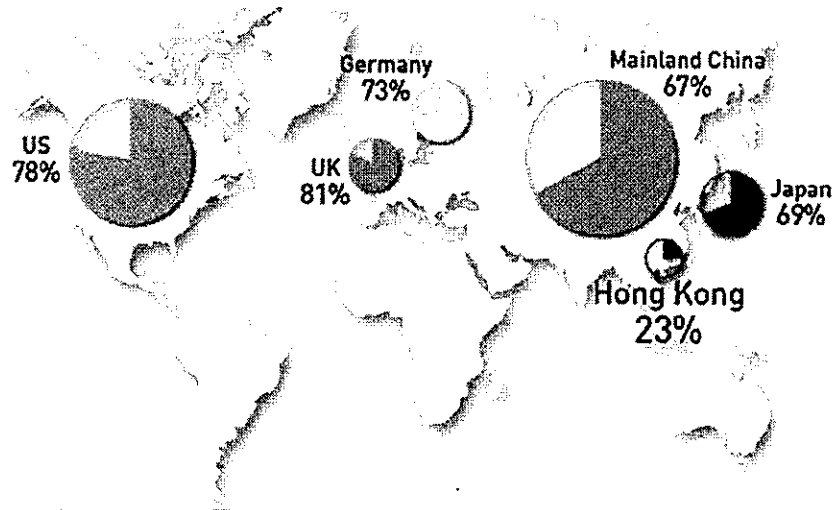
E-Commerce in Hong Kong



- Special Administrative Region within China: Separate legal system, immigration, import/export, etc.
- Population: 7,448,900 as of mid-2018 (census data)
- Population density: 6,732 persons per km² (4th highest after Macau, Monaco and Singapore)

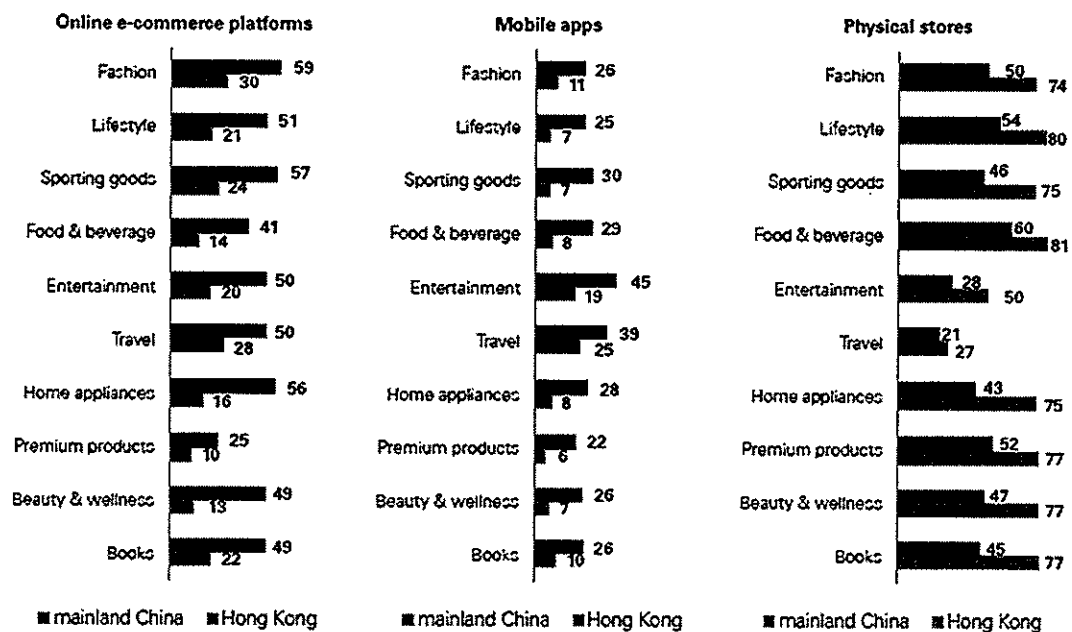
E-Commerce in Hong Kong

Figure 1: Online retail penetration rates in Mainland China, selected EU countries, the US, Japan and HK⁸



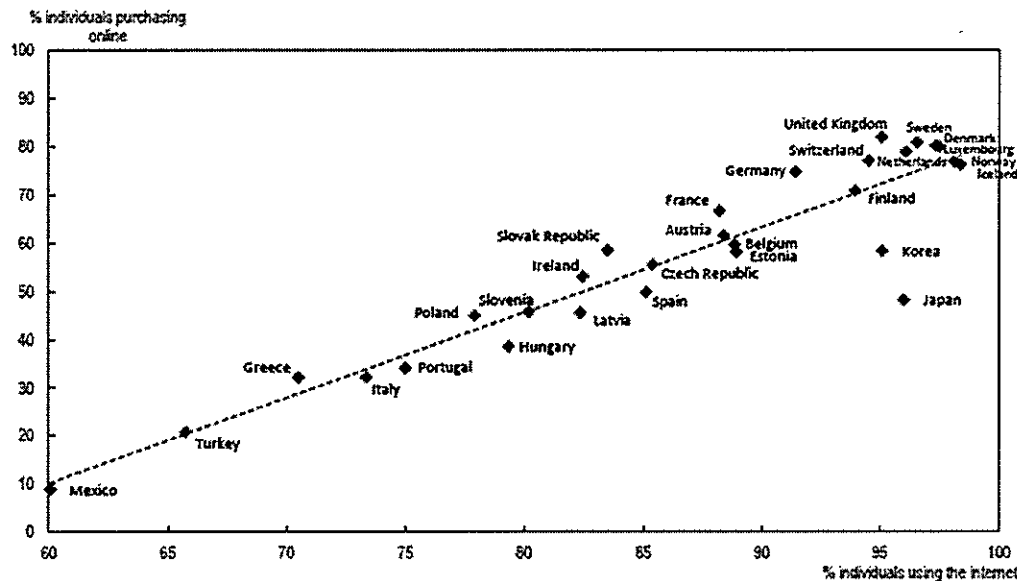
E-Commerce in Hong Kong

Where did you shop last year?



E-Commerce in Hong Kong

Figure 2. E-commerce and internet penetration in OECD countries in 2017



Note: No data is available for Australia, Canada, Chili, Israel, New Zealand and the United States.

Source: OECD (2018), "ICT Access and Usage by Households and Individuals", OECD Telecommunications and Internet Statistics (database), <http://dx.doi.org/10.1787/b9823565-en>.

E-Commerce in Hong Kong

Explanations for low e-commerce penetration

- Hong Kong has many shopping malls – highest mall density in the world
- Hong Kong people treat shopping as a leisure activity
- Hong Kong shipping costs are relatively high
- Hong Kong e-commerce sites are less well developed than in other countries
- Other demographic or geographic factors

Competition issues in e-commerce

1st Possible Response – Wait and See

- Commission is a young and relatively small competition authority
- Commission's focus has thus far been on cartels
- E-commerce remains a relatively small part of Hong Kong's economy
- Complaint driven regime and we have few relevant complaints
- No single market imperative

1st Possible Response – Wait and See

Is there consensus in relation e-commerce related non-price restraints?

A. Online sales ban

B. Exclusive distribution agreement and parallel import bans

C. Geo-blocking

A) Online Sales Ban

Approach in HK

- On-line sales bans not distinguished from other selective distribution systems (SDS)
- SDS, where FCR applies, considered 'by effects'
- No block exemption or level of market share above which concerns might arise
- No cases, advisory notes, or complaints
- Single market imperative does not apply

A) Online Sales Ban

Approach in Europe

- Imposing online sales ban considered an object infringement in certain circumstances
 - Metro 1 (criteria for Article 101 not to apply)
 - VABER
 - Pierre Fabre (indirect online sales ban object infringement)
 - Ping (UK case online sales ban object infringement)
- Contrast with SDS restrictions on online market places – Coty
- How relevant is the European approach in jurisdictions without a single market imperative?
- Does an online sales ban reveals in itself a sufficient degree of harm to competition to constitute an object restriction in the context of HK given lower e-commerce rates?

A) Online Sales Ban

Approach in other jurisdictions

You tell us!

B) Exclusive Distribution and Parallel Import Ban

Approach in HK

- Modelled after EU principles
- Legal principles are well established and largely transferrable
- Considerations:
 - Single market considerations do not arise
 - No vertical block exemption
- What if exclusive distribution is accompanied by parallel import ban (e.g. from Mainland China)?
 - EU position – ‘absolute territorial protection’ has the object of restricting competition
 - Largely motivated by single market imperative – but, loss of intra-brand competition may have harmful effect on competition.

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C) Geo-blocking

Approach in Hong Kong

- Geo-blocking is not covered in the Commission’s Guidelines.
- Geo-blocking may restrict online sales or parallel imports into Hong Kong and in theory potentially restrict competition.

Approach in Europe

EU has adopted Regulation 2018/302 setting out bright-line rules on the prohibition of geo-blocking.

- Clear that the Regulation is motivated by single market considerations and do not affect the competition law position.
- Likely inappropriate to simply adopt the EU position.

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2nd Possible Response – Worry!

Why competition authorities might like higher rates of e-commerce penetration and worry about low rates:

- Expansion of consumer choice and potential for fierce price competition.
- Increases availability of information and transparency leading to reduced search and comparison costs. User reviews and rating may increase confidence in product and retailer.
- Reduces barriers to entry for smaller retailers/distributors.
- E-commerce provides a means for compensating for smaller domestic markets particularly in relation to niche products.
- In some jurisdictions (e.g. Hong Kong) there may be a large number of malls but many may have common ownership.

2nd Possible Response – Worry!

- Easy to identify *demand-side* factors to explain low e-commerce penetration rates.
- Could anti-competitive restraints (price and non-price) also play a role? For example:
 - Resale Price Maintenance
 - Online sales bans
 - Restriction by Trade Associations
 - Other horizontal agreements
- If this was a problem has the introduction of competition law already solved it?



Thank you for listening!

JingHui, TSAI (蔡靜慧)
Taiwan Fair Trade Commission (TFTC)

Outline

Overview



Case Studies



Conclusion

Overview

The B2C e-commerce operations in Taiwan :

Shopping Websites

- Website operators sell products to consumers and earn the difference prices between retail and wholesale prices.

E-commerce Platforms

- Platform operators collect rents from suppliers and provide technical assistance.

- Unlike on the shopping websites, suppliers have more autonomy on e-commerce platforms and are allowed to market products of their own brands.

The influence on competition of shopping websites and e-commerce platforms

De-intermediary and vertical integration

manufacturers can directly sell products to consumers through shopping websites and e-commerce platforms

Obscure geographic market borderlines

consumers can purchase products from overseas

Entry barriers for latecomers

the network effect will cause enterprise that entering the market early to have the first-mover advantage

Increase of price transparency

enterprise can respond more quickly when competitors lower their prices; facilitates competitors to supervise others

Issues of free riding

consumers may check out the products in physical stores and collect related information before buying them from online stores

Challenges for competition law

Definition of the relevant market

- online shopping
- the range of geographic market becomes more extensive

Both pro- and anti-competitive effects

- price transparency
- monitor price easily

Case Studies

A case of exclusive dealing contracts between e-commerce platform and e-tailers(2015)

• FACT

Complaint

- P Co. signed with e-tailers including provisions prohibiting the e-tailers from setting up stores on other e-commerce platforms.
- Restricting the e-tailers' freedom to deal with other e-commerce platform operators.

Investigation and Assessment factors

- P Co. was the largest e-commerce platform in Taiwan.
 - The purpose and nature of exclusive dealing provisions
 - The foreclosure rate and duration of exclusive dealing provisions
 - The effect of exclusive dealing provisions on competition

The purpose and nature of exclusive dealing provisions

- 1) prevent competitors from “getting a free ride” ?
 - P Co. claimed that the stipulation of exclusive dealing provisions in the rental service contracts was designed to prevent e-tailers using the services of P Co. from opening more shops on other e-commerce platforms to market their products or services after quickly building up sales, good ratings, reputations and purchase ability.
 - While P Co. still had to shoulder cost and management risks for such businesses.

The purpose and nature of exclusive dealing provisions

2) whether the range of restriction covered by such exclusive dealing provisions is across the board or only in certain areas ?

- The TFTC's investigation showed that P Co. signed with e-tailers only restricted the e-tailers from setting up operations on e-commerce platform that were competitor of P Co.
- not cover other e-commerce operating modes.

The purpose and nature of exclusive dealing provisions

3) whether the exclusive dealing provisions are unilaterally imposed "take-it-or-leave-it" provisions or an agreement established after negotiation ?

- Despite more than half of the e-tailers that having signed contracts that included exclusive dealing provisions, there were still a rather considerable number of e-tailers not restricted by the exclusive dealing provisions.
- P Co. didn't impose exclusive dealing on all the e-tailers.

The foreclosure rate and duration of exclusive dealing provisions

1) Was the rate of foreclosure sufficient to threaten competition ?

- Since opening shops on e-commerce platforms is a new approach to set up a business and it has been growing rapidly.
- The competitors of P Co. could attract retailers that had not yet set up online operations but were interested in doing so.

The foreclosure rate and duration of exclusive dealing provisions

2) whether or not the party under restriction can terminate the contract at any time (the opt-out clause) ?

- The rental service contracts that P Co. signed with e-tailers did not include any contract period and either party could notify the other and terminate the contract at any time.
- Competitors of P Co. could persuade such e-tailers to stop renting the service of e-commerce platform of P Co., terminate the contract and switch to their platforms.

The effect of exclusive dealing provisions on competition

- Besides the informer, there were no other competitors of P Co. that expressed concerns about the said exclusive dealing provisions having created competition restraints.
- Meanwhile, there were some competitors that entered the e-commerce platform market in 2014, suggesting that the exclusive dealing between P Co. and e-tailers had not increased any market entry barrier or led to foreclosure.

Reason

- As opening stores online is an emerging industry and the market is growing fast, the competitors of P Co. could make offers to attract e-tailers to switch platforms or recruit store owners that are willing to set up online stores.
- More importantly, after P Co. started to impose the exclusive dealing restriction, there were a large number of e-commerce platforms successfully entered the market.

In determining whether the restrictions mentioned in such case is improper and being likely to restrain competition, the totality of such factors as the intent, purposes, and market position of the parties, the structure of the market to which they belong, the characteristics of the goods or services, and the impact that carrying out such restrictions would have on market competition shall be considered.

Outcome

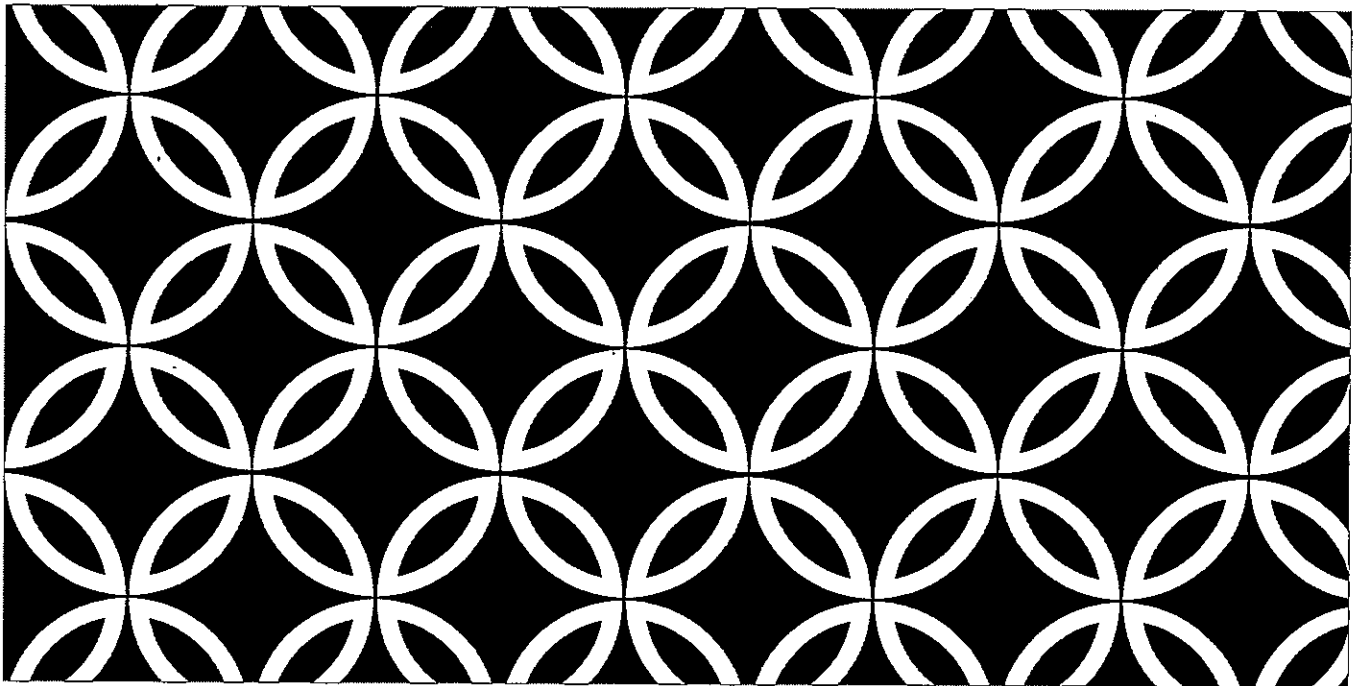
In taking all of the above issues into consideration, the TFTC concluded that it was difficult to deem that P Co. was in violation of the Fair Trade Law.

Conclusion

Conclusion

- The common competition problems encountered in the e-commerce market are associated with vertical restraints related to price or non-price factors.
- Like some cases which apply to the rule of reason, assessment of vertical restraint cases depends on whether the effect of promotion of competition outweighs the effect of anti-competition.
- Therefore, more evidence and economic analysis are required and it means competition authorities will face more difficult challenges.

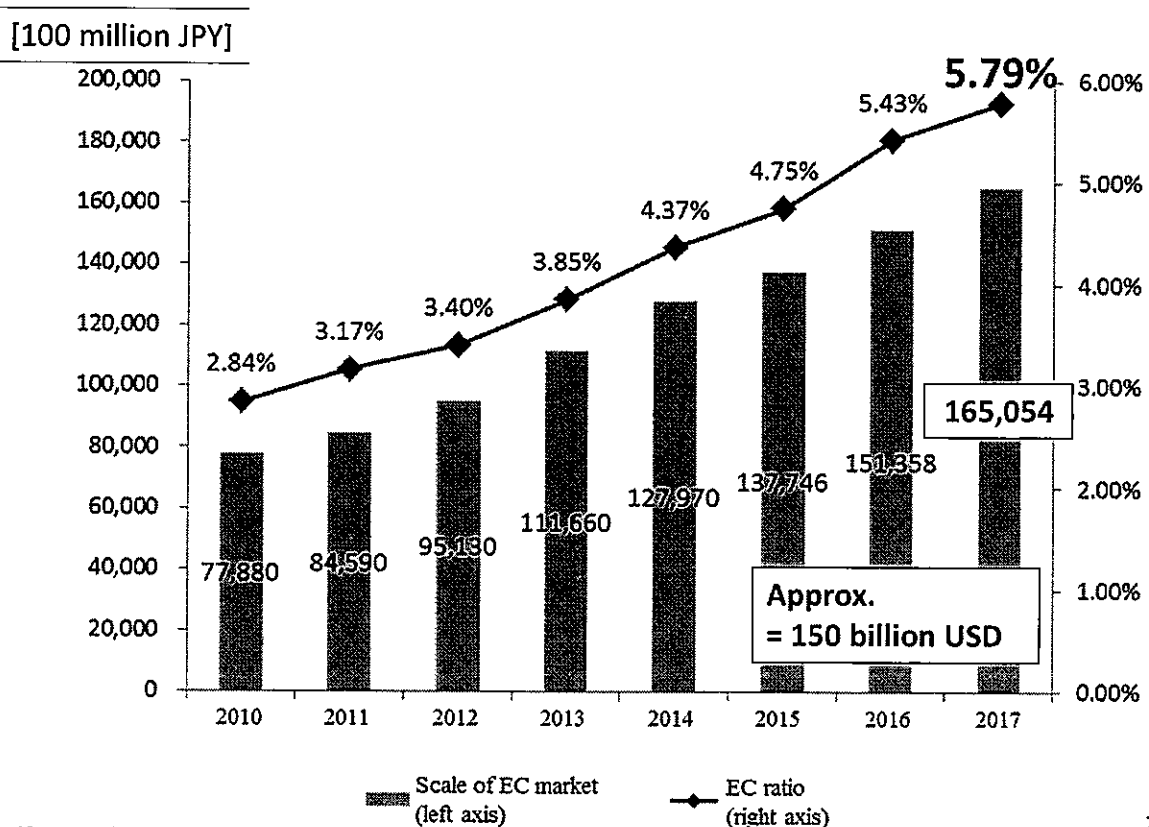
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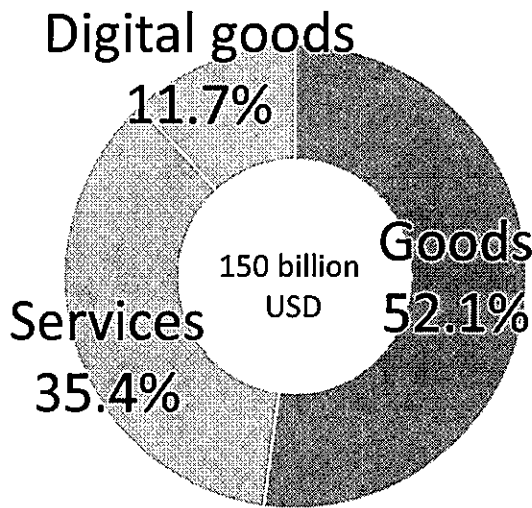
Amazon's Price Parity Clauses

Daiki IKEDA
 Chief Investigator,
 Investigation Bureau, JAPAN

Japan's e-commerce Market (B-to-C)

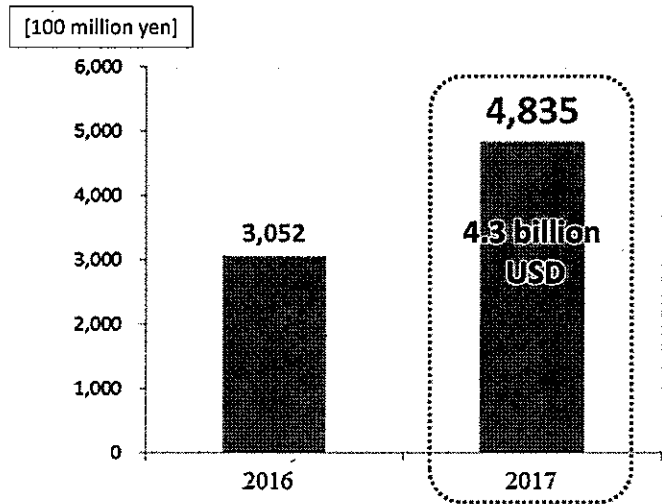


EC market (B-to-C)



Services: Reservation of travel, restaurants etc.
 Digital goods: Music, e-books, online-game etc.

EC market (C-to-C)



Flea market apps dramatically expanding

INVESTIGATION CASE:

Parity Clauses in Amazon Marketplace(2017)

- ✓ August 2016: JFTC conducted a dawn raid on Amazon JP to investigate its **price parity clauses** and **selection parity clauses** in the seller contracts on Amazon Marketplace.
- ✓ April 2017: Amazon JP proposed to take **voluntary measures**.
- ✓ June 2017: JFTC recognized these measures would eliminate the suspected violation and decided to **close the investigation**.
- ✓ Relevant article : Article 19 of Japanese Anti-monopoly Act.

Amazon Japan & Amazon Marketplace

- Established in 2016
- Amazon Japan
 - sells goods through its website “**Amazon.co.jp**”
 - operates “**Amazon Marketplace**” inviting other sellers
- Amazon Services International Inc. operated Amazon Marketplace before establishment of Amazon Japan

5

Parity Clauses on Amazon Marketplace

Price Parity Clauses

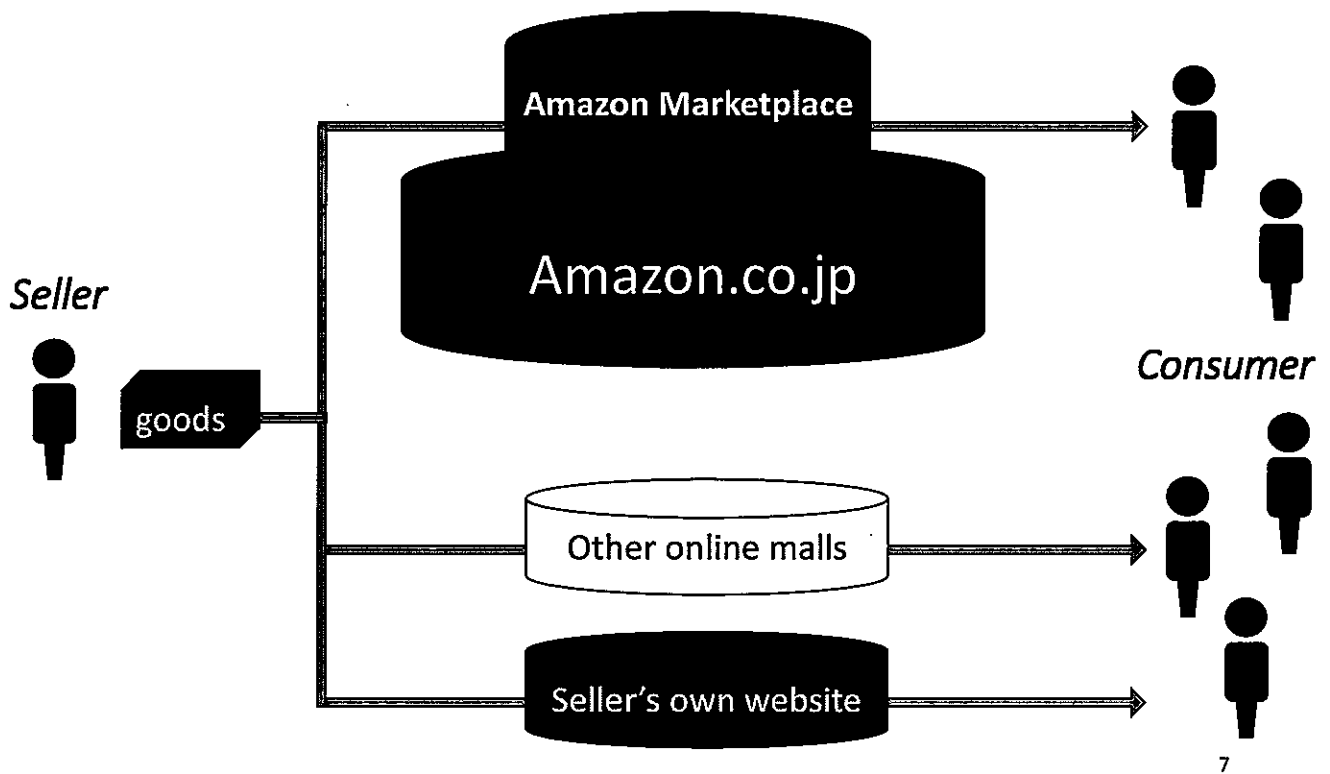
- → Clauses to require sellers to ensure that **prices and sales terms for products** they sell in Amazon Marketplace are **the most advantageous for purchasers** among the ones for the identical products they sell via other sales channels

Selection Parity Clauses

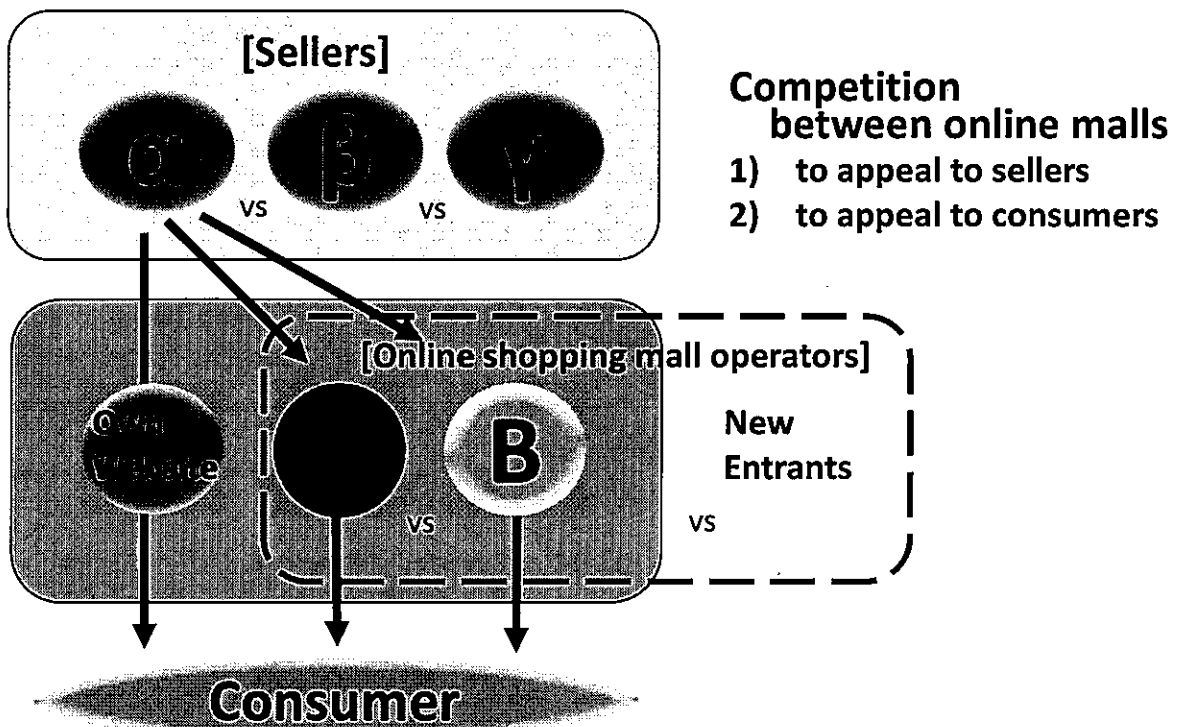
- → Clauses to require sellers to offer in Amazon Marketplace **all variations in color and size, etc. of all products** they sell via other sales channels.

6

Alternatives to sell goods online:



Structure: Two-sided market



Competitive effects of parity clauses

Pro-competitive Effect

- (1) Prevention of "free-riding"
- (2) Reduction of transaction cost

VS

Anti-competitive Effect

- (1) Reduction of incentive to reduce prices
- (2) Foreclosure of rivals or new entrants
- (3) Facilitation of concerted practice

9

Overview of the Antimonopoly Act (JAPAN)

Conducts Causing a Substantial Restraint of Competition in the market (Article 3)

- | | |
|----------------------------------------|--------------------------|
| Private Monopolization | • Exclude or Control |
| Unreasonable Restraint of Trade | • Cartel and Bid rigging |

Unfair Trade Practices (Tending to Impede Fair Competition) (Article 19)

- | | |
|-------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Refusal to Trade | • Concerted Refusal to Trade
• Other Refusal to Trade
• Discriminatory Treatment on Trade Terms, etc.
• Discriminatory Treatment, etc. in a Trade Association |
| Unjust Consideration | • Discriminatory Consideration
• Unjust Low Price Sales
• Unjust High Price Purchasing |
| Trade Coercing/Inducement | • Deceptive Customer Inducement
• Customer Inducement by Unjust Benefits
• Tie-in Sales, etc. |
| Trading on Restrictive Terms | • Trading on Exclusive Terms
• Resale Price Restriction
• Trading on Restrictive Terms |
| Abusing etc. | • Abusing Superior Bargaining Position
• Unjust Interference with appointment of officer in one's transacting party |
| Interference | • Interference with a Competitor's Transactions
• Interference with Internal Operation of a competing company |

10

“Guidelines concerning Distribution Systems and Business Practices under the Antimonopoly Act”

PART I. RESTRICTIONS ON TRADING PARTNERS’ BUSINESS ACTIVITIES

1. Scope of These Guidelines

With the development and expansion of e-commerce, various business models have been created and enterprises actively use the Internet in their advertising and publicity as well as in their distribution channels. In especial, transactions through the Internet are effective means for enterprises and their customers. For example, in those transactions, enterprises can reach wider areas and more diversified customers than in traditional transactions in brick-and-mortar stores. The basic approaches described in the following sections apply commonly to transactions through the Internet.

In addition, the basic approaches described below also apply to any platformer’s actions toward users of its platform. For the purpose of these Guidelines, the term “platformer” means an enterprise that operates and offers a so-called platform which serves two or more user groups (such as consumers and enterprises offering products to them) and in which a level of its use by one user group influences a level of its use by another user group and vice versa. Such platforms include shopping malls, online marketplaces, online travel booking services and video game consoles.

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“Guidelines concerning Distribution Systems and Business Practices under the Antimonopoly Act”

NO COMPETITION, NO GROWTH

In Considering pro and anti Competitive Effects, Taking into Account the following Factors;

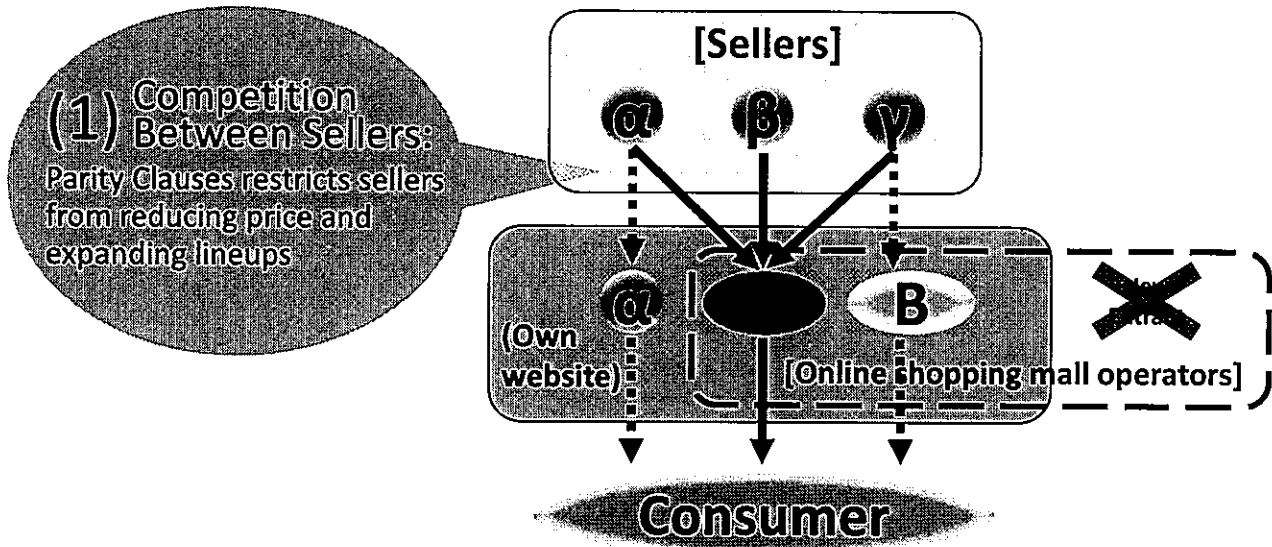
- 1 Actual condition of inter-brand competition
- 2 Actual condition of intra-brand competition
- 3 Position in the market of an enterprise that imposes the vertical restraint
- 4 Impact of the vertical restriction on business activities
- 5 The number of trading partners affected by the restraint, and their positions in the market

Platformer :

Taking into account

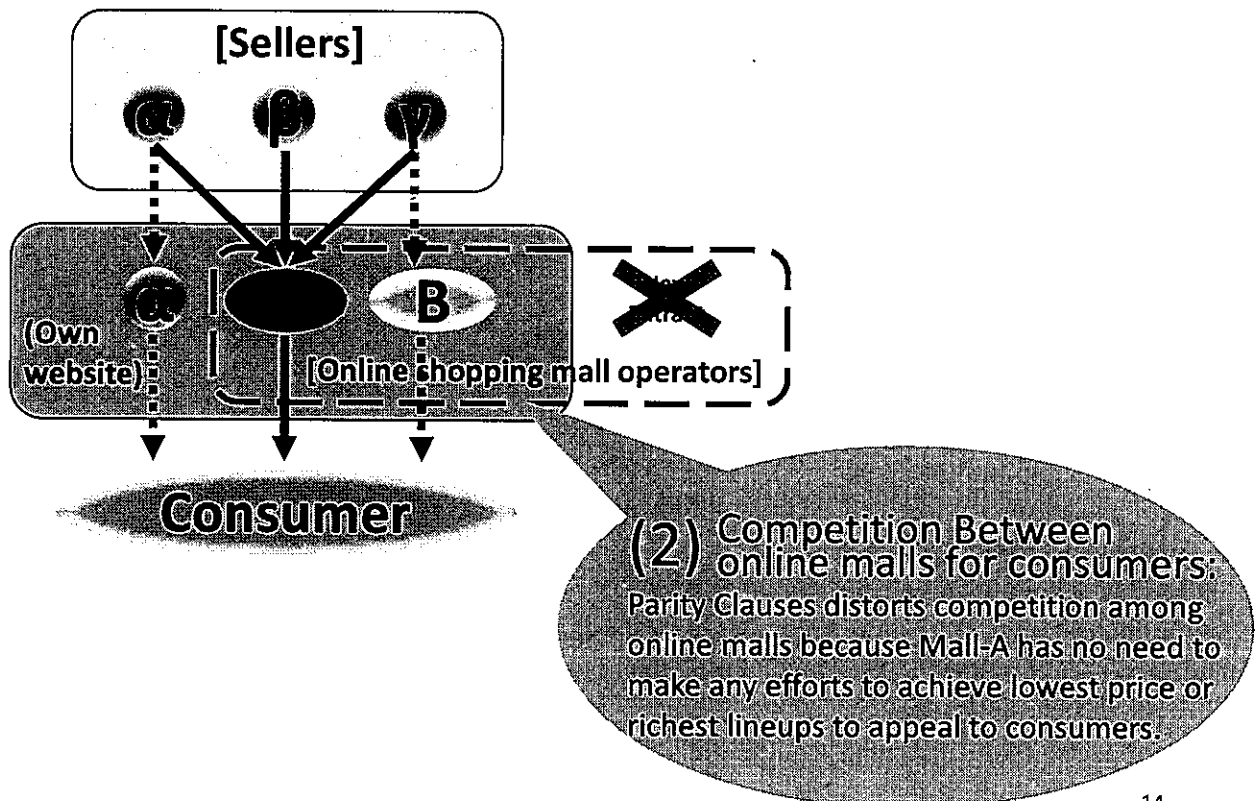
- *Actual conditions of competition among the platformer and its competitors*
- *Position in the market of the platformer based on a reflection of network effects*

THREE COMPETITIVE CONCERNS of Parity Clauses



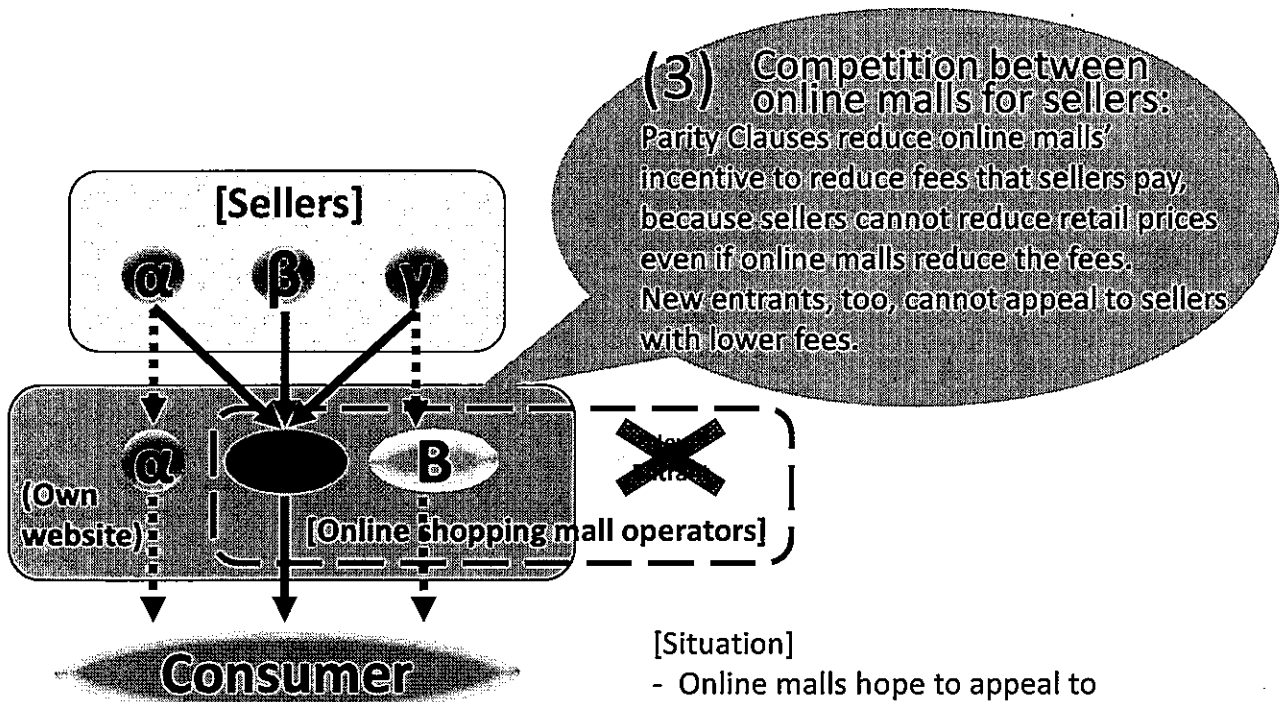
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THREE COMPETITIVE CONCERNS of Parity Clauses



14

THREE COMPETITIVE CONCERNS of Parity Clauses



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Two types of Anticompetitive Effect

- *Foreclosure Effect*
- *Price Maintenance Effect*

Anticompetitive Effect: *Foreclosure Effect*

Cases where a vertical non-price restraint tends to cause situation that new entrants to the relevant market and the enterprise's existing competitors are excluded and/or opportunities available to them are reduced.

For example, a situation where such restraint makes it difficult for them to easily acquire alternative trading partners, and causes increase of their expenses for conduct of business and/or their discouragement from entering the market or developing new products.

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Anticompetitive Effect: *Price Maintenance Effect*

Cases where vertical non-price restraints tends to impede competition among a counterparty to the restraint and its competitors and enable the counterparty to reasonably freely control its prices in its own discretion and thus maintain or raise its prices for a product or products in question

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Concerns: Price Parity Clauses

(1) Restrict sellers' business activities by limiting reduction of prices that the sellers sell via other sales channels

Price Maintenance Effect

(2) Distort competition among platforms by allowing an platform imposing the price parity clauses to achieve the lowest price of goods sold in its online shopping mall without making any competitive effort

Foreclosure Effect

(3) Reduce platforms' incentive to reduce fees for sellers because the reduction of fees that sellers pay to the platform does not result in these sellers' reduction of prices

Price Maintenance Effect

Foreclosure Effect

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Concerns: Selection Parity Clauses

(1) Restrict sellers' business activities by limiting expansions of lineups of goods that the sellers sell via other sales channels

(2) Distort competition among platforms by allowing an platform imposing those parity clauses to achieve the richest lineup of goods sold in its online shopping mall without making any competitive effort

(3) Reduce online platforms' incentive to reduce fees for sellers because the reduction of fees that sellers pay to the platform does not result in these sellers' expansion of lineups of goods

Foreclosure Effect

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Wide or Narrow

- **Narrow MFN**
Require sellers **not to sell** their goods **directly to consumers or purchasers** for prices lower than the ones for which the sellers sell goods to the consumers or purchasers through the platform with which the sellers conclude the MFN clauses
- **Wide MFN** ⇒ *Amazon JP's MFN Clauses*
Require sellers **not to sell** their goods **not only directly but also through other sales channels** to consumers or purchasers for the prices lower than the ones for which the sellers sell goods to the consumers or purchasers through the platform with which the sellers conclude the MFN clauses

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Closing the Case:

Measures Proposed by Amazon JP

- ✓ Amazon JP will delete the price parity clauses from concluded seller contracts, or will waive and will not exercise the rights of the price and selection parity clauses.
- ✓ It will not provide those parity clauses in seller contracts.
- ✓ It will notify all sellers of these measures.
- ✓ It will annually report the implementation status to JFTC in writing for 3 years.



JFTC recognized that these measures would eliminate the suspected violation of the Antimonopoly Act and decided to close the investigation on this case.

22

Thank you today.

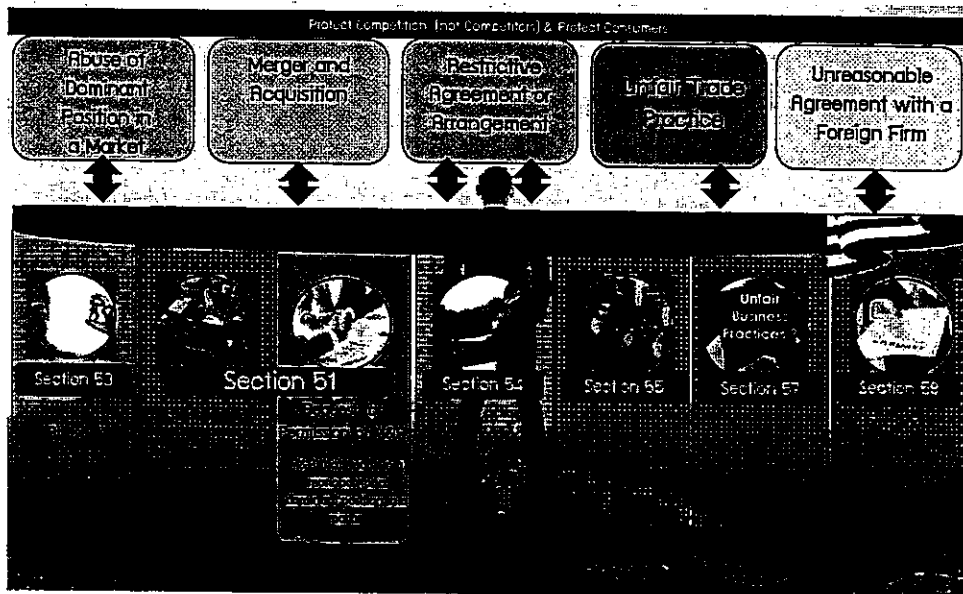
Daiki IKEDA
daiki_ikeda267t@jftc.go.jp

"E-Commerce and Competition"

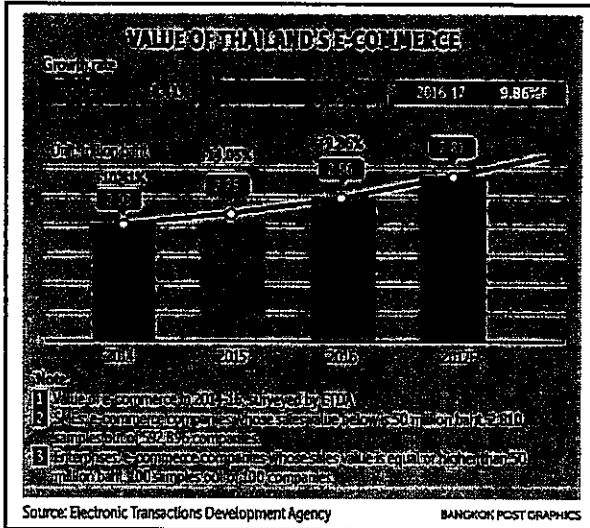


Regional Antitrust Seminar on
"E-Commerce and Competition"
September 26-27, 2018
Bali, Indonesia

Regulating Anti-competitive Conducts

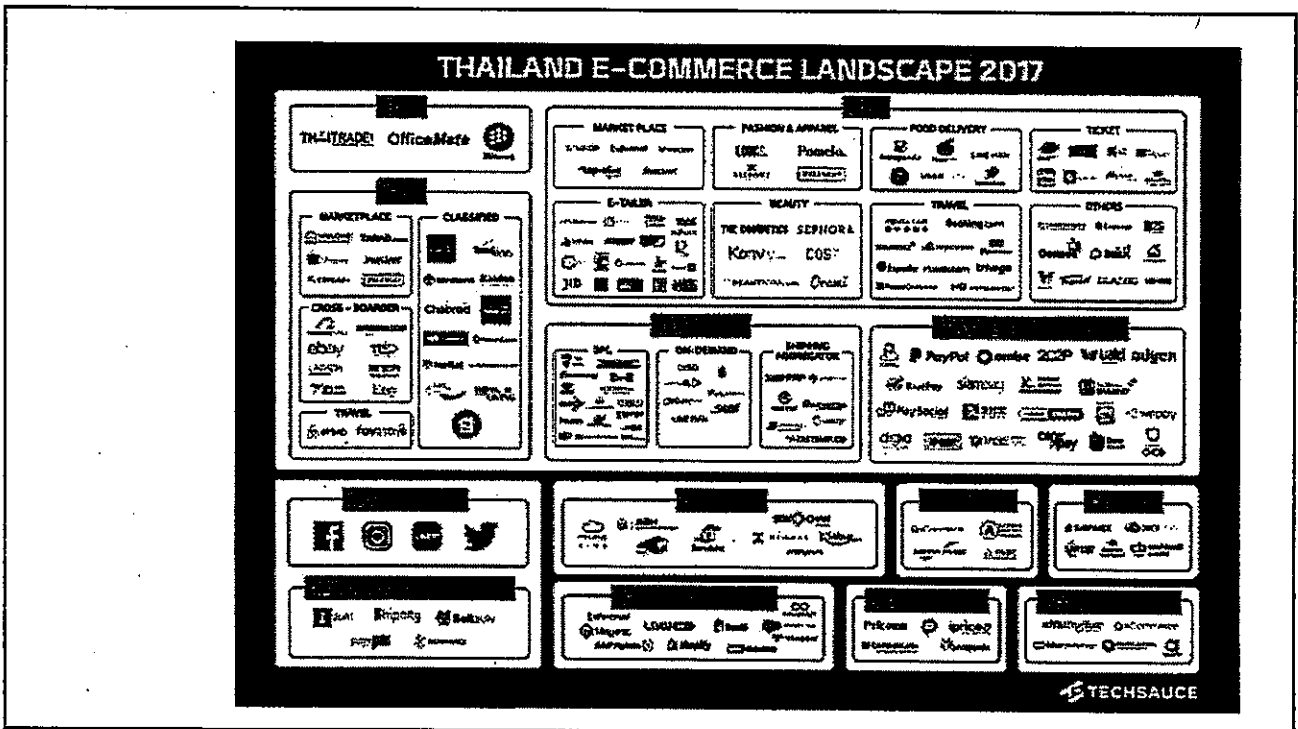


E-Commerce in Thailand



VALUE Increase by 9.8% from 2016 to 2017
In 2017, estimated at 2.8 trillion Baht

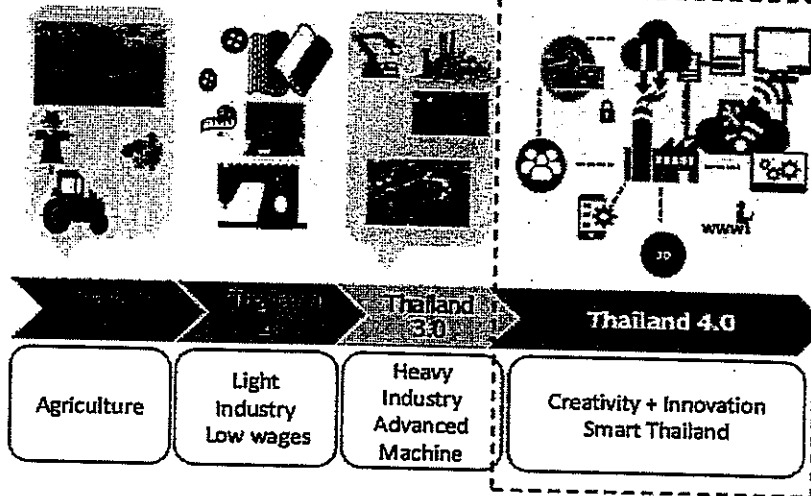
DRIVEN FACTORS Internet development
Mobile phone usage
Logistics and e-payment systems
Online shopping services
Acceptance of e-commerce



E-Commerce & National Policy

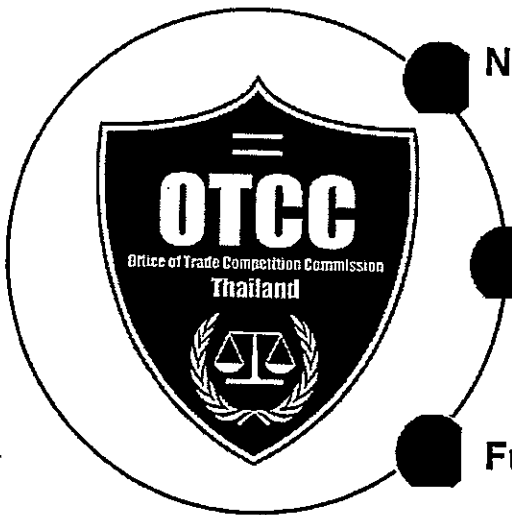
Thailand 4.0

(Smart Industry + Smart City + Smart People)



5

Price Restraint in E-Commerce market



No case of Price Restraint in Thailand

Must learn from the experiences of other competition authorities

Future challenges for Thailand

6

Future Challenges

Section 50

1. Drafting – Guideline to consider prohibited behaviors for firm who has Dominant Position:

- Price Discrimination
- Resale price maintenance

Related to
Price-Restraint

Section 57

2. Drafting – Guideline to consider prohibited behaviors under Unfair Trade Practices:

- Unfairly setting low selling price / high buying price of product (service)

7

Thank you for your kind attention.



Website
www.otcc.or.th



Line



Fan Page

8

Su-Yen Yeh

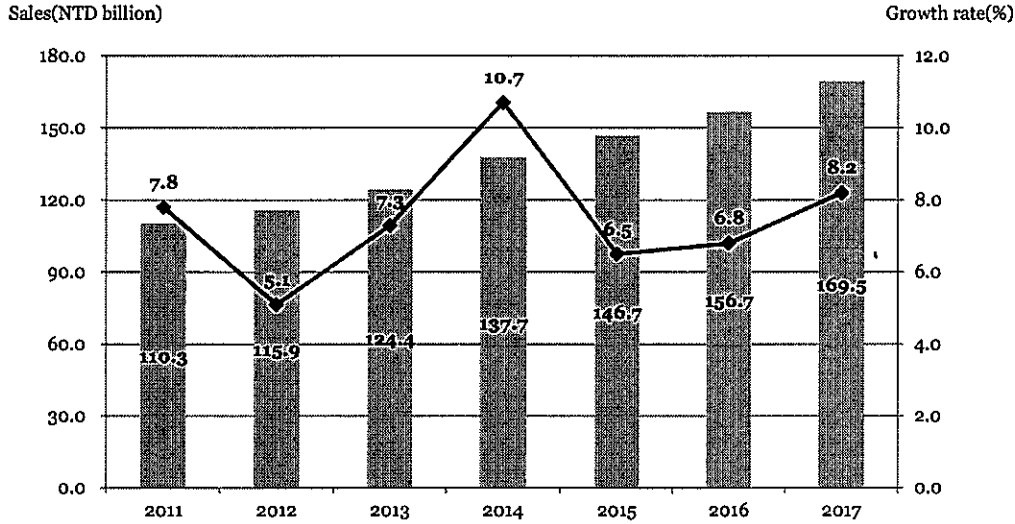
Taiwan Fair Trade Commission
September, 2018

Outline

- The Development of E-commerce in Taiwan
- Selected Enforcement Issues
- Case Examples
- Conclusions

The Development of E-commerce in Taiwan

Online Retail Market



data source: Ministry of Economic Affairs

Popular E-commerce Sites

- B2B websites:



- B2C/B2B2C websites:



Selected Enforcement Issues -the price restraints online

- Retail price maintenance (RPM) ✓
- Dual pricing
- Most-favored-nation clauses (MFN) ✓
- Restriction on price comparison

Case Example of RPM -overview of the legal framework

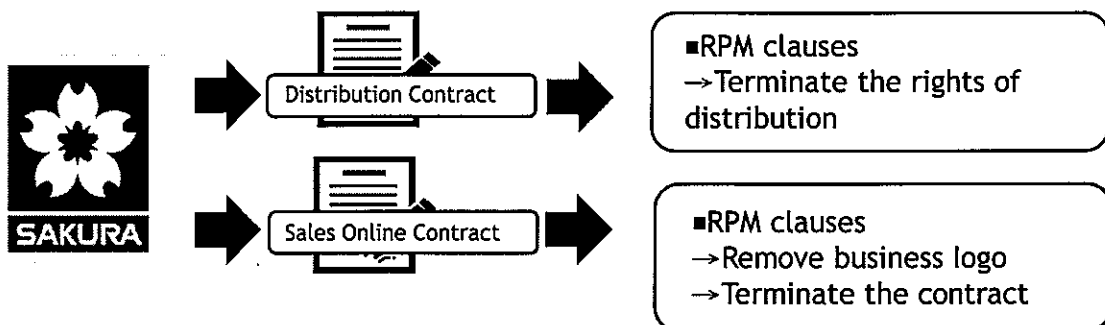
- Before February 2015:
 - Per se illegal
- After February 2015:
 - Rule of reason
 - Article 19(1) of the Fair Trade Act: An enterprise shall not impose restrictions on resale prices of the goods supplied to its trading counterpart for resale to a third party or to such third party for making further resale. However, those with justifiable reasons are not subject to this limitation.

Case Example of RPM -the rule of reason determined factors

- Encouragement of downstream enterprises to enhance efficiency or quality of pre-sale service
- Prevention of free-riding effects
- Promotion of entries of new businesses or brands
- Stimulation of competition between brands
- Other reasonable economic grounds concerning competition

Case Example of RPM -background

Taiwan Sakura Corporation (an water heater company) and its distributor were complained that they restricted retailers' online prices.



Case Example of RPM

-TFTC's findings and decision

Taiwan Sakura Corporation restricted retailers from offering discounted prices online by contracts, which was deemed RPM in violation of Article 18 (now Article 19) of the Fair Trade Act. Taiwan Sakura Corporation was fined NT\$1 million (≐ US\$33,000).

Case Example of MFN

-overview of the legal framework

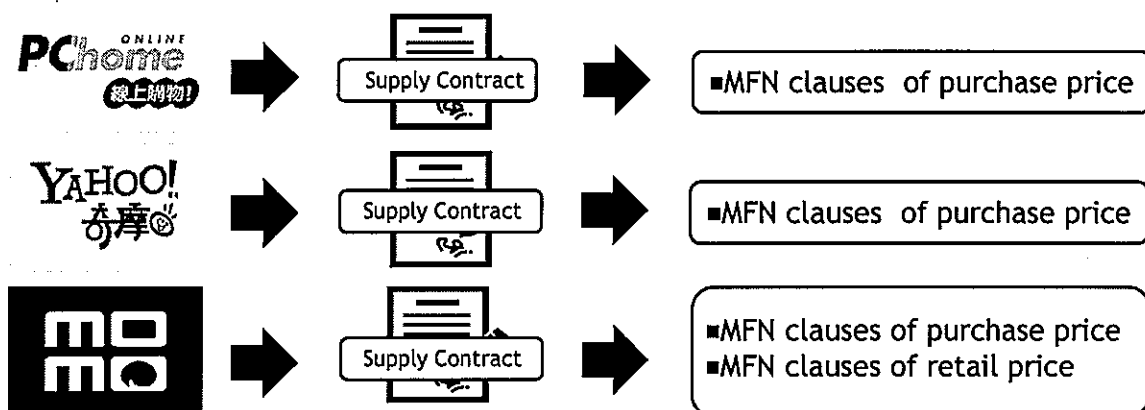
Article 20(5) of the Fair Trade Act: No enterprise shall engage in any of the following acts that is likely to restrain competition... 5.imposing improper restrictions on its trading counterparts' business activity as part of the requirements for trade engagement.

Case Example of MFN -the rule of reason determined factors

- Intent
- Purposes
- Market position of the parties
- Structure of the market
- Characteristics of the goods or services
- Impact

Case Example of MFN -background

TFTC investigated whether PChome, Yahoo ! and momo online retail companies restricted their suppliers' activities by contracting MFN clauses.



Case Example of MFN -investigation approach

- Needed to understand online retail market in Taiwan
 - what's the scale of online retail market
 - who were the major participants
- Broad perspective from industry competitors
 - what're the competitive issues of MFN clauses
- Suppliers' inquiries and observations
 - what's the impact of carrying out MFN clauses
- Consulted with the scholars and experts
 - arranged a forum on August 8, 2017

Case Example of MFN -TFTC's findings and decision

- PChome, Yahoo ! and momo online retail companies did not seriously carry out the MFN clauses to their suppliers.
- New competitor (like Shopee) entered the market and had efficient competition, like offering free shipping and lower retail price.
- Those online retail companies weren't deemed in violation of Article 20(5) of the Fair Trade Act.

Conclusions

- The potential competition concerns merit attention, but do not necessarily present an automatic prescription for antitrust intervention.
- The legal framework might have enough tools to deal with price restraints online issues, but need for a more flexible application.
- Review the current regulations and develop a competition culture to the enterprises.

Thanks for Your Attention

<https://www.ftc.gov.tw>

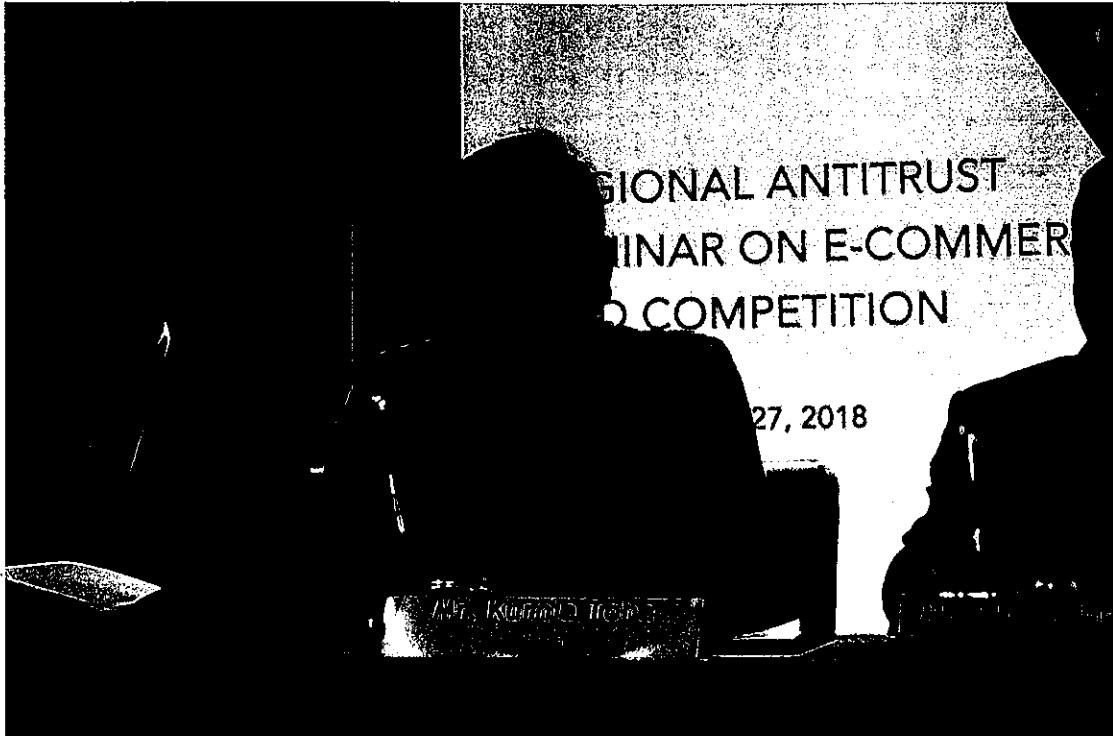
2018 年國際反托拉斯區域研討會活動照片



全體與會人員合影



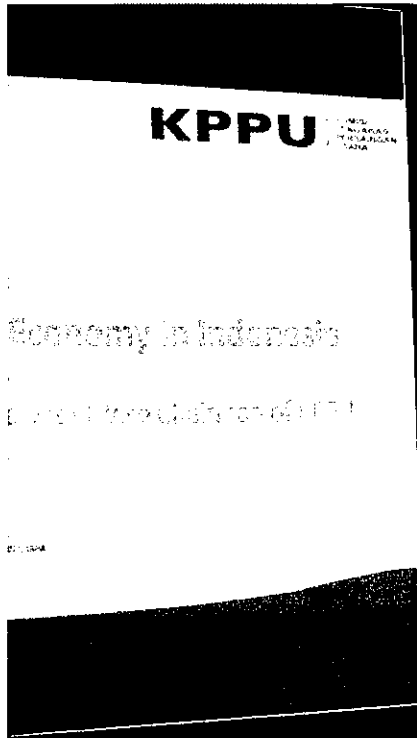
本會彭副主任委員紹瑾致開幕詞



印尼商業競爭監督委員會主任委員 Kurnia Toha 先生致歡迎詞



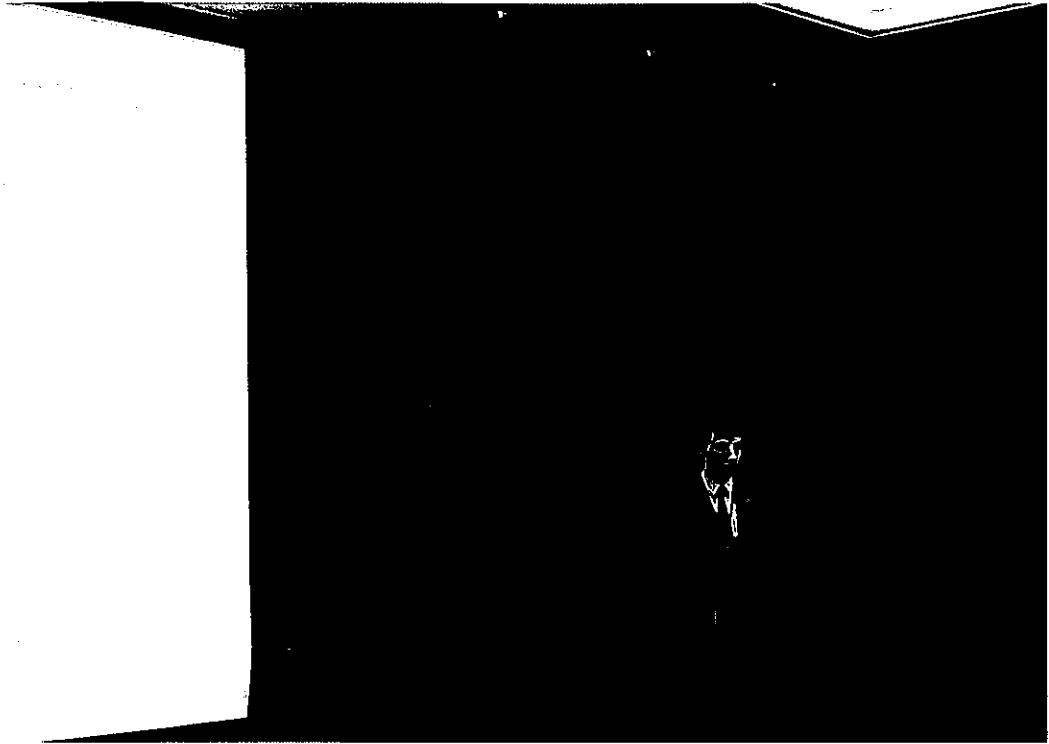
彭副主任委員以「數位經濟時代臺灣競爭法執法概況」為題進行專題演講



印尼商業競爭監督委員會副主任委員 Ukay Karyadi 先生進行「印尼之數位經濟」專題報告



澳洲學者 Robert Ian McEwin 教授報告



經濟合作發展組織（OECD）競爭專家 Pedro Gonzaga 先生報告



加拿大競爭局資深競爭法官員 Max Zhuo Wei Liu 先生報告



日本公平交易會首席調查官 Daiki Ikeda 先生報告