



Handbook on E-Commerce and Competition in ASEAN

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Executive Summary

Executive Summary

E-commerce in ASEAN

E-commerce markets have grown significantly within ASEAN over recent years. Since 2015, the number of internet users in the six largest economies in ASEAN has risen from 244 million to 283 million¹, and this growth is projected to continue at an annual rate of 17.7% until 2020². Despite these high levels of growth, there remains room for further expansion in E-commerce markets across ASEAN. Singapore, Malaysia, Thailand, Indonesia, Vietnam and the Philippines all currently generate less than 4% of their retail sales online, a much lower proportion than other E-commerce markets such as the Republic of Korea (16%) and China (7%)³.

To make the full potential of the E-commerce market in ASEAN, improvements are required in terms of technological infrastructure, and in the regulatory and legal environment in which E-commerce firms operate across ASEAN. A broadband divide currently exists between the richer metropolitan cities such as Bangkok, Kuala Lumpur and Jakarta, and more rural locations. In some ASEAN Member States (AMS), broadband remains expensive in comparison to other developed countries, thereby inhibiting access to E-commerce markets for some consumers, although the growth in M-commerce is to some extent helping to address this disparity. Cyber-security concerns are also common across the region, resulting in a lack of trust among consumers when asked to provide banking details online. Consequently, many consumers still have a preference for shopping in brick-and-mortar stores.

In order to support the development of E-commerce markets across ASEAN, and facilitate cross-border trade, greater harmonisation of regulations across the region is required, for instance with regards to customs and tax rules where disparities among AMS currently exist.

Impact of E-commerce on competition

The ease with which consumers can compare prices across different retailers has increased. Price comparison websites (PCWs) have greatly enhanced price transparency for consumers in many markets. Competitors' prices are also now more visible to firms, enabling retailers to implement more responsive pricing strategies. This has been supported by the development of new technologies such as automated pricing algorithms which allow firms to instantly respond to competitors' price movements.

The variety of products available to consumers has also increased. E-commerce retailers are now able to stock a more extensive range of products in comparison to brick-and-mortar stores due to a reduction in physical constraints and an increase in the ability to access wider geographic markets.

Consumers have largely benefitted from both of these developments. Search costs have decreased significantly, both in terms of time and cost, and competition on price has intensified. Consumers benefit as long as price competition is not at the expense of quality, innovation or diversity of goods/services on offer.

For new entrants and smaller retailers, some barriers to entry and expansion have diminished as a result of the emergence and growth of E-commerce. Economies of scale that large retailers may benefit



The number of internet users in the six largest economies in ASEAN is estimated to be

283
million

Retail sales online



1 Statista (2017n,o,p,q,r,s).

2 Frost & Sullivan (2016b).

3 UNCTAD (2015), page 21.

from in brick-and-mortar markets have fallen as the fixed costs to retailers from entering new markets and locations have decreased. Other new barriers to entry and expansion have however emerged, or became more pronounced in E-commerce markets in comparison to traditional brick-and-mortar sales channels. Barriers to entry may be present in multi-sided markets where network effects are present (i.e. the value one user places on a platform increases as other users join that platform). As a platform grows in size, network effects increase, therefore increasing the costs to consumers from switching to an alternative platform. As a result, it is harder for smaller platforms to enter and gain market share. If consumers use multiple platforms (i.e. they multi-home) however, network effects pose less of a barrier to new entrants. Access to supporting infrastructure, such as logistics, inventory and payment systems may also constitute a barrier to entry, and vertical integration by a platform or single-sided firm may affect other firms' ability to gain access to these systems.

E-commerce has also enabled firms to collect more detailed data on their customers. This has made it possible for firms to offer products and services better tailored to consumers' preferences. It is widely debated whether access to this data constitutes a barrier for new entrants. Some consider data to be an asset that new firms are unable to replicate. However, in many markets such data can be obtained from a variety of sources, thereby reducing the extent to which the data an incumbent firm holds can inhibit the growth of smaller competitors.

Defining markets, multi-sided markets, and assessing market power

Many new multi-sided online markets have emerged as a result of the growth in E-commerce, such as online marketplaces and PCWs. In these markets, existing approaches to define the relevant market(s) may no longer apply due to the interrelationships and externalities between distinct sides of the market which affect the way in which firms set prices. If the value from using a platform increases on one side as a result of more users on the other side, a platform may set price below cost on one side of the market to attract users on the other side. The traditional tests⁴ used by competition authorities for defining a market are therefore typically not applicable. When conducting a market definition assessment in multi-sided markets, in some instances the total price charged to all sides of a market should be considered (i.e. the sum of the price charged to all sides of a market), as opposed to considering the price charged to each side in isolation. In reality, however, instead of technically defining a relevant market, competition authorities may be better placed to pursue a more holistic assessment of the market, by considering more broadly the competitive constraints that a firm faces on all sides of the market and the ability of consumers to substitute to an alternative provider. Also, when assessing market power in multi-sided markets, the nature of competition should be assessed, and in particular the relationships between all sides of the market should be considered, focusing on network effects and any additional feedback effects.

When assessing market power, competition authorities may also want to assess the data that a firm holds on its customers, and the access that competitors have to similar information. This is currently an area of debate in the field of competition policy. On one hand, firms may be able to purchase such data from other sources, but on the other hand, in some instances this alternative data may not be of equivalent quality to the data possessed by the market leading firm.

Competition authorities may need to adapt their approach for the assessment of alleged anti-competitive conduct in multi-sided markets. The presence of externalities between different sides of markets makes the standard analytical framework, founded on assumptions from single-sided markets, ill-suited to investigating alleged anti-competitive conduct. For example, in instances of potential predatory pricing, the costs incurred, and prices charged to all sides of the market may need to be considered together rather than focusing on the price and cost on each side of the market in isolation. In assessing harm in multi-sided markets, the interrelationships between different sides of the market should also be considered, though this does not necessarily mean that harm on one side of the market can be offset by benefits on another side.

Online markets often evolve rapidly as competitors successfully innovate and displace leading incumbent firms from their position in the market. Therefore, when assessing market power, both in single- and multi-sided markets, competition authorities should look beyond the static market share of a firm, and also consider the dynamic competition from potential future entrants to a market. This is particularly relevant in merger assessments where the merger may result in the removal of a potential future entrant to a market, even if there is no overlap in the products or services currently provided by the merging parties.

Vertical agreements

The emergence and growth of E-commerce has resulted in an increase in the adoption of vertical restraints by firms, due to concerns of free-riding by online retailers on the pre- or post-sales services provided by brick-and-mortar stores or other online retailers and platforms.

⁴ The 'small but significant and non-transitory increase in price' test, or SSNIP test, is a typical example which consists of identifying the smallest possible market (in terms of products and geographic scope) that a hypothetical monopolist could sustainably and profitably increase price.

Agreements between firms at different stages of production are generally benign as they generate efficiencies, for example, improving the availability or quality of service that consumers receive by overcoming issues of free-riding, reducing price by overcoming double marginalisation, and/or resolving potential specific investment hold-up risks. However, in some instances, vertical restraints can pose challenges to competition authorities in that they can also give rise to anti-competitive effects. Vertical restrictions generally inhibit intra-brand competition. This may facilitate collusion in some instances when inter-brand competition is limited.⁵

Some of the restraints used by firms in E-commerce markets have been regarded as hardcore restrictions of competition in Europe,⁶ on the basis that the anti-competitive effects have been deemed to greatly exceed any efficiency benefits to consumers. Restrictions that unjustifiably prevent all sales via the internet, or discriminate between online stores and brick-and-mortar retailers (e.g. on the wholesale price charged to a retailer), are regarded as hardcore restrictions and therefore not allowed in the EU. Restrictions on cross-border passive sales in the EU⁷ are also treated in this way, for instance where consumers are unable to access a foreign website or unable to complete transactions on a foreign website.

As a result of the novelty of the application of vertical restraints to E-commerce, and of the ensuing uncertainty as to whether these vertical restraints are to the benefit or to the detriment of consumers, a clear and consistent position has not yet been reached by competition authorities around the world on all forms of vertical restraints. With the exception of hardcore restrictions which are understood to be essentially harmful to competition, when assessing any such vertical restraints a case-by-case approach is recommended.⁸ This applies to Most Favoured Nation (MFN) clauses,⁹ also known as best-price guarantees or price parity clauses. Currently, competition authorities around the world have taken contrasting positions on the use of MFNs. This was the case, for example, in the hotel booking market,¹⁰ where, despite international attempts for coordination,¹¹ competition authorities have reached different conclusions. International consensus has also not yet been reached on the use of agreements that prevent a retailer from selling via online marketplaces or advertising on PCWs.

As the ASEAN region continues to pursue its objective of becoming a more integrated market, ASEAN competition authorities may also be concerned with vertical restraints that restrict cross-border trade. Geo-blocking strategies employed by firms may inhibit the development of E-commerce markets across wider regions such as ASEAN. In Europe, where digital market integration among Member States is also a key objective, an important distinction is made between vertical restraints that restrict active and passive sales to a particular country.¹² The former is permitted if it concerns sales into an exclusive territory, whereas both active and passive sales restrictions are prohibited if implemented within a selective distribution system.¹³ Blocking payment from other countries or redirecting web-browsers to a local website may be considered passive sales restrictions.

Horizontal coordination

Greater price transparency, and the development of advanced price setting algorithms have made establishing and enforcing price coordination easier for firms in some markets. Evidence from cases in the US and the UK have shown that existing competition policy and law are largely sufficient to deal with the challenges raised by price algorithms at this stage.¹⁴ No equivalent cases have been investigated in ASEAN, and only one questionnaire respondent¹⁵ currently considers price-setting algorithms to be a competition concern within its jurisdiction. However, as E-commerce markets continue to grow, this challenge may become more prevalent in the region. The challenge faced by competition authorities around the world in this area has been a more practical one. The need to investigate the nature of price algorithms and their functions has made it essential to recruit the necessary expertise with the ability to undertake such investigations.

⁵ European Commission (2010), para. 100.

⁶ A hardcore restriction is one that is so serious that consideration of any pro-competitive effects is highly unlikely and rare. For example, resale price maintenance, RPM, is widely treated in this manner.

⁷ Passive sales are where a consumer independently reaches out to a retailer. Conversely, active sales are where a retailer directly targets a consumer e.g. through advertising.

⁸ It is noted that in some jurisdictions, such as Singapore, vertical restraints are per se exempt therefore the recommended approach would also apply to those vertical restraints regarded as hardcore restrictions in other jurisdictions.

⁹ A wide MFN is a vertical restraint that ensures that no other competitor will be given more favourable terms by a supplier/customer/platform – for instance being able to sell at a lower price. A narrow MFN restricts a firm from setting a lower price in its own store, but it is free to agree to a lower price with a competing store e.g. a hotel that enters a narrow MFN agreement with a hotel booking platform cannot set a price on its own website lower than the price on the booking platform, but it can agree to lower prices on competing platforms.

¹⁰ See for example: CE/9320-10 (CMA), B 9-121/13 (Bundeskartellamt).

¹¹ An international working group including ten competition authorities (Belgium, Czech Republic, France, Germany, Hungary, Ireland, Italy, Netherlands, Sweden and the UK) was set up to coordinate actions for a possible harmonisation of approach on wide and narrow MFN clauses across jurisdictions.

¹² Active sales refer to cases in which a firm reaches out to consumers (for example through targeted advertising); whereas passive sales consist of cases in which a consumer independently reaches out to a retailer to make a purchase.

¹³ European Commission (2017b), para. 52.

¹⁴ CMA, 50223, Online sale of posters and frames (2016); US Department of Justice, Press release number 15-1488 (2015).

¹⁵ A comprehensive questionnaire on competition in E-commerce in ASEAN was designed for the purpose of this handbook. The competition authorities of Singapore, Malaysia, the Philippines, Vietnam and Indonesia completed this questionnaire in April 2017.

Competition authorities should however closely monitor the development of price-setting algorithms. Concerns have been raised that as such technologies become more sophisticated, they may self-learn that coordination among competitors is optimal. Were such developments to occur, legal clarity would be required, for instance explaining where the liability falls. The issue has only just emerged as a question for competition policy and law therefore a conclusion on this question has not yet been reached.

The development of online platforms in multi-sided markets has also made competitors' pricing more transparent to firms. Two recent cases highlight how coordination can occur between competing firms on the prices charged on platforms both with and without facilitation from the platform itself.¹⁶ In both of these instances, existing competition policy and law was sufficient to identify and investigate the alleged anti-competitive conduct.

As evidenced by the E-books case investigated by competition authorities around the world,¹⁷ firms operating in E-commerce markets may also implement vertical restraints in a coordinated manner, leading to an increase in prices in a market. There is no general rule as to when a network of vertical agreements constitutes horizontal coordination, however in the E-books case, the US authorities highlighted the integral role that Apple played in ensuring that five leading publishers all adopted the new structure of vertical agreement with Amazon as an important factor.

Unilateral conduct

Forms of conduct that competition authorities may deem to be anti-competitive by a firm in a dominant position are analogous in E-commerce markets to exclusionary or exploitative types of conduct observed in brick-and-mortar markets, for example: setting unreasonably high prices, selling at artificially low prices to foreclose competitors from the market, or obstructing competitors in the market through tying or bundling.

The growth of E-commerce has however increased the prevalence of some of these types of conduct. Many multi-sided platforms that offer a range of related services have employed tying and bundling strategies, attracting the attention of competition authorities around the world. For example, Google has been investigated for a series of alleged instances of favouring its own services.¹⁸ Two relevant cases have also been investigated in ASEAN, notably relating to the tying and bundling of online services¹⁹, and the imposition of exclusivity agreements by an online ticketing platform²⁰.

Experience to date has indicated that the legal framework for abuse of dominance in brick-and-mortar markets is broadly sufficient to deal with analogous conduct in E-commerce markets. An important factor in such assessments should be the extent to which the conduct is harming competition, or whether a dominant firm is simply more efficient or innovating at a faster pace than its rivals.

Some consider Big Data to be a source of market power, therefore when assessing whether a firm is dominant, the data (or absence of data) that a leading firm and its competitors possess may be an important factor to consider. However, to date, no company has been found to have infringed competition law as a result of abusing a position of dominance through the use of Big Data, and doubts have been raised in several fora as to whether Big Data could possibly be regarded as an essential facility given its nature, which allows it to be replicated. The debate on this issue is ongoing at the time of finalising this handbook.

Mergers and acquisitions

Given the rapid pace of change in many E-commerce markets, and relatively low barriers to entry, when assessing whether existing merger control regimes are suitable for capturing potentially harmful mergers in E-commerce markets, it is important to consider dynamic competition. Competition authorities should consider whether their existing regime includes rules which are sufficiently broad so that cases of potential lessening of dynamic competition can be assessed, even if there is limited or no current overlap in the products and services offered by the parties, or when turnover thresholds are not met.

AMS are currently at different stages in developing their merger controls, with Cambodia announcing their draft law in 2016. Where there are merger control rules in place, these may fail to capture mergers that could remove a potential future entrant to the market, for example if revenues fall below the relevant threshold, despite a high transaction value on the deal. This is common in E-commerce markets where the acquiring firm may place a high value on the technology of the acquired firm based on the prospect of future revenue,

¹⁶ CCS 500/003/13; and Lithuanian Competition Council (LCC), Case C-74/14, Eturas (2016).

¹⁷ See for example European Commission, COMP/39.847 (2012); and Case I3-3741, United States v. Apple Inc. et al. (2016).

¹⁸ European Commission, 40099 Google Android, 39740 Google comparison shopping; and UK High Court Streetmap.EU Limited v Google Inc., Google Ireland Limited and Google UK Limited [2016] EWHC 253 (Ch). In the Google comparison shopping case, the European Commission determined that Google had abused its position of dominance as a search engine by favouring its own comparison shopping service in search results ahead of competing comparison shopping providers.

¹⁹ My E.G. Services Berhad (24/06/16); Malaysia Competition Commission.

²⁰ Abuse of a Dominant Position by SISTIC.com Pte Ltd (CCS/600/008/07).

and, potentially, internalising the value of higher future profits due to a reduction in expected competition. This issue has led some competition authorities around the world to review their tests for merger notification. Some authorities (e.g. Germany) are in the process of updating their tests for notification so as to include a test based on the value of the transaction. Currently no AMS has a transaction value threshold in place.

In assessing proposed mergers in multi-sided online markets, the presence and extent of network effects should be considered. Authorities should evaluate whether a tipping point is more likely to occur as a result of the merger. Such assessment should consider the extent to which consumers multi-home, the switching costs that consumers encounter, the interoperability between competing platforms, and the barriers to entry and expansion smaller firms face. If it is deemed that remedies are required, they should be designed to focus on maintaining or improving these market characteristics.

More generally, in E-commerce markets, competition authorities may identify potential issues in mergers between firms at different stages in the vertical chain if the merger gives rise to the incentive and the ability for the merged entity to pursue foreclosure strategies aimed at excluding or marginalising competitor/s, or when a maverick new entrant is being acquired by a larger incumbent firm. The merger review should also consider whether the merger may give rise to market power as a result of the pooling of consumer data held by the merging parties. However, this may be mitigated if competitors are able to source equivalent data from other sources.

Sufficiency of existing competition policy and law to protect and promote effective competition in E-commerce markets

To date, competition authorities around the world have found the legal framework provided by existing competition policy and law to be largely sufficient to deal with virtually all competition challenges brought about by the emergence and growth of E-commerce. Case reviews presented throughout this handbook illustrate this. However, the more technical nature of some forms of alleged anti-competitive conduct in E-commerce markets has given rise to a broad need to develop specific resources which are able to explore and assess these issues, such as dealing with potential coordination via pricing algorithms.

The growth of E-commerce has given rise to a significant increase in the adoption of vertical restraints. This is particularly due to the growth of online platforms. As a result, vertical restraints have been the object of wide debate, and on occasion, different competition authorities have taken contrasting positions, thus posing a challenge for firms operating internationally. For example, the different conclusions reached by competition authorities investigating the use of MFN clauses in the hotel bookings market have made the need for international coordination quite apparent. Whilst there might not be a broad need to create new rules in order to deal with these types of issues, international coordination could help to harmonise the approach in dealing with competition challenges in E-commerce markets, though attempts so far in the hotel booking market have proven unsuccessful.

In order to create a stable and consistent policy environment for firms to operate within, cooperation among competition authorities across AMS on the approaches used to investigate instances of alleged anti-competitive conduct in E-commerce markets is particularly important.

Competition advocacy role of authorities

Competition authorities can also facilitate the growth and development of E-commerce markets in ASEAN through support to businesses and government bodies in the form of advocacy. The checklist provided in Section 12 of this handbook provides guidance and support to businesses engaged in E-commerce across ASEAN in complying with competition law.

By encouraging government bodies to harmonise the legal and regulatory environment in which businesses operate, cross-border trade will be encouraged. Ensuring coordinated and effective systems of intellectual property (IP) rights allocation and enforcement across AMS will provide businesses with sufficient confidence that the returns from their investments will be protected. This would increase firms' incentives to invest which would in turn, facilitate investment in, and the development of, E-commerce markets. Greater regional coordination to tackle data protection, cybersecurity, and access to broadband issues would also further facilitate the development of a single digital market in ASEAN.

Competition authorities can provide further support to government bodies through offering guidance on conducting assessments of the impact of proposed policies on competition in E-commerce markets. By undertaking ex ante assessments of the likely impact of a policy, any unwelcome anti-competitive effects can be prevented or mitigated. In conducting such assessments government bodies can adopt a range of qualitative and quantitative approaches, such as looking at the effect of similar policies in related product or geographic markets. To evaluate how successful a policy has been, or to decide whether to expand a policy wider, an ex post evaluation can be adopted using similar techniques.

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Glossary

Glossary

Term	▶ Definition
ACCC	Australian Competition and Consumer Commission
AEGC	ASEAN Experts Group on Competition
AMS	ASEAN Member State
ASEAN	The Association of Southeast Asian Nations.
ASEAN6	The six largest economies in ASEAN: Singapore, Vietnam, Thailand, Malaysia, Indonesia, and the Philippines. ²¹
AWGIPC	ASEAN Working Group on Intellectual Property Cooperation
B2B	Business to business.
B2B2B	Business to business to business.
B2B2C	Business to business to consumer.
B2C	Business to consumer.
Brick-and-mortar firm	A firm that does not conduct business online, but only through ‘traditional’ offline channels (e.g. in physical stores).
C2B	Consumer to business.
C2C	Consumer to consumer.
CAGR	Compound Annual Growth Rate.
CCS	Competition Commission of Singapore
Click-and-mortar firm	A firm that conducts business online and also through ‘traditional’ offline brick-and-mortar channels.
CMA	Competition and Markets Authority (UK)
Consumer	The individual or entity that uses the product or service
Customer	The individual or entity that purchases the product or service
Cyberlaw	The part of the overall legal system that deals with the Internet and cyberspace.
DCT	Digital Comparison Tool
Digital adoption	The use of emerging digital technology to drive efficiencies across different business processes.
DoJ	Department of Justice (USA)
Drop shipping	Instances when an online retailer passes an order directly to the wholesale/manufacturer, therefore removing the need to have a physical warehouse to store the products they sell.
EC	European Commission
ECJ	European Court of Justice
ECN	European Competition Network
E-commerce	The buying and selling of goods and services over the internet.

21 GDP (IMF, October 2016).

Term	▶ Definition
E-Fulfilment	The people, processes and technology required to deliver an online order to a consumer.
FRAND	Fair, reasonable and non-discriminatory
FTC	Fair Trade Commission (USA)
G2B	Government to business.
G2C	Government to consumer.
Geo-blocking	Measures to restrict the access to products or services through the internet based on the geographic location of the user.
Horizontal agreement	Agreements between competing businesses operating at the same level in the market to collectively agree on some activity (e.g. set a specific level of prices or production).
IP	Intellectual Property
JFTC	Japan Fair Trade Commission
KPPU	Komisi Pengawas Persaingan Usaha (Indonesia Competition Authority)
LCC	Lithuanian Competition Council
MAS	Monetary Authority of Singapore
M-commerce	An E-commerce activity conducted via a mobile device
MIF	Multi-lateral Interchange Fee
Most Favoured Nation clause (MFN)	A wide MFN is a vertical restraint that ensures that no other competitor will be given more favourable terms by a supplier/customer/platform – for instance being able to sell at a lower price. A narrow MFN restricts a firm from setting a lower price in its own store, but it is free to agree to a lower price with a competing store e.g. a hotel that enters a narrow MFN agreement with a hotel booking platform, cannot set a price on its own website lower than the price on the booking platform, but it can agree to lower prices on competing platforms.
Multi-sided market	A two- or multi-sided market is one in which distinct but related customer groups are connected by a common platform. Each side of a multi-sided market typically gives rise to externalities which impact the other side, and this can affect the way in which firms set their pricing structures.
Multi-sided platform	A two- or multi-sided platform is a firm which facilitates transactions between different types of users in a multi-sided market. Such platforms typically have the feature that at least one type of user value the platform more when there are more users of another type using the same platform. For example, a newspaper connects readers and advertisers; a hotel booking website connects hotels with travellers. There may be more than one multi-sided platform in a particular multi-sided market e.g. multiple newspapers available in a particular location.
MyCC	Malaysia Competition Commission

Term	► Definition
Network effects	The utility that a given user derives from the good depends upon the number of other users who are in the same "network" as is he or she. ²²
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading (UK, now known as the CMA)
Omni-channel strategy	A cross-channel business model that companies use to enhance customer experience.
Online marketplace	A platform whereby buyers and sellers are connected, and transactions are processed (e.g. Amazon marketplace, eBay).
OTA	Online Travel Agent
Pure-play	A publicly traded company focused on only one industry or product.
PC	Personal Computer
PCT	Patent Cooperation Treaty
Price Comparison Website (PCW)	A service enabling consumers to compare between different providers of a good or service. Users are typically able to filter or rank offerings based on criteria such as price, availability of certain features, or review scores. Users can follow a link to purchase a good or service from the website of their selected provider.
Resale Price Maintenance (RPM)	A form of vertical restraint broadly defined as any restriction on the price that resellers can sell a product at.
RRP	Recommended Retail Price
Selective distribution	A vertical restraint whereby a firm only allows some retailers who adhere to certain criteria to sell its products.
SLC	Substantial Lessening of Competition
Small and Medium-sized Enterprises (SMEs)	A non-subsidiary, independent firm which employs fewer than a given number of employees (the number varies across countries).
SSNIP	Small but Significant Non-transitory Increase in Price
TFEU	Treaty on the Functioning of the European Union
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
VABER	Vertical Agreement Block Exemption Regulation, also known as VBER (Vertical Block Exemption Regulation)
Vertical restraint	Vertical agreements, also known as vertical restraints, are broadly defined as instances of coordination between firms at different stages of the supply chain that restrict or limit in some way one of the firms' activity in the market. Most commonly, vertical restraints impose restrictions on retailers selling a manufacturer's product.
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

²² Katz, M. and Shapiro, C. (1985); page 424.

The background is a solid orange color. It features several abstract geometric elements: a network of thin yellow lines with small dots at the intersections, primarily in the upper right and lower left; a large, faint, dotted outline of the European continent in the center; and various overlapping translucent orange polygons and rectangles scattered across the page.

Introduction

01 Introduction

- 1.1. The rapid emergence and growth of E-commerce markets has brought significant benefits to consumers and businesses worldwide. Consumers benefit from increased price transparency, reduced search costs and access to a greater variety of goods and services. Firms benefit from access to new markets, reduced barriers to entry, and operational cost savings.

Motivation for handbook

- 1.2. The rapid change in the characteristics and competitive dynamics of some markets as a result of the growth of E-commerce has raised a number of challenges for competition authorities. The need to deal with cases involving newer issues, such as online price parity agreements, has led competition authorities around the world to question whether existing competition policy and law are able to deal with antitrust issues arising in E-commerce markets. In the context of this debate, the Competition Commission of Singapore (CCS) commissioned PricewaterhouseCoopers (PwC) to assist them in preparing a handbook for competition authorities within ASEAN Member States (AMS). This handbook aims to increase the understanding of the current level of development of E-commerce in ASEAN, and of the challenges emerging for competition authorities in the region. This handbook also aims to enhance authorities' understanding of how best to respond to any such challenges when they arise so that any anti-competitive behaviour can be identified and addressed appropriately, whilst still promoting the development of E-commerce for the benefit of consumers and businesses.

Supporting materials

- 1.3. This handbook should be used in conjunction with the guidelines and strategies set out by ASEAN to promote the sustainable growth of E-commerce in the region over the coming years, notably the ASEAN Economic Community Blueprint 2025,²³ the ASEAN Competition Action Plan (2016-2025)²⁴ and the ASEAN ICT Masterplan 2020.²⁵

Research sources

- 1.4. This handbook draws upon the latest developments in the debate on E-commerce in competition law and economics, as well as case law from jurisdictions around the world, and insights from a comprehensive questionnaire on E-commerce in ASEAN designed for the purpose of this handbook. The competition authorities of Singapore, Malaysia, the Philippines, Vietnam and Indonesia completed this questionnaire in April 2017. Interviews with experts from across the PwC network specialising in industries disrupted by E-commerce have further informed the contents of this handbook.

Content of handbook

- 1.5. It is important to note that competition policy on E-commerce is an area of current debate among competition authorities and practitioners. Some of the emerging challenges are not yet fully understood, and contrasting positions have sometimes been taken by competition authorities in different jurisdictions. This handbook aims to summarise the latest developments based on current literature, however, given the dynamic nature of this subject, it should not be seen as presenting an ultimate set of principles, but providing guidance based on current understanding and experience instead.

Structure of handbook

- 1.6. This handbook consists of three main parts:
 - a. Part A introduces E-commerce and its value chain, and presents the current E-commerce landscape in ASEAN, with a particular focus on the barriers faced by businesses in E-commerce markets within ASEAN;
 - b. Part B outlines the challenges faced by competition authorities in E-commerce markets, and provides recommendations on how best to respond to these challenges should the need arise. Examples of real cases from different jurisdictions around the world are presented throughout to illustrate the issues discussed. A competition compliance checklist for businesses engaged in E-commerce in ASEAN is also provided; and
 - c. Part C considers the advocacy role of competition authorities, looking at regulatory and legal barriers to E-commerce in ASEAN such as intellectual property (IP) rights. The extent to which these barriers are impediments to a single digital market in ASEAN is also outlined. Part C concludes by presenting recommendations for competition authorities in supporting government bodies to evaluate the impact of their policies on competition in E-commerce markets.

²³ <http://asean.org/asean-economic-community/>.

²⁴ <http://www.asean-competition.org/read-publication-asean-competition-action-plan-acap-2016-2025>.

²⁵ http://www.asean.org/storage/images/2015/November/ICT/15b%20-%20AIM%202020_Publication_Final.pdf.



Part A:

Overview of E-commerce in ASEAN

02 Introduction to E-commerce and its value chain

2.1. Definition of E-commerce

2.1.1. There are various definitions of electronic commerce, or E-commerce. The most widely used definition is the sale and purchase of goods and services through electronic networks and the internet, encompassing a broad range of commercial activity.²⁶ It is important to note that the definition of E-commerce in this handbook includes mobile commerce (M-Commerce) which is the sale and purchase of goods and services using mobile (smart) phones. This is an important consideration in developing countries as the growth in smart phone usage is outstripping access to conventional computers/laptops.²⁷ The term E-commerce also covers activities throughout the entire value chain of the transaction process, and includes activities such as the delivery of the good to the consumer's preferred location.

2.2. Overview of the business models associated with E-commerce

2.2.1. There are a variety of business models that fall under the broad banner of E-commerce. Table 1 provides a summary of these different models. These are referred to throughout the handbook.

Table 1: E-commerce business models

		Consumer of good or service	
		Consumer	Business
Provider of good or service	Consumer	Consumer-to-Consumer (C2C) e.g. eBay, Carousell	Consumer-to-Business (C2B) e.g. freelancers to businesses (Freelancing.my, Upwork)
	Business	Business-to-Consumer (B2C) e.g. retailer to end consumer (Aliexpress, Lazada)	Business-to-Business (B2B) e.g. manufacturer to wholesaler or wholesaler to retailer (Alibaba)
	Government	Government-to-Consumer (G2C) e.g. government website (www.eCitizen.gov.sg)	Government-to-Business (G2B) e.g. eProcurement (www.philgeps.gov.ph)

Source: PwC Analysis.

²⁶ ADBI (2016), page 1.

²⁷ Statcounter (2016).

2.2.2. Definitions of the business models listed above are provided below:

- a. **B2B:** describes transactions that exist between businesses, such as one involving a manufacturer and wholesaler, or a wholesaler and a retailer;²⁸
- b. **B2C:** refers to transactions that are from a business to a consumer. Businesses might exclusively trade with consumers through electronic means, conduct sales through traditional physical brick-and-mortar stores or sell both online and in physical stores;
- c. **C2C:** refers to commercial transactions between consumers through a third party (i.e. an online platform provider). An auction, where multiple consumers can bid for the same product or service, is a common method used to complete a transaction in this instance. Third party providers, such as eBay, benefit by charging a flat fee or a commission on the purchase price;²⁹
- d. **C2B:** refers to commercial transactions where consumers (individuals) offer products and services to businesses. The simplest example of this is the emerging gig economy where potential employees offer their skills and time to potential employers;
- e. **G2B:** refers to commercial transactions between a government and the private sector;³⁰ and
- f. **G2C:** refers to commercial transactions between a government and a private individual.

Scale of business models

- 2.2.3. The B2B and B2C business models are the two most significant in terms of market value. According to UNCTAD, B2B E-commerce markets are valued at around US\$19.9 trillion globally.³¹ B2C markets are significantly smaller, totalling US\$2.2 trillion globally.³² Whilst the B2B market constitutes the largest share of global E-commerce markets, the B2C segment is expanding quickly, with most of the future growth expected to come from the Asia Pacific region as a result of the rapidly expanding middle class in the region.³³

Emerging business models

- 2.2.4. Recently, new generations of business models have emerged, including brokerage systems that have increased the number of tiers within the different business models described above. One type of brokerage system is an aggregator that displays a range of related content, such as Rakuten which sells a variety of products, from fashion to electronics. Such an aggregator based business model is classified as having a three tier architecture as the platform is intermediating the more conventional B2C model, and, as such, extending the architecture to a B2B2C model.



**B2B E-commerce
markets are valued
at around**

**US\$19.9
trillion**



**B2C E-commerce
markets are valued
at around**

**US\$2.2
trillion**

²⁸ Investopedia (2017).

²⁹ World Applied Programming (2011), page 102.

³⁰ World Applied Programming (2011), page 102.

³¹ UNCTAD (2016c).

³² UNCTAD (2016c).

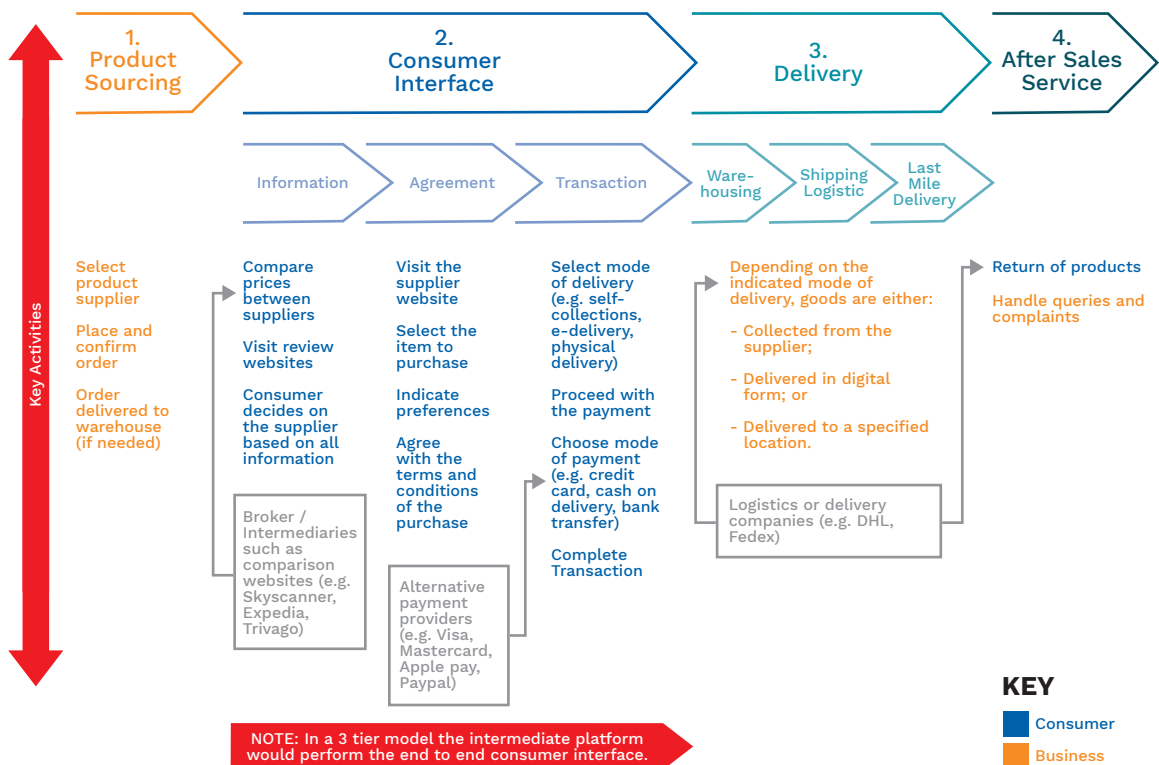
³³ UNCTAD (2015), page 12.

- 2.2.5. Some brokerage systems are a little harder to classify. An example is Airbnb. It could be argued that Airbnb is a C2C model with a facilitated platform in the middle that takes a commission. However, hotels and small businesses also use the Airbnb platform, therefore the market could also be classified as B2B2C. The advantage of intermediaries to consumers is that they provide a wider number of market offerings, allowing consumers to optimise their search time. Independent providers also benefit from the platform's market reach and the power of the platform brand (such as Airbnb) which helps to foster trust between the provider and the final consumer.
- 2.2.6. Both B2B2C and B2B2B are based on the idea of automation. The theory is that inefficiencies in the previous two-tier architecture can be overcome by replacing the process of manually selecting individual preferences (B2C) with an algorithm that automatically compares prices and product information across various websites. B2B2C applications are common in the travel and accommodation sectors, (e.g. Skyscanner, Expedia and Trivago). Businesses in the centre of this three-tier architecture are often referred to as 'platforms' operating in 'two- or multi-sided markets'. These terms are used throughout this handbook, and are discussed in detail in Part B, considering the competition challenges emerging from these market structures.

2.3. Overview of the value chain

- 2.3.1. Each business model described above has a specific value chain (i.e. the end-to-end process from where the transaction commences to where it finishes). The key elements of the B2C value chain are:
- Product Sourcing;
 - Customer Interface;
 - Delivery; and
 - After sales service.
- 2.3.2. Figure 1 below depicts the value chain from start to finish within the B2C business model.

Figure 1: B2C E-commerce value chain



Source: PwC Analysis.

2.3.3. The following sub-sections discuss this process in greater detail, working from left to right of Figure 1.

Product sourcing

2.3.4. An E-commerce business, just like a traditional brick-and-mortar business, must initially source its products. Part of this process includes managing its supply chain in terms of inbound logistics and inventories. E-commerce has, however, presented new opportunities for product sourcing, as companies can potentially avoid warehousing and storage costs by acting purely as the conduit between the manufacturer and the final customer. Assuming the E-commerce retailer is trading physical goods, there is an opportunity for the firm to enhance efficiency by placing an order with the manufacturer to be delivered only when the product needs to be shipped to the final customer, thus saving storage and warehousing requirements. Alternatively, to maximise efficiency, an E-commerce retailer may allow the manufacturer to use their own logistics capabilities to deliver direct to the customer, therefore minimising any storage or handling time by the E-commerce retailer.

Customer Interface

2.3.5. The customer interface links the consumer with the seller's products and services. Customers can access information on what is being traded, choose their selected items and complete their transaction. The customer interface may take the form of two integrated systems between businesses (in the case of B2B transactions, businesses can directly link their systems to communicate with one another so that they do not need to use a public platform), or alternatively a third party interface, such as a website or app that customers can directly access, can be used (in the case of B2C, where publicly available interfaces are used).

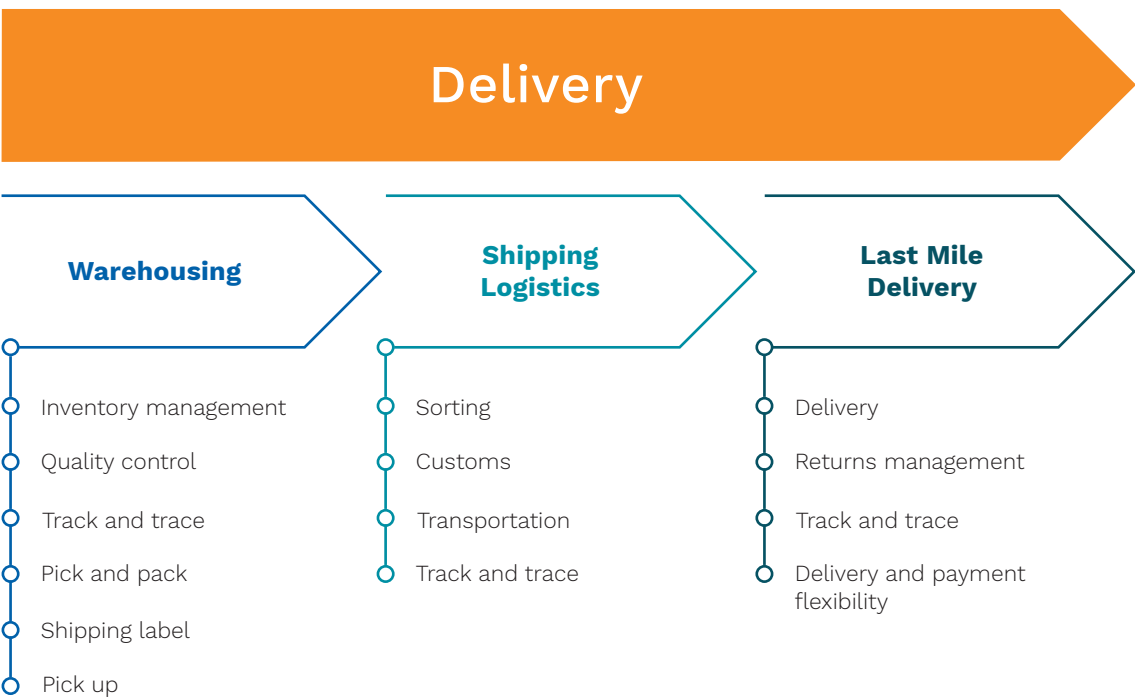
2.3.6. Businesses may decide to develop their own websites to sell direct to customers, or sell via a third party platform, such as Amazon or Qoo10. Transactions through third party platforms are (as mentioned above) referred to as B2B2C and B2B2B, reflecting the fact that the platform serves as a link between the customer and the seller (e.g. Zalora).

2.3.7. The decision to use a third party platform as the customer interface presents challenges and opportunities. It is cheaper (at least in the short term) compared to creating a bespoke platform and it is likely to provide access to a wider customer base. Consumers are also more likely to trust an established platform as opposed to the new website of an independent retailer. Third party platforms can therefore reduce barriers to entry for businesses (which are discussed in greater detail in Section 4), potentially leading to increased competition. However, once a business has established itself on a third party platform, it may be difficult to trade outside of that platform, which could limit future growth.

Delivery

- 2.3.8. Delivery remains one of the key challenges for E-commerce. Online platforms can enable access to global markets, but the physical challenge of delivering products to final customers still remains. Delivery can involve interactions between different types of firms, such as logistics companies or postal services. Delivery also requires reliable infrastructure to be in place. The costs associated with delivery and the time it takes for consumers to receive goods presents a key challenge for businesses to overcome as they compete on customer experience.
- 2.3.9. The growth of E-fulfilment services in recent years has enabled E-commerce companies to deliver a more compelling end-to-end customer experience. E-fulfilment is defined as the people, processes and technology required to deliver an online order to a customer.³⁴ Dedicated companies have been set up to service this need, offering organisations participating in E-commerce the opportunity to outsource this critical part of their value chain.
- 2.3.10. Within the delivery phase, three sub-stages form the E-fulfilment value chain. This is shown in Figure 2 below.

Figure 2: E-fulfilment Value Chain



Source: AT Kearney (2016), PwC Analysis.

³⁴ nchannel (2016).

2.3.11. There are three key areas where E-fulfilment services could provide substantial advantages for E-commerce players:³⁵

- a. **End-to-end capabilities:** This could include flexible pick-up timings, packing solutions, inventory management, and fulfilment solutions (defined as the process of receiving, packaging and shipping orders for goods.³⁶). These elements fit within the warehousing and shipping section of the E-fulfilment value chain; and
- b. **Enabling cross-border E-commerce transactions:** E-fulfilment can help small and medium sized enterprises (SMEs) to extend their reach into new markets. By outsourcing to a focussed logistics or E-fulfilment company, SMEs are more likely to have access to international partnerships and networks that can assist with cross-border transactions and deliveries.
- c. **Last mile delivery:** The introduction of automated lockers has led to progress within the last mile delivery phase. In 2016, Singapore Post introduced Singapore's first island wide open parcel locker service. This allows retailers and consumers to rent a locker to deliver and collect their goods securely. This process can take place at any time during the day³⁷ overcoming the issue of having to have someone available to collect a good. It also means returning a product is easier as goods can simply be left in the locker ready for collection. The introduction of 'Federated Lockers' has also begun within Singapore, which has the aim of creating a nationwide common parcel locker system. This will be the first of its kind in the world.³⁸ The project will involve the large scale deployment of parcel lockers within Singapore, aiming to ease the last mile delivery challenges currently being faced. It is a centralised system that can be used by all logistics companies, rather than each company having to set up lockers themselves. The theory behind this method is that it will be cheaper for businesses and consumers to have one provider for locker systems.

After sales service

2.3.12. As well as competing on price, E-commerce firms compete on customer service by providing additional offerings such as online customer query resolution and free return of products.

2.3.13. The return of products is one of the biggest challenges for online retailers. Many companies offer a free returns service to reduce the burden on the customer, whilst others still charge a fee to cover the associated costs.

³⁵ AT Kearney (2016).

³⁶ Entrepreneur (2016).

³⁷ Singapore Post (2016).

³⁸ Prime Minister's Office Singapore. See: <http://www.pmo.gov.sg/newsroom/dpm-tharman-shammugaratnam-opening-ceremony-singapore-post-regional-ecommerce-logistics>.

03 Overview of the E-commerce landscape in ASEAN, the current state of E-commerce development in each of the AMS and its growth potential

3.1. Introduction

- 3.1.1. This section provides an overview of the current E-commerce landscape in ASEAN, and is structured as follows:
- Firstly, the key current business models in ASEAN are outlined, as well as the expected growth trajectories within the region;
 - Secondly, the current state of E-commerce in all AMS is explored in greater detail; and
 - Finally, the impact of E-commerce on the value chain in ASEAN is presented, before looking more closely at the changes in five heavily disrupted industries.

3.2. Overview of the current retail E-commerce markets in ASEAN and their likely evolution

Current scale of E-commerce markets in ASEAN

- 3.2.1. Since the opening of the internet for commercial use in the early 1990s, E-commerce has grown significantly both in terms of revenue and the number of markets where it is operational. In the six largest economies within ASEAN (Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam, hereafter referred to as the ASEAN6), retail E-commerce has a total market size of US\$7 billion.³⁹
- 3.2.2. Table 2 below shows the market size within these AMS.

Table 2: The retail E-commerce markets in ASEAN (2015)

ASEAN member state	Market size (US\$bn) ⁴⁰	Population (millions) ⁴¹	Market size per capita (US\$ per capita)	Internet users per capita (%) ⁴²	Internet users (millions) ⁴³
Brunei Darussalam	-	0.4	-	71.2	0.3
Cambodia	-	15.6	-	19.0	3.0
Indonesia	1.3	257.6	5.05	22.0	56.6
Lao PDR	-	6.8	-	18.2	1.2
Malaysia	1.3	30.3	42.90	71.1	21.5
Myanmar	-	53.9	-	21.8	11.8
The Philippines	1.0	100.7	9.93	40.7	41.0
Singapore	1.7	5.5	309.09	82.1	4.5
Thailand	0.9	68.0	13.24	39.3	26.7
Vietnam	0.8	91.7	8.72	52.7	48.3
ASEAN total		630.5		34.1	214.9

Source: AT Kearney (2015); Statista (2017u, 2017v). Note: A dash (-) indicates unavailable data.

³⁹ AT Kearney (2015), page 2.

⁴⁰ AT Kearney (2015), page 2.

⁴¹ Statista (2017u).

⁴² Statista (2017v).

⁴³ Ibid.

- 3.2.3. Table 2 shows that in 2015 the market size per capita was highest in Singapore, and lowest in Indonesia. This demonstrates that E-commerce has penetrated further into Singapore than other AMS, but the potential for E-commerce growth is greatest in Indonesia, especially given its significant population. Internet users per capita is also highest in Singapore, and lowest in Indonesia and Thailand, thus showing a correlation between internet usage and the size of the E-commerce market per capita.
- 3.2.4. The level of market penetration of E-commerce varies significantly across nations. To assess E-commerce adoption across ASEAN, internet retail sales as a share of brick-and-mortar based retail sales can be considered. UNCTAD data shows that Singapore, Malaysia, Thailand, Indonesia, Vietnam and the Philippines all currently generate less than 4% of their retail sales online.⁴⁴ The country with the highest proportion of retail sales from E-commerce within the study of 42 selected countries is The Republic of Korea, at 16%. The equivalent figure in China is 7%.
- 3.2.5. Table 3, highlights key characteristics of E-commerce markets in ASEAN, outlining the current state of the sector for the ASEAN6. Each of these countries is then discussed in greater detail in the following sub-sections. Further details of the government initiatives to enhance E-commerce markets are provided in Annex 2.

Table 3: The retail E-commerce market in the ASEAN6

ASEAN member state	Market size (US\$bn), 2015	Market Size per cap (US\$), 2015	Expected annual growth rate 2017-2021 (%)	Key sectors impacted by E-Commerce	Main impediments to growth	Government initiatives
Indonesia	1.3	5.05	20.1 ⁴⁵	Entertainment media (books, video, games), consumer electronics, fashion, travel ⁴⁶	Cyber-security, product reliability ⁴⁷	E-commerce Roadmap ⁴⁸
Malaysia	1.3	42.90	23.2 ⁴⁹	Travel, entertainment media, consumer electronics, fashion ⁵⁰	Cyber security, consumers preference for brick-and-mortar shopping ⁵¹	National E-commerce Strategic Roadmap ⁵²
The Philippines	1.0	9.93	17.3 ⁵³	Consumer electronics, food & grocery ⁵⁴	Credit card penetration ⁵⁵	E-commerce Roadmap ⁵⁶
Singapore	1.7	309.09	11.2 ⁵⁷	Travel, fashion and beauty, entertainment & lifestyle, IT and electronics, insurance ⁵⁸	Brick-and-mortar shopping culture ⁵⁹	Retail Industry Transformation Map, ⁶⁰ SMEs Go Digital Programme, initiatives to speed up customs clearance
Thailand	0.9	13.24	15.9 ⁶¹	Travel, fashion, electronics, media ⁶²	Cyber security, poor logistics, infrastructure ⁶³	Latest economic growth plan, Thailand 4.0, includes E-commerce initiatives ⁶⁴
Vietnam	0.8	8.72	16.5 ⁶⁵	Fashion, electronics, media, food, home appliances ⁶⁶	Product reliability, cyber security ⁶⁷ , poor logistics ⁶⁸	E-commerce Growth Plan 2016-20 ⁶⁹

Source: Various (see footnotes).

⁴⁴ UNCTAD (2015), page 21.

⁴⁵ Statista (2017c).

⁴⁶ DBS (2015).

⁴⁷ DBS (2015).

⁴⁸ Digital News Asia (2016). See <https://www.digitalnewsasia.com/digital-economy/indonesia-announces-e-commerce-roadmap-part-jokowi%E2%80%99s-newest-economic-reform-package>.

⁴⁹ Statista (2017e).

⁵⁰ DBS (2015).

⁵¹ DBS (2015).

⁵² Malaysian Digital Economy Corporation, (2016). See <https://www.mdec.my/digital-innovation-ecosystem/ecommerce/nedr>.

⁵³ Statista (2017d).

⁵⁴ DBS (2015).

⁵⁵ DBS (2015).

⁵⁶ Philippine E-commerce roadmap, (2017). See <http://www.dti.gov.ph/roadmap>.

⁵⁷ Statista (2017b).

⁵⁸ DotEcon (2015), page 24.

⁵⁹ DBS (2015).



Indonesia

- 3.2.6. The growth projection for the Indonesian E-commerce sector is a compound annual growth rate (CAGR) of 20.1% (2017–21).⁷⁰ The largest sectors within E-commerce in Indonesia are entertainment media (e.g. books, videos and games), consumer electronics, fashion and travel.⁷¹ Logistical infrastructure and internet penetration are relatively weak compared to other members of the ASEAN6, making it harder for E-commerce retailers to reach consumers.⁷² Factors that are supporting the development of E-commerce include a growing middle class (expected to be 140 million by 2020, from 74 million in 2014)⁷³, and a young population (70% of the population is under the age of 40).



Malaysia

- 3.2.7. The current growth projection for the Malaysian E-commerce sector is a 23.2% CAGR from 2017–21.⁷⁴ The largest sectors within E-commerce are travel, followed by entertainment media, consumer electronics and fashion.⁷⁵ Key drivers of the expected growth in E-commerce markets within Malaysia include high internet penetration, at 67%,⁷⁶ higher than average credit card usage for the region, which is at 9%,⁷⁷ and good transport infrastructure for product sourcing, logistics and delivery. Despite these factors, the online retail segment is still less than 1% of total retail sales.⁷⁸ Reasons for this include a lack of trust in online retailers, in terms of product reliability and safety of payment mechanisms, and poor local logistics infrastructure.⁷⁹ Questionnaire responses indicate that a number of successful platforms have emerged in Malaysian E-commerce markets, namely Lazada, Zalora and Lelong.

The largest sectors within E-commerce in Indonesia are



ENTERTAINMENT MEDIA



CONSUMER ELECTRONICS



FASHION



TRAVEL



The largest E-commerce sector in Malaysia is

TRAVEL

⁶⁰ SPRING Singapore (2016). See <https://www.spring.gov.sg/NewsEvents/PR/Pages/Retail-Industry-Transformation-Map-to-Drive-E-Commerce-Omnichannel-Formats-to-Enhance-Growth-and-Competitiveness-20160915.aspx>.

⁶¹ Statista (2017a).

⁶² DBS (2015).

⁶³ DBS (2015).

⁶⁴ Asia Today (2017). See <http://www.asiatoday.com/pressrelease/thailand-drafts-roadmap-digital-economy-0>

⁶⁵ Statista (2017f).

⁶⁶ Qandme.net. (2016).

⁶⁷ Vietnam Net (2016). See <http://english.vietnamnet.vn/fms/business/162619/vn-government-sets-targets-for-e-commerce-in-2016-2020.html>.

⁶⁸ Qandme.net (2016).

⁶⁹ DBS (2015).

⁷⁰ Statista (2017c).

⁷¹ DBS (2015).

⁷² DBS (2015).

⁷³ International Business Times (2014).

⁷⁴ Statista (2017e).

⁷⁵ DBS (2015).

⁷⁶ AT Kearney (2015), page 3.

⁷⁷ World Bank (2016).

⁷⁸ DBS (2015), page 20–22.

⁷⁹ DBS (2015), page 12.



The Philippines

3.2.8. The current growth projection for the Philippines E-commerce sector is a CAGR of 17.3% between 2017 and 2021.⁸⁰ According to the Singapore Post, the largest online retail sector within the Philippines is consumer electronics, followed by food and groceries.⁸¹ Euromonitor (2017), however, found that media products, such as in-game purchases, is the largest sector.⁸² Set against this, however, according to the Philippines Retailers Association, only approximately 3% of the total retail market is based online.⁸³ One driver of the low level of E-commerce adoption in the country is the small proportion of people who own a credit card; specifically, there are only 2.5 million credit cards in a population of around 100 million.⁸⁴ The fragmented geography of the Philippines also makes it a challenge to have reliable courier services, particularly serving the more rural areas.⁸⁵

3.2.9. Like many countries in ASEAN, the Philippines has many citizens working as migrants overseas. This has created opportunities for these citizens to buy domestic products online whilst overseas to deliver to family and friends still residing in the Philippines. Online stores targeting such customers have emerged.⁸⁶ Island Rose, as an example, is an online flower retailer that allows consumers from all over the world to purchase gifts to be delivered within the Philippines.



The largest online retail sector in the Philippines is

CONSUMER ELECTRONICS



Singapore

3.2.10. Singapore has a high online penetration rate (78%) and a population which spends a large amount of time online (5.3 hours a day through desktop, and 2.4 hours a day through mobile devices).⁸⁷ Also, the existing export and import infrastructure is strong. Singapore has comparatively low market entry barriers compared to other AMS, evidenced through its rating as the second most free economy in the world in the 2014 index of Economic Freedom, behind only Hong Kong.⁸⁸

3.2.11. The growth projection for the Singaporean E-commerce sector is a CAGR of 11.2% (2017-21).⁸⁹ The largest sectors within E-commerce are travel, fashion and beauty, entertainment and lifestyle, IT and electronics and general insurance.⁹⁰ Key drivers of growth in the market are high internet penetration and smartphone adoption, strong financial infrastructure, and good logistical facilities.⁹¹

3.2.12. Over the period from 2009 to 2014, B2C online business such as Reebonz, Qoo10, Luxola, Groupon, Deal.com.sg, NoQStore, Bellabox, VanityTrove, Kwerkee, Zalora, Food Panda, Taobao, HipVan, Omigo, Rakuten and Lazada have entered the market. There have also been new entrants in terms of C2C online businesses, for example Clozette and Carousell, as well as platforms like Uber and Grab (Grab offers both C2C and B2C services through GrabCar, GrabHitch and GrabTaxi).

The largest E-commerce sectors in Singapore are



TRAVEL



FASHION AND BEAUTY



ENTERTAINMENT AND LIFE STYLE



IT AND ELECTRONICS



GENERAL INSURANCE

⁸⁰ Statista (2017d).

⁸¹ DBS (2015).

⁸² Euromonitor (2017).

⁸³ DBS (2015), page 22.

⁸⁴ DBS (2015), pages 22-24.

⁸⁵ Philippine Competition Commission (2017).

⁸⁶ DBS (2015), pages 22-24.

⁸⁷ Singapore Post (2014), page 14.

⁸⁸ Ibid.

⁸⁹ Statista (2017b).

⁹⁰ DBS (2015).

⁹¹ DBS (2015), page 13.

3.2.13. Despite Singapore possessing the right enablers for E-commerce markets to flourish, retail E-commerce adoption rates are not as high as Japan or South Korea. This may be due to the convenience of shopping malls, and the culture of shopping in traditional brick-and-mortar outlets. A survey by IMDA revealed that one of the top reasons for not shopping online was a “preference to shop in person or deal personally with a service provider”.⁹² Questionnaire responses also highlighted this is a barrier in Singapore.

3.2.14. Online retail adoption could, however, increase due to the following reasons:

- a. Recent labour policy changes have reduced the supply of labour in the market, prompting retailers to look again at E-commerce, as trading online tends to be less labour intensive than selling via brick-and-mortar stores;⁹³
- b. Recently, there has been an emergence of strong E-commerce players in the region, such as Alibaba, which has led to cost reductions and increased quality of service for customers;⁹⁴
- c. The new federated locker system will improve last mile delivery. In addition, the introduction of a ‘shopping mall’ by SingPost, which offers a complete suite of E-commerce logistics solutions, will also drive online retail sales. Shopping through online retailers will include in-shop online ordering and flexibility in delivery and pickup timings;⁹⁵ and
- d. Changi Airport’s E-commerce AirHub facility, which is designed to speed up the processing of parcels flown in from abroad will decrease the time taken for online purchases to be delivered to final customers. This will be done by increasing mail-sorting capability by three times and reducing processing time by half,⁹⁶ and driven by the introduction of a fully automated mail-sorting system that will increase mailbag processing capability from 500 per hour to more than 1,800 per hour. The facility is expected to be ready during the second half of 2017.



Thailand

3.2.15. The growth projection for Thailand’s E-commerce sector is a CAGR of 15.9% (2017-21).⁹⁷ The largest sectors within E-commerce are travel, fashion, electronics & media.⁹⁸ The key click-and-mortar⁹⁹ players include Tesco Lotus, 7-Eleven and CP-ALL.

3.2.16. The challenges within Thailand are similar to those of Indonesia, mainly surrounding a lack of trust. 62% of online shoppers in the country are reluctant to give out their credit card information online.¹⁰⁰ Other issues include the high cost of E-payment and logistics, expensive telecommunications and internet access, and a lack of capital to assist start-up companies.¹⁰¹



Singapore has a high online penetration rate of

78%

Amount of time online



Through desktop:
5.3 hours a day



Through mobile devices:
2.4 hours a day



The largest E-commerce sectors in Thailand are

**TRAVEL, FASHION,
ELECTRONICS &
MEDIA**

⁹² IMDA (2014).

⁹³ DBS (2015), page 13.

⁹⁴ Ibid.

⁹⁵ Singapore Post (2015)

⁹⁶ Business Times (2017).

⁹⁷ Statista (2017a).

⁹⁸ DBS (2015).

⁹⁹ Firms that conducts business online and also through ‘traditional’ offline brick-and-mortar channels.

¹⁰⁰ The Paypers, (2017).

¹⁰¹ Electronic Development Transactions Agency, (2017).



Vietnam

- 3.2.17. The growth projection for Vietnam's E-commerce sector is a CAGR of 16.5% (2017-21). The largest sectors within E-commerce are fashion, electronics & media, food & home appliances.¹⁰²
- 3.2.18. As of 2016 there were 45 million internet users in the country, and over 34 million smartphone devices sold. The most popular method of payment for E-commerce transactions is cash on delivery, followed by bank transfer and payment card.¹⁰³
- 3.2.19. The top 5 B2C Vietnamese websites according to questionnaire responses are Thegioididong.com.vn; Nguyenkim.com; Fptshop.com.vn; Dienmayxanh.com; and VienthongA.vn. The top 5 C2C Vietnamese websites are Vatgia.com; Chotot.com; 5giay.vn; Chodientu.vn; and Webmuaban.vn.
- 3.2.20. Reasons for poor adoption of E-commerce in the country include concerns over the quality of products, security worries, high prices, and delivery costs. Many of these issues stem from the lack of logistics infrastructure within the country and inefficient E-commerce practices.¹⁰⁴ Trust is a big issue for consumers online, who often prefer to purchase from brick-and-mortar companies.¹⁰⁵

The largest E-commerce sectors in Vietnam are



FASHION



**ELECTRONICS
AND MEDIA**



FOOD



**HOME
APPLIANCES**



Brunei Darussalam, Lao PDR, Cambodia, Myanmar

- 3.2.21. The uptake of E-commerce has increased within Brunei Darussalam in recent years, as access to mobile and internet capabilities has increased. However, the majority of E-commerce is limited to the accommodation and transport booking sectors. For example, Royal Brunei Airlines has an online reservation system. Hoteliers also have e-booking services.¹⁰⁶
- 3.2.22. A lack of investment in telecommunications infrastructure, and the low rate of formal banking and credit card use are two reasons why E-commerce is not widely used in Lao PDR. While broadband access is widely available in the capital, Vientiane, country-wide access to the internet is mainly through mobile devices.¹⁰⁷
- 3.2.23. There is a growing number of websites being set up in Cambodia which mainly cater for a small number of consumers in the major cities with better access to the internet. Impediments to growth are inadequate infrastructure and low levels of credit card penetration.¹⁰⁸
- 3.2.24. As of 2015, Myanmar's internet penetration was around 22% of the population, a figure which has grown from under 3% in 2013.¹⁰⁹ Internet access has, however, historically been unreliable and slow. There have been attempts to establish a presence online within the real estate and automotive industries in recent years. The growth in smart phone penetration (at 45% as of November 2015) bodes well for further E-commerce development going forward.¹¹⁰



The largest E-commerce sectors in Brunei Darussalam are

**ACCOMMODATION
& TRANSPORT
BOOKING**



Myanmar's internet penetration was around

22%

of the population as of 2015

¹⁰² Qandme.net. (2016).

¹⁰³ Foreign Trade University (2017).

¹⁰⁴ Qandme.net (2016).

¹⁰⁵ Vietnam Net (2016).

¹⁰⁶ Export.gov (2016a).

¹⁰⁷ Export.gov (2016b).

¹⁰⁸ Export.gov (2016c).

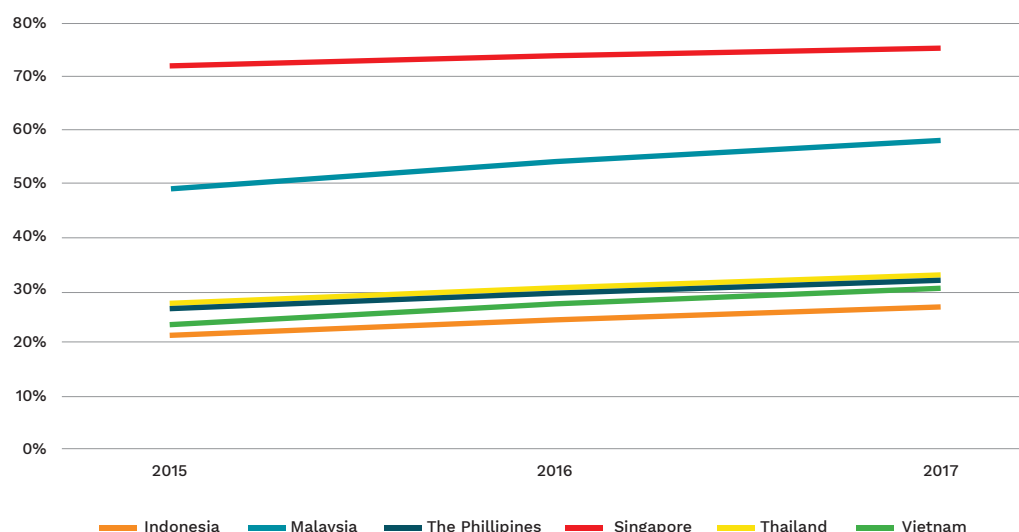
¹⁰⁹ World Bank (2017).

¹¹⁰ Export.gov (2016d).

Likely evolution of E-Commerce in ASEAN

3.2.25. Key drivers of growth in ASEAN include a rapidly expanding population and a rising middle class (expected to grow from 190 million people within Southeast Asia in 2012 to 400 million by 2020).¹¹¹ This growth is also being supported by a high penetration of smart phones (see Figure 3 below), an increase in sales through M-commerce, more payment and shipping options, and major brands entering local E-commerce markets.¹¹²

Figure 3: Smartphone penetration in the ASEAN6



Source: Statista (2017g), Statista (2017h), Statista (2017i), Statista (2017j), Statista (2017k), Statista (2017l).

3.2.26. There are several challenges that E-commerce markets in ASEAN are facing. These include poor E-commerce infrastructure (such as banking infrastructure) and a lack of E-commerce regulations. These are discussed in greater detail in Section 4.

3.3. Impact of E-commerce on the value chain in ASEAN

3.3.1. This section considers the impact that E-commerce has had on the value chain in AMS in comparison to traditional brick-and-mortar sales channels. It looks at the differences in cost structures, the availability of information, and the supply chain and logistics functions of firms. Finally, the new business models that have emerged in the E-commerce space within the region are outlined.

Differences in cost structures

3.3.2. Online retailers are not as physically constrained as their brick-and-mortar counterparts. They can offer a wider variety and quantity of goods without the need for a physical shop floor to showcase their products and services.¹¹³ Businesses are able to save on both fixed and variable costs, such as rent, labour and other overheads related to maintaining a physical presence on the high street.

3.3.3. Many of the costs associated with cross-border trade are reduced as the physical presence required to trade is diminished. As a result, more new and existing companies are expanding their sales into new markets and geographies.¹¹⁴ For example, Rakuten, a Japanese firm, has set up their regional headquarters in Singapore to reach other ASEAN markets.¹¹⁵

¹¹¹ Nielsen (2014). Middle class defined as people that “have the financial means to make purchase decisions based on their level of disposable income.”

¹¹² DBS (2015), pages 12-14.

¹¹³ ADBI (2016), page 2.

¹¹⁴ Competition Commission of Singapore (2015), page 4.

¹¹⁵ Singapore Post (2014), page 4.

Availability of information

- 3.3.4. E-commerce has increased the availability of information, both to consumers and businesses at all stages in the value chain. Providers in digital markets collect and make use of large quantities of data and information on consumer preferences. This can be used to the mutual benefit of producers and customers by better meeting consumers' needs through tailoring products to individuals' preferences.
- 3.3.5. Competitors' price movements are also more visible in digital markets. The availability of online algorithms used to identify and respond to price movements means companies are able to react automatically to changes in their competitors' prices. Companies, such as Zalora, have visibility of any price changes to products made by online competitors, and can react to these changes almost instantly. Pricing algorithms are discussed in greater detail in Section 8, with a focus on the implications for competition.

Supply chain/logistics

- 3.3.6. A supply chain is defined as an "entire network of entities, directly or indirectly interlinked and interdependent in serving the same consumer or customer".¹¹⁶ This includes logistics, manufacturing and procurement. The growth of E-commerce has led to changes in the supply chain. Shorter delivery times are being demanded by online shoppers, and companies want to differentiate themselves in the market.¹¹⁷
- 3.3.7. Some retailers have implemented a 'drop-shipping supply chain', where an order is passed directly onto a wholesaler/manufacturer, removing the need to have a physical warehouse to store the products, therefore decreasing costs. Cleo-cat fashion and Blogshop have adopted such processes in Singapore.¹¹⁸
- 3.3.8. E-commerce companies have also started to acquire or develop elements of the supply chain, rather than rely on other companies to complete these parts of the customer journey. This is often used to gain greater control over the entire customer experience. For example, Jindong Mall, has recently been given a licence for its logistics subsidiary, allowing it develop an in-house logistics framework rather than rely on third party infrastructure.¹¹⁹

New business models

- 3.3.9. E-commerce is creating new customer-centric business models. Advancements in data analytics allow better targeting of products and marketing via the most effective distribution channels to consumers, who are demanding a more unique and efficient customer experience.
- 3.3.10. Price Comparison Websites (PCWs) which allow consumers to easily compare and filter different suppliers of goods or services, have become prevalent across ASEAN. PCWs make their money from advertising, and also commission from the company the customer purchases from. CompareXpress.com in Singapore, CompareHero.my in Malaysia, and Websosanh in Vietnam, all adopt this business model. In online marketplaces such as Amazon, actual sales are made, whereas on PCWs, consumers are directed to retailers' websites.
- 3.3.11. The impacts of these new business models on competition are considered in detail in Section 7 of this handbook.

¹¹⁶ BusinessDictionary.com (2017).

¹¹⁷ Nomura (2016).






¹¹⁸ Competition Commission of Singapore (2015), page 11.

¹¹⁹ Singapore Post (2014), page 8.

3.4. Discussion on five industries disrupted by E-commerce within ASEAN

3.4.1. This section considers the changes discussed in Section 3.3 in detail for five industries within ASEAN. These industries have been selected on the basis of the extent to which challenges have arisen for competition authorities in E-commerce markets in these industries around the world (as discussed in detail in Part B of this handbook). Given this two-sided selection approach, it is important to note that these are not the five largest E-commerce sectors in ASEAN, but those that have been significantly disrupted by E-commerce and posed challenges to competition authorities around the world. The five industries considered in this section are listed (in no particular order) in Table 4 below.

Table 4: Five disrupted industries by E-commerce within ASEAN

Industry				
				
Accommodation booking	Flight booking	Land transport	Cosmetics and beauty products	Fashion

Source: PwC Analysis.

3.4.2. Table 5, below, provides a summary of the key impacts from the disruption caused by the emergence and growth of E-commerce in ASEAN within the five industries discussed. The following sub-sections then discuss the disruption in each of these industries in ASEAN in greater detail.

Table 5: Summary of key impacts from E-commerce in the five disrupted industries within ASEAN

Industry	Key impacts and consequences	Examples of significant players in ASEAN
Accommodation booking	Increase in independent providers, increased price competition, new audiences for traditional hoteliers.	Agoda, Trivago, Expedia, Booking.com, Hilton, Intercontinental, Hyatt, Airbnb
Flight booking	Increased price competitiveness, lower price dispersion, demise of independent travel agents.	Expedia, Skyscanner, Asia Travel, Flight Centre, Flight World, Hello World
Land transport	Increased innovation, reshaping of markets, more sensitive pricing strategies.	Uber, ComfortDelGro, GoJek, Grab
Cosmetics and beauty products	Increased price competition and competition on product selection, demise of brick-and-mortar companies.	Luxola, Hermo, Bellabox
Fashion	Increased product choice for consumers, growth in consumer expectations.	Zalora, Clozette, VanityTrove, Lelong.my, Fashion Valet, ASOS, Shopbop.com

Source: PwC Analysis.

Accommodation booking

- 3.4.3. Brick-and-mortar companies within ASEAN in the accommodation booking sector (including traditional travel agents) have seen fierce competition from aggregators and other sites such as Agoda, Trivago and Booking.com, which have become key players in the industry.
- 3.4.4. Whilst many travellers in the region, especially older groups, still rely on brick-and-mortar operators, 80% of travellers in Singapore¹²⁰ say that they gather their travel information online. It has been argued that the survival of brick-and-mortar providers in Singapore is in jeopardy.¹²¹ This is particularly true for business travel agents as it is now easier for firms to manage these services in-house or through single online vendors.
- 3.4.5. The rise of PCWs and digital platforms for accommodation providers has led to a large increase in independent accommodation providers coming to the market, using digital platforms to reach their customers. Airbnb, as an example, acts as an intermediary connecting accommodation providers and travellers. Independent providers are given the opportunity to improve their brand since consumers rely on the reputation of the platform to ensure their expectations are met, along with reviews that consumers and vendors provide. On platforms such as Airbnb, Tripping, and HomeAway, the majority of vendors are independent providers. On other platforms, such as Booking.com and Trivago, traditional hotel chains such as Hilton, Intercontinental and Hyatt sell room vacancies in order to reach a wider range of customers.
- 3.4.6. The impact of the disruption brought about by E-commerce on the hotel industry varies by the size of the business. The largest international brands have a very loyal consumer base, incentivised by loyalty programmes, such as Hilton, Intercontinental, and Hyatt. Many of these businesses were quick to develop their own B2C website, which, combined with their loyal consumer base, allows them to manage real time demand and adopt flexible pricing models. Smaller hoteliers are more likely to benefit from intermediaries' platforms to access a wider consumer base.
- 3.4.7. There has also been a shift in the way the largest hotel chains structure themselves to combat the downward pressure on prices arising from greater competition. Many large hotels now have sister brands allowing them to offer both premium accommodation and budget offerings under different brands within the same group enabling them to serve two distinct customer segments. An example of this is Hilton, which has the Hilton hotel brand for premium accommodation, and the Tru brand, competing with economy brands. Similarly, Intercontinental Hotels Group offers premium accommodation through its Intercontinental brand, and standard accommodation through its Holiday Inn hotels.

Flight booking

- 3.4.8. E-commerce has heavily disrupted this sector with companies such as Expedia, Wego and Skyscanner providing a platform for consumers to compare prices across airlines. Traditional travel agents are the brick-and-mortar companies disrupted by E-commerce in the flight bookings market. Flights are now widely sold through airlines' own web portals and new online travel agencies such as Asia Travel. In the latter case Asia Travel acts as an intermediary, and takes a commission or fee for the booking service it provides. Airlines are also now selling tickets via aggregator sites. Examples of aggregators in this sector include Momondo and Webjet.
- 3.4.9. The impact of these companies on flight bookings has been evident in price competition. Studies have shown an increase in price competition as the size of the internet travel search population grows.¹²² There is also lower price dispersion online compared to brick-and-mortar agencies.¹²³
- 3.4.10. There are three key developments which have led this sector to its current model. Firstly, the advent of the internet and the subsequent vast global uptake has been a key enabler to the growth of today's market. Secondly, airlines have set up direct websites, where tickets are sold directly to customers. The third, and perhaps most important, change was the advent of an E-ticket; first created by the International Air Transport Association (IATA) on 1 June 2008.¹²⁴ The result of these three developments is that flights can now be bought and sold anywhere in the world without the need for a paper ticket

¹²⁰ GfK Singapore, (2014).

¹²¹ DotEcon (2015), page 132.

¹²² Verlinda and Lane (2004), page 8.

¹²³ Sengupta and Wiggins (2007), page 1.

¹²⁴ IATA (2008).

to be issued. This has had a profound effect on the development of the market. One consequence is the demise of local independent travel agents, which have been unable to compete with the growth of large E-commerce companies.

- 3.4.11. Some larger brick-and-mortar entities have however survived, such as Flight Centre, Flight World, and Hello World. The success of these operators has been achieved by providing a higher level of customer care whilst offering a bundled service, including flights, accommodation, and other trips on the holiday. In the case of Flight Centre, 95% of its sales are still done in store rather than online.¹²⁵
- 3.4.12. E-commerce is now entrenched in the flight booking industry, with aggregator sites providing more information and comparability for customers than their brick-and-mortar counterparts. These sites are also able to perform sophisticated price discrimination, with the likes of Skyscanner charging a higher price based on analytics of how many times consumers have looked at a particular flight or route. As a result, they are able to estimate consumers' level of demand for the service.

Land transport

- 3.4.13. Brick-and-mortar companies within ASEAN that operate in land transport include local taxi operators which have licences, as well as nationalised (or franchised) rail and bus services. New online companies such as Uber, GoJek and Grab have developed to a differing extent within ASEAN. For example, Grab claims to have more than 95 per cent of the third-party-taxi-hailing market within Southeast Asia as a whole.¹²⁶ Private-hire care services have also emerged, such as Smove in Singapore.
- 3.4.14. The growth of E-commerce via M-Commerce has meant that innovative apps are being developed by firms such as Uber, where GPS technology on lower cost smartphones can be used to match customers and drivers. Customers can also find other customers that are travelling in the same general direction and "share their ride". GPS technology enables fare-seeking drivers to be matched with journey-seeking customers, rather than the more conventional system of customers having to find an available taxi. By using GPS technology customers get a smoother experience and the drivers benefit as the app identifies customers closest to that driver, therefore minimising drivers' non-fee paying journeys. The apps can also be used globally, providing even greater convenience and familiarity to consumers.
- 3.4.15. Data gathered by these companies' means that firms are also able to implement real time pricing, matching supply to demand and enabling price increases during peak times. Uber is a good example of a firm using these capabilities.
- 3.4.16. Consumer choice has increased as new alternative transport options arise. Drivers are also more able to choose when and where they work.
- 3.4.17. These new disruptive organisations (e.g. Grab/Uber) are now diversifying their offer to logistics such as last mile delivery (e.g. UberEats, which provides a delivery service for restaurants to deliver their product to their final customers).
- 3.4.18. Transport markets are also becoming increasingly complex. For instance, taxi drivers are starting to use the Grab app to find customers, and car owners can also use Grab to earn extra income from their journeys by using 'Grabhitch'.

Cosmetics and beauty products

- 3.4.19. Traditional cosmetics and beauty firms (brick-and-mortar companies) within ASEAN have struggled to compete with new online retailers such as Luxola. Hermo, a marketplace for cosmetics and beauty products based in Malaysia, has monthly traffic of 870,000 hits.¹²⁷
- 3.4.20. Traditionally, the cosmetics industry has relied on the ability for consumers to smell and touch products prior to purchase, but the online alternative is proving to be an attractive option due to convenient delivery, wider product selection and competitive pricing. Online retailers are able to offer value-added options such as remembering a consumer's allergies and preferences, helping consumers to make quicker, more informed decisions. Digital disruption has led to innovative subscription services and other new ways for firms to attract customers, many of which have now been followed by brick-and-mortar sellers.

¹²⁵ News.com.au (2016).

¹²⁶ Wired (2016).

¹²⁷ ASEANUP (2017).

- 3.4.21. A survey of online cosmetics and beauty products shoppers has shown that the key issues that influence online purchases are site security, product availability and free shipping.¹²⁸ This is understandable as most shoppers are repeat purchasers, and therefore worry less about being able to see, touch or smell products.
- 3.4.22. Some of the large trusted brands in this industry are making use of online platforms in order to reach a broader customer base and to get closer access to their customers. Benefit US, for example, has used Facebook to reach its customers, whilst Pinterest and Vine are used by many cosmetics companies for a similar purpose.¹²⁹ Other firms, such as Coty and Pierre Fabre in Europe, are less accommodating to the sale of their products via online channels. The restrictive practices adopted by these firms are discussed in detail in Section 7.
- 3.4.23. Many brands are also trying to use their own websites to build loyalty and to impart information about their products, rather than as a point of sales tool. L'Oréal Paris launched its Makeup Genius app in 2014 which uses facial mapping technology to turn the front-facing camera of a smartphone into a virtual mirror, allowing users to feel like they are trying on products.¹³⁰

Fashion

- 3.4.24. Since the emergence of E-commerce, global online retailers such as ASOS have regularly shipped to ASEAN. More recently ASEAN based retailers, such as Zalora, have entered the market, disrupting both the traditional brick-and-mortar firms and earlier E-commerce sites. Formed in 2012 by Rocket Internet, the company now has a presence in all of the ASEAN6, with 1.85 million unique hits per month as of February 2017.¹³¹ According to Euromonitor, in 2007 internet retailing was around 3% of fashion sales globally, but by 2012 this share had doubled and showed the fastest growth rate of all retail channels.¹³²
- 3.4.25. The typical model of expansion employed by fashion retailers is a three-step process. Firstly, a website is set up in the home country, providing a global service based out of that country. Once the company has started to generate interest in other nations, it will then set up a local site in that region, with products still being supplied from the home jurisdiction. Finally, once the level of demand has reached a given level of maturity in the new location, a distribution centre will be set up to service the demand more easily and efficiently.
- 3.4.26. The impact of E-commerce on fashion has been considerable. The industry has a long and complex supply chain which, since the 1990s and 2000s, has seen structural and disruptive changes due to globalisation, sustainability concerns, and E-commerce.¹³³ In contrast to beauty products, where price competition has increased, competition in the fashion domain is based more on range and choice.
- 3.4.27. The role of social media is one which is often overlooked by industry observers and firms alike. Pictures of celebrities sometimes lead to huge spikes in demand for fashion products. Whilst some of these promotional activities are planned, other unplanned instances may take retailers by surprise. Retailers are required to be far more agile than ever before. The growth of M-commerce is leading to a more immediate gratification model, whereby consumers surf the internet from their smartphone, often looking at celebrities and what they wear. Consumers are able to purchase these products within a few minutes from their phone and have them delivered potentially by the end of the day.
- 3.4.28. Consumer expectations have grown since the advent of E-commerce. Online retailers have responded to this in ASEAN by offering click-and-collect services, making agreements with delivery partners which enable consumers to collect products from specified locations. Despite this progress, there is still a long way to go in comparison to the service experience available to consumers in other countries outside of ASEAN. Last minute delivery is more difficult in some parts of the region due to poor logistics. Free returns are also often not offered.
- 3.4.29. The reduced need for inventory in shops, and greater dependence on distribution networks has impacted supply chains. There has been a shift in labour needs from brick-and-mortar shops to distribution centres to assist with packaging and delivery of products. Consumers are also now more demanding, requesting next day delivery to specific locations, which means individual items are now being delivered on their own to households, as opposed to in the past where big deliveries went from one place to another.

¹²⁸ AT Kearney (2014), pages I-II.

¹²⁹ Econsultancy (2016).

¹³⁰ Translate Media (2017).

¹³¹ ASEANUP (2017).

¹³² Euromonitor (2013), pages 1-51.

¹³³ Credit Suisse (2016).

04 Key competition and other regulatory challenges and/or barriers faced by businesses in the E-commerce sector for AMS and how they hinder competition and growth of the E-commerce sector in the region

4.1. Introduction

- 4.1.1. Businesses competing in E-commerce markets may face two distinct types of barriers. Firstly, there may be barriers to the growth and development of E-commerce markets affecting all firms in the market (barriers to expansion), such as restrictive forms of regulation, or broad technological delays. The quality of connectivity infrastructure may also be considered a barrier to the growth and development of E-commerce in ASEAN. Secondly, there may be barriers to entry that apply to potential entrants or small firms (e.g. economies of scale or network effects). These two types of barriers are explored in the following sub-sections.

4.2. Barriers to expansion

- 4.2.1. A barrier to expansion is defined as “*something that prevents a firm already in the market from being able quickly and cheaply to increase its output*”.¹³⁴ The presence of these barriers inhibits the development of E-commerce markets in ASEAN and affects all firms, including incumbents. In order for E-commerce markets to flourish, the service provided to customers must be trustworthy, and suitably efficient, such that it is an attractive alternative to brick-and-mortar transactions. Throughout ASEAN, however, there is a lack of trust among customers when completing transactions online, for instance with regards to data protection, banking fraud, unfulfilled deliveries, and the inability to return products. 20% of Malaysian SMEs report E-payment concerns as one of the main obstacles to the development of E-commerce.¹³⁵ This lack of trust, ultimately stemming from a lack of technological infrastructure in the region, and a weak regulatory environment has prevented E-commerce markets from growing to their full potential and has inhibited the growth of firms trading across borders. These two categories of barriers are explored in greater detail in the following sub-sections.



¹³⁴ Bishop, S. and Walker, M. (2010), page 81.

¹³⁵ ACCCIM (2012), page 9.

Level of technological infrastructure in ASEAN

- 4.2.2. Despite significant investment in their technological infrastructure, many AMS still lag behind in global rankings in terms of speed, efficiency and reliability of internet services.¹³⁶ Multiple questionnaire respondents highlight the current level of technological infrastructure as an emerging issue or barrier to the development of E-commerce in their jurisdiction. These issues are separated into three key areas: Information and Communication Technology (ICT), broadband and mobile internet, and logistics and delivery.
- 4.2.3. **ICT:** The ICT Development Index (IDI)¹³⁷ published by the International Telecommunication Union (ITU) scores countries and ranks them based on 11 benchmarks covering three key areas: ICT access, ICT use and ICT skills.
- 4.2.4. Rankings of AMS on the basis of this index vary significantly. Of the AMS, Singapore is ranked the highest in 20th place with a score of 7.95, whereas Lao PDR is ranked lowest, in 144th place with a score of 2.45.¹³⁸ The rankings of all AMS are presented in Table 6 below.

Table 6: ASEAN rankings of IDI

ASEAN ranking	World ranking	Country	IDI 2016 value ¹³⁹	IDI 2015 value	% change year-on-year
1	20	Singapore	7.95	7.88	1%
2	61	Malaysia	6.22	5.64	10%
3	77	Brunei Darussalam	5.33	5.25	2%
4	82	Thailand	5.18	5.05	3%
5	105	Vietnam	4.29	4.02	7%
6	107	The Philippines	4.28	3.97	8%
7	115	Indonesia	3.86	3.63	6%
8	125	Cambodia	3.12	2.78	12%
9	140	Myanmar	2.54	1.95	30%
10	144	Lao PDR	2.45	2.21	11%

Source: International Telecommunication Union (2016).

- 4.2.5. The average IDI value for AMS in 2016 was 4.5, marginally below the global average of 4.9. However, there are clear signs of improvement in Cambodia, Myanmar and Lao PDR (the three lowest ranked AMS), which achieved the highest year-on-year change among AMS.

¹³⁶ International Telecommunication Union (2016).

¹³⁷ <http://www.itu.int/net4/ITU-D/idi/2016/>.

¹³⁸ There are 175 countries in the IDI rankings published by the ITU.

¹³⁹ A high IDI score (maximum of 10) indicates an advanced level of ICT development with respect to access, use and skills.

- 4.2.6. **Broadband and mobile internet:** A broadband divide exists in many nations within ASEAN between the richer metropolitan cities that have strong and stable internet coverage, and the poorer rural regions that have very limited connectivity.¹⁴⁰ The connectivity infrastructure in ASEAN also varies significantly between AMS, affecting businesses' ability to sell online, and consumers' access to E-commerce markets. Average internet speeds and the cost of accessing the internet in the ASEAN6 are presented in Table 7 below. Figures for the UK and USA are provided for comparison.

Table 7: Connectivity infrastructure across ASEAN

Country	Average broadband speed (Mbps)	Average mobile internet speed (Mbps)	Connectivity cost (USD) (60 Mbps, Unlimited Data, Cable/ADSL) (Utilities (Monthly))	Connectivity cost as a % of average income
Indonesia	6.6	4.7	25.7	9.0
Malaysia	7.9	7.9	37.4	4.2
The Philippines	4.6	3.3	42.4	14.3
Singapore	19.0	30.1	30.4	0.7
Thailand	13.7	6.1	18.4	3.9
Vietnam	7.3	-	10.5	6.3
UK	15.8	15.1	28.3	0.8
USA	16.9	12.5	52.7	1.1

Source: Average broadband speed: Akamai state of the internet (Q2 2016 – Q1 2017); Average mobile internet speed: Opensignal.com February 2017 (Data from November 2016 – January 2017); Connectivity cost: Numbeo.com (2017); Average income: Worlddata.info (2015). Note: Average broadband speed calculated as an average of four quarters of data. Data only provided for those AMS where available.

- 4.2.7. Table 7 highlights the differences in the speed and cost of access to the internet across AMS. Whilst the Philippines has the slowest average broadband speed of the ASEAN6, it is also the most expensive both in nominal terms and as a percentage of average income. Research suggests that faster broadband is available in the Philippines, offering speeds of 20, 50 and 100Mbps, but the associated costs make it even more unaffordable than the current situation.¹⁴¹ Singapore is the only AMS that has comparable speeds and costs to the established networks in the UK and USA.
- 4.2.8. The UNESCAP (2013) outlines how there is an opportunity for a pan-regional terrestrial fibre optic network which could provide fast broadband connectivity to the entire region, allowing AMS to realise the full potential of E-commerce on a domestic and international level. For a project such as this to be successful, the cooperation of governments and other international organisations across ASEAN would be essential, and access to significant funding would be required.

¹⁴⁰ UNESCAP (2013), page 5.

¹⁴¹ Philstar (2016).

- 4.2.9. **Logistics and delivery:** To enhance the speed and reliability of E-commerce processes, and reduce delivery costs, improvements in logistics and delivery systems are needed across ASEAN. For nearly half of Singaporeans, the primary reason for not buying online is delivery concerns.¹⁴² However, research suggests that the number of parcels delivered within ASEAN will grow at an annual growth rate of 23% between 2016 and 2020,¹⁴³ largely driven by the growth of E-commerce within the region. Given that only Singapore and the Philippines have liberalised their postal industries,¹⁴⁴ the ability to manage the increase in the volume of deliveries arising from E-commerce will be a challenge for the state owned postal operators to overcome. However, the market for courier services is less regulated so there is an opportunity for last-mile delivery to be performed via these providers to meet this increase in demand.
- 4.2.10. The fact that some AMS are archipelagos also causes significant logistical restraints for the sale of goods via the internet. For example, with about 2,000 inhabited islands in the Philippines, the delivery of goods is both expensive and time consuming. As a result, E-commerce is currently largely only available to wealthy consumers, or those living on better connected islands.

Regulatory and legal barriers inhibiting E-commerce transactions and cross-border trade

- 4.2.11. **Cybersecurity:** As well as the current level of technological infrastructure in the region, the regulatory and legal environment across the region has also failed to protect transactions from cyber-threats.
- 4.2.12. Sophos (2013) found that four of the top five worldwide riskiest countries for cyber-attacks are in ASEAN and that Asia has the most spam sources by continent.¹⁴⁵ It is therefore apparent that work is required on regulations to tackle cybersecurity issues, in order to build trust among consumers and allow E-commerce to flourish in the region. UNCTAD (2013) highlights coordination in regulations tackling cybercrime, consumer protection and recognition of electronic signatures as critical requirements, in addition to the establishment of a regional online dispute resolution facility.
- 4.2.13. AMS are focusing on cybersecurity as an area for development, with S\$10 million set aside to fund work in this sector over the next five years. This ASEAN Cyber Capacity Programme has been designed to develop the technical, policy and strategy-building capabilities required within AMS that will allow businesses to operate confidently within E-commerce markets.¹⁴⁶ Senior officials across AMS recognise that a secure and resilient cyberspace is a critical enabler for AMS to harness the opportunities from digital technologies and E-commerce to achieve economic growth and improve living standards throughout ASEAN.¹⁴⁷

¹⁴² AT Kearney (2015), page 17.

¹⁴³ Nomura (2016).

¹⁴⁴ Postal services is, however, currently a government monopoly in the Philippines.

¹⁴⁵ Sophos (2013), page 29.

¹⁴⁶ NATO CCDCOE (2017).

¹⁴⁷ Cyber Security Agency of Singapore (CSA) (2016).

- 4.2.14. **Customs and taxes:** National tax policies were raised in questionnaire responses as an issue or barrier to E-commerce within ASEAN. Specifically, responses suggested that consumers and businesses are discouraged from purchasing goods from overseas firms because of uncertainty and a lack of awareness of customs and tax rules. There are also variations in the import duties and taxes payable when purchasing goods from another AMS in ASEAN. Import duties and taxes on a \$50 handbag range from \$0 to \$19.55.¹⁴⁸ The breakdown of these duties and taxes in each country is presented in Table 8 below.

Table 8: Import duties and taxes on a US\$50 handbag

AMS	Duty (US\$)	Taxes (US\$)	Total (US\$)
Brunei Darussalam	0.00	2.50	2.50
Cambodia	3.50	5.35	8.85
Indonesia*	0.00	0.00	0.00
Lao PDR	5.00	5.50	10.50
Malaysia	0.00	3.00	3.00
Myanmar	3.75	2.69	6.44
The Philippines*	0.00	0.00	0.00
Singapore	0.00	0.00	0.00
Thailand	15.00	4.55	19.55
Vietnam	12.50	6.25	18.75

Source: Dutycalculator.com (2017). Note: Calculation made on basis of a cotton handbag manufactured in Italy and sold in Singapore (with the exception of Singapore which was assumed to be sold in Malaysia). *No duty/taxes as the good's value does not exceed US\$50 in the case of Indonesia, and PhP10000 in the case of the Philippines.

- 4.2.15. The degree to which foreign companies are able to compete with domestic players therefore varies across the region. As a result of import duties, firms exporting to another country in ASEAN are at a disadvantage in comparison to domestic firms.
- 4.2.16. Non-tariff barriers also restrict firms from abroad, as highlighted by UNCTAD (2016). Although such barriers may have a main objective unrelated to trade, such as protecting public health or the environment, they may have the adverse effect of inhibiting cross-border trade. Complex technical, sanitary and phytosanitary measures are particularly prevalent barriers across ASEAN.¹⁴⁹ Pre-shipment inspection and price control measures¹⁵⁰ have also been identified as barriers regularly restricting cross-border trade in ASEAN.

¹⁴⁸ Duty Calculator (2017).

¹⁴⁹ UNCTAD (2016), page 24.

¹⁵⁰ Price control measures are "those implemented to control or affect the prices of imported goods in order to, inter alia, support the domestic price of certain products when the import prices of these goods are lower; establish the domestic price of certain products because of price fluctuation in domestic markets, or price instability in a foreign market; or to increase or preserve tax revenue. This category also includes measures, other than tariff measures, that increase the cost of imports in a similar manner (para-tariff measures)." UNCTAD (2016), page 5.

- 4.2.17. **Application of competition policy and law:** Differences in approaches to the application of competition policy and law in AMS, as set out in Part B of this handbook, also pose challenges to firms looking to operate internationally across ASEAN. This is particularly important with regards to the use of vertical restraints by firms operating in online markets (i.e. when a restraint may be deemed anti-competitive by authorities – see Section 7 for a more detailed discussion). International differences in approaches to applying competition policy and law gives rise to an additional burden for the firms, as they may need to adapt their conduct depending on the different approach adopted in the different territories where they wish to conduct their business. The recent Booking.com case (see Case review 17) is a good example of such a case, with different competition authorities reaching different conclusions on the use of wide and narrow MFN clauses¹⁵¹ in the hotel booking industry. Online booking platforms had to adapt their conduct in different jurisdictions as a result.
- 4.2.18. AMS are however working hard to overcome problems and improve the harmonisation of regulations, for example by introducing the ASEAN Competition Action Plan (ACAP) 2016-2025,¹⁵² which aims to improve the consistency of regulations and build trust for consumers looking to complete transactions in other jurisdictions. The increase in globalisation, fuelled by E-commerce, has led to a rise in the challenge to identify and combat anti-competitive conduct, and mergers which may lead to a lessening of competition across international borders. AMS are already conducting training on how best to approach situations like this, which is an essential first step in creating effective cross-border enforcement.¹⁵³ UNCTAD highlighted that membership of the International Consumer Protection and Enforcement Network would be another beneficial move to improve regional cooperation. At present, only the Philippines and Vietnam are members.¹⁵⁴

4.3. Barriers to entry

- 4.3.1. Barriers to entry can be defined as “a cost of producing which must be borne by a firm that seeks to enter an industry but is not borne by firms already in the market”.¹⁵⁵ Barriers to entry limit the ability of new entrants to enter and expand output in a given market. These barriers can be considered under four broad categories: economic advantages enjoyed by incumbents; costs and network effects that inhibit consumers from switching suppliers; legal barriers; and the conduct of incumbent firms.¹⁵⁶ These barriers are present both in brick-and-mortar and online markets, but there are differences in the prevalence and magnitude of some of these barriers between the two sales channels. This section considers each of the four categories in turn, highlighting any important features of E-commerce markets throughout.

Economic advantages enjoyed by incumbent firms

- 4.3.2. Incumbent firms in a market may benefit from certain economic advantages that new firms or smaller players are unable to achieve, by virtue of their size. Economies of scale and scope, privileged access to essential inputs, technologies or information, and an established sales network all put smaller firms and new entrants at a disadvantage.¹⁵⁷ This sub-section focuses on two potential economic advantages that have been impacted by the growth and development of E-commerce: economies of scale, and privileged access to inputs, technologies or information.
- 4.3.3. **Economies of scale:** Economies of scale arise when the average cost per unit of output decreases with the increase in the scale of the output produced, and economies of scope occur when it is cheaper to produce two products together than to produce them separately. In such instances, new entrants or smaller firms are unable to produce as efficiently as larger firms, or firms producing a range of related products.

¹⁵¹ A wide MFN is a vertical restraint that ensures that no other competitor will be given more favourable terms by a supplier/customer/platform – for instance being able to sell at a lower price. A narrow MFN restricts a firm from setting a lower price in its own store, but it is free to agree to a lower price with a competing store e.g. a hotel that enters a narrow MFN agreement with a hotel booking platform, cannot set a price on its own website lower than the price on the booking platform, but it can agree to lower prices on competing platforms.

¹⁵² ASEAN Competition Policy and Law (2016).

¹⁵³ ASEAN (2017).

¹⁵⁴ AT Kearney (2015), page 12.

¹⁵⁵ Bishop, S. and Walker, M. (2010), page 75.

¹⁵⁶ Whish, R. and Bailey, D. (2015), page 194.

¹⁵⁷ Ibid. page 46.

- 4.3.4. Whilst economies of scale apply to brick-and-mortar firms as well as to online retailers, they appear to represent less of a barrier to entry in E-commerce markets as the fixed costs of entering a new location or market via the internet are significantly lower. In E-commerce markets there is no need to build or rent a physical retail space to sell goods. The costs of making a website accessible in a new location are relatively low, for example the cost of translating the website into the local language as compared to the cost of establishing a brick-and-mortar retail presence in other countries.
- 4.3.5. Incumbent firms do still benefit from some economies of scale in E-commerce markets, therefore some barriers for new entrants remain. The ability to spread marketing costs over a larger quantity of goods sold remains a constraint for online retailers seeking to grow or enter new markets in comparison to larger incumbent firms.
- 4.3.6. **Privileged access to inputs, technologies or information:** Access to supporting infrastructure, such as logistics, inventory and payment systems may also constitute a barrier to entry. Vertical integration by an incumbent platform or single-sided firm may affect other firms' ability to gain access to these systems.
- 4.3.7. Some also consider the data that a firm holds on its customers to be an asset that incumbent firms have privileged access to. The rise in the quantity of data that some firms are collecting in E-commerce markets is under close consideration by some competition authorities around the world. The question facing authorities is whether this data, often referred to as Big Data, constitutes a barrier to entry and therefore is likely to enhance a potential position of market power.
- 4.3.8. Big Data is defined as: *"the use of large scale computing power and technologically advanced software in order to collect, process and analyse data characterised by a large volume, velocity, variety and value."*¹⁵⁸
- 4.3.9. The presence of Big Data has grown significantly over recent years through the automated collection of information on online activity, including from social networking sites. Firms are able to use complex algorithms automatically to sieve through this data to identify the patterns and trends in consumers' behaviour. Consumers benefit if firms pass on any efficiency gains from the use of this data, improve the quality and scope of their goods/services, and/or offer more targeted advertising.¹⁵⁹
- 4.3.10. On the other hand, there are concerns that the additional insights that firms have of their customers may be an asset that smaller firms or new entrants are unable to replicate, and therefore increase a potential firm's position of market power. However, general consensus on this issue has yet to be reached. Owning large datasets does not necessarily lead to market power, or act as a barrier to entry per se, especially in E-commerce markets where competition is dynamic.¹⁶⁰ In many markets, data can be collected from multiple sources, and such customer insights are not expensive, even for small companies and new entrants, to gain access to. When, on the other hand, such data cannot be replicated, it is important to understand whether such data constitutes an essential facility without which competitors are unable to operate. This is not a new issue in competition policy.
- 4.3.11. Competition authorities' approaches to dealing with E-commerce related cases where Big Data is a factor should be no different to those in offline markets. The OECD (2017) states that although further research is needed in this area, traditional antitrust tools can be adapted and applied to tackle data-related anti-competitive practices. Nonetheless, Big Data remains a widely debated area of competition policy at the time of finalising this handbook.

¹⁵⁸ OECD (2017).

¹⁵⁹ Skadden (2017).

¹⁶⁰ OECD (2017).

Costs and network effects that obstruct consumers from switching suppliers

- 4.3.12. Switching costs for consumers also make it harder for new entrants and smaller firms to compete with large incumbent players. Switching costs make it more expensive for consumers to purchase a good or service from an alternative supplier beyond the direct price charged. These costs may be monetary or non-monetary. For example, the time spent in creating an account with a new provider is considered a non-monetary cost of switching. Some costs may not materialise, such as costs arising from the risk of online fraud, but in these instances the risk that an additional cost will be incurred may deter consumers from switching providers. Switching costs may arise naturally, or may be created or increased as a result of the actions of incumbent firms in order to restrict the entry and expansion of smaller firms. For example, loyalty reward schemes are designed by incumbent firms to increase switching costs for consumers to alternative providers.
- 4.3.13. The established reputation of an incumbent represents a barrier for new online retailers. For consumers considering switching there is a risk that the new retailer may not be reliable. The quality of the service (e.g. reliability of delivery times, return policy, etc.) and the product itself (e.g. if it is a counterfeit) are both untested. A consumer is therefore more likely to purchase from a retailer it has used before, and trusts.
- 4.3.14. Switching costs are present both in brick-and-mortar and online sales channels. In E-commerce markets some switching costs have emerged for consumers, making it harder for new entrants and smaller firms to compete with incumbent online retailers. As indicated in 4.3.12, there are more risks involved in switching to an alternative retailer in the online space than in brick-and-mortar markets. This is because in an online environment consumers are less able to assess the risks they face in terms of the reliability of the service, the quality of the products, the treatment of their personal data, and the safety of sharing their payment details. These potential risks constitute a switching cost that makes consumers more likely to use an incumbent online retailer whom they have purchased from before, and that they trust, as opposed to a new online retailer offering the same product, thereby creating barriers to entry. Accreditation from independent consumer bodies, as well as testimonials and reviews from customers, can go some way towards reducing these switching costs, although consumers may not necessarily know whether to trust such endorsements.
- 4.3.15. Network effects can also create switching costs for consumers. As explained in Technical Explanation 1 in Annex 1, network effects are present when the value that one user places on a good or service increases as the number of other users of that good or service rises (that is the scale of the network). If an individual, and a large proportion of that individual's network, are using a good or service provided by one firm, there is a cost to that individual from switching to an alternative provider in that fewer people are using the other service. The value that the individual derives from consuming the good or service provided by a smaller firm is lower (as the value depends on the size of the network, which is smaller). The network effects therefore constitute a barrier for new entrants and smaller firms.
- 4.3.16. While network effects are present in both brick-and-mortar and online markets, the emergence and growth of E-commerce has resulted in the development of many new platforms in multi-sided markets where network effects are highly prevalent, such as online marketplaces, PCWs and social media sites.
- 4.3.17. Network effects are less of a barrier to entry if individuals multi-home; that is, they use multiple providers of a good or service. Consumers may prefer the use of a platform which provides access to a large number of products or services, but if they can easily source the products or services from other platforms (i.e. multi-home) the larger scale of the incumbent network does not necessarily constitute a barrier. By contrast, if there is a cost to multi-homing then the barrier to new entrants and smaller firms is greater.

4.3.18. In online markets multi-homing is common, therefore network effects do not always represent a significant barrier to entry for new entrants and smaller firms. Moreover, even in cases when consumers single-home, the advent of a better product or service can induce those consumers to switch. Facebook is a good example of a firm overcoming network effects when it displaced MySpace as market leader in social media.¹⁶¹ Similarly, Taobao's displacement of eBay in the Chinese online marketplace sector also highlights this.¹⁶²

Legal barriers

4.3.19. “*Legal advantages such as regulatory rules that limit the number of market participants*” can also constitute barriers to entry,¹⁶³ in particular with regards to IP rights. This is with regards to industrial property, namely patents for inventions, and copyright laws,¹⁶⁴ whereby new entrants and smaller firms may not be able to access patented technology or copyrighted content. Most academics agree that IP rights are crucial for certain markets to function effectively,¹⁶⁵ though they can have the effect of restricting entry. This topic is discussed in detail in relation to E-commerce in ASEAN in Section 14. Other legal barriers may derive from “*government licensing requirements and planning regulations, statutory monopoly power and tariff and non-tariff barriers*.”¹⁶⁶

The conduct of incumbent firms

4.3.20. Finally, the conduct of large incumbent firms may restrict entry to a particular market when they are able to exercise market power and thereby exclude or marginalise competitors. The conduct of firms in E-commerce markets, either unilaterally or in coordination, is discussed in detail in Part B of this handbook, which presents a discussion of when such conduct is likely to lead to anti-competitive effects.

4.3.21. Additionally, as discussed in 4.3.12, switching costs for consumers may be increased as a result of the actions of incumbent firms.

¹⁶¹ Bloomberg (2011).

¹⁶² The Economist (2006).

¹⁶³ Whish, R. and Bailey, D (2015), page 920.

¹⁶⁴ WIPO (2011).

¹⁶⁵ Center on Law and Information Policy (2011).

¹⁶⁶ Whish, R. and Bailey, D. (2015), page 194.



Part B:

Section for Competition Authorities

05 Introduction

- 5.1. The growth of E-commerce has brought about a number of changes to the way markets work. Price transparency has increased, online platforms such as marketplaces and PCWs have emerged and rapidly grown, and vertical restraints have been used more frequently as manufacturers seek to gain better control over distribution networks.¹⁶⁷

Benefits to consumers from E-commerce

- 5.2. Overall, consumers have benefited from the rapid innovation brought about by the internet and E-commerce. Price comparison has become significantly easier for consumers, which reduces search costs for consumers, both in terms of time and cost. Consumers are also able to switch easily from one channel (online/offline) to another.¹⁶⁸ The increase in price transparency has intensified price competition in many markets, to the benefit of consumers as long as this competition is not at the expense of product quality. For the most part, product diversity has increased for consumers as a result of the emergence and growth of E-commerce, as firms are able to stock a wider range of products due to a reduction in physical constraints.

Barriers to consumer benefits

- 5.3. To fully realise the benefits from these developments, it is important that competition is not impaired by any form of unilateral or coordinated conduct by companies active in E-commerce.
- 5.4. This part of the handbook looks at the challenges faced by competition authorities in establishing whether the behaviour of firms in E-commerce markets is anti-competitive or efficiency enhancing, and considers whether existing competition policy and law is sufficient to deal with such challenges. The approach taken in this section focuses on specific competition issues arising as a result of the emergence and growth of E-commerce.

Current stage of debate on competition policy and law in E-commerce markets

- 5.5. It is important to note at the outset that competition policy in E-commerce is an area under constant development around the world. Some of the emerging challenges are still not fully understood, and on occasion, competition authorities have taken contrasting viewpoints on similar issues, illustrating the complexities surrounding this area of competition policy. This part of the handbook provides guidance based on current developments and trends. However, due to the ongoing development of the debate in this area of competition policy, it should not be seen as presenting an ultimate set of principles.

¹⁶⁷ European Commission (2017b), para. 15.

¹⁶⁸ European Commission (2017b), para. 11.

Research sources

- 5.6. This part of the handbook draws upon cases from jurisdictions around the world, and insights from a comprehensive questionnaire on E-commerce in ASEAN completed by the competition authorities of Singapore, Malaysia, the Philippines, Vietnam and Indonesia. Whilst competition cases related to E-commerce are still relatively few in ASEAN, only one of the questionnaire respondents has not dealt with any E-commerce related cases. It is also clear that authorities expect to deal with more cases in the near future, as 80% of respondents see E-commerce as one of the focus areas of their authority's work over the next three to five years.

Structure of Part B

- 5.7. This part of the handbook is organised as follows:
- Section 6 looks at the challenges that competition authorities face when defining markets and assessing market power in E-commerce markets, including a consideration of adaptations to approaches that may be required when investigating multi-sided markets;
 - Section 7 explores challenges faced by competition authorities with regards to the use of vertical restraints by firms in E-commerce markets;
 - Section 8 considers issues relating to horizontal coordination in E-commerce markets;
 - Section 9 looks at unilateral anti-competitive conduct (i.e. abuse of dominance), and issues arising as a result of the emergence and growth of E-commerce;
 - Section 10 considers mergers and acquisitions in E-commerce markets, with a particular focus on issues arising as a result of network effects, in addition to looking at whether existing tests are able to capture all relevant cases;
 - Section 11 outlines ways in which AMS can address the challenges discussed in Sections 6 - 10 through the design and enforcement of competition policy and law; and
 - Section 12 concludes this part of the handbook by presenting a stand-alone competition policy and law compliance checklist for businesses engaged in E-commerce in AMS.

06 Market definition, multi-sided markets, and market power

6.1 Defining the relevant market

Traditional approach

- 6.1.1. Typically, the first step in a competition investigation is to define the relevant market, both in terms of the relevant products and/or services, and of the geographic area covered.¹⁶⁹

Relevant product market(s) in E-commerce

- 6.1.2. The traditional method of establishing the relevant market is to consider the products and/or services that consumers regard as substitutable. Supply side substitution and potential competition from new entrants and smaller firms are also important factors. This approach has been developed to apply to traditional single-sided markets and, as such, it applies equally to single-sided online markets. For many competition authorities, defining the relevant market involves implementing the SSNIP test (small but significant and non-transitory increase in price) or hypothetical monopolist test. This test involves establishing whether a hypothetical monopolist in a market could profitably raise prices by 5-10% for a sustained period of time. However, in practice, it may not be possible to obtain the necessary data to conduct a SSNIP test, in which case the market may be defined through less technical means, such as conducting a thorough assessment of the demand and supply side substitutes in order to identify all the relevant competitive constraints.
- 6.1.3. Applying a SSNIP test to online markets often means that online and offline sales are found to be included in the same relevant market i.e. one would expect that for most products, if prices were to rise by 5-10% in brick-and-mortar stores, consumers would switch to online channels, and vice versa. A hypothetical monopolist in only the brick-and-mortar market could not sustain a SSNIP. There may, however, be instances when online and offline sales are not found to be part of the same relevant market and therefore should be considered separately. Analogous considerations apply in cases when the relevant market is defined on the basis of interchangeability and substitutability rather than by means of a SSNIP test.

Relevant geographic market(s) in E-commerce

- 6.1.4. Following the definition of the relevant product market, the next step should lead on to define the geographic boundaries of the relevant market under consideration.¹⁷⁰ One would expect this dimension of the relevant market to be wider in online markets given the ability to substitute purchases with online stores from remote areas in a way that was simply not possible in a traditional brick-and-mortar store. However, other factors, such as geographic restrictions on access to the website may affect this. Hence, as for traditional market analysis, the geographic scope of the relevant market should be determined on a case-by-case basis.

¹⁶⁹ For assessments of alleged cartels, the relevant market may not need to be defined; but rather the affected goods determined.

¹⁷⁰ The relevant geographic market is the region in which “the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area” (European Commission, 1997). Determining the relevant geographic market effectively involves starting from a narrow geographic market area and assessing whether customers would switch to providers in a wider geographic area following a SSNIP by an incumbent hypothetical monopolist (demand side substitution), or whether suppliers from further afield would enter the market following a SSNIP (supply side substitution).

Challenges in applying this approach

- 6.1.5. Although traditional assessments of substitutability still appear fit to tackle online single-sided markets, the emergence and growth of E-commerce has posed challenges to competition authorities in defining markets in instances where the interaction between manufacturers/distributors and consumers deviates from traditional models. This is highlighted by the fact that 80% of questionnaire respondents within ASEAN point to market definition as one of the biggest issues they face when dealing with E-commerce cases.
- 6.1.6. In many instances, online markets are multi-sided in nature, and often due to the rapid pace of innovation and flexibility of different technologies, firms may face competitive constraints from outside the relevant market. These challenges are discussed in detail in the following sub-sections.

6.2. Multi-sided markets

Definition of multi-sided markets

- 6.2.1. Traditional brick-and-mortar retail environments are one-sided in nature, namely, through the retailing operation a store acquires the ownership of products through a one-sided relationship with its suppliers, and sells them on to its customers through a separate one-sided retailing arrangement with consumers. However, many online markets are multi-sided in nature. In other words, relationships between the two sides of the market, e.g. the supplier and the customer, are interdependent. Although not a unique feature of online markets, multi-sided markets are more prevalent in E-commerce markets. Technical Explanation 1 in Annex 1 defines and explains multi-sided markets in detail, and discusses important characteristics of such markets relevant to competition authorities.

Market definition in multi-sided markets

- 6.2.2. When defining relevant markets in competition investigations relating to E-commerce, traditional methods of assessing demand and supply substitutability are well positioned to continue to serve authorities in one-sided markets. If, however, a market is multi-sided in nature, a number of challenges arise when defining relevant markets using existing approaches. One questionnaire respondent highlighted how it is currently facing this challenge when defining online markets that are multi-sided in nature.
- 6.2.3. In traditional single-sided markets, a firm's market share will typically be the proportion of sales of a particular good or service. In multi-sided markets, as well as the market for the particular good or service, the process of facilitating transactions between distinct sides may itself be considered a relevant market. One may consider a platform's market share to be the proportion of transactions in a market that it facilitates, or the number of platform users that it serves (e.g. buyers and sellers), as suggested by one questionnaire respondent.
- 6.2.4. Competition authorities therefore face the challenge in deciding whether to define one relevant market comprising all sides, or separate relevant markets on each side. There is no general rule on this, however some consider defining one single relevant market more appropriate when a multi-sided platform facilitates transactions between sides (as, for example, is the case for credit cards), rather than just providing access for users.¹⁷¹ Nevertheless, consensus has yet to be reached on the correct approach¹⁷² and a more thorough approach considering both the case of separate relevant markets and of one combined market including all sides should be pursued and evaluated case-by-case.
- 6.2.5. Before defining a market, competition authorities should determine whether a market is truly multi-sided in nature. There is no standard definition of a multi-sided market, however often in economic literature, a multi-sided market is defined as one where an intermediary serves multiple different customer groups, and there are indirect network effects between these sides of the market which affects the price that is set on both sides.¹⁷³ In practice, determining whether a market is multi-sided in nature may require a cross-elasticity analysis to show that price on one side of the market affects demand on another side.

¹⁷¹ Filistruechi (2017).

¹⁷² As evidenced by the OECD Hearing on "Rethinking the Use of Traditional Antitrust Enforcement Tools in Multi-Sided Markets" held in Paris on 22nd June 2017.

¹⁷³ See, for example, Hagiu and Wright (2015).

- 6.2.6. If a market is multi-sided in nature, the standard SSNIP test is unlikely to apply, as it is based on assumptions originating from one-sided markets which do not apply to multi-sided markets.
- 6.2.7. In one-sided markets, a firm typically profit maximises by setting price above marginal cost. However, in multi-sided markets pricing below cost on one side of a market is a common strategy employed by firms in order to attract users to another side of the market. An increase in price above marginal cost in a one-sided market typically decreases welfare as some consumers are no longer served. By contrast, in multi-sided markets an increase in price on one side of the market does not necessarily mean that total welfare has fallen or that quantity sold declines because of the interdependency of demand between the two sides. For example, when considering a two-sided market: if at the same time as price is increased on side A, the price on side B is reduced, consumer welfare on side B may rise and potentially offset or exceed any loss in welfare on side A. Furthermore, consumer welfare does not necessarily fall on side A, as the fall in price on side B may increase the value to users on side A, thereby increasing demand, and possibly offsetting or exceeding the decline in demand from the direct increase in price.
- 6.2.8. As a result of the differing characteristics of multi-sided markets, when applying the SSNIP test Evans (2003) proposed that in some instances the total price should be considered instead of the separate prices charged to each side individually (i.e. the sum of the price charged to all sides of the market). Hesse and Soven (2006) adopted this approach when defining electronic payment network markets in the US.
- 6.2.9. In theory, a SSNIP test can be applied to multi-sided markets using total price, however in reality this is not always possible. Multi-sided markets are often highly complex in that a platform may compete with single-sided firms on some sides of the market and/or platforms that have more or fewer sides than itself. Additionally, in applying a SSNIP test authorities must ask themselves on which side(s) of the market the increase in total price should be applied, and what the relative distribution of this price increase should be. Also, in many instances users of a platform do not pay a price per transaction, but rather a price to access a platform, therefore making a calculation of a price per transaction very challenging.
- 6.2.10. Where a market cannot be defined using the traditional market definition tests based on one-side substitutability, as a result of these complexities, authorities may be better placed adopting a less rigid methodology for the definition of the market. When adopting such an approach, all competitive constraints that a firm faces on each side of the market should be considered; for example from other platforms, one-sided firms, and/or potential entrants. Authorities should consider the relationships between all sides of the market, specifically focusing on the presence and direction of network effects on both sides of the market, and any subsequent feedback effects. The price level should be considered for each side of the market, as well as the total price for all sides and its structure.
- 6.2.11. When defining the relevant geographic market in online multi-sided markets, equivalent adaptations to the standard approach may be required as when determining the relevant product markets. As in the general case for single-sided markets, in online multi-sided markets, one would expect the relevant geographic market to be wider than in equivalent brick-and-mortar markets because of their wider geographic reach.
- 6.2.12. In summary, in some multi-sided markets distinct sides transact directly with one another. For example, for an online marketplace one transaction would be the sale of a good from a retailer to a consumer. In other multi-sided markets the relationship between distinct sides is less clear. For instance, an advertiser does not directly interact with an individual newspaper reader; instead an advertiser is charged a fee to access all readers. Although the relationship between sides is arguably clearer when distinct sides of a market transact on a one-to-one basis, it is not necessarily easier to define these markets. For example, an online marketplace faces competitive constraints not only from other online platforms, but also from single-sided online retailers and brick-and-mortar shops, as well as multi-sided brick-and-mortar shopping malls.
- 6.2.13. There is therefore no general rule as to how to define a multi-sided market. Instead, competition authorities should carefully consider all aspects of competition that a platform faces. Practically this involves assessing the market for facilitating transactions between each distinct side, the competition that the platform faces on each side, the relationships between all sides, and any feedback effects.

Assessing market power in multi-sided markets

- 6.2.14. Questionnaire responses highlight the challenges that competition authorities in ASEAN are currently facing when assessing market power in multi-sided markets, particularly where access to a platform is free for one distinct group of users. When assessing market power in multi-sided markets, all sides of the market may need to be considered together, as well as in isolation. In assessing whether a firm is able to sustain super-normal profits, in some instances the costs incurred and prices charged to all sides of the market should be taken into account. This is more likely to be the case when a multi-sided platform facilitates transactions between sides, instead of providing access for users. Moreover, the degree of demand and supply substitution, and the level of actual and potential competition that a firm faces should be considered on all sides of the market.
- 6.2.15. Due to the importance of externalities between sides, it may be sufficient for a platform to have market power on only one side of a market for it to be in a strong position in the market as a whole, through the creation of a competitive bottleneck. The direction and magnitude of network effects between sides of a particular market should therefore be an important consideration in the assessment of market power. As discussed in Section 4, network effects may constitute a barrier to entry and expansion in some markets by imposing a switching cost on users, however this barrier may be mitigated if multi-homing is common.
- 6.2.16. Section 6.3 provides a more general discussion on the assessment of market power in online markets, with a particular focus on the role of dynamic competition from innovation. First, the assessment of harm in multi-sided markets is considered.

Assessing harm in multi-sided markets

- 6.2.17. The overall net effect from certain forms of conduct by firms in multi-sided markets is often unclear. In a one-sided market, any increase in price above marginal cost typically reduces total welfare by creating a dead-weight loss. In multi-sided markets, however, it is more complex. Consider a case where a platform increases price for one side of a market, and reduces price for the other side of the market. Assuming there are positive externalities between sides (i.e. more users on one side is beneficial for the other side), the overall effect on welfare for both sides is unclear.
- 6.2.18. If one extends this analysis to consider more intricate forms of conduct, such as tying and bundling, the welfare analysis becomes even more complex.
- 6.2.19. Competition authorities also face the challenge of deciding whether harm to one side of a market (i.e. a fall in welfare) can be offset by benefits to another side (i.e. a rise in welfare). If welfare effects to both sides are considered together, further questions emerge, such as: Are all sides weighted equally? If one side consists of businesses and the other side is consumers, should they be treated equally? Typically competition authorities would pursue consumer welfare, however, some jurisdictions, such as Singapore, adopt a total welfare test. If one side of the market is represented by businesses, what weight should be put on their welfare increase?¹⁷⁴ Furthermore, the question is not always as simple as whether harm to one side of the market can be offset by benefits to another side. In some instances, without certain conduct by firms, a market may not exist at all. As an example, it may be hard for a platform to attract users on one side of the market unless a price below marginal cost is charged.
- 6.2.20. Consider the example of a platform setting price above marginal cost for one side of the market and below marginal cost for the other as a result of externalities between the two sides. If each side is evaluated separately, a platform could be accused of predatory pricing on one side, and excessive pricing on the other side. However, this business model is common in online multi-sided markets such as online search and social media, and is widely accepted by competition authorities. This point demonstrates that, when assessing alleged harm, competition authorities should at least consider the network effects between distinct sides of a multi-sided market and any additional feedback effects.

¹⁷⁴ This is especially true if the rise in welfare translates into increased consumer welfare for the business' final customers.

- 6.2.21. Insights from previous cases in multi-sided markets are limited. So far, international consensus has yet to be reached on whether harm on one side of a market can be offset by the benefit to another side, as outlined in the following paragraphs.
- 6.2.22. In the US, in the recent investigation of non-discrimination provisions implemented by American Express (see Case review 2),¹⁷⁵ the Second Court of Appeals found that *“the two sides of the platform [merchants and consumers] cannot be considered in isolation”*. It was also concluded that the District Court’s previous analysis:

“erroneously elevated the interests of merchants above those of cardholders” and that “the market as a whole includes both cardholders and merchants, who comprise distinct yet equally important and interdependent sets of consumers sitting on either side of the payment-card platform”.

- 6.2.23. By contrast, in the EU investigation of MasterCard’s multilateral interchange fees (MIF) (see Case review 1),¹⁷⁶ the European Court of Justice (ECJ) concluded in its review of the General Court’s decision to prohibit the conduct that:

*“the General Court took into account the two-sided nature of the system, since it analysed the role of the MIF in balancing the ‘issuing’ and ‘acquiring’ sides of the MasterCard system, while recognising that there was interaction between those two sides. Furthermore, in the absence of any proof of the existence of appreciable objective advantages attributable to the MIF in the acquiring market and enjoyed by merchants, the General Court did not need to examine the advantages flowing from the MIF for cardholders, since such advantages cannot, by themselves, be of such a character as to compensate for the disadvantages resulting from those fees.”*¹⁷⁷

- 6.2.24. In Singapore, MIF has also been assessed as part of a notification for decision filed by Visa Worldwide Pte Ltd. In September 2013, following an in-depth review CCS approved the use of Visa Worldwide Pte Ltd.’s MIF system (see Case review 3).¹⁷⁸ In its decision, CCS highlighted how:

“in conducting the analysis of the Visa Group’s MIF system, it is important to recognise how the separate markets are inter-related in the context of a two-sided platform, and how the actions in one market can directly affect the other markets and vice versa.”

¹⁷⁵ United States et al. v. American Express Company et al., No. 15-1672 (2d Cir. 2016).

¹⁷⁶ C-382/12 P - MasterCard and Others v Commission.

¹⁷⁷ Judgment in Case C-382/12 P MasterCard Inc. and Others v Commission, Press release No 122/14.

¹⁷⁸ CCS 400/001/06 (2013).

CASE REVIEW 1 – MASTERCARD MIF

Industry: Payment systems

Country / Union of countries: EU

Court / Competition Authority: European Commission, ECJ

Case name and citation: C-382/12 P

Date of decision: 11th September 2014

Type of alleged infringement: Horizontal price coordination

▶ | Case summary

In December 2007, the European Commission found MasterCard to have implemented clauses in its MIF system that in effect set a price floor on retailers and therefore restricted competition on price between payment systems. Consequently MasterCard was required to remove the MIF within 6 months. MasterCard initially appealed to the General Court before then appealing to the ECJ. In both cases the appeal was dismissed.

Importantly, in dismissing the appeal the ECJ ruled that: “the General Court took into account the two-sided nature of the system, since it analysed the role of the MIF in balancing the ‘issuing’ and ‘acquiring’ sides of the MasterCard system, while recognising that there was interaction between those two sides. Furthermore, in the absence of any proof of the existence of appreciable objective advantages attributable to the MIF in the acquiring market and enjoyed by merchants, the General Court did not need to examine the advantages flowing from the MIF for cardholders, since such advantages cannot, by themselves, be of such a character as to compensate for the disadvantages resulting from those fees.”

CASE REVIEW 2 – AMERICAN EXPRESS MIF

Industry: Payment systems

Country / Union of countries: US

Court / Competition Authority: US DoJ, US Court of Appeals for the Second Court

Case name and citation: No. 15-1672

Date of decision: 26th September 2016

Type of alleged infringement: Restriction of price competition through a vertical restraint

▶ | Case summary

American Express was investigated in the US for its use of non-discrimination provisions which prevented retailers from offering discounts to customers who use other cards (which incur lower fees for the retailers).

Initially the US DoJ deemed these agreements to be anti-competitive on the basis of the economic harm caused to retailers. However, following an appeal, the US Court of Appeals for the Second Court reversed the initial decision on the basis that the lower court’s analysis failed to take into account the multi-sided nature of the market and the effect of the conduct on customers and retailers.

CASE REVIEW 3 – VISA MIF

Industry: Payment systems

Country / Union of countries: Singapore

Court / Competition Authority: CCS

Case name and citation: CCS 400/001/06

Date of decision: 3rd September 2013

Type of case: Notification

▶ | Case summary

Visa Worldwide sought approval from CCS to implement its MIF system in Singapore.

In September 2013, following an in-depth review, CCS approved Visa's MIF. CCS assessed the effect of the pricing system on three relevant markets; namely, the issuing market, the acquiring market and the card scheme market.

CCS found that in both the issuing market and the card scheme market it was unlikely there would be more competition in the absence of Visa's MIF; and, in the acquiring market it was not clear whether competition would be significantly greater in the absence of Visa's MIF.

It was also found that in the absence of Visa's MIF, barriers to entry and expansion would likely be higher for small, or new, acquirers.

In its decision CCS highlighted how: *"in conducting the analysis of the Visa Group's MIF system, it is important to recognise how the separate markets are inter-related in the context of a two-sided platform, and how the actions in one market can directly affect the other markets and vice versa."*

6.3. Assessing market power and the impact of dynamic competition from innovation

Impact of E-commerce in assessment of market power

- 6.3.1. The rise of E-commerce has not substantially changed the assessment of market power in single-sided markets. Typically, market power is defined as *"the ability of firms to increase prices profitably above the competitive price for a sustained period"*,¹⁷⁹ regardless whether this is an online or a brick-and-mortar setting. As the competitive price is often difficult to identify in practice, an indirect assessment is generally required to determine whether a firm enjoys market power. Calculating market shares of the company in question and of rival companies supplying substitutable goods or services remains a common approach for examining a firm's position in a market, and is applicable to both online and traditional brick-and-mortar markets.
- 6.3.2. As in brick-and-mortar markets, other factors beyond market share should be considered when assessing market power, in particular, the ability of smaller firms to expand, and new entrants to join the market. Barriers to entry, such as network effects and switching costs for consumers (as discussed in Section 4), should also be considered, as well as the countervailing buyer power of customers should also be taken into account.
- 6.3.3. Some consider Big Data as a factor that should be taken into account when assessing dominance, as it may represent an asset that competitors are unable to replicate, and therefore comprise a barrier to entry (as discussed in Section 4).

¹⁷⁹ Bishop, S. and Walker, M. (2010), page 51.

Assessing dominance in ASEAN

- 6.3.4. Market shares are widely regarded as a useful first indication of the structure of a given market, and the importance of the various operators active in it.¹⁸⁰ It is also useful for authorities to look at how market shares have evolved over time, rather than taking a static view. Different competition authorities apply different market share thresholds when assessing a firm's market power. The market shares of more firms in a market may also be considered when looking into whether there is a position of collective dominance in a particular market.
- 6.3.5. Table 9, below, provides a breakdown of the market share thresholds in Europe when assessing market power, emerging from case law:

Table 9: Market shares thresholds for the assessment of dominance in Europe

Market share	Description
100%	Complete monopolist.
80%	A firm with a market share above 80% is in a position of 'super-dominance', where their conduct is likely to have a strong adverse effect on the market, and therefore is likely to fall under Article 102 of the Treaty of the Functioning of the European Union (TFEU).
50%	There is a legal presumption that a firm with a market share of 50% or more is in a dominant position. This presumption applies in the case of collective dominance, as well as single-firm dominance.
40%	A firm with a market share of 40% may be considered dominant under Article 102 of the TFEU. In the UK, the Competition and Markets Authority (CMA) considers a firm with a market share below 40% 'unlikely' to be in a dominant position.

Source: Whish, R. and Bailey, D. (2015), pages 48-51.

- 6.3.6. The assessment of dominance under competition law varies across AMS and is not always as prescriptive as Table 9 above. For example in Malaysia, Section 10 (4) of the Competition Act 2010¹⁸¹ states:

"the fact that the market share of any enterprise is above or below any particular level shall not in itself be regarded as conclusive as to whether that enterprise occupies, or does not occupy, a dominant position in the market"

- 6.3.7. In contrast, the Commission for the Supervision of Business Competition of the Republic of Indonesia (KPPU) states:

*"Business actors shall be reasonably suspected or deemed to control the production and or marketing of goods and or services... if one business actor or a group of business actors controls more than 50% of the market share of a certain type of goods or services".*¹⁸²

- 6.3.8. Table 10 presents a detailed breakdown of the definitions and market share thresholds (where relevant) for dominance in AMS. The differences across ASEAN in the assessment of dominance may raise some difficulties in ensuring a consistent treatment of E-commerce operators when their operations span multiple jurisdictions. Competition authorities should be wary of the differing criteria of dominance that may be in place if assessing anti-competitive behaviour across two or more AMS. This would avoid situations where similar cases reach contrasting judgements in different AMS, causing uncertainty and risk for firms operating within ASEAN. At present, the general view of dominance across ASEAN is:

*"a situation where the business operator has enough economic strength to act in the market without regard to what its competitors (actual or potential) do."*¹⁸³

¹⁸⁰ European Commission (2009), para. 13.

¹⁸¹ Malaysia Competition Commission (2010).

¹⁸² Commission for the Supervision of Business Competition of the Republic of Indonesia (1999).

¹⁸³ ASEAN (2013), page 9.

Table 10: Market shares and dominance in AMS

ASEAN Member State	Market share	Description
Brunei Darussalam	-	Dominant position means a situation in which one or more undertakings possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors within Brunei Darussalam or elsewhere.
Cambodia	-	Dominant position means a situation in which a person, either individually or together with other persons, is in a position in a market to act without effective constraint from competitors or potential competitors
Indonesia	50%	Business actors shall have a dominant position in the following events: a. One business actor or a group of business actors controls more than 50% of the market share of a certain type of goods or services; or b. Two or three business actors or a group of business actors control more than 75% of the market share of a certain type of goods or services
Lao PDR	-	-
Malaysia	-	Dominant position means a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors. The fact that the market share of any enterprise is above or below any particular level shall not in itself be regarded as conclusive as to whether that enterprise occupies, or does not occupy, a dominant position in the market.
Myanmar	-	No market share thresholds have been provided for a dominant position based on Myanmar's Competition Law (2015).
The Philippines	50%	Dominant position refers to a position of economic strength that an entity or entities hold which makes it capable of controlling the relevant market independently from any or a combination of the following: competitors, customers, suppliers, or consumers. There shall be a rebuttable presumption of market dominant position if the market share of an entity in the relevant market is at least 50%, unless a new market share threshold is determined by the Commission for that particular sector.
Singapore	60%	There is no definition of dominance given in Singapore's Competition Act. However, CCS considers a market share in excess of 60% as likely to indicate that an undertaking is dominant in the relevant market. ¹⁸⁴
Thailand	75%	The Commission shall have the power to issue a written order requiring a business operator who has market domination, with the market share of more than 75%, to suspend, cease or vary the market share. Under Thailand's merger regime a firm is regarded as dominant if their share of the market is greater than 50%. ¹⁸⁵
Vietnam	30%	An enterprise shall be deemed to be in a dominant position if such enterprise has a market share of 30% or more in the relevant market or is capable of substantially restraining competition.

Source: Information obtained from the respective AMS's competition law unless stated otherwise.

¹⁸⁴ Getting The Deal Through (2017).

¹⁸⁵ Allen & Overy (2017).

6.3.9. The harmonisation of competition law within ASEAN was highlighted in the March 2017 GCR Live Asia-Pacific Law Leaders Forum. Specifically, it was outlined how, together, AMS are identifying the differences and similarities of each AMS's competition policy and law.¹⁸⁶ Given the different rules for the assessment of dominance, this is a potential area that may benefit from a harmonised approach. A standardised approach would avoid situations in which competition authorities in AMS reach inconsistent judgements in similar cases dealing with the same operator and the same conduct.

Importance of dynamic competition in E-commerce markets

6.3.10. In the assessment of a firm's market power, many factors beyond a firm's market share are important, such as the extent to which barriers to entry and expansion restrict or prevent new or smaller firms from entering or expanding in the market (as discussed in Section 4 of this handbook). This is particularly the case in E-commerce markets where successful innovation can result in an incumbent firm rapidly losing or gaining market share. Taobao's displacement of eBay as the leading online marketplace in China demonstrates this point.¹⁸⁷ In assessing market power in E-commerce markets, competition authorities should therefore also consider the long run dynamics of markets in addition to static market share analyses, as discussed by Affuso and Hall (2016).

6.3.11. Many online markets are interconnected through so-called 'digital eco-systems'. Due to the infrastructure that large online firms have developed, entering new or adjacent markets can be much easier than in offline markets, as technologies may be easily adapted to serve a similar purpose in a related online market. For example, Google, Amazon, Apple, and Facebook all offer a range of services based on a set of adaptable technologies and capabilities. Indeed, entry by these firms into markets that are being led by another of these global players is common; for example, Google entered the social media market with Google Plus, and Amazon expanded from its core competency as a retail marketplace to produce devices such as the Kindle and Fire in competition with Apple's iPad.

6.3.12. As a result of the adaptability of online firms, players outside of what may be considered the relevant market can still impose a competitive constraint on active market players. A firm which may be defined as outside of the relevant market can therefore still constrain an operator with a significant presence in (and share of) the market.

6.3.13. Alibaba's presence in online marketplaces, electronic payment services, and cloud computing demonstrates how firms can successfully expand into online services outside of the relevant market from which they originate. Consequently, if an online firm were to try to take advantage of its strong market share in a particular market, for example by charging excessively high prices or reducing quality of service to consumers, other firms operating in related markets based on similar technologies may enter and quickly displace the incumbent.

6.3.14. Neighbouring online platforms, operating in a different market, can be thought of as potential innovators who may be able to develop alternative, better products or services in the future. This dynamic competition incentivises incumbent firms to continually innovate to ensure they maintain their position in the market. In the absence of a potential innovator, for example following a merger, the incumbent firm may face reduced incentive to innovate, leading to a reduction in the quality received by consumers in the long run.

6.3.15. As a result, dynamic competition, and the role of firms outside the relevant market should also be considered as competitive constraints in competition investigations when assessing the market power held by a firm in online markets.

¹⁸⁶ GCR (2017), page 36.

¹⁸⁷ The Economist (2006).

07 Vertical agreements

7.1. Introduction

- 7.1.1. Vertical agreements, or vertical restraints, are broadly defined as agreements between firms at different levels in the supply chain. Most commonly, vertical restraints impose restrictions on retailers selling a manufacturer's product; for example: whether they are allowed to sell the product; conditions that must be met for them to be able to sell the product; who they can sell to; the price they can sell the product at; or the quantity of the product they must buy/sell.
- 7.1.2. Firstly, this section looks at the challenges faced by competition authorities in analysing vertical restraints in E-commerce markets and, following that, outlines recommendations on how best to assess these restraints. Examples of cases from across the world are presented throughout to support the discussion.

7.2. Challenges faced by Competition Authorities in the assessment of vertical restraints

- 7.2.1. Vertical restraints are generally considered as a benign business practice as they give rise to a number of efficiencies. However, vertical restraints can pose a challenge to competition authorities if there are both pro- and anti-competitive effects from such agreements. This section looks at these effects in turn, before evaluating the impact that E-commerce has had on the use of such restraints.

Potential pro-competitive effects of vertical restraints

- 7.2.2. Vertical restraints can have pro-competitive effects, posing a challenge to competition authorities in assessing whether to allow such agreements.

Vertical restraints to overcome free-riding problems

- 7.2.3. Vertical agreements are often needed to overcome issues of free-riding which result in the under-provision of important pre- or post-sales services. Evidence from the UK and Europe indicates that this is a common reason among firms for the use of vertical restraints in online markets.¹⁸⁸ Consider, for example, the market for contact lenses: consumers may make use of the pre-sale service in a brick-and-mortar store, trying various types of contact lenses, and assessing which suit them the best. They may then purchase the selected contact lenses online at a cheaper price. In this example, the online store is free-riding on the pre-sales service of the brick-and-mortar store. Conversely, consumers may make use of online pre-sales services (e.g. price comparison and customer reviews), before purchasing in store. Online stores may be able to sell at a lower price than brick-and-mortar stores as they do not incur the costs relating to pre-sale services that brick-and-mortar stores face. In the absence of vertical restraints, in order for brick-and-mortar stores to compete with online channels on price, they may reduce pre-sales service quality in order to reduce costs. Consumers may therefore be worse off due to the under-provision of pre-sales services. Selective distribution systems are often used to overcome such concerns – for instance a manufacturer may only allow retailers who offer a certain level of pre- or post-sales service to sell their products.

¹⁸⁸ UK - Oxaera and Accent (2016) – commissioned by the CMA, and European Commission (2016).

- 7.2.4. Another issue which vertical restraints can help to overcome is the hold-up problem. In some instances, there is a need for a firm to make a relationship-specific investment in a vertical relationship (i.e. with a specific firm, up- or down-stream) before making any sales. For example, a manufacturer may need to invest in new machinery in order to fulfil an order with a particular retailer, or a retailer may need to invest in training its staff prior to selling a specific manufacturer's product. In the absence of a vertical agreement, these investments may not be made as "once relationship specific costs have been sunk by one party, another party may opportunistically seek to renegotiate terms in its favour."¹⁸⁹

Vertical restraints to protect a product's image

- 7.2.5. Overcoming issues of free-riding is generally accepted by competition authorities as a pro-competitive benefit of vertical restraints. However, case law is less clear on whether this reason is a legitimate justification for the use of vertical restraints by firms. Specifically, a firm may try to increase users' valuation of a product by developing a 'luxury' brand image so that owning that good becomes a signal of that consumer's status in society. Designer handbags are often considered in this category of goods. To develop a status image, a manufacturer may use a selective distribution system, only allowing premium retailers to stock its products, thereby increasing the value that consumers place on the good. A landmark case on this issue is currently under review in Europe concerning the beauty product manufacturer, Coty¹⁹⁰ (see Case review 16). The ECJ is considering whether ensuring a luxury image is a valid reason for preventing sales through online marketplaces. Interestingly, the ECJ has previously ruled on a similar case concerning Pierre Fabre¹⁹¹ (see Case review 4), a manufacturer of luxury cosmetic products. In 2011, the ECJ agreed with the Paris Court of Appeal that Pierre Fabre's restrictions on retailers to only sell through physical stores in the presence of a qualified pharmacist restricted competition as all online sales were prevented.

- 7.2.6. There may also be signalling benefits from vertical restraints, whereby:

*"certain retailers have a reputation for stocking only "quality" products. In such a case, selling through these retailers may be vital for the introduction of a new product. If the manufacturer cannot initially limit his sales to the premium stores, he runs the risk of being delisted and the product introduction may fail."*¹⁹²

- 7.2.7. In the absence of a vertical restraint allowing only 'quality' retailers to sell the product, consumers may be worse off in that the product may be discontinued following a failed introductory period.

Vertical restraints to avoid double marginalisation

- 7.2.8. Vertical restraints may also be beneficial for consumers as they can lead to lower prices in markets by overcoming issues of double marginalisation. Double marginalisation arises when firms in a vertical relationship both have market power (i.e. they can both set prices above marginal cost). In this situation, the upstream firm sets its prices above the marginal cost of production, in addition to the downstream firm setting a subsequent mark-up above its input price, both unilaterally maximising profit. As a result the retail price has been marked up twice.¹⁹³ If however, through the use of a vertical agreement, a manufacturer and retailer agreed to coordinate price or quantity sold in order to maximise joint profits, the retail price for consumers would fall as only a single mark-up would be applied to the good, and in doing so increase total welfare.

¹⁸⁹ Lee, I. (2016), page 2319.

¹⁹⁰ Case C-230/16, Coty Germany GmbH vs. Parfümerie Akzente GmbH (ongoing).

¹⁹¹ Case C-439/09, Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi (October 13, 2011).

¹⁹² European Commission (2010), para. 107.

¹⁹³ Bishop, S. and Walker, M. (2010), page 192.

Potential anti-competitive effects of vertical restraints

- 7.2.9. Vertical restraints can have the effect of facilitating collusion, limiting inter-brand competition (i.e. competition between different brands) and/or limiting intra-brand competition (i.e. competition between products of the same brand sold in different outlets). When there is a degree of market power at the level of the supplier, buyer, or both, anti-competitive effects are likely to be greater.¹⁹⁴
- 7.2.10. For example, an agreement between a manufacturer and retailers that a specific product cannot be sold below a specified price would limit intra-brand competition and may facilitate collusion between retailers. As another example, an agreement between a manufacturer and a retailer specifying that the retailer must stock at least a certain quantity of a product may limit the ability of the retailer to stock competing manufacturers' products, thereby harming inter-brand competition.
- 7.2.11. If there is strong inter-brand competition, a reduction in intra-brand competition is unlikely to be harmful to consumers as retailers selling competing products impose a competitive constraint on any retailer that sells a high proportion of a particular manufacturer's products. For this reason restrictions limiting inter-brand competition are more of a concern to competition authorities than restrictions limiting intra-brand competition. For example, there may be an extreme scenario where there is only a single retailer selling a manufacturer's good, assuming for now that inter-brand competition is strong (i.e. there is an abundance of retailers selling other manufacturers' products). If this retailer tried to exploit its position of power by raising its price and/or reducing service quality, consumers would switch to an alternative retailer selling a similar good produced by a different manufacturer. By contrast, if inter-brand competition is weak, market outcomes are more likely to be adversely affected. As a result, in both online or offline markets, inter-brand competition is vital to protect and promote consumer interests. The US antitrust authorities apply this logic in their rule-of-reason approach to the assessment of vertical agreements.¹⁹⁵
- 7.2.12. Some forms of vertical restraints restrict the ability of consumers to engage in transactions in other territories. This is especially the case in E-commerce markets where cross-border transactions are common. In instances where several countries agree to promote free movement of goods with the aim of promoting cross-border trade, as for example in the EU, this type of restriction may violate the free movement rule and harm consumers. Instances where a business imposes restrictions inhibiting cross-border trade between Member States are referred to as geo-blocking strategies. The evidence in Europe suggests that this is widespread.¹⁹⁶ Such measures may be of concern to ASEAN as it moves closer towards an integrated market, through the implementation of its ASEAN Economic Community Blueprint 2025, the ASEAN Competition Action Plan (2016-2025) and ICT Masterplan 2020.

Comparing the pro- and anti-competitive effects of vertical restraints

- 7.2.13. In those instances when vertical restraints are not unequivocally beneficial, competition authorities face the challenge of assessing whether vertical restraints are anti-competitive and harm consumers, or whether the benefits they generate for consumers outweigh the harm. Generally speaking vertical restraints are considered beneficial, and are typically permitted unless there are potential anti-competitive effects.
- 7.2.14. In some jurisdictions, there are instances when a specific vertical restraint is identified as a restriction of competition which is not likely to give rise to any potential consumer benefits, and, as a result, it is prohibited without need for a more detailed assessment – so called hardcore restrictions as explained in Technical Explanation 2 in Annex 1 (such is generally the case for Resale Price Maintenance, RPM). Overall, competition authorities would need to perform a case-by-case analysis in order to assess whether the benefits outweigh any potential consumer detriment. In other jurisdictions however, vertical restraints which are not defined as hardcore restrictions, may be permitted without need for an assessment. These are often identified in some form of block exemption regulation, such as the European Commission's Vertical Agreement Block Exemption Regulation (VABER),¹⁹⁷ as explained in greater detail in Technical Explanation 2 in Annex 1. These general considerations apply to E-commerce in the same way as they have been applied to the brick-and-mortar retailing model of traditional markets.

¹⁹⁴ Bishop, S. and Walker, M. (2010), page 205.

¹⁹⁵ See, for example, Rosch, J. (2012).

¹⁹⁶ European Commission (2017d).

¹⁹⁷ Slaughter and May (2016).

Effect of E-commerce on the use of vertical restraints

- 7.2.15. While vertical restraints are present in both brick-and-mortar and online channels, experience to date demonstrates that the use of vertical restraints is particularly prevalent in E-commerce markets, largely driven by manufacturers' concerns that online retailers may free-ride on the services provided by their brick-and-mortar counterparts.¹⁹⁸ Free-riding may also occur between different online retailers and platform websites.
- 7.2.16. Some online retailers may free ride on the services and features offered on other websites, such as independent reviews or price comparison tools. Taking the example of a hotel booking platform where a leading platform may invest in certain features, such as advanced filtering capabilities or tailored mapping services. In order to fund these features the hotel booking platform may agree a price parity clause so that its offers cannot be undercut by other websites/platforms, or the hotels on their own websites. Other platforms that do not offer these features may then agree on lower rates with hotels and free ride on the investment that the superior booking platform had made. Consumers would select the hotel they want to book by making use of the features available on the superior platform before eventually purchasing the hotel room on an alternative, cheaper platform. Similarly, a hotel which has its own website may free-ride on a platform's free advertisement, but offer rooms at a cheaper rate on its own site. As a result of this free-riding, investment in developing such features on platforms may be compromised in the absence of vertical restraints, ultimately resulting in poorer services for consumers.

Overview of the following sub-sections

- 7.2.17. To support competition authorities in assessing the use of vertical restraints in online markets the following sub-sections consider in turn different types of vertical restraints¹⁹⁹ that have been found to be prevalent in online markets²⁰⁰ and have posed challenges to competition authorities around the world.²⁰¹ Although questionnaire responses indicate that some of these challenges have not yet emerged in ASEAN, one would expect that the use of such restrictions will increase as E-commerce markets continue to expand in the region. Currently only two out of five AMS authorities have encountered these vertical restraints in online markets. Additionally, some of the vertical restraints considered in this handbook, specifically dual pricing systems and market place bans,²⁰² have not yet been encountered in any of the five jurisdictions.
- 7.2.18. Relevant cases from jurisdictions in ASEAN and around the world are presented to illustrate the issues discussed, and, where relevant, the approach followed by competition authorities in pursuing their investigations is outlined.

¹⁹⁸ European Commission (2016) and Oxera and Accent (2016).

¹⁹⁹ This is a non-exhaustive list. There are other vertical restraints used by firms which competition authorities may investigate under certain circumstances, such as franchising arrangements, however these are not considered here as evidence has shown they are not prevalent in online markets and/or have not raised challenges to competition authorities around the world.

²⁰⁰ See, for example, Oxera and Accent (2016).

²⁰¹ See, for example, European Commission (2016).

²⁰² The following vertical restraints have been encountered by questionnaire respondents: Resale price maintenance, selective distribution, geo-blocking, bans on PCWs and MFN clauses. However, as it stands, the following restraints have not been encountered: dual pricing systems, bans on online marketplaces, or exclusionary practices between physical stores and online shops.

7.3. Selective distribution networks that exclude or restrict online sales

Overview of restraint

7.3.1. Selective distribution agreements are defined as instances where:

*“[a] producer establishes a system in which the products can be bought and resold only by authorised distributors and retailers. Non-authorised dealers will not be able to obtain the products, and the authorised dealers will be told they can resell to other members of the system or to the final consumer.”*²⁰³

- 7.3.2. Selective distribution is commonplace in many markets as manufacturers seek to ensure that their products are sold in an appropriate manner. To overcome free-riding concerns, a manufacturer may only form distribution agreements with retailers who agree to a certain level of pre- or post-sales service.
- 7.3.3. One questionnaire respondent indicated that they had encountered selective distribution agreements in E-commerce markets within their jurisdiction.
- 7.3.4. Selective distribution agreements limit intra-brand competition; but unless the manufacturer has a strong position in the market, inter-brand competition should be sufficient to prevent any anti-competitive effects from being too severe.²⁰⁴ Nevertheless, a case-by-case approach to reviewing selective distribution agreements is recommended so as to assess any anti-competitive effects arising from the agreements and any countervailing efficiencies which may justify their adoption.

Insights from cases

- 7.3.5. In Europe, competition authorities have focused their attention on selective distribution agreements that exclude a whole channel (such as the internet). The Pierre Fabre ruling²⁰⁵ (see Case review 4 below) determined that distribution agreements which prevented firms from selling on the internet amounted to anti-competitive conduct, as they restricted firms from passive sales across borders and prevented the benefits from the internet being realised. Agreements that prevent sales via a certain channel, such as the internet, are treated as a hardcore restriction by the European Commission, as explained in greater detail in Technical Explanation 2 in Annex 1.
- 7.3.6. A manufacturer is however generally permitted to require retailers to have at least one brick-and-mortar store in order to ensure that certain quality standards are met, though:

*“while acknowledging that brick and mortar requirements are generally covered by the VBER [Vertical Block Exemption Regulation], certain requirements to operate at least one brick and mortar shop without any apparent link to distribution quality and/or other potential efficiencies may require further scrutiny in individual cases.”*²⁰⁶

Indeed, such form of restraint might be used in order to prevent pure online retailers from access to the distribution of certain products.

²⁰³ Whish, R. and Bailey, D. (2015), page 641.

²⁰⁴ European Commission (2010), para. 177.

²⁰⁵ C-439/09, Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi (2011).

²⁰⁶ European Commission (2017b), para. 27.

CASE REVIEW 4 – PIERRE FABRE

Industry: Cosmetics and beauty products

Country / Union of countries: European Union

Court / Competition Authority: Paris Court of Appeal, ECJ

Case name and citation: Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi. (C-439/09)

Date of decision: 13th October 2011

Type of alleged infringement: Selective distribution

► | Case summary

Pierre Fabre is a manufacturer of luxury cosmetic products sold primarily through pharmacies. In 2011 Pierre Fabre was investigated for its use of vertical restraints. Specifically, distributors were restricted to sell Pierre Fabre's products only from a physical location with a qualified pharmacist present, despite the products not being medicines. Retailers were therefore prevented from selling online.

Similar concerns relating to selective distribution agreements used by competitors were also raised, but in 2007, the French Conseil de la Concurrence (the French competition authority) accepted commitments from these firms to amend their selective distribution arrangements to allow internet sales. However, Pierre Fabre, who controlled roughly 20% of the market, refused, arguing that its products required a qualified pharmacist present at the point of sale to provide specialist advice.

The Paris Court of Appeal approached the ECJ for advice on the case. The ECJ confirmed that the ban restricted competition as it reduced the ability of a distributor to sell the products to customers outside its territory. Importantly, the ECJ ruled that a block exemption under VABER (i.e. an exemption from competition law based on Pierre Fabre's market share being less than 30%) could not be applied to this agreement. In Europe, this case has led to an understanding that firms cannot block sales through a specific channel, such as the internet.

- 7.3.7. In the UK, the Pierre Fabre ruling was relied upon by the OFT (now the CMA) in its investigation of the mobility scooter sector, ruling that the prohibition of online sales amounted to anti-competitive conduct, in addition to other infringements in the market (see Case review 5).²⁰⁷

²⁰⁷ CE/9578-12, *Pride/Roma* (2014).

CASE REVIEW 5 – MOBILITY SCOOTERS

Industry: Mobility scooters

Country / Union of countries: UK

Court / Competition Authority: OFT, now the CMA

Case name and citation: Mobility scooters prohibitions on online sales and online price advertising, CE/9578-12

Date of decision: 27th March 2014

Type of alleged infringement: Exclusion of online sales and RPM

▶ | Case summary

The OFT now known as CMA, conducted a market study of the mobility scooter market in 2011. Following this review, an investigation was opened into online vertical restraints being used in the market.

The investigation found that Roma had prohibited online sales for seven retailers between July 2011 and April 2012. The OFT also found that Roma had prohibited online advertising of any prices for some retailers in the same period.

Additionally, the investigation found that another producer of mobility scooters, Pride, had entered into agreements with eight of its retailers, preventing them from advertising online prices below the RRP (Recommended Retail Price). The OFT ruled that these agreements prevented, restricted or distorted competition in the supply of mobility scooters.

The OFT directed both parties to remove any form of price restriction related to the above findings within 20 days of the date of decision, and to write to the affected retailers informing them that such restraints were no longer in place.

7.3.8. In the UK, the CMA is currently investigating the golf club manufacturer, Ping, for an outright ban on internet sales (see Case review 6 below).²⁰⁸

CASE REVIEW 6 – PING

Industry: Sports equipment

Country / Union of countries: UK

Court / Competition Authority: CMA

Case name and citation: Ping Europe Limited (Ping)

Date of decision: Ongoing

Type of alleged infringement: Exclusion of online sales

► | Case summary

The CMA is investigating Ping Europe Limited (Ping), a golf club manufacturer, for the use of bans which prevent retailers from selling Ping golf clubs online. The CMA's findings are, however, provisional at this stage, and Ping has been invited to respond to the CMA's concerns. The CMA has argued that online sales are an increasingly important distribution channel, and that retailers' ability to supply through this channel should not be unduly restricted. The investigation is being conducted under Chapter 1 of the Competition Act 1998, and Article 101 of the TFEU.

7.3.9. The Pierre Fabre ruling was also followed in an investigation of BMW's agreements with dealers of its cars that prevented listings on online platforms.²⁰⁹ However, following commitments made by BMW to withdraw the relevant clauses from its agreements, the investigation was subsequently terminated (see Case review 7 below).

CASE REVIEW 7 – BMW

Industry: Automotive

Country / Union of countries: UK

Court / Competition Authority: CMA

Case name and citation: "BMW changes policy on car comparison sites following CMA action" (<https://www.gov.uk/government/news/bmw-changes-policy-on-car-comparison-sites-following-cma-action>)

Date of decision: 24th January 2017

Type of alleged infringement: Exclusion of online sales

► | Case summary

In January 2017, BMW UK changed its policy following the threat of a CMA investigation into an alleged exclusion of online sales. In particular, carwow, a provider of an online comparison tool, had complained to the CMA that BMW UK had prevented dealers from listing BMW and MINI cars on its portal. Following discussions between carwow, the CMA and BMW, BMW agreed to allow dealers to list BMW and MINI cars on carwow and other internet platforms.

²⁰⁸ Press release: CMA alleges breach of competition law by Ping; <https://www.gov.uk/government/news/cma-alleges-breach-of-competition-law-by-ping> (2016).

²⁰⁹ News story: BMW changes policy on car comparison sites following CMA action; available at: <https://www.gov.uk/government/news/bmw-changes-policy-on-car-comparison-sites-following-cma-action> (2017).

7.4. Resale Price Maintenance (RPM)

Overview of restraint

- 7.4.1. RPM consists of “*agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer*”.²¹⁰ Price floors may be explicitly specified in a contract, or implicitly enforced through threats by a manufacturer to punish a retailer if a price different to what the manufacturer suggests is set. RPM is widely regarded as a hardcore restriction as it reduces intra-brand competition, and may facilitate collusion, raise prices, and reduce inter-brand competition if implemented by multiple manufacturers. In the US, however, at federal level, minimum resale price restrictions are analysed under a rule-of-reason approach.²¹¹
- 7.4.2. One questionnaire respondent indicated that they have encountered RPM within E-commerce markets in their jurisdiction.
- 7.4.3. While a recommended retail price (RRP) is typically not deemed by competition authorities around the world to be anti-competitive, any attempt to enforce an RRP, for example by threatening to punish any retailers who deviate from such recommendations (e.g. by removing discounts or limiting/ending supply), is regarded as a hardcore restriction.
- 7.4.4. By the same logic that is applied in cases of RPM in brick-and-mortar markets, in E-commerce markets RPM is deemed likely to be harmful to consumers and is therefore treated in a similar manner.

Insights from cases

- 7.4.5. The approach to RPM and RRP discussed above has been observed in cases to date. For example, the OFT found that restrictions preventing dealers from displaying advertised prices below an RRP amounted to RPM in the mobility scooter sector (Case review 5).²¹² Enforced RRP have also been deemed anti-competitive. Case review 8 highlights how the German competition authority found Lego guilty of RPM through threats to remove wholesale discounts,²¹³ and Case review 9 presents the UK CMA’s investigations in the catering equipment and bathroom fittings sectors.²¹⁴
- 7.4.6. On rare occasions, RPM may be permitted if it is deemed that efficiency benefits outweigh any anti-competitive effects. Although the Australian Competition & Consumer Commission (ACCC) typically regards RPM as per se illegal, such conduct can be permitted if it can be demonstrated that the efficiency benefits outweigh any costs. This was the case in 2014 when Tooltechnic was granted permission to implement a minimum resale price for Festool power tools (see Case review 10). In this instance it was deemed that due to the technical nature of the product, and the importance of pre- and post-sales services, in the absence of RPM, free-riding by retailers would have been a serious concern. Given that Tooltechnic had a small market share in the supply of power tools, significant anti-competitive effects were deemed unlikely.

²¹⁰ European Commission (2010), para. 223.

²¹¹ Rosch, J. (2012). In some states, such as California, RPM is still considered per se illegal (Lindsay, M. (2017)).

²¹² CE/9578-12, Pride (2014).

²¹³ Press release: Bundeskartellamt fines LEGO for vertical resale price maintenance, bundeskartellamt.de (2016).

²¹⁴ CE/9856-14, Commercial catering equipment sector: investigation into anti-competitive practices (2016); and CE/9857-14, Bathroom fittings sector: investigation into anti-competitive practices (2016).

CASE REVIEW 8 – LEGO

Industry: Children's toys

Country / Union of countries: Germany

Court / Competition Authority: Bundeskartellamt

Case name and citation: : “Bundeskartellamt fines LEGO for vertical resale price maintenance”
(http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/12_01_2016_Lego.html)
“LEGO changes its discount system - Fairer conditions for online sales”
(https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/18_07_2016_Lego.html)

Date of decision: 12th January 2016

Type of alleged infringement: RPM

► | Case summary

In January 2016 the German competition authority fined LEGO €130,000 for RPM strategies. The firm was found to have enforced recommended prices by threatening to punish deviators with the removal of discounts on wholesale prices.

More recently in July 2016, the Bundeskartellamt also investigated LEGO for another infringement inhibiting online sales, specifically through offering differing levels of discounts to online and offline retailers on the wholesale price. To allay these concerns LEGO committed to changing its online pricing structures so that brick-and-mortar and online retailers were treated equally.

CASE REVIEW 9 – CATERING EQUIPMENT AND BATHROOM FITTINGS

Industry: Catering equipment / bathroom fittings

Country / Union of countries: UK

Court / Competition Authority: CMA

Case name and citation: Commercial catering equipment sector: investigation into anti-competitive practices (CE/9856-14); and
Bathroom fittings sector: investigation into anti-competitive practices (CE/9857-14)

Date of decision: 24th May 2016; 26th April 2016

Type of alleged infringement: RPM

► | Case summary

A fridge supplier, ITW Ltd, was fined over £2m in June 2016 for using RPM strategies for online sales. Specifically, ITW implemented a minimum advertised price and threatened dealers with higher wholesale prices or the withdrawal of supply if the suggested pricing structures were not followed.

The CMA pursued a similar case in May 2016 relating to RPM in the bathroom fittings market. In this instance Ultra Finishing Ltd was found to have enforced recommended retail prices through threats to charge retailers higher prices, withdrawing rights to use the supplier's images online, or withdrawing supply of products. A fine of £786,668 was imposed.

CASE REVIEW 10 – TOOLTECHNIC

Industry: Power tools

Country / Union of countries: Australia

Court / Competition Authority: ACCC

Case name and citation: : Tooltechnic Systems (Aust) Pty Ltd - Authorisation - A91433

Date of decision: 5th December 2014

Type of alleged infringement: RPM

▶ | Case summary

In June 2014, Tooltechnic sought approval from the ACCC to amend its contracts with dealers to allow it to impose a minimum resale price in the supply of Festool power tools, where they were the exclusive importer and wholesaler.

The ACCC states that “under the Competition and Consumer Act 2010 (CCA), resale price maintenance is prohibited per se. However, the ACCC can authorise resale price maintenance where it is satisfied that in all the circumstances the conduct is likely to result in public benefits which outweigh the public detriments likely to result from the conduct.” (ACCC Determination, 2014, page ii.)

On 5th December 2014 the ACCC granted Tooltechnic permission to implement these clauses until 31 December 2018 on the basis that the extent of any detrimental effect was likely to be low given the wide range of alternative power tools, the small market share of Festool products, a history of entry and expansion in the market, and the highly innovative and differentiated nature of products in the market. It was deemed that overcoming issues of free-riding by retailers on the pre- and post-sales services provided by other retailers outweighed any costs that would arise. Investment in pre-sales services was deemed important in this instance due to the complex nature of the products being sold. Furthermore, in its decision, the ACCC specifically cited online retailers as potential free-riders on brick-and-mortar stores services.

The ACCC also committed to monitor the impact of the RPM on an annual basis.

7.5. Dual pricing systems

Overview of restraint

- 7.5.1. Some firms may charge different wholesale prices depending on the channel through which retailers sell their final products. Typically dual pricing in E-commerce markets involves firms setting a higher wholesale price for goods sold via online channels in comparison to sales made in brick-and-mortar stores. Although such practices may compensate manufacturers for differences in costs between brick-and-mortar stores and online retailers, they may also be used as a strategy to inhibit online sales.
- 7.5.2. Dual pricing systems are regarded as a hardcore restriction in Europe. However, in its Final Report on the E-commerce Sector Inquiry, the European Commission (2017b)²¹⁵ outlines how this hardcore restriction only applies to dual pricing systems for click-and-mortar retailers (hybrid retailers); i.e. a retailer that sells both online and via brick-and-mortar stores cannot be unjustifiably charged a different wholesale price depending on the channel through which the product is sold. By contrast, “charging different wholesale prices to different retailers is generally considered a normal part of the competitive process”.²¹⁶

²¹⁵ European Commission (2017b), page 10.

²¹⁶ European Commission (2017b), page 10. Note: “Unless different wholesale prices to (online) retailers have the object of restricting exports or partitioning markets.”

- 7.5.3. Dual pricing systems for click-and-mortar firms may be permitted in Europe if pricing differentials can be justified by differences in costs incurred by the manufacturer from retail sales in one channel compared to another.²¹⁷ For example, where a good benefits from professional installation, a manufacturer may face higher costs from sales made online, for instance if customer complaints and warranty claims are higher when the product is not appropriately installed.²¹⁸

Insights from cases

- 7.5.4. A dual pricing system was observed in the recent investigation of Lego in Germany (Case review 8). Specifically, Lego was found to have offered different levels of discounts for online and offline sales.²¹⁹ Similar cases, also in Germany, are presented in Case review 11 and Case review 12 below. Interestingly, in Germany, the Bundeskartellamt's intervention appears to go beyond the European Commission's current thinking. In addition to wholesale price discrimination for click-and-mortar retailers depending on the sale channel, the German authority is also concerned by wholesale pricing structures that discriminate between retailers that only sell online and retailers that only sell in brick-and-mortar stores, and between click-and-mortar and brick-and-mortar retailers. This difference in interpretation of the law poses a challenge for businesses operating across different jurisdictions within Europe.

CASE REVIEW 11 – BOSCH

Industry: Home appliances

Country / Union of countries: Germany

Court / Competition Authority: Bundeskartellamt

Case name and citation: Bosch Siemens Hausgeräte; B7-11/13

Date of decision: 23rd December 2013

Type of alleged infringement: Dual pricing

▶ | Case summary

In December 2013 Bosch Siemens Hausgeräte (BSH) agreed to withdraw rebate offers which favoured offline only retailers as opposed to retailers selling both online and in brick-and-mortar stores. The higher the turnover so-called hybrid retailers made from online channels, the lower their rebates would be. The commitments made by BSH were enough to put a halt to the Bundeskartellamt's investigation following complaints from retailers.

In this instance, the Bundeskartellamt acknowledged that a manufacturer is allowed to agree with his dealers on quality requirements for the sale of his products, but in this specific instance retailers were restricted in their choice of sales channel and incentivised to limit online sales.

²¹⁷ European Commission (2016), para. 543.

²¹⁸ European Commission (2010), para. 64.

²¹⁹ Press release: LEGO changes its discount system - Fairer conditions for online sales, bundeskartellamt.de (2016).

CASE REVIEW 12 – GARDENA

Industry: Gardening tools

Country / Union of countries: Germany

Court / Competition Authority: Bundeskartellamt

Case name and citation: Gardena, B5-144/13

Date of decision: 28th October 2013

Type of alleged infringement: Dual pricing

▶ | Case summary

In 2013 the Bundeskartellamt investigated Gardena for implementing dual pricing practices that limited the online distribution of its products. Online distributors of Gardena's products claimed that Gardena's discount system favoured traditional brick-and-mortar stores over online retailers.

The Bundeskartellamt ruled that Gardena must remove their dual pricing systems, thereby giving equal levels of discount to both brick-and-mortar and online retailers. Though the Bundeskartellamt acknowledged that "a manufacturer may well take account of the different conditions in the different distribution channels" (Bundeskartellamt press release: 28/11/2013), it was deemed in this instance that the system discriminated against online sales.

7.6. Geo-blocking

Overview of restraint

- 7.6.1. In meeting ASEAN's objective to become a more integrated market, competition authorities may also be concerned by firms' attempts to restrict cross-border sales – a type of conduct referred to as geo-blocking. One questionnaire respondent indicated that they had encountered geo-blocking strategies in E-commerce markets within their jurisdiction.
- 7.6.2. The view in Europe on this matter is that a manufacturer may be allowed to restrict retailers' ability to actively sell to a particular region or country that is exclusive to another distributor, for example through advertising bans.²²⁰ This is because exclusive territories can generate efficiencies, for example overcoming free-riding issues inhibiting the incentives to invest. However, restrictions on passive sales to other member states (i.e. preventing customers who independently reach out to a retailer's website in a foreign country from purchasing a good from that store) are regarded as a hardcore restriction as they prevent the benefits of the single market from being realised.²²¹ Passive sales may be restricted by automatically re-routing customers to their domestic website, or refusing payment to foreign customers. Outright bans on sales to foreign customers in other member states are therefore also not allowed. Additionally, in Europe, an agreement with retailers in a selective distribution network must not "*have as its object to restrict active or passive sales to end users*" or between authorised dealers.²²²

²²⁰ European Commission (2016), para. 393.

²²¹ These restrictions are regarded as a hardcore restriction if they are part of an agreement between a manufacturer and retailer. Unilateral decisions of non-dominant companies are permitted.

²²² European Commission (2016), para. 398.

- 7.6.3. In the context of E-commerce, in line with its strategy to promote a single digital market, the approach followed by the European Commission regards geo-blocking as an infringement of competition law. As a result, the European Commission has imposed a number of fines in several instances of geo-blocking practices. In 2005 Peugeot was found to have engaged in geo-blocking measures through its agreements to only pay bonuses to dealers for cars sold to Dutch citizens (see Case review 13).²²³ Similarly, through restrictions in its agreements with retailers, Yamaha was also deemed to have restricted cross-border trade through geographic limits on product guarantees and requirements for retailers to notify Yamaha if they were to sell abroad (Case review 14).²²⁴ Additionally, following the publication of the preliminary findings on its E-commerce sector inquiry, the European Commission initiated an investigation into the hotel bookings market, looking at whether pricing systems adopted by hotels and tour operators discriminate between customers based on where they are located, and therefore inhibit cross-border trade (Case review 15).²²⁵

CASE REVIEW 13 – PEUGEOT

Industry: Automotive

Country / Union of countries: EU

Court / Competition Authority: European Commission

Case name and citation: 37275 SEP et autres / Automobiles Peugeot SA

Date of decision: 5th October 2005

Type of alleged infringement: Geo-blocking

► | Case summary

In October 2005, the European Commission announced that it had imposed a fine of €49.5m on Peugeot for obstructing new car exports from the Netherlands to other EU Member States between 1997 and 2003.

Dealers were only paid a bonus if a car was registered in the Dutch market, and those who sold cross-border were pressured into not doing so, for example by threatening to limit the quantity of cars supplied.

²²³ 37275 SEP et autres / Automobiles Peugeot SA (2005).

²²⁴ 37975 PO/Yamaha (2003).

²²⁵ Press release: Antitrust: Commission opens three investigations into suspected anti-competitive practices in e-commerce (2017).

CASE REVIEW 14 – YAMAHA

Industry: Musical instruments

Country / Union of countries: EU

Court / Competition Authority: European Commission

Case name and citation: 37975 PO/Yamaha

Date of decision: 16th July 2003

Type of alleged infringement: Geo-blocking

▶ | Case summary

In June 2003 the European Commission announced that it had imposed a €2.56m fine on Yamaha, the manufacturer of musical instruments, for restrictions of trade (geo-blocking) and RPM.

The European Commission determined that as a result of requirements to notify Yamaha if a retailer wanted to export via online channels, “dealers were clearly discouraged from exporting”. “The Commission sees no reasons to justify such an obligation to consult Yamaha before exporting via the internet and interprets this clause as deterring exports via the internet.”

In its agreements with retailers, Yamaha had included restrictions to only sell to final customers and not dealers, and dealers were obliged to only buy from Yamaha’s national subsidiary and not from foreign dealers. Additionally, in some countries product guarantees were only valid in the country of origin. Once the European Commission opened its proceedings, Yamaha removed the relevant conditions from its contracts.

CASE REVIEW 15 – HOTEL ACCOMMODATION

Industry: Accommodation booking

Country / Union of countries: EU

Court / Competition Authority: European Commission

Case name and citation: AT.40308 – Hotel pricing

Date of decision: Ongoing

Type of alleged infringement: Geo-blocking

▶ | Case summary

In February 2017, following the publication of the European Commission’s E-commerce sector inquiry preliminary findings, the European Commission opened an investigation into the hotel accommodation market in relation to alleged agreements between a hotel group (Melia) and four tour operators which discriminate between consumers based on their location in Europe.

It is alleged that pricing mechanisms designed to maximise room usage may discriminate between customers based on where they are located within Europe. Consumers in some countries are therefore not able to see the best prices available; conduct which may be deemed anti-competitive as a result of partitioning the Single Market.

7.7. Platform bans

Overview of restraint

- 7.7.1. Platform bans occur when manufacturers prevent sales through certain online marketplaces via selective distribution agreements. This type of agreement is different from an outright ban of online sales, as sales through some online retailers are permitted, but sales through online platforms such as Amazon marketplace are restricted.
- 7.7.2. Such agreements may combat the sale of counterfeit goods, ensure sufficient pre- and post- sales service, protect the status image of a product, and/or signal that a good is premium by only selling it through higher-end, online retailers.²²⁶ On the other hand, intra-brand competition is restricted. Given that there are both pro- and anti-competitive effects of such restraints, a case-by-case approach to assessing platform bans is recommended.

Insights from cases

- 7.7.3. A landmark case is currently under investigation in Europe concerning the beauty product manufacturer, Coty (Case review 16 below).²²⁷ Specifically, the ECJ is considering whether status reasons are valid justifications for the use of vertical restraints to prevent sales through online marketplaces. The outcome of this case is likely to have far-reaching implications for the luxury-goods industry, but also for platforms such as Amazon marketplace, as platform bans of this type hinder the growth of E-commerce. A similar case was heard in 2011 in the sportswear market (see Case review 20). Following different assessments of platform bans by the German courts, it was eventually decided by the Higher Court of Frankfurt to refer the Coty case to the ECJ to seek clarity on the matter.
- 7.7.4. In its final report on the E-commerce Sector Inquiry, the European Commission (2017d) has indicated that it does not consider marketplace bans a hardcore restriction as they “*do not have as their object (i) a restriction of the territory or the customers to whom the retailer in question may sell or (ii) the restriction of active or passive sales to end users.*”²²⁸ Competition authorities should however review the ECJ’s ruling on the Coty case once it is issued as this could supersede the European Commission’s current thinking if a different view is taken by the Court.

CASE REVIEW 16 – COTY

Industry: Cosmetic and beauty products

Country / Union of countries: Germany

Court / Competition Authority: Higher Regional Court of Frankfurt, ECJ

Case name and citation: Coty Germany GmbH v Parfümerie Akzente GmbH, Case C-230/16

Date of decision: Pending (lodged on 25th April 2016)

Type of alleged infringement: Selective distribution/marketplace bans

▶ Case summary

The Higher Regional Court of Frankfurt is currently reviewing the legality of restrictions imposed by the beauty product manufacturer, Coty, preventing its distributor, Parfümerie Akzente, from selling products via third party online platforms such as Amazon marketplace due to fears that such platforms weaken the status image associated with its products.

In 2014, the Regional Court of Frankfurt dismissed Coty’s claim, instead arguing that these terms infringed German antitrust rules. Coty has appealed this decision, and the ECJ has been asked to provide guidance on whether these selective distribution agreements, in the form of online platform sales bans, infringe European competition law.

²²⁶ European Commission (2016), page 148.

²²⁷ Coty Germany GmbH v Parfümerie Akzente GmbH, Case C-230/16 (2016).

²²⁸ European Commission (2017d), page 152.

7.8. Most Favoured Nation (MFN) clauses

Overview of restraint

- 7.8.1. Another form of vertical restraint often used by online platforms are Most Favoured Nation (MFN) or price parity clauses. Specifically, firms may include restrictions in contracts that ensure that no other competitor will receive more favourable terms – for instance being able to sell at a lower price. This is commonly referred to as a wide MFN. In contrast, a narrow MFN prevents a firm from being able to set a lower price on its own website, but it is free to agree lower prices with other platforms.
- 7.8.2. One questionnaire respondent indicated that they have encountered the use of MFN clauses in E-commerce markets within their jurisdiction.
- 7.8.3. MFN clauses pose a challenge to competition authorities in that they have both pro- and anti-competitive effects. MFNs restrict intra-brand competition and can facilitate collusion between sellers in the market by enforcing uniform prices. However, MFN clauses can help to overcome issues of free-riding. Considering the hotel booking market, MFN clauses prevent other platforms (in the case of wide MFNs), or hotels themselves (under both wide and narrow MFN clauses), from free-riding on the service provided by the platform, and offering a cheaper price themselves (for example free-riding on the superior platform's functionalities including hotel reviews, price comparison and/or free advertisement of the hotel). MFN clauses may also result in reduced search costs for buyers, and avoid price discrimination between buyers. To effectively weigh up these pro- and anti-competitive effects, a case-by-case approach is sensible. Such an approach enables the competition authority to analyse the potential harm and/or benefit depending on the market structure, type of MFN clause used, and the characteristics of the product market and of its buyers and sellers.²²⁹

Insights from cases

- 7.8.4. MFN clauses are common in the hotel booking market, and have been investigated by the UK CMA, the German Bundeskartellamt, the Paris Commercial Court and seven other competition authorities across Europe (see Case review 17 below). This case is of particular interest because it has resulted in different conclusions being reached by different competition authorities. One reason for the different approaches taken by authorities may be the influence of governments in some countries who are looking to pursue their own industrial strategy objectives. In general, competition policy and law should focus on assessing the pro- and anti-competitive effects of various forms of conduct by firms, and remain independent from industrial strategy considerations.
- 7.8.5. The UK CMA has prohibited hotel booking platforms from using wide MFNs, but has been more lenient on the use of narrow MFNs on the basis that narrow MFNs help to overcome issues of free-riding by hotels on the platform's service. Germany's Bundeskartellamt, however, has prohibited both wide and narrow MFNs in the hotel booking market, arguing that narrow MFNs restrict price competition across the market, as even under the less restrictive narrow MFNs there is little incentive for a hotel to allow one online booking platform to set a lower price if it has to display higher prices on its own website due to an MFN clause it has agreed with another platform.²³⁰ Analogously, Italy, Austria and France have recently introduced legislation to ban both narrow and wide MFNs in the hotel booking market. Although there are no public details of the case, it has been reported that the Chinese authorities have also investigated online hotel booking platforms regarding the use of MFN clauses.²³¹ By contrast, in the US, authorities have not pursued the use of MFNs by hotel booking platforms, and class actions have failed as there was no evidence of a concerted practice.²³²
- 7.8.6. The ACCC has also found narrow MFNs to be anti-competitive in its investigation into Flight Center's alleged pressure on airlines to not sell flights at a price lower than what was available on its website (see Case review 19).²³³ In this case a critical factor in the decision was the determination of whether Flight Center, as a booking platform, was in competition with the airlines themselves. Following an initial decision and two appeals, it was eventually established that this was indeed the case, therefore in this instance the use of MFN clauses was considered a horizontal agreement as opposed to a vertical restraint.

²²⁹ CCS (2015).

²³⁰ Andreas Mundt, Bundeskartellamt (2015).

²³¹ Freshfields (2017).

²³² Ibid.

²³³ Case B15/2016 Flight Center (2016).

- 7.8.7. Amazon has also been investigated for its use of MFN clauses. In 2012, the OFT²³⁴, opened an investigation into the price parity policy that Amazon implemented on its online marketplace.²³⁵ Amazon agreed to remove this policy, resulting in the OFT closing its investigation. Similarly, when investigated by the European Commission for its use of MFN clauses in the E-books market in 2017, the case was closed following commitments made by Amazon. Japan's Fair Trade Commission (JFTC) also recently investigated Amazon Japan for use of wide MFN clauses, following dawn raids in August 2016 (see Case review 18).²³⁶ By contrast, in the US, so far, authorities have chosen not to investigate Amazon for the use of MFN clauses.
- 7.8.8. The difference in competition authorities' opinions on MFN clauses across the world has raised concerns. The Booking.com case illustrates the challenges faced by businesses when competition authorities take contrasting views on issues such as the use of narrow MFNs. Whilst their practices may be perfectly legal in one jurisdiction, they may not be so in a neighbouring jurisdiction, thus limiting their ability to expand internationally via the same platform and accompanying business model.
- 7.8.9. Ten national competition authorities have been assessing the effect of the various approaches to MFN clauses in the hotel sector via the European Competition Network (ECN). The findings²³⁷ show that as a result of online travel agents (OTAs) such as Booking.com and Expedia switching from using wide to narrow MFN clauses (which allow the hotels to offer different prices to different OTAs as long as the hotel's website rates are no lower), there has been a recognisable increase in price differentiation via OTAs. The CMA has therefore concluded that it will not prioritise further investigation of pricing practices in the sector but will seek to raise further awareness of this recent change in pricing clauses. Within a region such as ASEAN, where businesses operate internationally, a consistent approach is recommended in order to facilitate growth in E-commerce markets. If possible, a concerted approach could be facilitated via the ASEAN Experts Group on Competition.

CASE REVIEW 17 – ONLINE HOTEL BOOKING

Industry: Accommodation booking

Country / Union of countries: UK, Germany, France, Belgium, Hungary, Ireland, Italy, the Netherlands, Czech Republic and Sweden

Court / Competition Authority: CMA (UK), Bundeskartellamt (Germany)

Case name and citation: CE/9320-10 (CMA), B 9-121/13 (Bundeskartellamt)

Date of decision: Varying (2015 - 2016)

Type of alleged infringement: MFN clauses

► | Case summary

In December 2015, the German competition authority (the Bundeskartellamt) prohibited Booking.com from applying its 'best price' (or MFN) clauses. The Bundeskartellamt prohibited clauses which prevented hotels from offering lower prices on platforms competing with Booking.com as well as their own website (wide MFNs). The German competition authority also prohibited the use of narrow MFNs, preventing travel websites from implementing clauses restricting hotels from offering lower room rates on their own online booking system, but allowing hotels to agree lower rates with other platforms. Booking.com has argued that narrow MFNs are required to prevent hotels from free-riding by using Booking.com to promote their hotels but offering a cheaper price on their own website. The French, Italian and Austrian authorities are following the German position, and are implementing new legislation to prohibit all MFNs in the hotel booking market.

The CMA in the UK has however decided that Booking.com must remove its wide MFNs, but permitted the use of narrow MFNs. In its view, narrow MFNs do not have a significant effect on competition and are likely to be necessary to ensure the benefits that online platforms offer consumers, such as the ease of comparing prices and switching between providers. The decision from the Bundeskartellamt is the more conservative judgement, prohibiting both narrow and wide MFNs. The divided nature of these decisions has led to the absence of an EU-wide position.

²³⁴ Now known as the UK CMA.

²³⁵ CE/9692/12 Online retail sector (2012).

²³⁶ JFTC (2017), Press release: "The JFTC closed the investigation on the suspected violation by Amazon G.K."

²³⁷ European Commission (2017e).

CASE REVIEW 18 – AMAZON JAPAN

Industry: Online marketplaces

Country / Union of countries: Japan

Court / Competition Authority: JFTC

Case name and citation: Press release – “The JFTC closed the investigation on the suspected violation by Amazon Japan”

Date of decision: 1st June 2017

Type of alleged infringement: MFN clauses

▶ | Case summary

In June 2017 the JFTC announced that it had closed its investigation into Amazon Japan. The investigation had focused on Amazon's use of MFN clauses which restricted the price retailers could sell their goods for on competing sites.

The investigation was closed following voluntary commitments by Amazon to remove the MFN clauses from their contracts, and to report annually on the implementation status of these contractual changes.

CASE REVIEW 19 – FLIGHT CENTER

Industry: Flight bookings

Country / Union of countries: Australia

Court / Competition Authority: ACCC, Full Court of the Federal Court of Australia, High Court of Australia

Case name and citation: Australian Competition & Consumer Commission v. Flight Centre Travel Group Limited (Case B15/2016)

Date of decision: 14th December 2016

Type of alleged infringement: MFN clauses

▶ | Case summary

Between August 2005 and May 2009 Flight Center were alleged to have attempted to force three airlines (Emirates, Malaysia Airlines, and Singapore Airlines) to not sell flights at a price cheaper on their own website than on Flight Center. In 2012 the ACCC commenced proceedings against Flight Center for proposing these provisions, that in their view had the purpose or effect of “fixing or controlling or maintaining prices for the supply of services which it and they [the airlines] were selling” (High Court Determination, 2016, para. 4). A key factor in the investigation was whether or not the airlines were to be deemed competitors of Flight Center. The ACCC ruled that this was the case and therefore deemed the pricing practice to be anti-competitive, quashing the claim that Flight Center was acting as an agent to the airlines.

Though the ruling was initially changed following an appeal to the Full Court, the ACCC's initial decision was reinstated following a High Court appeal, though some adjustments were made. For instance, the market was reworded as ‘international airline tickets’ instead of ‘distribution and booking services for international passenger air travel’. The level of financial penalties has yet to be confirmed.

7.9. Restrictions on price comparison websites

Overview of restraint

- 7.9.1. Some manufacturers may prevent retailers from using price comparison tools. Indeed, one questionnaire respondent indicated that they had encountered the use of bans on PCWs within their jurisdiction in E-commerce markets.
- 7.9.2. Competition authorities may be concerned that these restrictions are being used to restrict price competition online by reducing price transparency. There may, however, be pro-competitive benefits of restrictions on PCWs, for instance increasing competition on product quality. PCWs focus mainly on price competition, and often do not compare the quality of products or services offered by firms. PCWs therefore encourage firms to compete intensively on price, but reduce the incentives to compete on product quality as firms seek to keep costs and therefore price to a minimum. Restrictions on PCWs may therefore encourage competition on product quality and investments in innovation.
- 7.9.3. Brand image arguments may also be given by firms for restricting retailers from using PCWs.²³⁸ However, status reasons are not yet widely regarded as a pro-competitive justification for the use of vertical restraints by firms. The Coty ruling in Europe on online marketplace restrictions will provide insights on this. However, it is important to note that although parallels can be drawn between cases relating to marketplace bans and PCW restrictions, there are important differences between the business models of the two types of platforms that must be considered. For example, on marketplace platforms, actual sales are made, whereas on price comparison sites consumers are instead directed to retailers' websites.

Insights from cases

- 7.9.4. Restrictions on PCWs were considered in the recent ASICS case (Case review 20).²³⁹ In this instance, the restrictions were deemed to be hardcore restrictions, however it is worth noting that this view may change following the ECJ's guidance on the Coty case involving platform bans.
- 7.9.5. In its Final Report on the E-commerce Sector Inquiry, the European Commission (2017d)²⁴⁰ outlined its current view that:

"Absolute price comparison tool bans which are not linked to quality criteria therefore potentially restrict the effective use of the internet as a sales channel and may amount to a hardcore restriction of passive sales under Article 4 b) and 4 c) of the VBER [Vertical Block Exemption Regulation]. Restrictions on the usage of price comparison tools based on objective qualitative criteria are generally covered by the VBER."

²³⁸ See, for example, European Commission (2016).

²³⁹ ASICS (B2-98/11) (2015).

²⁴⁰ European Commission (2017d), page 166.

- 7.9.6. In late 2016, the UK CMA launched a study on digital comparison tools (DCTs), looking at the effects that tools such as PCWs have had on industries such as motor insurance, energy suppliers and retail banking. The study aims to explore the benefits from DCTs to consumers, and help understand and address any potential issues or barriers in order to maximise these benefits. The final report is due in September 2017.²⁴¹
- 7.9.7. There are both pro- and anti-competitive effects from the use of restrictions on PCWs. Additionally, given the fact that these practices are relatively new, there is limited case law and a lack of international precedent. Therefore, any restrictions on PCWs which have not been deemed a hardcore restriction are best dealt with on a case-by-case basis.

CASE REVIEW 20 – ASICS

Industry: Athletics and sportswear

Country / Union of countries: Germany

Court / Competition Authority: Bundeskartellamt

Case name and citation: ASICS (B2-98/11)

Date of decision: 26th August 2015

Type of alleged infringement: Selective distribution

▶ Case summary

In 2012, ASICS, a producer of athletic and sportswear introduced a number of restrictions on retailers. Specifically, the following were prohibited: the use of the ASICS brand name by retailers on third party websites (i.e. in adverts for that retailer); links from PCWs; and sales via online marketplaces. The Bundeskartellamt launched an investigation in September 2011, following complaints from various distributors. In its view, ASICS imposed restrictions which constituted a restriction of competition by object, and therefore violated Article 101 (1) of the TFEU.

In the eyes of the Bundeskartellamt, the prohibition of the use of brand names (ASICS), and restrictions on the use of PCWs constituted hardcore restrictions, and therefore could not be exempt under the VABER. The Bundeskartellamt also ruled that the prohibition of sales via online marketplaces was a hardcore restriction on competition, and again could not be deemed exempt under VABER. As this meant the restrictions were anti-competitive by object, there was no further inquiry into efficiency considerations.

²⁴¹ CMA (2017), update paper 28/03/2017.

7.10. Exclusive purchase restrictions

Overview of restraint

- 7.10.1. As in traditional brick-and-mortar markets, exclusive purchase restrictions, which prevent a customer from purchasing a particular product, or group of products from any other alternative supplier, can be deemed to be an anti-competitive agreement. Such agreements are known under various terms, for example exclusive purchasing, single branding, requirements contracts, and non-compete obligations. Despite the differing names, the underlying concept is the same: the purchaser is prevented from purchasing competing products from anyone other than the manufacturer it has entered into an agreement with.²⁴²
- 7.10.2. Such clauses can help to overcome issues of free-riding between suppliers, for example where a manufacturer has to invest in training a retailer or in providing special equipment to support the sales process. This is particularly relevant for highly technical products. However, exclusive purchase provisions remove inter-brand competition on the website, or in the stores of the retailer that agrees to the clause. Therefore, there may be both pro- and anti-competitive effects of such practices. Consequently, a case-by-case approach is sensible. In such assessments the positions of both the retailer selling, and the manufacturer producing the good are highly important. If either is in a position of dominance, the practice is highly likely to be anti-competitive. By contrast, if neither the retailer nor the manufacturer are in a position of market power, significant anti-competitive effects are less likely.

Insights from cases

- 7.10.3. This approach was evident in the CCS's recent review of the online food delivery industry, where exclusivity clauses were identified. It was deemed that, at present, such practices are not anti-competitive in the online food delivery sector; however the CCS committed to closely monitor the market going forward, on the basis that such agreements could be problematic in the future if a particular firm using such restraints became dominant (see Case review 21 below).
- 7.10.4. A similar case involving exclusivity provisions was investigated in Indonesia in the flight bookings market (see Case review 22 below).²⁴³ It was deemed that provisions that restricted travel agencies making Garuda ticket reservations from using systems other than an Abacus terminal, were anti-competitive under Indonesian vertical integration prohibitions.

²⁴² Whish, R. and Bailey, D. (2015), page 723.

²⁴³ Garuda Abacus Case; KPPU Decision No. 01/KPPU-L/2003; Central Jakarta District Court Decision No. 001/KPPU/2003/PN.Jkt.Pst; Supreme Court Decision No. 01 K/KPPU/2004 In 28 August 2000.

CASE REVIEW 21 - ONLINE FOOD DELIVERY

Industry: Online food delivery

Country / Union of countries: Singapore

Court / Competition Authority: CCS

Case name and citation: Media release – 25/08/16 “CCS investigation finds online food delivery industry to be currently competitive but exclusive agreements could be problematic in future”

Date of decision: 25th August 2016

Type of alleged infringement: Exclusive purchase restrictions

▶ | Case summary

Following complaints, the CCS investigated an online food delivery provider for alleged anti-competitive conduct relating to the use of exclusive purchasing provisions with certain restaurants.

In this instance it was deemed that competition was not harmed by the agreements. However, the authority committed to monitoring the sector going forward, as in the instance that an online food deliverer became dominant, such agreements may be deemed anti-competitive.

CASE REVIEW 22 - GARUDA / ABACUS

Industry: Flight booking

Country / Union of countries: Indonesia

Court / Competition Authority: KPPU; Central Jakarta District Court; Supreme Court of Indonesia

Case name and citation: Garuda Abacus Case; KPPU Decision No. 01/KPPU-L/2003;
Central Jakarta District Court Decision No. 001/KPPU/2003/PN.Jkt.Pst;
Supreme Court Decision No. 01 K/KPPU/2004

Date of decision: 5th September 2005

Type of alleged infringement: Restriction of competition through vertical integration

▶ | Case summary

In August 2000, Garuda and Abacus formed an agreement that travel agents must use an Abacus terminal when making Garuda flight bookings, thus imposing a barrier on other providers of similar systems.

The KPPU deemed that this agreement constituted a breach of Article 14 of Indonesian Competition Law (Vertical Integration). It was highlighted how Garuda owned a significant number of shares in Abacus and that some individuals sat on the board of directors for both firms.

Garuda appealed to the Central Jakarta District Court on efficiency grounds, eventually resulting in the initial decision being overturned. However, following an appeal by the KPPU, the initial decision was reinstated by the Supreme Court.

7.11. Practical steps/guidelines or recommendations to identify and address competition policy and law issues

- 7.11.1. In each of the cases outlined above, existing competition policy and law covering vertical restraints for traditional brick-and-mortar markets has been deemed sufficiently broad and flexible enough to allow competition authorities to capture vertical restraints used by firms in E-commerce markets.
- 7.11.2. Some authorities are, however, introducing new legislation to ban MFN clauses, notably Italy, Austria and France in the hotel booking market. On the other hand, others have deemed the existing legal framework sufficient to deal with the issues arising, such as the UK and Germany, the latter banning MFN clauses in the hotel booking market under its existing law.
- 7.11.3. In enforcing competition law, given the fact that vertical restraints can give rise to both pro- and anti-competitive effects, as discussed thus far, competition authorities have applied the general set of principles deriving from their rules on vertical agreements, and considered each case individually by weighing up the pro-competitive and anti-competitive effects (e.g. on price and quality of goods both in the short and long run, on the level of pre- and post-sales service provided in the market, as well as the incentives to invest). To support authorities in ASEAN in conducting such assessments in E-commerce markets the following types of questions and accompanying guidance should be considered:

1.

Firstly, it should be determined whether the agreement is horizontal or vertical in nature.

- **Does the agreement involve coordination between competing firms?**

If so, consider also the guidance provided in Section 8.5 on horizontal coordination.
If the firms are at different stages of production, proceed on to stage 2 below.



2.

The market share of the parties involved in the vertical agreement should be considered.

- **Does any party in the vertical agreement have a large market share in the buying or selling of the good?**

If yes, the vertical restraint is more likely to have anti-competitive effects, ceteris paribus. However, depending on the jurisdiction, some hardcore restrictions may be prohibited regardless of the size of the parties, such as RPM.

- **Is the market multi-sided in nature?**

If yes, consider not just the market for goods/services but also the market for providing the platform service e.g. the share of transactions facilitated by the platform. Additionally, going forward with the investigation, ensure that all sides of the market are considered and network effects, between and within sides, are taken into account as well as any feedback effects.



If it is deemed that the firms involved in the vertical restraint are not small enough to limit any anti-competitive effects from arising, and no hardcore restrictions have been breached, a more in depth assessment of the vertical restraint should be conducted. Firstly, the extent of the anti-competitive effects resulting from the restraint should be evaluated. The following questions should be considered:

- **Is inter-brand competition harmed by the vertical restraint?**

If yes, the vertical restraint is more likely to be anti-competitive, *ceteris paribus*.

- **Is intra-brand competition harmed by the vertical restraint?**

If yes, the vertical restraint is more likely to be anti-competitive, *ceteris paribus*. However, restrictions of inter-brand competition are typically more problematic than restrictions of intra-brand competition therefore the next step should consider whether inter-brand competition is sufficient.

- **Does the vertical restraint create or increase barriers to entry or expansion?**

If yes, the higher the barriers to entry in the market, the more likely is the vertical restraint to have anti-competitive effects, *ceteris paribus*.

For all of the questions below, the vertical restraint is more likely to be anti-competitive in case of a positive answer.

- **Is price competition inhibited as a result of the vertical restraint?**
- **Are retailers restricted in any way in the price that they can set, either explicitly or implicitly through threats of punishment?**
- **Does the vertical restraint facilitate collusion among competing firms at any stage of production?**
- **Are sales through an entire channel unjustifiably restricted? E.g. all online sales.**
- **Are online retailers unjustifiably treated differently to brick-and-mortar retailers? E.g. charged a different wholesale price, despite the costs to the manufacturer being the same.**
- **Does the vertical restraint reduce the diversity or quality of goods available to consumers, or the level of pre- or post-sales service in any way?**
- **Are any MFN clauses wide in nature (as opposed to narrow)? Note – this question depends on the competition authorities position on the use of MFN clauses**

4.

Once the extent of the anti-competitive effects has been evaluated, any pro-competitive effects should also be considered by asking the following questions:

For all of the below: If yes, the vertical restraint may have pro-competitive benefits which may justify use of the restraint, if the benefits outweigh any anti-competitive effects.

- Does the vertical restraint help to overcome issues of free-riding by retailers, manufacturers or other platforms?
- Does the vertical restraint reduce price to consumers? E.g. by overcoming double marginalisation.
- Are incentives to invest or innovate increased as a result of the vertical restraint?



5.

If it is determined that efficiency benefits may justify the use of the vertical restraint, the following factors should also be considered:

- **Do consumers receive a fair share of any efficiency gains? I.e. at least compensating for the anti-competitive effects resulting from the vertical restraint.**

If no, any pro-competitive effects are less likely to justify the use of the vertical restraint.

- **Are alternative vertical restraints (or other options) available to firms which are more beneficial/less costly to consumers? I.e. have less anti-competitive effects and/or greater pro-competitive effects.**

If yes, explore the possibility that these could be implemented by firms instead of the existing vertical restraint.

08 Horizontal coordination

8.1. Introduction

Defining horizontal coordination

- 8.1.1. Competing firms at the same stage of production can horizontally coordinate, for example, to increase prices above the prevailing competitive level in order to increase their profits. Explicit agreements between firms are often referred to as hardcore cartels. A hardcore cartel is defined as:

*“an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce”;*²⁴⁴

and *“hardcore cartels are prohibited by virtually all systems of competition law and are the subject of ever more draconian penalties”.*²⁴⁵

- 8.1.2. Horizontal coordination does not necessarily require an explicit agreement. Indeed the same outcome can be achieved by means of tacit collusion. Broadly speaking:

*“a problem for competition policy arises in markets in which there are only a few operators who are able, by virtue of the characteristics of the market, to behave in a parallel manner and to derive benefits from their collective market power, without, or without necessarily, entering into an agreement or concerted practice”*²⁴⁶;

- 8.1.3. Whereas explicit agreements in cartels are widely regarded as hardcore restrictions, tacit collusion is typically not caught by competition law. If a market has oligopolistic market characteristics, price competition will naturally not be as intense as in a more competitive market, and firms often unilaterally react to other firms' conduct. Whish and Bailey (2015), however, highlighted how tacit coordination may lead to an alleged abuse of dominance if firms are in a position of collective dominance:

“a distinct issue is whether collectively dominant firms may abuse their position by charging excessively high prices: here the abuse would lie not in the parallelism of the prices, but in their level.”

- 8.1.4. The authors do, however, note that cases such as this are very rare, and there have been very few investigations of this nature, and none to our knowledge in E-commerce markets. Additionally, those that have been investigated focused on different issues, for instance restricting parallel imports.

²⁴⁴ Whish, R. and Bailey, D. (2012), page 515.

²⁴⁵ Ibid, page 513.

²⁴⁶ Ibid, page 559.

Effect of E-commerce on horizontal coordination

8.1.5. Horizontal coordination is a phenomenon which has long existed in traditional brick-and-mortar markets. The emergence and growth of E-commerce has created new challenges for competition authorities in dealing with such cases. E-commerce has increased price transparency in markets, and digital tools that automatically monitor competitors' prices have made it easier for firms to engage in collusive behaviour, either implicitly, by means of their best response to competitors' prices, or in the implementation of an explicit agreement. Online platforms might also be used as vehicles to implement horizontal agreements.

Structure of this section

8.1.6. This section considers the challenges arising from the growth and emergence of E-commerce in facilitating coordination among competitors, and discusses the current status of the debate, as well as ways in which competition authorities around the world have dealt with such issues in previous cases.

8.2. Price monitoring tools and price setting algorithms

Overview of conduct

- 8.2.1. With the development and growth of E-commerce markets, the ease with which firms can monitor competitors' prices, and adjust their price in response to any observed movements, has significantly increased. In the early phases of the development and growth of E-commerce markets, this would have been simply through monitoring a rival's website. More recently, digital price monitoring tools allow this to be done automatically. Such tools can make it easier for cartels to operate, as any deviations from agreed prices are easier to identify and react to.
- 8.2.2. Tools have also been developed that enable firms to automatically adjust their prices in response to competitors' price movements using algorithmic software. Whilst firms may use such tools unilaterally to maximise profits, concerns have been raised that such software has facilitated coordination among firms by enabling the implementation of explicit agreements. Tacit coordination may also become more common as a result of the emergence and increased prevalence of price-setting algorithms in markets, though no cases of this nature have been investigated to date.
- 8.2.3. Alternatively, firms may collude through so-called hub-and-spoke systems, where multiple firms in a market all outsource automated pricing to the same third party. This is a rare, but potentially harmful situation whereby the outsourced firm (which codes the pricing algorithm) has sold the algorithm to several competitors. In this instance, the outsourced firm has complete power over prices that are charged within a market, and may potentially have incentives to maximise industry profits (as a cartel would) as opposed to each firms' own profits in a more competitive situation.
- 8.2.4. The development of algorithmic software based on 'machine learning' tools may lead to further competition concerns in future. As David Currie, the CMA Chairman, recently remarked: "*Machine learning means the algorithms may themselves learn coordination is the best way to maximise long-term business objectives*".²⁴⁷ Were such developments in technology to arise, it is unclear where the liability would fall. The OECD recently indicated that "*there is no legal basis to attribute liability to a computer engineer for having programmed a machine that eventually 'self-learned' to coordinate prices with other machines.*"²⁴⁸ This technology is perhaps speculative at this stage, but it is something that competition authorities should be aware of going forward, and closely monitor any developments in, both in their own jurisdiction and internationally.

²⁴⁷ Currie, D. (2017).

²⁴⁸ OECD (2016b), para. 81.

- 8.2.5. Given that these technological developments are relatively new, international case law is limited in the field. As it stands, there are no cases involving pricing algorithms that have been assessed within ASEAN, and only one questionnaire respondent considers it as a competition concern within their jurisdiction at present. However, in the US, in December 2015 the Department of Justice (DoJ) prosecuted a company and its founder for engaging in a concerted practice with competitors regarding the sale of posters on the Amazon marketplace between September 2013 and January 2014 (see Case review 23 below).²⁴⁹ Price-fixing algorithms were used to implement the collusive agreements. A similar case was also investigated in the UK. Two retailers selling posters and frames were found to have behaved anti-competitively by using automatic pricing software to enforce a price-fixing cartel.²⁵⁰ In conducting its investigations, the UK CMA and US authorities coordinated closely.

CASE REVIEW 23 – TROD/GB EYE

Industry: Posters/frames

Country / Union of countries: US, UK

Court / Competition Authority: DoJ, UK CMA

Case name and citation: DoJ, Press Release: Number 15-1488; UK - Online sales of posters and frames (50223);

Date of decision: 4th December 2015 (US); 12th August 2016 (UK)

Type of alleged infringement: Price fixing cartel implemented through price-fixing algorithms

► Case summary

In December 2015, the US DoJ prosecuted a company (TroD Ltd) and its founder for fixing prices in the sale of posters and frames on the Amazon marketplace between September 2013 and January 2014. Price-fixing algorithms were used to automatically implement this agreement on the platform.

Similarly, in the UK, in August 2016, TroD Ltd and GB eye Ltd (GBE) were found to have been involved in an illegal price fixing cartel, whereby neither agreed to undercut each other's prices for posters and frames on the Amazon marketplace from March 2011 to July 2015.

As in the US, the parties were found to have used online automated repricing tools to implement the agreement. In this instance, both parties were using different re-pricing software systems, but were still able to collude. GBE implemented a rule in its software that if TroD Ltd had a price set, and there was no other seller on Amazon with a lower price, GBE would match TroD Ltd's price, so long as this price was not below GBE's independently set minimum price for the product. Through the implementation of rules such as this, the two firms were able to sell 99% of their products at the same price at one particular point in time.

In the UK, a financial penalty of £163,371 was imposed on TroD Ltd, and GBE was not punished as a result of notifying the CMA of the cartel under the CMA's leniency policy.

²⁴⁹ US Department of Justice, Press release number 15-1488 (2015).

²⁵⁰ CMA, 50223, Online sale of posters and frames (2016).

8.3. Online platforms and collusion

Overview of conduct

- 8.3.1. Competition authorities may also be concerned with contractual terms regarding online platforms that may facilitate collusion. A platform that restricts in some way the price that firms are able to sell at via the system may be deemed to be facilitating collusion as a result of reducing competition on price. In such an instance, both the platform and the firms selling through the platform may be deemed to have behaved anti-competitively.
- 8.3.2. Furthermore, questionnaire responses from AMS highlight the difficulties authorities face due to the new and advanced technical skills required to investigate and gather evidence on the information exchanged through online systems, which may facilitate coordination.

Insights from cases

- 8.3.3. In the recent Eturas case (Case review 24), the Lithuanian Competition Council (LCC) found that a common cap on price discounts on hotels on the Eturas online booking system amounted to horizontal coordination among the travel agents.²⁵¹ In this instance, it was the platform that implemented the price cap, and travel agents were deemed to have engaged in horizontal coordination as a result of accepting the restraint imposed.

CASE REVIEW 24 – ETURAS

Industry: Online travel booking

Country / Union of countries: Lithuania

Court / Competition Authority: LCC; Lithuanian Supreme Administrative Court (LSAC); ECJ

Case name and citation: Eturas (Case C-74/14)

Date of decision: 21st January 2016

Type of alleged infringement: Horizontal coordination on price

► Case summary

The LCC imposed fines on Eturas (an online travel booking platform) and 30 travel agencies for applying a common cap on discounts for services offered through the Eturas online booking platform. The discount cap of 3% was communicated to the travel agents via an internal messaging system. This decision was then appealed to the LSAC, who requested a preliminary ruling from the ECJ, in particular as to whether awareness of the cap amounted to tacit participation in the agreement, and if not, what factors should be considered in determining if a firm was engaged in the agreement.

The ECJ took the position that if travel agencies used the platform, had knowledge of the content of the internal message, and did not object to the discount cap or report it to the administrative authorities, then it may be presumed that they had participated in the horizontal agreement. The LSAC was consistent with the ECJ's guidance, and found that the agencies which knew of the restriction and did not oppose it should be held to have participated in the anti-competitive conduct.

²⁵¹ Case C-74/14, Eturas (2016).

- 8.3.4. Firms using a platform may also collude on the prices available, or promotions offered on a platform among themselves, without the need for coordination by the platform itself. In a recent case in the financial advisory industry in Singapore (Case review 25), a competitor was pressured by other competitor firms into removing a life insurance offer on a platform website.²⁵² Absent this collective pressure, the discount (through commission rebates) would have put the competitors under competitive pressure to follow suit and provide similar offers to consumers. The disruption to the financial advisory industry would therefore have led to lower prices for consumers. However, competitors were not happy with this disruption as they faced a competitive threat from an innovative offer. Hence, they colluded to pressurise the discounting firm into removing its offer. As a result of this collusion, improved outcomes for consumers were not realised.

CASE REVIEW 25 – iFAST

Industry: Financial advisory services

Country / Union of countries: Singapore

Court / Competition Authority: CCS

Case name and citation: Financial Advisers Penalised by CCS for Pressurising a Competitor to Withdraw Offer from the Life Insurance Market (CCS 500/003/13)

Date of decision: 17th March 2016

Type of alleged infringement: Horizontal coordination on price

▶ Case summary

In March 2016, ten financial advisers were found to have engaged in an anti-competitive agreement in the financial advisory industry. The ten firms were adjudged to have pressured a competitor into removing an offer on an online investment platform (fundsupermart.com). Specifically, iFAST Financial Pte. Ltd. (iFAST) had offered a 50% commission rebate on life insurance products on fundsupermart.com, passing on to consumers distribution cost savings from using the online platform.

iFAST implemented the offer on 30th April 2013. On 3rd May 2013 the offer was withdrawn. An investigation into this withdrawal was initiated following media reports that iFAST withdrew the offer due to unhappiness in the industry. In its investigation, CCS found that the 10 financial advisers met on 2nd May 2013 to discuss the offer, where it was agreed that a single firm would represent the group and put pressure on iFAST to remove the discount. iFAST did not introduce another offer on this website until August 2015.

CCS deemed that this pressure had an adverse effect on competition due to the content of the agreement, and combined market share of the parties. The quantity of traffic on fundsupermart.com meant that had iFAST's offer remained in place, other financial advisers would have been under competitive pressure to also introduce similar incentives for customers. Ultimately, the parties' actions were found to have prevented the market from moving to a more competitive state.

Following this decision, financial penalties were imposed on all ten parties.

- 8.3.5. The emergence of online platforms has increased the transparency of prices both for competing firms and for consumers, thereby making higher prices more obvious to consumers, and price matching more likely. Competition authorities are less likely to have concerns if price parallelism is reached through unilateral decisions of firms. By contrast, authorities are more likely to open investigations if this parallelism is reached as a result of coordination between firms not to undercut each other on a particular platform.

252 CCS 500/003/13 Infringement of the section 34 prohibition in relation to the distribution of individual life insurance products in Singapore (2016).

8.4. Coordinated use of vertical restraints by competitors

Overview of conduct

8.4.1. The vertical restraints discussed in Section 7 of this handbook can also be deemed to facilitate horizontal coordination if implemented in a concerted manner among competitors. Such coordination can limit inter-brand competition, which may lead to increases in price and/or reductions in quality to the detriment of consumers. In addition to the colluding competitors, other parties in the vertical agreements may also be found to have participated in the concerted practice if they facilitate coordination among competitors down- or upstream. As discussed in detail in Section 7, some vertical restraints do have pro-competitive effects, for instance overcoming issues of free-riding. These effects should also be considered in any competition assessment relating to the coordinated use of vertical restraints.

Insights from cases

8.4.2. In the E-books case in Europe and the US (see Case review 26), it was found that in response to decreasing prices of E-books on the Amazon platform²⁵³, publishers collectively switched to an agency model²⁵⁴ (where the publisher sets prices) from a wholesale pricing structure (where the retailer is free to set retail prices).²⁵⁵ In addition, publishers implemented MFN clauses with Apple, having the effect of raising prices throughout the market by effectively forcing other firms, such as Amazon, to adopt a similar change in contractual model. The US authorities eventually fined Apple \$450 million for violating federal antitrust laws, highlighting the critical role that Apple played in increasing e-book prices from \$9.99 to \$12.99 or \$14.99.²⁵⁶

²⁵³ In June 2015, Amazon itself was investigated for an alleged abuse of dominance in the market for E-books. In particular, the European Commission had concerns that MFN clauses in contracts with publishers made it harder for smaller firms in the market to compete. This case is ongoing.

²⁵⁴ Whish, R. and Bailey, D. (2012), page 621, explain how “the function of a sales agent is to negotiate business and to enter contracts on the producer’s behalf. In this case the agent may be paid a commission for the business it transacts or it may be paid a salary.”

²⁵⁵ COMP/39.847 E-Books (2012).

²⁵⁶ Case 13-3741, United States v. Apple Inc. et al. (2016).

CASE REVIEW 26 – APPLE AND E-BOOK PUBLISHERS

Industry: E-books

Country / Union of countries: EU

Court / Competition Authority: European Commission

Case name and citation: COMP/39.847 — E-BOOKS

Date of decision: 12th December 2012

Type of alleged infringement: Horizontal coordination through switch to agency pricing model and implementation of MFN clauses

► | Case summary

In response to decreasing retail prices for E-books, for example on the Amazon platform, five publishers (Simon & Schuster, Harper Collins, Hachette Livre, Verlagsgruppe Georg von Holtzbrinck, and Penguin) entered into contracts with Apple that aimed to increase the price of E-books above those set by Amazon. The contracts comprised a switch from the incumbent wholesale model (where the retailer is free to set retail prices) to an agency model (where the publisher sets prices). Additionally, an MFN clause was put in place which meant that the price that Apple paid had to be at least as low as the price offered to other online retailers. Amazon was therefore 'forced' to also adopt an agency model and therefore increase its prices.

It was deemed that Apple sought to coordinate higher prices with publishers, whilst also ensuring that these prices matched those available on Amazon. Overall, this concerted practice had the effect of raising retail prices of E-books across the market.

The five publishers and Apple have since undertaken commitments with the EC. It was agreed that the agency agreements with Apple would be terminated, and that other retailers would be offered the opportunity to terminate their agency agreements. Publishers were also not allowed to restrict retailers' ability to set prices for a period of two years, and were not allowed to set MFN clauses for a period extending three further years. Four publishers agreed to these commitments in December 2012, whereas the fifth publisher, Penguin, did not finalise its commitments until July 2013.

In the US, as a result of the switch to an agency model, and the simultaneous implementation of MFN clauses, prices in the E-books market rose from \$9.99 to \$12.99 or \$14.99. It was found that Apple played an integral role in this market shift. In February 2016 the Appeals court upheld the initial decision to fine Apple \$450 million for breaching antitrust laws. The five publishers also settled earlier in proceedings.

8.5. Practical steps/guidelines or recommendations to identify and address competition policy and law issues

- 8.5.1. As evidenced in Sections 8.2 - 8.4 above, existing competition policy and law appears to be able to deal with most cases involving horizontal coordination. Therefore, there appears to be no need for an overhaul of competition policy and law to deal with issues of horizontal coordination arising in E-commerce markets currently.
- 8.5.2. Competition authorities should, however, monitor the development of pricing algorithms very closely. If pricing algorithms were to self-learn that coordination is optimal due to built-in machine learning capabilities, it is unclear under existing competition policy and law if and where the liability would fall. Although this is not currently a problem in E-commerce markets because the technology has not been developed, debate on the issue is already developing, though no clear international consensus has yet been reached.²⁵⁷
- 8.5.3. In applying and enforcing competition policy and law, competition authorities may wish to consider the following types of question and accompanying guidance to determine when coordination among competing firms is anti-competitive:

1.

Firstly, it should be determined whether the conduct by firms amounts to a hardcore cartel or explicit collusive agreement by asking the following types of question:

- **Are firms explicitly agreeing to fix prices, share markets or limit output?**

If yes, the agreement is highly likely to be deemed to constitute a cartel.

- **Do a platform's terms of use restrict in any way the price that firms can sell at on that platform?**

If yes, collusion may be facilitated by the platform (as in the Eturas case – see Case review 24) in particular if competing firms are aware of/agree to the same terms e.g. a limit on price discounts.

- **Are firms coordinating in any way to collectively implement a vertical restraint, such as an MFN clause? E.g. as in the E-books case (Case review 26).**

If yes, collusive outcomes may be reached by such means.



²⁵⁷ See, for example, Ezrachi, A. and Stucke, M. (2016).

2.

If horizontal coordination between firms is not deemed to be a hardcore cartel, a more in-depth evaluation should be conducted by comparing the anti-competitive effects of such coordination with any efficiency benefits. To determine the extent of the anti-competitive effects resulting from the coordination, the following questions should be asked:

- **Does the horizontal coordination result in higher prices, a reduction in quality of goods/service, a decrease in the level of investment/innovation, and/or a decrease in consumer choice?**

If yes, anti-competitive effects from horizontal coordination are more likely.

To support competition authorities in determining the effect of horizontal coordination on these market outcomes, the following questions can be asked:

For all of the questions below: If the answer is yes, the extent of any anti-competitive effects is likely to be greater.

- **Do the parties of an agreement have a large market share, individually and/or collectively?**
- **Are the firms close competitors?**
- **Is it hard for customers to switch to an alternative provider?**
- **Are there high barriers to entry?**
- **Is the market transparent, concentrated, non-complex, stable and/or symmetric?**

All of these factors increase the likelihood of collusive outcomes being reached from horizontal coordination (European Commission (2011), para. 77).



3.

Once the extent of the anti-competitive effects has been evaluated, any pro-competitive effects should also be considered by asking questions such as:

- **Are there any efficiencies arising from the horizontal agreement, for example resulting from the sharing of complementary skills/assets between the firms, risk sharing, and/or knowledge and innovation sharing?**

If yes, the horizontal coordination may have pro-competitive benefits which may justify use of coordination, if the benefits outweigh any anti-competitive effects.



4.

If it is determined that efficiency benefits may justify the horizontal coordination, the following factors should also be considered:

- **Do consumers receive a fair share of any efficiency gains? I.e. at least compensating for the anti-competitive effects resulting from the coordination.** (Note: This is not a requirement in all jurisdictions).

If no, any pro-competitive effects are less likely to justify the horizontal coordination.

- **Are alternative less restrictive agreements available to firms which are more beneficial/less costly to consumers? I.e. have greater pro-competitive effects and/or fewer anti-competitive effects.**

If yes, explore the possibility that these could be implemented by firms instead of the existing horizontal coordination.

09 Unilateral conduct

9.1. Introduction

Defining dominance

- 9.1.1. Operators with market power in E-commerce markets may have the ability to engage in unilateral anti-competitive conduct by abusing a dominant position in the market. A dominant position may be defined as:

*“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers”.*²⁵⁸

- 9.1.2. The general definition of dominance within AMS is “a situation where the business operator has enough economic strength to act in the market without regard to what its competitors (actual or potential) do”.²⁵⁹
- 9.1.3. As noted in Section 6, some AMS rely on a market share threshold to define dominance, whilst others are not equally prescriptive.

Assessing dominance in E-commerce markets

- 9.1.4. When assessing market power and determining whether a firm is dominant, other factors beyond market share should be considered, as discussed in Section 6.3. In particular, this should take into account the presence and extent of any countervailing buyer power of customers, as well as the ability of smaller firms to expand in the market, and new firms to enter. Barriers to entry, such as network effects and switching costs for consumers (as discussed in Section 4) should therefore be considered.
- 9.1.5. It should be noted, however, that due to the nature of network effects, online platforms often have the ability to increase their market share over a short period of time. Facebook’s entry, and rapid displacement of MySpace as the market leader in online social media²⁶⁰ demonstrates how online firms can rapidly gain or lose market share.
- 9.1.6. As discussed in Section 6, there is an ongoing debate as to whether access to data is a source of market power. Some see it as an asset that smaller firms are unable to replicate, however, data is often replicable, and can be purchased from a number of sources, therefore mitigating this concern. To date, only the Bundeskartellamt’s investigation into Facebook has centred around alleged abuse of dominance from infringing data protection rules. In this instance, Facebook does not have significant market power because of the Big Data that it holds, but rather the Bundeskartellamt alleged that Facebook has abused its dominant position in the social media market by imposing unfair contractual data terms and conditions on its users. Nevertheless, the Bundeskartellamt has indicated that Facebook will not be fined for this conduct following the investigation.²⁶¹ International consensus has yet to be reached as to whether competition law or data protection law are the best tools to deal with these issues, and whether data ownership gives rise to market power, and thereby the ability to exploit consumers and exclude (or marginalise) competitors.

²⁵⁸ Whish, R. and Bailey, D. (2015), page 190.

²⁵⁹ ASEAN (2013), page 9.

²⁶⁰ See Section 4 for further information on a new entrant displacing an incumbent, e.g. MySpace and Facebook, and Taobao and eBay.

²⁶¹ Whilst the investigation is ongoing, Andreas Mundt has made it clear there is no risk of a fine for Facebook, and the issue is being dealt with by the antitrust authority (rather than the German privacy agency) because they are seen to have a broader impact on privacy issues.

Abuse of dominance in E-commerce markets

- 9.1.7. A dominant firm may abuse its position in many ways, for example by setting unreasonably high prices, selling at artificially low prices so as to foreclose its competitors from the market, imposing unfair contractual terms, or foreclosing competitors in the market through other practices such as bundling.
- 9.1.8. This section looks at some relevant cases from across the world, focusing on the types of conduct that are most commonly observed in E-commerce markets and have posed challenges to competition authorities around the world. There are other forms of unilateral conduct that may be deemed to be an abuse of dominance which are not discussed here as they do not raise any special considerations with regard to E-commerce.

9.2. Tying/bundling

Overview of conduct

- 9.2.1. A form of unilateral conduct that is relevant for E-commerce is the abuse of dominance through foreclosure of competitors by tying or bundling. Tying (under unilateral conduct) is a situation where customers purchasing a good/service from a dominant firm are also required to purchase another product from the same firm.²⁶² Bundling can be either pure or mixed. Pure bundling occurs when products are sold jointly in fixed proportions, and mixed bundling (sometimes known as a multi-product rebate) occurs when products are available separately in addition to as a bundle, but the sum of the prices when purchasing products separately is higher than the bundle price.²⁶³
- 9.2.2. Typically, bundling and tying are not anti-competitive per se. However, competition concerns may arise if the mandatory secondary purchase is for an unrelated product or service. There are economic benefits that can be realised from engaging in such practices. For example, a firm may use tying or bundling to save in production, distribution and transaction costs. However, tying or bundling products can extend a dominant firm's position into another market that may have previously been competitive. Under such circumstances, competition authorities may deem tying or bundling to be anti-competitive since such conduct favours the dominant firm's good/service over other firms' offerings. Given that there are both pro- and anti-competitive effects associated with the bundling and tying of goods, it is sensible for competition authorities to conduct a full analysis of the effects to assess such practices. (Note that although in this handbook the application of an effects-based approach to the assessment of unilateral conduct is advocated, established case law in the area still relies heavily on a 'form-based' approach, which focuses on the form of the conduct rather than its effect.)

Insights from cases

- 9.2.3. Bundling and tying strategies have long been employed by firms in brick-and-mortar markets. However, the use of such strategies is also prevalent in E-commerce markets, particularly in multi-sided markets where platforms such as Google offer a variety of related services for internet users. Google has been investigated for a series of alleged instances of favouring its own services over competitors, with a number of ongoing investigations which have yet to reach a conclusion to date.
- 9.2.4. One of these investigations involves the European Commission exploring whether Google abused a dominant position in online search by favouring its own online comparison shopping service over its competitors' (see Case review 27).²⁶⁴ In June 2017, the European Commission determined that this conduct amounted to an abuse of dominance, and therefore issued a fine of €2.42 billion, though Google may decide to appeal. In addition, the European Commission had concerns with the way in which Google restricts websites from displaying search adverts from Google's competitors.²⁶⁵
- 9.2.5. Google has previously been involved in similar cases of allegedly abusing its market position in online search to favour its own services. In 2016, a long-running dispute brought against Google by Streetmap reached its conclusion (see Case review 28).²⁶⁶ Specifically, it was alleged that Google had aimed to extend its position of dominance in online search by favouring its own mapping service in the way it displayed search results, thereby foreclosing Streetmap from the market. However, the UK's High Court ruled that Google's actions were instead the result of pro-competitive innovation rather than anti-competitive conduct.

²⁶² European Commission (2009), para. 48.

²⁶³ Ibid.

²⁶⁴ 39740 Google comparison shopping (2017).

²⁶⁵ 40411 Google AdSense (2017).

²⁶⁶ Streetmap.EU Limited v Google Inc., Google Ireland Limited and Google UK Limited [2016] EWHC 253 (Ch).

- 9.2.6. This case illustrates that not all instances of bundling are anti-competitive as such behaviour can be the result of innovation leading to higher quality goods and services, and thereby generating benefits for consumers. Competition authorities, as well as courts, should explore the effects of specific forms of conduct on the market.

CASE REVIEW 27 – GOOGLE SEARCH

Industry: Online search

Country / Union of countries: EU

Court / Competition Authority: European Commission

Case name and citation: 39740 Google comparison shopping; and 40411 Google AdSense

Date of decision: 27th June 2017; Ongoing

Type of alleged infringement: Abuse of dominance

▶ | Case summary

In a long-running investigation, the European Commission has investigated Google for an alleged abuse of its dominant position as a search engine; specifically relating to Google systematically favouring its own comparison shopping service in its search result pages ahead of competing comparison shopping service providers. In June 2017, the European Commission announced that it had determined this conduct to be an abuse of dominance, and therefore fined Google €2.42 billion. Google may, however, decide to appeal. A key area of debate is likely to be how widely the market should be defined. Nonetheless, the European Commission has stated that even if the market were to be more broadly defined, it would still have competition concerns relating to Google's conduct.

An additional alleged abuse relates to Google restricting third parties websites from displaying search adverts from Google's competitors, i.e., adverts on other websites facilitated by Google's AdSense platform.

CASE REVIEW 28 – STREETMAP v GOOGLE

Industry: Online search and mapping services

Country / Union of countries: UK

Court / Competition Authority: UK High Court

Case name and citation: Streetmap EU Limited v Google Inc., Google Ireland Limited and Google UK Limited [2016] EWHC 253 (Ch)

Date of decision: 12th February 2016

Type of alleged infringement: Abuse of dominance

▶ | Case summary

Streetmap was an online map provider, launched in 1997. In 2005, Google introduced its own online mapping service, 'Google Maps', to rival Streetmap. In 2007, Google launched a small thumbnail box feature in the top right corner of its online search results page called 'Maps OneBox', containing a map result related to the initial search. Streetmap argued that this form of 'bundling' was an abuse of Google's dominant position in the online search market, and drove online traffic to Google Maps at the expense of Streetmap. Streetmap's argument was not that the small thumbnail map should not be present, but that it should feature results from other online map providers. However, the High Court in the UK rejected Streetmap's claims. The judge concluded that Google was objectively justified to include Maps OneBox within the search results as it improved the general search engine to the benefit of users. In February 2017, Streetmap was denied the option to challenge the decision by the UK Court of Appeal.

- 9.2.7. The European Commission is currently investigating Google for an alleged abuse of dominance of its position in the mobile phone operating system market (see Case review 29),²⁶⁷ regarding the alleged bundling of Google's Android operating system with Google apps, in addition to other potential infringements.

CASE REVIEW 29 – GOOGLE ANDROID

Industry: Mobile operating systems

Country / Union of countries: Europe, US, Korea, Russia

Court / Competition Authority: European Commission

Case name and citation: 40099 Google Android

Date of decision: Ongoing

Type of alleged infringement: Abuse of dominance

► | Case summary

In April 2015 the European Commission opened a formal investigation into Google's Android mobile operating system. Similar cases are also being investigated in the US, Korea, and Russia. In particular it is being investigated whether Google has either entered into anti-competitive agreements and/or has abused a position of dominance.

The European Commission is investigating three allegations:

1. Whether rival mobile applications were hindered as a result of Google requiring or incentivising device manufacturers to exclusively pre-install Google's own apps and services;
2. Whether similar harm was caused by the tying/bundling of Google apps and services on Android devices; and
3. Whether preventing device manufacturers from developing modified and competing versions of Android on other devices inhibited competition in the operating systems market.

In its Statement of Objections in April 2016, the European Commission outlined that it had reached a preliminary view that Google has abused its position of dominance by imposing restrictions on Android device manufacturers and mobile network operators. Specifically, Google Search is pre-installed and set as the default search engine on most Android phones. Additionally, financial incentives are often offered to manufacturers and mobile network operators that exclusively pre-install Google Search. Finally, manufacturers are prevented from selling smart mobile devices running on competing operating systems based on the Android open-source code.

The European Commission is concerned that this will strengthen Google's position in the internet search market, and inhibit competitors to Google Chrome in the mobile browsers market. The European Commission is also concerned that the development of new operating systems based on Android source code is being inhibited, thereby harming consumers through limiting choice and stifling innovation.

²⁶⁷ 40099 Google Android (2017).

- 9.2.8. A local example of an abuse of dominance case in ASEAN is outlined in Case review 30.²⁶⁸ Specifically, the Malaysia Competition Commission found that MyEG had abused its dominant position in the online provision of Foreign Workers Permit Renewal applications by requiring some customers to also purchase insurance through its site, thereby preventing competition in the market for these insurance products.

CASE REVIEW 30 – MyEG

Industry: Online Foreign Workers Permit Renewal applications / Insurance

Country / Union of countries: Malaysia

Court / Competition Authority: MyCC

Case name and citation: My E.G. Services Berhad

Date of decision: 24th June 2016

Type of alleged infringement: Abuse of dominance

► | Case summary

In June 2016, My E.G. Services Berhad (MyEG) was found to have abused its position of dominance in the market for online Foreign Workers Permit Renewal applications following complaints by other parties.

Specifically, MyEG was found to have inhibited competition in the selling of mandatory insurance policies – products that are also sold by a number of competitors. Complainants argued that employers of foreign workers were “forced” to purchase insurances through MyEG, and when the employers were allowed to purchase the insurances from other insurance companies or insurance agents, it was alleged that MyEG had imposed unfair and unreasonable conditions on such parties.

A financial penalty of RM307,200 was imposed on MyEG, who was also required to remove existing agency agreements with regard to mandatory insurances, and provide entry for all insurance companies to sell mandatory insurances, allowing them to compete at the same level.

9.3. Predatory pricing

Overview of conduct

- 9.3.1. Predatory pricing occurs when:

“a dominant firm deliberately reduces prices to a loss-making level when faced with competition from an existing competitor or a new entrant to the market; the existing competitors having been disciplined, or the new entrant having been foreclosed, the dominant firm then raises its prices again, thereby causing consumer harm”.²⁶⁹

- 9.3.2. In single-sided markets, pricing below average variable cost may therefore be considered indicative of a predatory strategy. In online one-sided markets, the same approach to determining when below-cost pricing is predatory behaviour by a dominant firm can be used as in traditional brick-and-mortar one-sided markets.
- 9.3.3. In multi-sided online markets, however, below-cost pricing on one side of a market is a common strategy employed by firms to attract users on another side of a platform, due to the externalities between the different sides of a market. This may be true even in the long run, beyond an initial phase of ‘penetration pricing’ that a firm may implement when entering a market.²⁷⁰ For example, online search and social media services are typically free for individuals in order to attract advertisers who are charged for usage of the platform. Social media users are therefore charged a “price” (equal to zero) below the cost of the service to the platform. This is not considered anti-competitive behaviour.

²⁶⁸ Press release: MyCC issues final decision against MY E.G. Services Berhad (MyCC, 2016).

²⁶⁹ Whish, R. and Bailey, D. (2015).

²⁷⁰ Evans, D. (2004).

- 9.3.4. In assessing alleged predation in multi-sided markets, competition authorities may therefore need to look at the price charged to all sides of a market, and costs incurred in serving all customer groups. As Evans (2004) discussed, this can be done by comparing the total price charged to all sides of a market per transaction with the incremental cost per transaction to all sides. Or, if price or cost per transaction cannot be determined, for instance as users are charged an access fee as opposed to a transaction fee, the total revenue can be compared with the total variable costs. As in one-sided markets, competition authorities may then wish to explore whether the dominant firm has a reasonable prospect of recouping profits by charging a higher total price in the future,²⁷¹ once competitors have left the market, again considering all sides of the market.

Insights from cases

- 9.3.5. The approach discussed above was utilised by the Paris Court of Appeal in its review of alleged predation by Google (see Case review 31 below).²⁷² In particular, it was alleged that Google had foreclosed Evermaps from the market by offering mapping services to retailers for free. However, the Paris Court of Appeal found that Google was in fact covering its costs when it also considered revenues obtained from advertising on the other side of the market. It was therefore concluded that the pricing practice was not predatory.

CASE REVIEW 31 - GOOGLE MAPS

Industry: Online mapping services

Country / Union of countries: France

Court / Competition Authority: Paris Commercial Court / Paris Court of Appeal

Case name and citation: 12/02931 Google/Evermaps

Date of decision: 25th November 2015

Type of alleged infringement: Abuse of dominance through predation

► Case summary

In January 2012, the Paris Commercial Court found that Google had abused its position of dominance in online mapping services (allowing retailers to provide directions and location information on their website) by pricing its service below cost (or rather, for free), thereby foreclosing Evermaps (formerly Bottin Cartographes) from the market. Google was charged €500,000 in damages. However, Google appealed, and, in November 2015, the Paris Court of Appeal, having sought advice from the French Competition Authority, ruled that the pricing structure was not predatory as income from advertising on the other side of the multi-sided market meant that Google was in fact covering its costs.

In its decision, the Appeal Court explained that:

“The Authority has rightly observed that for operators on multisided markets it may be rational... to provide free products or services in a market not to foreclose competitors but to increase the number of users on the other market [and that] the free business model is quite widespread in electronic markets”

²⁷¹ Recoupment of profits is not often a necessary part of the assessment. The ability to recoup profits in the future is part of the assessment in the United States, but is not in the European Union.

²⁷² 12/02931 Google/Evermaps (2015).

9.4. Price discrimination

Overview of conduct

- 9.4.1. Price discrimination occurs when “two similar products, which have the same marginal cost to produce, are sold by a firm at different prices”,²⁷³ and exists in both online and offline markets. Price discrimination is not necessarily a concern for competition authorities and it is not generally regarded as a violation of competition law as it can give rise to efficiencies by increasing trade and driving competition. However, price discrimination can raise competition issues if it has exploitative, distortionary or exclusionary effects.
- 9.4.2. Price discrimination is categorised under three different groups:
- First-degree, or perfect price discrimination, involves a firm setting price equal to each customer's willingness to pay for that good/service.
 - Second-degree price discrimination is indirect as it involves setting a menu of prices for different versions of the product. The decision of what to pay therefore rests with the customer.²⁷⁴ Business class and economy airfares may be considered an example of second-degree price discrimination where the customers “self-select” and choose the class of fares themselves.
 - Third-degree price discrimination involves a firm setting different prices for different groups of consumers (e.g. lower prices for pensioners or students).²⁷⁵

When competition authorities may investigate price discrimination

- 9.4.3. Fundamentally, price discrimination is not per se anti-competitive. It can increase allocative efficiency through more consumers being served. Some consumers who would not purchase a product under single pricing are now able to afford the product. Price discrimination is visible in many different markets, and firms use these strategies regardless of their level of market power. Because of this, the OECD suggest that competition authorities should have a rebuttable presumption that any observed price discrimination scheme has a benign or beneficial impact on consumers.²⁷⁶ However, there are times when competition authorities might want to investigate price discrimination, on the principle of protecting the interests of consumers. In other words, by and large the issue of concern with price discrimination might be relevant for consumer law and policy rather than for competition law.
- 9.4.4. Authorities may also wish to launch an investigation when distortionary price discrimination occurs upstream, as it can result in higher prices being charged to final consumers. In this situation, the actions of a dominant upstream firm can lead to a downstream firm paying higher prices for their inputs, which are then passed onto consumers.
- 9.4.5. The OECD (2016) listed several other reasons as to why price discrimination may be scrutinised, in particular for:

“concepts of fairness, or other policy goals, such as the desire to operate a single market, or to protect domestic producers and consumers from excess production by organisations in non-market economies.”²⁷⁷

²⁷³ OECD (2016), para. 1.

²⁷⁴ OECD (2016), para. 17.

²⁷⁵ Ibid, para. 18.

²⁷⁶ Ibid, para. 32.

²⁷⁷ Ibid, para. 123.

Price discrimination in E-commerce markets

- 9.4.6. It is generally easier for firms to implement price discrimination strategies in E-commerce markets as consumers can be offered a tailored price based on data that a firm holds on that consumer.²⁷⁸ This data is most likely to be technological/system based, geographic, or personal/behavioural information.²⁷⁹ Firms use this information to assess a consumer's willingness to pay for a product or service based on their behaviours and/or characteristics.²⁸⁰
- 9.4.7. In traditional brick-and-mortar markets, tailored pricing to this extent is rarely possible, as it would take significant time and require an ad-hoc data collection exercise for the retailer to make a reasonable estimate of a consumer's willingness to pay. Such constraints are no longer present in the online space, with online retailers being able to gather vast amounts of data and resort to personalised pricing. The OECD (2016)²⁸¹, however, highlighted that price discrimination of this form is not likely to be a concern if all competitors have access to such data; and, as discussed in Section 4.3 of this handbook – if the data that firms hold is non-rivalrous, non-excludable, and can be purchased from multiple sources, this condition is likely to be met in most markets.
- 9.4.8. Whilst price discrimination is not a new phenomenon arising in online markets, firms now have the tools and data to target specific consumers based on certain attributes. This should be of concern to authorities when firms with few competitors extract consumer surplus without expanding output, using personalised prices. These partitioning strategies may facilitate exploitative price discrimination, increasing mark-ups and market power at the expense of consumers.²⁸²
- 9.4.9. Personalised price discriminating strategies deployed by E-commerce firms include price testing. Price testing occurs when a firm offers different prices depending on the time of day, geographic location of the customer, or other characteristics that allow the firm to develop predictive models on a given individual's willingness to pay, and their elasticity of demand.²⁸³ It is possible for online firms to change their prices every minute, especially using automated pricing software, a practice that is not convenient, or even possible, for brick-and-mortar stores.
- 9.4.10. It is important to note, however, as mentioned above, that price discrimination such as personalised pricing is not a competition problem in itself, but may give rise to concerns around fairness. Issues of fairness are better addressed via more suited policy instruments such as consumer law, rather than competition law.
- 9.4.11. One of the key issues for competition authorities with respect to price discrimination is similar in online and offline markets; that is to prevent price discrimination that strategically excludes rivals. Exclusionary price discrimination of this nature can create, build and protect market power at the expense of consumers. Competition authorities should focus on instances where price discrimination is used as a means to exclude a rival which does not require the firm to sacrifice profits (i.e. margin squeeze, fidelity rebates and bundled discounts).²⁸⁴

Insights from cases

- 9.4.12. The European Commission is currently investigating price discrimination in the online hotel accommodation market, following complaints from consumers. The agreements in question are between large tour operators (such as Kuoni, REWE, Thomas Cook and TUI) and hotels (Melia Hotels), which may discriminate between customers based on their nationality or country of residence.²⁸⁵ Whilst the competition authority welcomes innovative pricing mechanisms, they cannot lead to price discrimination based on a customer's location.

²⁷⁸ Where the marginal cost of a good is close to zero, the scope for price discrimination is greater, as a supplier or retailer is incentivised to sell the greatest quantity possible in order to cover their fixed costs and return a profit. As this is often the case for digital goods or services in online markets, price discrimination is common where retailers attempt to maximise output. Looking at mobile applications, an app developer may implement such a strategy by offering a free basic version of an app, whereby revenue is generated from advertisements, in addition to offering a superior advert-free version of the app sold for a small fee. The superior version targets users who place a higher value on the app and therefore have a greater willingness to pay.

²⁷⁹ Mikians et al (2012).

²⁸⁰ OECD (2016), para. 144.

²⁸¹ OECD (2016), para 152.

²⁸² OECD (2016), section 4.

²⁸³ Ibid. para 147.

²⁸⁴ OECD (2016).

²⁸⁵ European Commission (2017c).

9.5. Fidelity rebates or loyalty discount schemes

Overview of conduct

- 9.5.1. An extension of price discrimination strategies are loyalty discount schemes, also known as fidelity rebates or exclusivity rebate schemes, present in both brick-and-mortar and E-commerce markets. These occur when a dominant seller offers a more favourable price, rebate or financial advantage to the buyer, conditional on their loyalty in the purchases they make.²⁸⁶ Rebates are common in E-commerce markets where firms provide customers with financial incentives in return for feedback, or reviews on a recent purchase.²⁸⁷
- 9.5.2. Under certain circumstances, such a practice can foreclose competitors and reinforce a firm's dominant position in the market. Whilst offering rebates to customers is not in itself anti-competitive, as such pricing structures can intensify competition amongst suppliers, case law from around the world suggests that rebates and loyalty price practices can have a detrimental effect on competition.²⁸⁸ EU competition law has traditionally found loyalty rebate schemes to constitute an abuse of that dominant position.²⁸⁹ Such case law, however, has typically pursued a strict approach focusing on the structure of the rebate (a 'form-based approach') which can be loyalty-inducing, rather than examining the actual impact on the market vis-à-vis the ability of competitors to match those rebates and counter a potential foreclosure (an 'effects-based' approach).

Insights from cases

- 9.5.3. Simple quantity rebates that are only linked to the volume of sales to a customer are commonly presumed to be lawful. On the other hand, exclusivity rebates, in which discounts are offered to consumers who purchase from a dominant firm, are typically considered unlawful unless objectively justified.²⁹⁰
- 9.5.4. Case law on rebates relies on insights from brick-and-mortar markets. There is no reason to believe that online rebates, with the exception of the considerations presented in Section 9.4 in relation to price discrimination, would require any specific approach which would differ from a proper assessment of the ability of competitors to compete effectively on the market and thereby avoid any potential foreclosure. There are currently no relevant cases considered by any competition authority which examine loyalty rebates in online markets.

9.6. Imposing vertical conditions (e.g. quantity forcing)

Overview of conduct

- 9.6.1. Dominant firms that impose vertical restraints on other parties at different stages in the chain of production may be deemed to have abused their position in the market (a dominant firm may lack the incentives to generate and/or pass on efficiency gains to consumers). Consequently, a vertical restraint which maintains, creates or strengthens a dominant position in the market cannot normally be justified on the grounds that it creates efficiency gains.²⁹¹

²⁸⁶ OECD (2016), para. 107.

²⁸⁷ ASEAN Today (2016).

²⁸⁸ See for example OECD (2002).

²⁸⁹ Bishop, S. and Walker, M. (2010), page 262.

²⁹⁰ Whish, R. and Bailey, D. (2015), page. 770.

²⁹¹ European Commission (2010), para. 127.

- 9.6.2. In 2010, CCS found SISTIC to have abused its position of dominance in the market for online ticket sales as a result of imposing exclusivity agreements on event venues (see Case review 32).²⁹²

CASE REVIEW 32 – SISTIC

Industry: Online event ticketing

Country / Union of countries: Singapore

Court / Competition Authority: CCS

Case name and citation: Abuse of a Dominant Position by SISTIC.com Pte Ltd (CCS/600/008/07)

Date of decision: 4th June 2010

Type of alleged infringement: Abuse of dominance through exclusive agreements

► | Case summary

In 2010 CCS found that SISTIC.com (SISTIC) had abused its position of dominance in the ticket service providers market. Ticket service providers act as a platform connecting event promoters and ticket buyers. It was calculated that SISTIC had a persistent market share of 85-95% in this market.

SISTIC was found to have abused its position of dominance through its exclusivity agreements with certain venues. For example, key venues such as The Esplanade and Singapore Indoor Stadium were required to use SISTIC as the sole ticket provider for all events.

It was found that these agreements restricted the choice of venue operators, event promoters and ticket buyers. Evidence of this was the ability of SISTIC to increase its booking fee for ticket buyers by 50% to S\$3 in 2008.

In its decision, CCS instructed SISTIC to change its agreements; in particular removing clauses that required SISTIC's contractual partners to use SISTIC exclusively. SISTIC was also fined S\$989,000 for infringing section 47 of the Singapore Competition Act (abuse of a dominant position).

On 3rd August 2010, SISTIC appealed this decision. The Competition Appeal Board of the Republic of Singapore upheld CCS's decision but reduced the financial penalty to S\$769,000.

9.7. Practical steps/guidelines or recommendations to identify and address competition policy and law issues

- 9.7.1. The cases outlined above illustrate that instances of alleged abuse of dominance in E-commerce markets tend to differ greatly in nature. However, in all instances, existing competition policy and law has been sufficient to deal with the issues arising. In applying this law, there is no one-size-fits-all approach to determining when certain types of conduct such as tying and bundling are anti-competitive. Therefore an 'effects based approach' is recommended, aimed at exploring whether the conduct in question constitutes anti-competitive behaviour. It is important to disentangle conduct which harms competitors (all competition harms competitors by definition) from conduct that harms competition, and thereby consumers.
- 9.7.2. The growth of IP rights relating to E-commerce markets is a new factor for authorities to be mindful of in the assessment of dominance. The ownership of IP rights, as discussed further in Section 14, may not only create a monopoly, but also constitute a barrier to entry for competitors in circumstances where the patented technology is crucial for entry.²⁹³

²⁹² Abuse of a Dominant Position by SISTIC.com Pte Ltd CCS/600/008/07 (2010).

²⁹³ Lexis (2017).

9.7.3. When conducting an assessment of alleged abuse of dominance in E-commerce markets, it is important that competition authorities recognise when a dominant firm is abusing its position; for example foreclosing a firm from the market, as in the MyEG case (Case review 30). However, authorities should also consider whether a dominant firm is instead simply innovating faster than its rivals, to the benefit of consumers; for instance as determined in the UK case between Google and Streetmap (Case review 28). To evaluate this, and other important factors in alleged abuse of dominance cases in E-commerce markets, competition authorities should consider the following questions:

1.

Define the relevant market or markets:

- **What is/are the relevant product market/s?**

This usually requires an identification of the potential economic substitutes from the consumers' point of view (demand side substitution), and the ability of suppliers to use existing capacity to begin producing the product in question (supply side substitution). (International Competition Network, 2011).

- **What is/are the relevant geographic market/s?**

The key question is whether consumers would substitute the relevant product of suppliers in other geographic areas in sufficient volume to constrain the exercise of market power by a hypothetical monopolist. The geographic market can be the location of suppliers of the relevant product, or it can also be defined as the location of customers in the given market. (International Competition Network, 2011).

2.

Next, the competition authority should determine whether the firm is in a position of dominance by considering the following questions:

- **Is the firm in a position of dominance? I.e. is it able to profitably increase prices above the competitive level for a significant period of time?**

In some jurisdictions around the world, dominance is assumed if a firm's market share is above a certain threshold. In other jurisdictions, such as Malaysia, the fact that a firm's market share is above or below a particular level is not deemed to be conclusive as to whether they occupy, or do not occupy, a dominant position in the market. Dominance should be determined by a number of factors such as the position of actual and potential competitors, barriers to entry, and the countervailing buyer power of customers. Moreover, dominance in itself is not a competition problem, rather, particular forms of conduct may give rise to an abuse of such a position and would therefore be anti-competitive. As discussed in Section 6.3, a firm may also be in a position of collective dominance alongside other competitors.

- **Is the market multi-sided in nature?**

If yes, in defining the relevant markets, the market for facilitating transactions and/or matching distinct sides should also be considered. Additionally, if an investigation is required, all sides of the market should be considered together, and in isolation, taking into account the presence, direction and magnitude of any network effects between or within the distinct sides of the market, as well as any feedback effects.

If a position of dominance is determined, a more in-depth analysis of the alleged anti-competitive unilateral conduct should be undertaken by asking the following questions:

- **Absent the alleged anti-competitive conduct, would prices be lower, investment/innovations greater, consumer choice more diverse and/or quality of goods/services enhanced?**

To support such an analysis the following factors can be considered:

- **How competitive is the market?**

The stronger is the position of the dominant firm, the weaker actual or potential competitors are, and the higher the impact of barriers to entry, the more likely anti-competitive foreclosure is, *ceteris paribus*.

- **What proportion of the dominant firms sales are affected by the conduct?**

The higher the share, the more likely anti-competitive foreclosure is, *ceteris paribus*.

- **What is the duration of the alleged anti-competitive conduct?**

The longer the duration, the more likely anti-competitive foreclosure is, *ceteris paribus*.

- **Is there evidence that the conduct has caused competitors' market shares to fall and/or firms to leave the market?**

If yes, this may be direct evidence of anti-competitive foreclosure.

- **Can an equally efficient firm (i.e. a firm as efficient in production as the dominant firm) compete with the pricing set by the dominant firm? E.g. in cases of predation or fidelity rebates.**

If yes, anti-competitive effects from a dominant firms' pricing strategies are less likely. In multi-sided markets, this evaluation should consider the costs in serving, and price charged, to all sides of the market, in addition to considering each side of the market in isolation if relevant, as discussed in Section 9.3 above.

- **Has the dominant firm imposed vertical restraints on other firms at different stages of production? E.g. exclusivity clauses.**

If yes, firms may be anti-competitively foreclosed from the market.

- **Are tied or bundled goods distinct products? I.e. absent the tying/bundling, a large proportion of the customers would not buy the tied or bundled good.**

If yes, anti-competitive foreclosure is more likely.

Following an analysis of the extent of any anti-competitive effects from the alleged abusive conduct, competition authorities should consider if there are any efficiency benefits from the behaviour by asking the following questions:

- **Does the tying/bundling generate any efficiencies to the benefit of consumers, such as a reduction in transaction costs for consumers and/or a reduction in production costs for the firm, for example through economies of scope?**

If yes, such efficiency benefits should be compared with any anti-competitive effects.

- **Do consumers receive a fair share of any efficiency gains? I.e. at least compensating for the anti-competitive effects resulting from the conduct.**

If no, any pro-competitive effects are less important in an assessment of the alleged anti-competitive conduct.

- **Are there alternative, less restrictive options available to the firm which are more beneficial/less costly to consumers? I.e. have greater pro-competitive effects and/or fewer anti-competitive effects.**

If yes, explore the possibility that these could be implemented by firms instead of the existing conduct.

10 Mergers and acquisitions

10.1. Introduction

Competition authorities' role

- 10.1.1. In addition to assessing cases of alleged anti-competitive conduct, if there is a merger regime in place it is the responsibility of competition authorities to assess proposed mergers that may significantly lessen competition in a particular market.²⁹⁴
- 10.1.2. Mergers can be either vertical (between firms at different stages of production), horizontal (between competing firms) or conglomerate (between firms with no horizontal or vertical connection). Generally, vertical mergers and conglomerate mergers do not pose competition issues unless a specific merger gives rise to the incentive and the ability to foreclose competitors. Authorities should be alert to horizontal mergers that give rise to more immediate and direct competitive concerns, such as the acquisition of a direct competitor or of a strong fringe player in the same relevant market.²⁹⁵

Structure of section

- 10.1.3. This section first considers whether existing competition rules are effectively able to determine when and how to assess a proposed merger in E-commerce markets, before looking at the implications of network effects on merger assessments, and finally considers structural and behavioural remedies when network effects are present. Key themes emerging from relevant cases in jurisdictions around the world are highlighted as well.

10.2. Ability of existing competition rules to capture relevant transactions

Standard approach to merger investigations

- 10.2.1. A merger investigation is normally concerned with the horizontal, vertical and/or conglomerate effects of a merger (or a combination of these three). Specifically, authorities are generally concerned with protecting competition in the relevant market in order to maximise consumer welfare, or total welfare in jurisdictions, such as Singapore, which adopt a total welfare rather than a consumer welfare standard. Determining whether a merger gives rise to anti-competitive effects is typically based on a static framework of analysis focusing on the degree of overlap in the products or services sold in the relevant market (generally measured by means of the merging parties' combined market share).²⁹⁶ Applying this test means that in instances where there is no overlap in the products or services sold in the relevant market(s), some mergers involving online players may not be investigated.
- 10.2.2. The substantive assessment of a merger normally develops around four key areas, namely: market definition, assessment of market structure and concentration, unilateral and coordinated effects, and market entry and expansion.²⁹⁷ Although this assessment is primarily focused on the existing features of competition in the market, a forward-looking view of the market, capturing the dynamic nature of competition, is particularly important, and even more so in online markets characterised by quickly developing technologies. The assessment of a merger therefore requires a proper understanding of how competition works in the market and a clear theory of competitive harm as to why consumers will be impacted, as well as evidence to support the theory of harm. To do this, authorities will need to consider both the likely future development of the market post-merger, and the counterfactual scenario if the merger was not to occur.²⁹⁸

²⁹⁴ In ASEAN, all AMS except Malaysia have merger controls in place.

²⁹⁵ The pooling of data between two merging firms may pose competition concerns, though this is likely to be mitigated if the data is not unique and can be replicated or purchased by competitors. As discussed in Section 4, and Section 6, most data that firms collect is easily replicable, or can be purchased from other sources, therefore it does not necessarily lead to an increase in a firm's market power.

²⁹⁶ See for example, European Commission (2013).

²⁹⁷ Whish, R. and Bailey, D. (2015), page 861.

²⁹⁸ Ibid, page 862.

Merger assessments in E-commerce markets

10.2.3. Given the relatively low barriers to entry in online markets, as discussed in Section 4, the likely development of a particular market can include entry of players from neighbouring markets. As a result, although a merger may involve firms operating in seemingly unrelated online markets, either firm, or indeed both firms, may be potential future entrants into each other's market. Dynamic competition may therefore be harmed as a result of a merger due to the removal of a potential future entrant in a given market. In some jurisdictions, such mergers may not be caught by current merger control policy as the merger tests for notification may not capture mergers where there is an absence of current overlaps in products/services between the merging parties, or where revenues of one of the firms are low, and, therefore, fall below notification thresholds. Additionally, if such mergers are captured by the relevant test, the current analytical framework for review is largely based on a static approach which may not consider dynamic aspects of competition. Consequently, potential anti-competitive mergers may not be captured by current merger control rules.

Implication of dynamic competition on merger controls

10.2.4. Competition authorities may therefore wish to consider whether their notification thresholds to determine when a proposed merger is reviewed are fit for purpose. In cases where a merger regulation regime is not present, there may be a need to introduce one. In some jurisdictions, such as the US, competition authorities are able to capture cases of potential competition thanks to a merger test which includes the value of the transaction. Some competition authorities who do not have an equivalent test are either consulting on the adoption of one (as is the case for the EU) or are already adapting their merger regimes to ensure they are able to investigate such mergers by adding a test based on the value of the transaction (as is the case for Germany).²⁹⁹ A transaction value threshold would enable competition authorities to investigate mergers and acquisitions where the purchase price is over a certain threshold, thus capturing mergers in E-commerce markets where the transaction value is high based on the market value of new technology, or IP, yet the revenue of the acquired firm, or its market share, is low and there are no clear current overlaps between the merging parties.

10.2.5. Establishing the best suited merger notification thresholds is extremely important for authorities. If thresholds are set too high, there is a risk that some anti-competitive mergers will not be captured. If thresholds are too low, the costs and administrative burden on competition authorities and businesses might exceed the benefits from having an ex ante merger control.³⁰⁰ The OECD (2016c) notes that if thresholds are set too low, unnecessary costs will be faced both by the merging parties and by the authorities.³⁰¹ Therefore, if authorities are to implement transaction value thresholds, it is important that these are set at an optimal level that does not discourage start-ups and small businesses from merging, thereby forgoing any potential efficiency benefits to consumers from economies of scope or innovation in the long run.

Implication of dynamic competition on merger controls

10.2.6. The German competition authority, the Bundeskartellamt, is currently updating its Merger Regulation to enable it to review mergers based on the transaction value.³⁰² A new law will state that a merger is to be subject to notification when the value of transaction is above a certain threshold, in addition to relying on the size of revenue of the two firms, as is currently the case. For example, the Facebook/WhatsApp merger of 2014 was not subject to notification in Germany as revenues were below the threshold for review, despite the deal being worth \$19 billion. This merger would now be captured under the proposed transaction value threshold. The Bundeskartellamt argues that relying on revenue thresholds does not take into account future values that could be realised through new technologies which are not yet driving significant revenues. This is particularly true in multi-sided E-commerce markets where firms may take time to build a large customer base, for example due to network effects.

²⁹⁹ See, for example, European Commission (2016b).

³⁰⁰ Buccrossi, Cervone and Riviera (2014), chapter 6.

³⁰¹ OECD (2016c), para. 16.

³⁰² See, for example, <http://www.bmw.de/Redaktion/DE/Dossier/schwerpunkte-wirtschaftspolitik.html>.

10.2.7. Austria is another example of a country updating its merger controls to account for the digital economy, enabling it to prevent large mergers from being completed without a suitable review. Beginning November 2017, Austria will introduce a transaction value merger notification threshold of €200 million (approx. S\$300 million) provided that the target company has significant activities in Austria. The European Commission is also currently undertaking a consultation on the implementation of a test on the transaction value.³⁰³ The deadline for submissions was January 2017, though findings from this consultation are yet to be published, as of June 2017.

Merger regimes in ASEAN

10.2.8. Table 11 provides a breakdown of the current merger control rules in place across ASEAN, in addition to the UK and USA for comparison. AMS are currently at different stages in developing their merger controls. Other than Cambodia, who has recently discussed its draft law with Australian experts to incorporate merger controls in its law by 2017, Malaysia is the only AMS that still does not have a merger control regime in place. Despite the lack of merger regulations in Malaysia, merging parties must ensure the post-merger outcome does not breach any prohibition under the Malaysian Competition Act 2010, i.e. prohibition of anti-competitive agreements and the abuse of a dominant position. Nevertheless, the Malaysian Aviation Commission (MAVCOM), an independent statutory body, prohibits any merger which will substantially lessen competition in any aviation service market. Thus, merger provisions related to competition in the aviation sector are enshrined in the Malaysian Aviation Commission Act 2015. Presently, no AMS has a transaction value threshold for notification within their merger regimes.

Table 11: Merger controls across ASEAN and other jurisdictions

ASEAN Member State	Competition Law	Type of regime (voluntary / mandatory)	Merger control thresholds
Brunei Darussalam	Competition Order, 2015, Chapter 4.	Voluntary notification	N/A
Cambodia	Draft law on Competition of Cambodia, Version 5.6 (May 2017).	Mandatory notification based on draft law	TBC
Indonesia	Article 28, Law No. 5 of 1999 on the prohibition of Monopoly and Unfair Business Competition Practices.	Voluntary premerger notification. Mandatory post-merger notification if thresholds are met.	Domestic assets and turnover. Notification is mandatory if a merger meets one or more of the following thresholds: (1) The asset value of the merged entity exceeds IDR 2.5 trillion; or (2) The turnover of the merged entity exceeds IDR 5 trillion. These thresholds are not applicable to transactions involving banks. For mergers involving two or more banks, the threshold for notification is IDR 20 trillion.
Lao PDR	Law on Business Competition (No. 60/NA)	Mandatory pre-merger notification unless business is classed as an SME. SMEs are required to notify post-closing (based on legislation that came into effect in December 2015)	N/A

³⁰³ European Commission (2016b).

ASEAN Member State	Competition Law	Type of regime (voluntary / mandatory)	Merger control thresholds
Malaysia	No general merger control regime at present. ³⁰⁴	N/A	N/A
Myanmar	The Competition Law, The Pyidaungsu Hluttaw Law No.9, 2015), Chapter X	Mandatory notification subject to thresholds	Market shares. Mergers will not be permitted if the intention is to create excessive market dominance within a certain period.
The Philippines	The Philippine Competition Act No. 10667	Mandatory notification subject to thresholds	Domestic turnover and asset size Mandatory notification if: (1) The annual gross revenues in, into, or from the Philippines, or value of the assets in the Philippines of the ultimate parent entity of at least one of the acquiring or acquired entities exceeds 1 billion pesos; or (2) The aggregate value of the assets, or revenues generated from the assets is greater than 1 billion pesos.
Singapore	Section 54, Competition Act, Chapter 50B.	Voluntary notification is encouraged for mergers that are likely to substantially lessen competition. Parties are required to do a self-assessment on whether a merger notification should be made to the CCS.	Market shares. The CCS is generally of the view that competition concerns are unlikely to arise unless: (1) The merged entity will have a market share of 40% or more; or (2) The merged entity will have a market share of between 20% to 40% and the post-merger combined market share of the three largest firms is 70% or more. The CCS is unlikely to investigate mergers involving small companies where their turnover in Singapore in the financial year preceding the transaction of each of the parties is below S\$5 million and the combined worldwide turnover in the financial year preceding the transaction is below S\$50 million.
Thailand	The Trade Competition Act BE2542, 1999, Section 26.	Mandatory filing if the merger may result in a monopoly or unfair competition as set out by the Trade Competition Commission.	Jurisdictional thresholds are to be set by notification, but no notifications have yet been issued. The Trade Competition Commission has not issued any minimum thresholds for notification of mergers, therefore pre-merger filing is not required.
Vietnam	Section 16 to 24, The Competition Law No: 27/2004/QH 11.	Mandatory merger notification if thresholds are met.	Market shares. Merging parties that have a combined market share of between 30% and 50% are required to notify.

³⁰⁴ Whilst Malaysia does not have a general merger regime in place, as noted above there are sector-specific rules set by MAVCOM, which establish a merger control regime for within the aviation sector.

ASEAN Member State	Competition Law	Type of regime (voluntary / mandatory)	Merger control thresholds
United Kingdom	Enterprise Act 2002, Enterprise and Regulatory Reform Act 2013.	Voluntary, however if the transaction meets the jurisdictional thresholds and the parties do not notify, the CMA can open an investigation.	Domestic turnover and market share. An anti-competitive situation may arise if the jurisdictional thresholds are met: (1) The target's UK turnover exceeds £70 million (2) The transaction results in a share of supply over 25%.
USA	Section 7 of the Clayton Act, enacted in 1914, amended in 1950.	Where the applicable thresholds are met and the transaction is not otherwise exempt, notification is mandatory.	Commerce test, size of person³⁰⁵, and size of transaction thresholds: (1) The commerce test – this test is met if either party is engaged, or affected by commerce. (2) The size of transaction test – mergers or acquisitions in excess of US\$80.8 million ³⁰⁶ may be subject to the HSR Act. (3) The size of person test – the parties to the transaction must meet certain size requirements if the transaction test is met. The size of person test is generally met where a person with annual net sales or total assets of US\$161.5 million or more acquires a person with annual net sales or total assets of US\$16.2 million or more, or vice versa.

Sources: International Financial Law Review (2016), Wong Partnership (2016), Rodyk (2013) and Competition Acts from respective countries available from the ASEAN-competition website.

Substantive test in merger controls

10.2.9. A necessary element of any merger control is a substantive test that can be used to determine whether a merger should be approved, modified by means of remedies, or prohibited.³⁰⁷ Merger controls in the US and UK rely on analysis aimed at investigating whether the merger substantially lessens competition, often referred to as an SLC test. Other jurisdictions require intervention where a merger would create or strengthen a dominant position that significantly impedes effective competition,³⁰⁸ a form of dominance test. Some nations, such as France and Greece, may use both the SLC and dominance tests when assessing the potential impact of a merger.

³⁰⁵ The term 'person' refers to the ultimate parent entity of the acquiring and acquired firm.

³⁰⁶ These figures are adjusted each year based on changes in the US gross national product.

³⁰⁷ Whish, R. and Bailey, D. (2015), page 866.

³⁰⁸ European Commission (2004), Article 2.

10.3. Innovation and dynamic competition in merger assessments

Assessment of dynamic competition in merger reviews

- 10.3.1. When determining whether a merger will result in a substantial lessening of competition, competition authorities may need to look beyond the static change in the distribution of market shares and consider how the long-run incentives to compete, for example through innovation, are affected. Furthermore, a static assessment of market shares may be irrelevant if there is no current overlap in goods/service offerings from the merging firms.
- 10.3.2. The concept of dynamic competition and the removal of a potential entrant or innovator from a market is a difficult area of competition policy due to the inherent speculative, and complex nature of assessing potential future competitive scenarios. Competition authorities as well as their international networks should monitor developments in the literature and policy debates to gain insights from new research in the area and ensure that they are able to reflect advances in the general competition policy debate in their own practice. Sidak and Teece (2009), in their discussion of how innovation and dynamic markets impact competition law, explained that:

*“[a] neo-Schumpeterian framework for antitrust analysis that favors dynamic competition over static competition would put less weight on market share and concentration in the assessment of market power and more weight on assessing potential competition and enterprise-level capabilities.”*³⁰⁹

- 10.3.3. Whilst competition authorities should evaluate the potential loss of dynamic competition resulting from a merger, there should also be a consideration of additional potential future dynamic competition faced by the merged entity arising from maverick firms or other potential entrants in the market.

Insights from merger reviews

- 10.3.4. The acquisition of LinkedIn by Microsoft is a good example of a merger between two large online players where the overlap in products and services was very limited. In its approval of the acquisition,³¹⁰ the European Commission considered only minor overlaps in online advertising with no reference to the removal of a potential entrant into social media markets, and the resultant threat to dynamic competition in the long run. The concerns explored by the European Commission focused on the potential for bundling or tying between Microsoft's products and LinkedIn's services, and the risk of less favourable treatment of LinkedIn's competitors by Microsoft.
- 10.3.5. Incentives to innovate and dynamic competition have not yet been considered in horizontal merger cases in E-commerce markets, however such factors have been evaluated in other markets. For example, the European Commission (2016d) provides a review of relevant cases in other markets, such as pharmaceuticals, where these issues were of critical importance for the assessment of the merger. In the approved US\$130 billion merger between agrichemical firms Dow Chemical and DuPont (expected to close August 2017), one of the European Commission's major concerns was that innovation would be adversely affected in the crop protection market, worth an estimated €60 billion annually.³¹¹ Evidence suggested incentives to innovate would have been lower post-merger, and therefore the levels of innovation, had the two companies remained separate, would have been higher. Therefore, the agreement for the merger to proceed required DuPont to divest most of its global research and development operations within the crop protection market.

³⁰⁹ Sidak and Teece (2009), page 581.

³¹⁰ European Commission (2016c).

³¹¹ Financial Times (2017).

10.4. Network effects in merger assessments

Assessing whether a merger will result in a tipping point being reached

- 10.4.1. As discussed in Section 6, the presence of network effects in multi-sided online markets has led some to consider whether a tipping point may exist in certain markets, which, once reached by a platform, would provide it with a critical size making competitors no longer able to compete.³¹² In this instance, all customers in a particular market opt for the product or service supplied by the dominant firm, creating an entry barrier that is too great for potential entrants and smaller firms to overcome. In the context of merger control, there may be concerns that a merger in markets characterised by the presence of strong network effects, and in which consumers tend to single-home, may lead to the merged firm reaching a tipping point in the market and thereby substantially lessening competition.³¹³
- 10.4.2. A number of factors affect whether a tipping point is likely to occur. In particular, a lack of interoperability between products in a market,³¹⁴ and high switching costs for users may increase the likelihood of a tipping point. However, if barriers to entry are low, network effects are less likely to be problematic. A tipping point is also less likely to occur if users multi-home. For example, if there is differentiation between platforms, consumers may use competing platforms depending on which suits their particular need best at that point in time. The likelihood of a tipping point occurring also depends on a range of other factors, such as the nature of the product/service, the size and direction of network externalities, and the degree of dynamic competition. Therefore, a thorough market review is recommended for merger assessments when network effects are present.

Insights from merger reviews

- 10.4.3. A good example of a case where network effects were considered is the recent review of the *Facebook/WhatsApp* merger.³¹⁵ The European Commission concluded that post-merger, network effects “do not constitute an insurmountable barrier”, citing the presence of multi-homing, the ability of new entrants to recreate a user’s network through access to that user’s phonebook, low switching costs for consumers, low barriers to entry, and rapid innovation in the market.
- 10.4.4. A similar conclusion was reached in the *Google/DoubleClick* merger decision of 2008.³¹⁶ Google purchased the online advertising firm DoubleClick for US\$3.1 billion. The US FTC reviewed the merger, and agreed that it could proceed as the two companies were not direct competitors in any market. The FTC’s statement addressed the issue:

“The markets within the online advertising space continue to quickly evolve, and predicting their future course is not a simple task. Accounting for the dynamic nature of an industry requires solid grounding in facts and the careful application of tested antitrust analysis. Because the evidence did not support the theories of potential competitive harm, there was no basis on which to seek to impose conditions on this merger.”³¹⁷

- 10.4.5. This decision was made on the basis that customers could easily switch to alternative providers in the post-merger scenario, and multi-homing was commonplace in the market.
- 10.4.6. In contrast, in the decision to require commitments in the *Microsoft/LinkedIn* merger in 2016,³¹⁸ the European Commission cited the existence of network effects as a contributing factor. Considering the market for professional social networks, it was deemed that the absence of multi-homing, the existence of switching costs associated with creating and maintaining a new profile on rival platforms for users, and a low likelihood of entry from neighbouring platforms all meant that a tipping effect was more likely to occur.
- 10.4.7. Given the heterogeneity of markets where network effects are present, for example the extent of multi-homing, barriers to entry, and consumer switching, in addition to the level of interoperability between competing platforms, an in-depth assessment of the nature of network effects and market features is recommended.

³¹² See, for example, European Commission (2015b).

³¹³ Whish, R. and Bailey, D. (2015), page 12.

³¹⁴ For example, a computer game that cannot be played on a rival console is a good example of a case where products are not interoperable. Conversely, a DVD can be played in any DVD player.

³¹⁵ European Commission (2015b).

³¹⁶ Case No COMP/M.4731 – Google/ DoubleClick (2008).

³¹⁷ Federal Trade Commission (2007).

³¹⁸ Case M.8124 – Microsoft / LinkedIn (2016).

10.5. Structural and behavioural remedies where network effects are present

Overview of remedy design

10.5.1. The approach to determining if structural or behavioural remedies are required to prevent a merger from giving rise to a substantial lessening in competition is equivalent in E-commerce markets and offline markets. The same is true for the methods for designing any such commitments or structural divestments, both when network effects are, and are not, present. Some authorities may consider structural remedies to be preferable, as monitoring is not required and any issues are addressed at the outset; though behavioural remedies can still be used effectively, as long as a compliance and monitoring process is in place. This section discusses specific ways in which remedies can be designed for mergers where the presence of network effects is likely to lead to a substantial lessening of competition, in order to reduce the likelihood of a tipping point being reached, and ensure a multi-sided market remains competitive.

Insights from merger reviews

10.5.2. Firstly, the presence of network effects, as discussed in Section 10.4, should be evaluated in conjunction with the wider assessment of the merger in order to consider if there is a need for remedies. For example, in both the *Google/DoubleClick* and *Facebook/WhatsApp* mergers, despite the presence of network effects, it was determined that remedies were not required.

10.5.3. In the *Microsoft/LinkedIn* merger of 2016,³¹⁹ the European Commission did have concerns. Despite there being little overlap between the two merging firms, the European Commission was worried that, post-merger, the new entity may be able to further enhance LinkedIn's position in the Professional Social Network (PSN) market through bundling and tying strategies. To overcome these concerns the European Commission accepted commitments that reduced the merged entity's ability to bundle or tie Microsoft's products with LinkedIn's PSN. Specifically, it was agreed that personal computer (PC) manufacturers would be free to not install LinkedIn on Windows, and users would be able to uninstall LinkedIn if PC manufacturers chose to pre-install the service on computers. Additionally, alternative professional social networks would remain interoperable on Microsoft's Office software package, so that LinkedIn was not favoured above other PSNs.

10.5.4. The *JobStreet/Seek Asia* merger³²⁰ in Singapore provides another good example of a merger in a multi-sided market where remedies were required; specifically, in the market for online recruitment services. Taking into account the dynamic nature of the market, the commitments were put in place for a period of three years. Upon review, the CCS concluded that the two firms were each other's closest competitor, and the merger may reduce competition, giving rise to price increases and/or exclusive contracts that would ultimately harm consumers. In order to address these concerns, Seek Asia offered commitments including a price cap and non-exclusive agreements, as well as to divest the complete assets of jobs.com.sg. The CCS cleared the merger following acceptance of the behavioural commitments and divestiture offered by Seek Asia as it was found that the likely adverse effects of the merger would be mitigated.

10.5.5. These cases illustrate that if it is deemed that remedies are required in mergers between online operators where network effects are present, intervention should focus on encouraging the pro-competitive factors discussed in Section 10.4, for example:

- a. enhancing or maintaining interoperability between competing platforms;
- b. reducing switching costs to users;
- c. encouraging multi-homing; and/or
- d. reducing barriers to entry.

10.5.6. As shown by the mergers referred to above, remedies should be selected on a case-by-case basis taking into account the specific market characteristics and the dynamic nature of competition.

10.5.7. Network effects are inevitable characteristics of multi-sided markets, and have significant benefits to users of platforms. In order to preserve these benefits, network effects should not be prevented, but rather harnessed in such a way to prevent a tipping point from being achieved, for example by lowering the barriers faced by competing platforms through reducing switching costs for users or encouraging multi-homing.

319 Case M.8124 – Microsoft / LinkedIn (2016).

320 CCS (2014).

Recommendations on improving the design of competition policy and enforcement of competition law to proscribe anti-competitive conduct relating to E-commerce for AMS

11.1. Introduction

Structure of section

11.1.1. This section looks at the various competition policies and laws in AMS, and the extent to which they are able to deal with the challenges posed by the emergence and growth of E-commerce, as outlined in Sections 6 - 10 of this handbook. This assessment is based on existing law and practice as of June 2017. Reassessment may be required going forward as competition authorities across ASEAN update and improve the design of competition policy and the enforcement of competition law as part of the ASEAN Competition Action Plan 2016-2025.

Basis of assessment

- 11.1.2. The recommendations included within this section are based on insights derived from international best practice and the latest debate in the field of competition policy and law, informed by economic analysis of E-commerce dynamics. This section also draws on findings from a questionnaire which was designed specifically to inform this handbook, and completed by competition authorities in five AMS.³²¹ Each of these authorities provided details of the design and enforcement of competition policy and law in their jurisdiction, in addition to their views on the challenges arising from the emergence and growth of E-commerce in ASEAN.
- 11.1.3. To date, two out of the five AMS that responded to the questionnaire have already considered E-commerce when formulating their jurisdiction's competition policy and law, and only one of the respondents said they would not be considering E-commerce if and when they revise their competition policy and law.

11.2. Design of competition policy and law

Ability of existing legal framework to deal with challenges in E-commerce markets

- 11.2.1. By drawing on case examples from various jurisdictions around the world (see sections 6 – 10), this handbook has considered the impact of E-commerce developments on competition policy and law. It has found that the existing legal framework is broadly sufficient to deal with cases in both online and offline markets.
- 11.2.2. This observation is consistent with the conclusion reached at the OECD's 2012 "Hearings on The Digital Economy", which explains that "*existing competition laws are sufficiently flexible and nuanced to be applied in the digital economy.*"³²² It is therefore apparent that a wide scale overhaul of competition policy and law may not be needed to deal with the challenges currently being posed by E-commerce. A similar conclusion appears to have been reached by the EU in its Final Report on the E-commerce Sector Inquiry. For example, it is outlined how the European Commission sees no need to accelerate the existing review process of its vertical block exemption regulation: "*The VBER expires in May 2022, and the results of the e-commerce sector inquiry confirm that there is no need to anticipate its review.*"³²³

³²¹ Competition Commission of Singapore, the Philippines Competition Commission, Vietnam Competition Authority, Malaysia Competition Commission, Indonesia Competition Authority.

³²² OECD (2012), page 7.

³²³ European Commission (2017b), para. 74.

11.2.3. To aid the effective design of competition policy and law in ASEAN, the following sections provide a series of recommendations that competition authorities may wish to consider when formulating or revising their competition regimes to ensure that they are able to effectively deal with the challenges arising from E-commerce.

Anti-competitive conduct

11.2.4. Competition authorities often face challenges in the assessment of the impact of a certain conduct of competition. Unless a per se illegal breach of competition law has occurred,³²⁴ there may be both pro- and anti-competitive effects resulting from vertical and horizontal agreements and certain types of unilateral conduct by dominant firms. This is highlighted in Sections 7 - 9 of this handbook. Consequently, a case-by-case approach to assessing such conduct is recommended, applying the principles and guidelines discussed in those sections; in particular weighing up any pro- and anti-competitive effects, and evaluating the extent to which consumers benefit from any such efficiencies. Consideration should also be given to whether firms could adopt alternative agreements, or conduct, instead of those being investigated, that may achieve the same (or greater) efficiency benefits, and/or incur fewer anti-competitive effects.

11.2.5. In order for authorities to be able to evaluate alleged anti-competitive conduct it is important that competition policy and law has a number of features; in particular, allowing for:

- an efficiency defence of horizontal agreements between firms;³²⁵
- an efficiency defence of vertical agreements between firms; and
- an effects based approach in the assessment of alleged unilateral anti-competitive conduct (i.e. abuse of dominance) by firms.

11.2.6. Table 12 below summarises the presence of these features in the competition policy and law in each of the AMS, with the exception of Lao PDR as an English translation of the competition law is unavailable.

Table 12: Competition policy and law relating to efficiency arguments in AMS

ASEAN Member State	Feature of competition policy and law that allows for:	
	An efficiency defence of agreements between firms	An effects-based approach in the assessment of alleged unilateral anti-competitive conduct by firms
Brunei Darussalam	<p>Section 9 of the Third Schedule of the Brunei Darussalam Competition Order 2015 states that:</p> <p><i>"The section 11 prohibition shall not apply to any agreement which contributes to -</i></p> <ol style="list-style-type: none"> <i>improving production or distribution; or</i> <i>promoting technical or economic progress,</i> <p><i>but which does not-</i></p> <ol style="list-style-type: none"> <i>impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or</i> <i>afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question."</i> 	No law in place allowing for this.

³²⁴ In some jurisdictions hardcore restrictions may also be defensible in some situations (see for example Case review 10)

³²⁵ For example, efficiencies resulting from combining complementary skills (Whish, R. and Bailey, D., 2012, page 591).

ASEAN Member State	Feature of competition policy and law that allows for:	
	An efficiency defence of agreements between firms	An effects-based approach in the assessment of alleged unilateral anti-competitive conduct by firms
Cambodia (Draft – Version 5.6)	<p>Article 17 of the draft law states that:</p> <p><i>“Articles 11, 12, 13 and 15 will not apply if a person who is party to the agreement can prove that:</i></p> <ul style="list-style-type: none"> <i>a. there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;</i> <i>b. the benefits would not arise without the agreement having the effect of preventing, restricting or distorting competition;</i> <i>c. the benefits of the agreement outweigh its anticompetitive effect; and</i> <i>d. the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.”</i> 	<p>Article 14 of the draft law states that:</p> <p><i>“This Article 14 does not prohibit a person or persons with a dominant position from conducting any action which has a legitimate commercial reason for particular actions, and that actions were not intend to prevent, restrict and distort competition.”</i></p>
Indonesia	<p>Article 50 of the Law Number 5 Year 1999 Concerning The Prohibition Of Monopolistic Practices And Unfair Business Competition states that:</p> <p><i>“ Excluded from the provisions of this law shall be the following:</i></p> <p>...</p> <ul style="list-style-type: none"> <i>c) agreements for the stipulation of technical standards of goods and or services which do not restrain, and or do not impede competition; or</i> ... <i>e) cooperation agreements in the field of research for raising or improving the living standard of society at large; or</i> ...” 	No law in place allowing for this.

ASEAN Member State	Feature of competition policy and law that allows for:	
	An efficiency defence of agreements between firms	An effects-based approach in the assessment of alleged unilateral anti-competitive conduct by firms
Malaysia	<p>Section 5 of the Competition Act 2010 states that:</p> <p><i>“Notwithstanding section 4, an enterprise which is a party to an agreement may relieve its liability for the infringement of the prohibition under section 4 based on the following reasons:</i></p> <ul style="list-style-type: none"> <i>a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;</i> <i>b) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;</i> <i>c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and</i> <p><i>the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.”</i></p>	<p>Section 10 (3) of the Competition Act 2010 states that:</p> <p><i>“This section does not prohibit an enterprise in a dominant position from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor.”</i></p>
Myanmar	<p>Section 14 of the Myanmar Competition Law states that:</p> <p><i>“The Commission may, by specifying a certain period, exempt in respect of agreement on restraint on competition which intends to lessen the expense of consumers if it is inclusive in any of the following matters;</i></p> <ul style="list-style-type: none"> <i>a. reforming formation and type of any business to improve the capability of business;</i> <i>b. upgrading of technology and technology level in order to improve the quality of goods and services;</i> <i>c. ensuring to be uniform development of technological standards and quality level of different products;</i> <i>d. ensuring to be uniform in the matters of carrying out business, distribution of goods and payment not concerned with price or facts related to price;</i> <i>e. ensuring to raise competitiveness of small and medium enterprises;</i> <i>f. ensuring to raise competitiveness of Myanmar businesses in the international market.”</i> 	No law in place allowing for this.

ASEAN Member State	Feature of competition policy and law that allows for:	
	An efficiency defence of agreements between firms	An effects-based approach in the assessment of alleged unilateral anti-competitive conduct by firms
The Philippines	<p>Section 14 (c) of the Philippine Competition Act states that:</p> <p><i>“Agreements other than those specified in (a) and (b) of this section which have the object or effect of substantially preventing, restricting or lessening competition shall also be prohibited: provided, those which contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation of this Act.</i></p>	<p>Section 15 of the Philippine Competition Act states that:</p> <p><i>“It shall be prohibited for one or more entities to abuse their dominant position by engaging in conduct that would substantially prevent, restrict or lessen competition.”</i></p>
Singapore	<p>Section 9 of the Third Schedule [Exclusions From Section 34 Prohibition And Section 47 Prohibition] of the Singapore Competition Act states that:</p> <p><i>“Agreements with net economic benefit 9. The section 34 prohibition shall not apply to any agreement which contributes to —</i></p> <p><i>a. improving production or distribution; or</i></p> <p><i>b. promoting technical or economic progress, but which does not —</i></p> <p><i>i. impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or</i></p> <p><i>afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or</i></p>	<p>No law in place allowing for this.</p> <p>However, in its Guidelines on The Section 47 Prohibition, CCS does state that:</p> <p><i>“In considering whether there has been an abuse of dominance, CCS will conduct a detailed examination of the relevant markets concerned and the effects of the undertaking’s conduct.” (para. 2.1)</i></p> <p><i>“In conducting an assessment of an alleged abuse of dominance, CCS 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. The process of competition may be adversely impacted, for instance, by conduct which would be likely to foreclose, or has foreclosed, competitors in the market. CCS considers that factors which would generally be relevant to its assessment include: the position of the allegedly dominant party and its competitors; the structure of, and actual competitive conditions on, the relevant market; and the position of customers and/or input suppliers.” (para. 4.4)</i></p>

ASEAN Member State	Feature of competition policy and law that allows for:	
	An efficiency defence of agreements between firms	An effects-based approach in the assessment of alleged unilateral anti-competitive conduct by firms
Thailand	<p>Section 27 of the Thailand Competition Act states that:</p> <p><i>“In the case where it is commercially necessary that the acts under [section 27] (5), (6), (7), (8), (9) or (10) be undertaken within a particular period of time, the business operator shall submit an application for permission to the Commission under section 35.”</i></p>	No law in place allowing for this.
Vietnam	<p>Article 10 of the Vietnam Competition Law 2004 states that:</p> <p><i>“An agreement in restraint of competition stipulated in clause 2 of article 9 of this Law shall be entitled to exemption for a definite period if it satisfies one of the following criteria aimed at reducing prime costs and benefiting consumers:</i></p> <p><i>a) It rationalizes an organizational structure or a business scale or increases business efficiency;</i></p> <p><i>b) It promotes technical or technological progress or improves the quality of goods and services;</i></p> <p><i>c) It promotes uniform applicability of quality standards and technical ratings of product types;</i></p> <p><i>d) It unifies conditions on trading, delivery of goods and payment, but does not relate to price or any pricing factors;</i></p> <p><i>dd) It increases the competitiveness of medium and small sized enterprises;</i></p> <p><i>e) It increases the competitiveness of Vietnamese enterprises in the international market.”</i></p>	No law in place allowing for this.

Source: Asean-competition.org.

- 11.2.7. As can be seen from the analysis in Table 12 above, there are some differences in the presence of these features in competition policy and law across AMS. For example, only the Philippines, Malaysia and Cambodia (draft) have a law in place that allows for an effects based approach to assessing alleged anti-competitive unilateral conduct. However, it is acknowledged that a specific law is not necessarily required for such an approach to be applied, as is the case in Singapore, where CCS guidelines on the application of the law outline this instead,³²⁶ as well as through decisional practice and court decisions. All AMS do have laws in place (or draft laws) permitting an efficiency defence of agreements between firms. There are however some differences in the breadth and scope of these laws. For example, in Indonesia, the relevant law does not cover as many areas as in the other AMS.

Merger control regimes

- 11.2.8. As discussed above, thresholds for notification are important in order to avoid a waste of resources to assess mergers that are unable to cause a substantial lessening of competition. As discussed in detail in Section 10, there is, however, a risk in E-commerce markets that certain mergers that may have anti-competitive effects in the long run may not be captured by existing merger thresholds. For instance, if there is no current overlap in products/services offered, but the merger results in the removal of a likely potential future competitor. As a result, existing thresholds may not capture mergers where dynamic competition might be adversely affected, thereby harming consumers in the long run.
- 11.2.9. This was highlighted when the German authorities' revenue thresholds did not capture the *Facebook/WhatsApp* merger, despite the deal being worth US\$19 billion. The Bundeskartellamt is currently adapting its merger control rules to include a threshold based on the value of transaction.³²⁷ Furthermore, the German authorities are not acting in isolation, as other authorities are considering taking this step.³²⁸
- 11.2.10. Table 11 in Section 10 presents a review of the current merger control rules in AMS, from which it is evident that no AMS currently has a transaction value threshold in place. In order to ensure that all mergers that may lead to anti-competitive effects in the long run are captured and assessed in full, AMS may wish to consider implementing a test on the transaction value in their merger control rules.

11.3. Enforcement of competition law

- 11.3.1. In assessing alleged anti-competitive conducts or reviewing proposed mergers, competition authorities should draw on the insights from previous cases, and the lessons that can be learnt from jurisdictions across the world.
- 11.3.2. In all of the cases reviewed in Sections 7 - 10 of this handbook, existing law and enforcement practice has shown to be largely sufficient in identifying and dealing with alleged instances of anti-competitive conduct in E-commerce markets, and in assessing proposed mergers. In multi-sided markets, however, adjustments to the approach followed may be required. Recommendations on how best to deal with multi-sided markets have been presented throughout this handbook, however no ultimate approach has yet been developed, and debate on the matter is ongoing. For instance, an OECD Hearing entitled 'Rethinking the use of traditional antitrust enforcement tools in multi-sided markets' was recently held in June 2017.
- 11.3.3. This sub-section presents further recommendations on how competition authorities across ASEAN can adapt to ensure they are better placed to deal with the challenges arising from the growth of E-commerce.

Capability building and technical assistance

- 11.3.4. As discussed in the preceding sections, the enforcement of competition law may be more complex in E-commerce markets in comparison to analogous investigations in brick-and-mortar markets. This is particularly true when markets are multi-sided in nature as a number of adaptations to existing approaches may be required, such as when defining the relevant market (or markets) and when assessing market power, as outlined in Section 6. Therefore, if AMS competition authorities are to upskill their staff, for instance through training and learning from more established authorities, the analysis of multi-sided markets should be high on the agenda.
- 11.3.5. AMS competition authorities may also want to consider in their recruitment, and upskilling of existing staff, the analysis of price-fixing algorithms and price monitoring tools. As E-commerce markets continue to grow in the region, one would expect the use of such tools to increase in prevalence among firms, therefore making cases involving these complex items of software more likely to arise.

³²⁷ See, for example, <http://www.bmw.de/Redaktion/DE/Dossier/schwerpunkte-wirtschaftspolitik.html>.

³²⁸ See, for example, European Commission (2016b).

- 11.3.6. The assessment of market power and dominance in E-commerce markets should also be included on the learning agenda for AMS competition authorities. In particular, the changes to barriers to entry in E-commerce retailers in comparison to brick-and-mortar markets, as discussed in Section 4.3, should be covered.
- 11.3.7. Competition authorities in ASEAN may also benefit from participating in international roundtables on the emerging challenges when dealing with issues relating to horizontal and vertical coordination in E-commerce markets, considering issues such as the adoption of MFN clauses. On a similar note, the possibility of seconding staff to competition authorities in other jurisdictions, where E-commerce markets are more developed, could be explored.

Data gathering and analysis

- 11.3.8. When enforcing competition law, competition authorities may need to make practical adjustments to the way in which they collect and analyse data. Questionnaire responses indicate that issues of data collection and reliability concerns are posing challenges to competition authorities in ASEAN when dealing with cases in E-commerce markets. Cases of this nature require authorities to understand what type of data is required, and therefore the necessary skills needed to analyse this information, if, for example, an authority needs to examine the mechanics behind a pricing algorithm.
- 11.3.9. In investigating a platform business in a multi-sided online market, a competition authority may wish to collate data on the number of users on each distinct side of the market, and the number of transactions facilitated, in addition to information on pricing and sales. When the required data is not available, authorities may wish to consider conducting specific survey which would enable them to obtain the necessary data.

Monitoring of ongoing developments in E-commerce markets internationally

- 11.3.10. As explained throughout this handbook, the debate on competition law, and its enforcement, in light of the challenges brought about by E-commerce, is still at a relatively early stage of development across the world. For some of the challenges which have emerged to date, international consensus has not yet been reached (as, for example, on the use of wide versus narrow MFNs in Europe, see Case review 17). Progress towards international coordination is however being made, for example with the OECD among other international groups, promoting wide-ranging debate on the relevant issues. Competition authorities should therefore follow the international debate and the development of case law around the world in order to keep abreast of developments.
- 11.3.11. The importance of keeping up-to-date with developments in the understanding of E-commerce practices and adopting the correct competition policy approach is all the more important for practices, such as price setting algorithms fostering collusion, where a clear response has not yet been identified.
- 11.3.12. New challenges are also likely to emerge. As discussed by David Currie (2017), the chairman of the UK CMA, automated pricing algorithms may progress to such a point that they are able to independently establish collusive behaviour between competing firms in order to maximise industry profits, reaching this conclusion without the need for human programming due to machine learning capabilities built into the tools. If such an eventuality does occur, it is unclear whether this would represent a breach of competition law. It is therefore important that competition authorities monitor any of such developments in E-commerce markets.

Harmonisation of competition policy and law across ASEAN

- 11.3.13. In order to support the development of an integrated ASEAN market, competition authorities should continue to work towards coordination in the interpretation and enforcement of competition policy and law.
- 11.3.14. Currently, there are differences in the design and enforcement of competition policy and law in AMS. As highlighted in the Section 11.2, only some AMS have a law in place that permits an effects-based assessment of alleged anti-competitive unilateral conduct. As a result of differences such as this, businesses may need to adapt their practices according to which AMS they are operating within, in order to comply with competition law. Consequently, cross-border trade may be inhibited, and breaches of competition laws may be more common, as firms operating internationally may fail to modify their operations to suit the relevant jurisdiction.
- 11.3.15. In the short term, competition authorities could look to release short handbooks to help businesses operating in their jurisdiction understand the specific laws and approach in that jurisdiction. In the long run, however, harmonisation would be advisable.
- 11.3.16. The challenges faced by businesses when competition authorities adopt different approaches is demonstrated by the Booking.com case in Europe (Case review 17), where authorities have taken contrasting stances on the use of wide and narrow MFN clauses in the hotel booking industry, despite attempts to facilitate coordination.³²⁹
- 11.3.17. AMS should therefore work together to come to a coordinated view on the various types of conduct discussed in Sections 7 – 9 of this handbook. Producing guidelines for businesses to outline and clarify these positions would help build confidence among firms operating internationally in ASEAN.

³²⁹ An international working group including ten competition authorities (Belgium, Czech Republic, France, Germany, Hungary, Ireland, Italy, Netherlands, Sweden and the UK) was set up to coordinate actions for a possible harmonisation of approach on wide and narrow MFN clauses across jurisdictions.

12 Competition policy and law compliance checklist for businesses engaged in E-commerce in ASEAN

12.1. Introduction

- 12.1.1. The following checklist aims to provide guidance that businesses engaged in E-commerce within ASEAN can follow to minimise the risk of breaching competition law.
- 12.1.2. There are three core areas of conduct that businesses should be mindful of:
- a. Coordination with competitors;
 - b. Other anti-competitive agreements; and
 - c. Individual anti-competitive conducts (i.e. abuse of dominance).
- 12.1.3. Examples of actions that could be deemed as anti-competitive conducts across each of these areas in E-commerce markets include the following:
- a. Coordination with competitors – e.g. agreements to fix prices on an online platform, limit supply, or share customers;
 - b. Other anti-competitive agreements – e.g. fixing or restricting the price that retailers can sell at on online marketplaces, long exclusivity contracts; and
 - c. Anti-competitive conducts by individual firms (i.e. abuse of a dominance) – selling a significant share of the products/services in an industry and exploiting this position, for example by: tying/bundling to create or raise barriers, refusing to supply, or increasing switching costs for consumers.
- 12.1.4. There are some overarching principles that businesses should adhere to, and it is the responsibility of businesses and their employees to ensure compliance with competition law. In particular:
- a. Companies should not enter into any agreement or practice that infringes competition law;
 - b. If businesses are aware of anti-competitive behaviour by an employee within the firm, a competitor, supplier, or other business, it must be reported immediately to the relevant competition authority; and
 - c. Tacit participation may still infringe competition rules.
- 12.1.5. Underpinning this is a commitment that compliance with competition laws is driven from the top of the organisation.
- 12.1.6. Questionnaire responses highlight that competition authorities in AMS receive a relatively small number of complaints from consumers or firms regarding anti-competitive behaviour. Consumers and businesses should feel empowered to speak up if they are aware of behaviour which they believe infringes competition law. In order to make a complaint, the CCS suggests collecting the following information:³³⁰
- a. Information about yourself, and the organisation you represent (if applicable);
 - b. Information about the party or parties involved;
 - c. A brief description of the agreement, conduct or merger that you are complaining about; and
 - d. Any other relevant information and supporting documents.

12.2. Stages of risk management to avoid competition law infringement

12.2.1. To reduce the risk of behaving anti-competitively in E-commerce markets, firms should follow a four-step process which is in accordance with international best practice.³³¹

- a. Identify risks;
- b. Assess risks;
- c. Take action to reduce risks; and
- d. Review processes.

12.2.2. Each of these stages is considered in greater detail below.

12.3. Identify risks

12.3.1. Firms should be aware of general guidance on competition law in order to ensure compliance. Some important questions firms should consider for E-commerce markets are highlighted below. Firms should seek legal advice if a conduct gives rise to a risk of infringement.

1. Coordination with competitors:

a. Do your employees have contact with competitors via online communication channels?

If so, these employees should be thoroughly trained, and closely monitored. Contact by itself is not wrong, but the details that are communicated may cause concern e.g. regarding bidding or pricing behaviour.

b. Do you communicate with competitors, for example at industry events, or trade association meetings?

As in (a).

c. In your market, do employees move frequently between competing firms?

If yes, the likelihood of sharing confidential information is increased. Any employee who has recently worked for a competitor, or is leaving to join a competitor, should be trained on what is and is not appropriate to share with their new employer.

d. Do you ever work alongside competitors?

If so, competition law relating to horizontal agreements should be thoroughly reviewed, and staff working closely with competitors should be trained on what is and is not allowed, including sensitive information that shouldn't be shared.

e. Do you use algorithms to adjust your prices subject to movements in your competitors' prices?

If so, it should be determined whether or not the supplier of the algorithm also supplies competing firms. The mechanics of the algorithm should also be fully understood i.e. do competitors who use the same supplier also have similar responsive pricing.

f. Do you explicitly or implicitly agree with your competitors a limit to supply?

If so, the agreement should be reviewed thoroughly and assessed as to whether it constitutes illegal cartel behaviour.

g. Do you sign up to terms with an online platform that are common across competitors, and do these terms restrict in any way the price that you are able to sell your goods/services at? Or are you a platform that sets contractual terms for business users, and do these terms include clauses that restrict the price that users can sell goods or services at?

If so, the terms should be thoroughly reviewed by an expert trained in competition law, as they may amount to horizontal coordination among competitors.

³³¹ CMA (2014).

2. Other anti-competitive agreements: *(Note: These questions are framed on the basis of a manufacturer forming an agreement with a retailer. Retailers should also review this guidance to identify the types of clauses in agreements that may be deemed anti-competitive)*

a. Do you require your retailers to enter into exclusive contracts for long periods of time?

In some jurisdictions this may be treated as an anti-competitive agreement. It should therefore be determined whether this is the case in the jurisdiction(s) where the contracts have effect.

b. Does your business impose restrictions on retailers and online marketplaces that sell your products? E.g. the retail price they can sell at, who/where they can sell to, conditions that must be met for them to be able to sell the product; the quantity of the product they must buy/sell.

If so, the guidelines on use of vertical agreements in the relevant jurisdiction(s) should be reviewed to determine whether the restrictions are permitted. The rules and their interpretations may vary across different jurisdictions.

c. Do you set a recommended retail price to your retailers or a minimum advertised price, and do you monitor compliance to this?

If so, such behaviour may be deemed to be equivalent to Resale Price Maintenance (RPM), conduct that is prohibited in some jurisdictions. If the recommended retail price is enforced (i.e. with punishment for deviators – e.g. withdrawal of supply or reduction in sales), it is likely to constitute RPM.

d. Do you exclude or restrict retailers from selling online?

Such conduct may be deemed anti-competitive in some jurisdictions. Guidance on internet sales bans should be reviewed in the relevant jurisdiction(s), and/or the competition authority should be contacted to seek clarity on whether the ban is permitted.

e. Do you treat retailers operating online differently from retailers with physical stores?

Such conduct may be deemed anti-competitive in some jurisdictions. Guidance on discrimination between channels should be reviewed in the relevant jurisdiction(s), and/or the competition authority should be contacted to seek clarity on whether the conduct is permitted.

f. Do you charge different wholesale prices (or offer different incentives) to retailers depending on whether products are sold online or offline?

As in (e).

g. Do you exclude or restrict retailers from selling on online platforms such as marketplaces?

Such conduct may be deemed anti-competitive in some jurisdictions. Guidance on platform bans should be reviewed in the relevant jurisdiction(s), and/or the competition authority should be contacted to seek clarity on whether the conduct is permitted.

h. Do you enter into 'best price' guarantees with retailers?

If so, it should be determined whether the clause breaches competition law in the jurisdiction in which it is being implemented i.e. in some jurisdictions different forms (or all forms) of price parity or MFN clauses may be prohibited.

i. Do you restrict retailers from using price comparison websites (PCWs)?

Such conduct may be deemed anti-competitive in some jurisdictions. Guidance on PCW restrictions should be reviewed in the relevant jurisdiction(s), and/or the competition authority should be contacted to seek clarity on whether the conduct is permitted.

3. Individual anti-competitive conduct by firms:

- a. Are you a business with a large share of any of the markets in which you operate (i.e. over 40%)³³² or do you sell a significant share of the products/services traded in the market?
If so, you may be considered dominant in some jurisdictions, therefore certain types of conduct may be deemed anti-competitive when they otherwise would not. Note, the exact definition of dominance will vary among different jurisdictions.
- b. Do you operate an online platform/website through which you cover a significant share of the activity in the market (on any side of the platform)? E.g. transactions made, or platform users.
If so, you may be considered dominant even if the market share of sales is not beyond the threshold for dominance.
- c. Do you impose any restrictions on advertisers/retailers that sell through your platform? E.g. the price they can sell at, or restrictions on which other websites they can sell on.
Such conduct may be deemed anti-competitive in some jurisdictions. Guidance on conduct that may be deemed anti-competitive should be reviewed in the relevant jurisdiction(s), and/or the competition authority should be contacted to seek clarity on whether the conduct is permitted.
- d. Do you refuse to supply customers with no objective justification?
As in (c).
- e. Do you offer different prices to similar customers without objective justification?
As in (c).
- f. Do you use bundling or tying strategies, whereby you sell/package products that you have market power in alongside other products where competition with other firms is fiercer?
As in (c).
- g. Do you impose terms on downstream firms? E.g. a minimum purchase quantity or an exclusivity clause.
As in (c).
- h. Do you charge a price below average variable cost and how do you recoup these costs?
Some forms of below cost pricing may be considered predation, and, as such, infringe competition law. If so, seek guidance from in-house or external lawyers as to whether this conduct constitutes predatory pricing.

³³² Market definition may vary on a case-by-case basis. The general rule is that above 40% dominance is assumed. In your risk assessment in order to be risk averse assume the narrowest market definition in terms of goods/services included and geographic area covered.

12.4. Assess risks

- 12.4.1. Having identified any areas where there might be a risk of breaching competition policy and law, companies should assess the likelihood of any breaches occurring, and take actions to prevent these from taking place.
- 12.4.2. Companies should understand in more detail the competition law(s) they are at risk of breaching. This may vary in each of the jurisdictions in which they operate. For more information on competition policy and law across ASEAN, and the rest of the world, businesses should consult the resources available at:

www.asean-competition.org/

www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/business.aspx

- 12.4.3. Companies should also identify which of their employees are most at risk of breaching competition law, for example those who agree contractual terms with customers, suppliers or users of an online platform, or those who have contact with competitors, or are in sales roles.

12.5. Take action to reduce risks

- 12.5.1. Businesses involved in E-commerce should set up processes to reduce the risk of breaching competition laws. For instance, firms may want to:
- Implement a procedure to register when an employee is attending events where competitors will be present, and provide guidance to these staff in such circumstances;
 - Create a log that captures all correspondence with competitors (whether this is face to face, or via online communication channels) and have someone review this against what is and isn't allowed under competition policy and law;
 - Have a trained employee in competition policy and law review any contracts before they are entered into e.g. when signing up to an online platform;
 - Train employees on relevant competition policy and law, and how these laws are enforced, highlighting the potential consequences of any breaches;
 - Establish a whistleblowing telephone hotline so that employees can confidentially raise any competition policy and law concerns that they might have, or ask for advice when in an uncertain situation; and/or
 - Consult competition lawyers.

12.6. Review processes

- 12.6.1. Firms should establish a periodic review process of their competition law compliance measures based on the risks identified.



Part C:

Section for Competition Advocacy

13 Regulatory and legal barriers in ASEAN to E-commerce and as impediments to a single digital market

13.1. Introduction

13.1.1. This section looks first at access to E-commerce in ASEAN before considering cybersecurity in the region.

13.2. Access to E-commerce

Customs and tax regimes

13.2.1. Differing customs and tax regimes within ASEAN affect access to E-commerce in the region. This has often led to uncertainty around costs for firms, which has had a negative impact on the potential for economies of scale for companies within the sector.³³³ However, the establishment of the ASEAN Economic Community in 2015 should act as an enabler to overcome this barrier, as one of its objectives is to streamline customs and tax rules across AMS.³³⁴

Online connectivity

13.2.2. Average connection speeds in the ASEAN6 are faster than in the Americas, Middle East and Africa, and are similar to worldwide averages, as shown in Figure 4. However, as evidenced by Table 7 in Section 4.2, there is a significant spread in terms of internet speeds within ASEAN, with connectivity speeds in some AMS significantly slower than global averages.

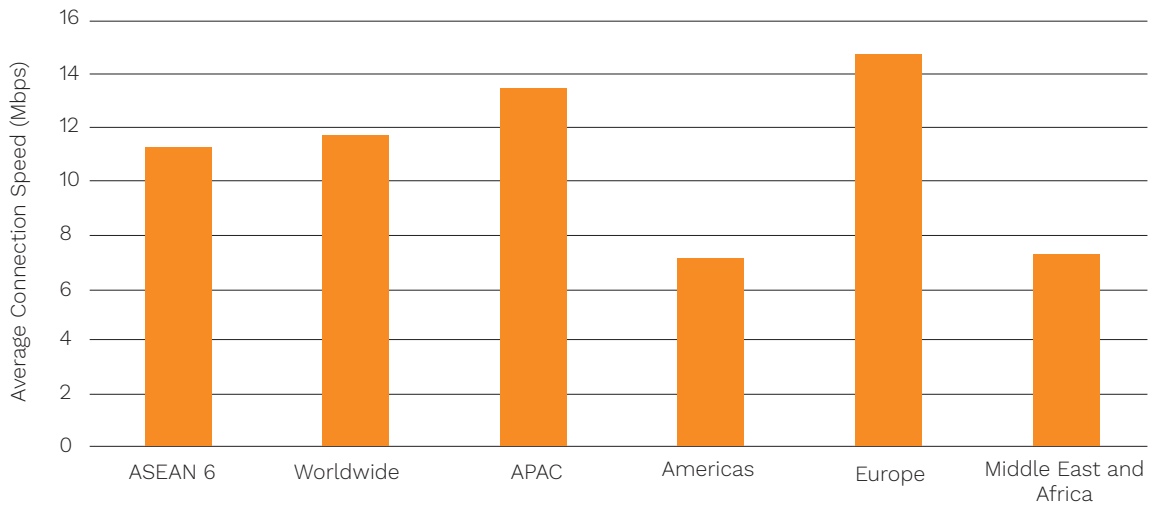
13.2.3. Questionnaire respondents identified slow internet speeds as one of the key barriers to the development of E-commerce in the region. One of the root causes of this is the limited overall network coverage, driven by the high risks for private firms to invest in infrastructure due to the uncertainty about their ability to generate an adequate return on their investment in remote and rural areas. The cost of connection within the region is also high, with only Singapore and Malaysia considered to have affordable broadband,³³⁵ as discussed in Section 4.

³³³ Singapore Post (2014), page 12.

³³⁴ ASEAN Economic Community (2015).

³³⁵ AT Kearney (2015), page 6.

Figure 4: Average internet speeds across the world



Source: Akamai state of the internet, Q1 2017 report. Note: Each bar consists of all countries listed within the Akamai report for that region. For example, 'Americas' consists of data from 15 different countries across North, South and Central America, with internet speeds ranging from 1.4 Mbps in Paraguay, to 18.7 Mbps in the United States.

13.2.4. State aid could be used to increase broadband coverage. This has been successful in the European Union, where funding was used to encourage broadband development in rural areas which would have otherwise been unattractive to private investors. This programme has been successful in providing consumers with equal access to broadband.³³⁶

13.3. Cybersecurity

The current challenge

13.3.1. As of 2013, only 2% - 11% of digital buyers use online payments in the region.³³⁷ One of the drivers of this low take up rate is concerns associated with data security and cybercrime.

13.3.2. One of the five key actions identified by the ASEAN Business Club Forum in 2014 to promote E-commerce was to reinforce cybersecurity.³³⁸ This involves *“increasing information sharing and bilateral assistance, harmonising existing legislative frameworks, and creating a regional online dispute-resolution facility”*.³³⁹

13.3.3. Currently, there is no regional entity set up to fight cybersecurity issues. This has created anxiety amongst consumers in the region.³⁴⁰ Establishing E-payment-specific regulations and harmonising E-payment regulations regionally would help to address cybersecurity issues.³⁴¹ This would help to improve the level of trust among consumers who would then be more likely to actively purchase items online. Figure 5, presents the current problem across ASEAN.

³³⁶ AT Kearney (2015), page 8.

³³⁷ Vela Asia online shopper (2013).

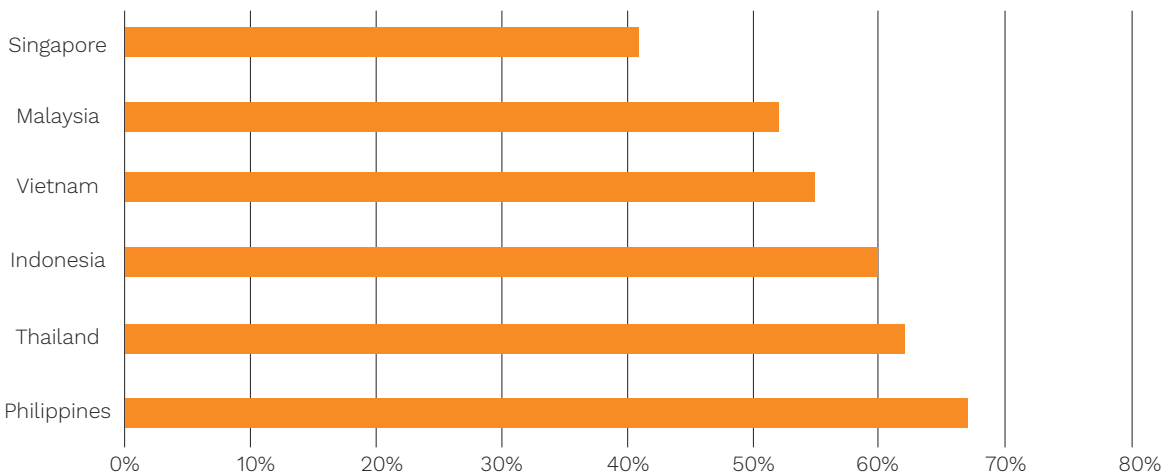
³³⁸ AT Kearney (2015).

³³⁹ AT Kearney (2015), page 1.

³⁴⁰ AT Kearney (2015), page 12.

³⁴¹ AT Kearney (2015), page 1.

Figure 5: Digital Buyers who say they do not trust giving their credit card information online



Source: AT Kearney (2015).

E-payment solutions

13.3.4. E-payment solutions are helping to overcome these issues, such as Amazon Payments and GHL Systems, an IT service management company. The governments of Singapore and Malaysia have also proposed potential solutions to improve payment regulations. The Monetary Authority of Singapore (MAS) has recently proposed a new regulatory framework and governance model for payments, which aims to bring payment regulations under a single framework to strengthen standards of consumer protection, anti-money laundering and cybersecurity. MAS has also proposed a National Payments Council, to coordinate initiatives such as promoting interoperability and adopting common standards between payment solutions.³⁴² In Malaysia, the government has set three goals for a new integrated payment system called the Entry Point Project (EPP), which is due to be implemented in 2020 and is aiming to: reduce cash transactions from more than 90% to 63%; increase E-payments to 200 per capita per year; and increase the number of point-of-sale terminals to 25 per 1,000 inhabitants.

13.3.5. For E-payments, regulation is required to ensure that current legal uncertainties can be reduced. For example, in ASEAN, cross-border transactions often require going through a heavy 'know-your-customer' process in order to comply with local anti-money laundering regulations. This increases compliance costs greatly and has a negative impact on the experience of the customer. This should also strengthen regulatory symmetry within the region between financial institutions and other payment agents to foster a fair and competitive environment, as long as this occurs throughout ASEAN as a whole.³⁴³

³⁴² Monetary Authority of Singapore (2016).

³⁴³ AT Kearney (2015), page 16.

14 The impact of intellectual property rights (including its territorial nature) as a barrier to E-commerce in ASEAN and as an impediment to a single digital market in ASEAN

14.1. Introduction

Overview of intellectual property rights

- 14.1.1. Intellectual property (IP) is defined as “creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.”³⁴⁴ Moreover, IP rights are defined as “the assignment of property rights through patents, copyrights and trademarks. These property rights allow the holder to exercise a monopoly on the use of the item for a specified period”.³⁴⁵
- 14.1.2. There are economic costs associated with granting such monopoly power as a result of creating a barrier to entry for firms that do not have access to the protected property, as discussed in Section 4.3. However, the benefits to society from incentivising innovation by granting IP rights are generally regarded to outweigh these costs.³⁴⁶ Specifically, IP rights foster innovation, creativity, entrepreneurship, investment in knowledge-based assets and growth,³⁴⁷ both in offline and online markets.
- 14.1.3. Competition authorities’ objectives of preserving competition, and the objectives of IP granting their owners exclusive rights, both have the ultimate objective of promoting consumer welfare via an efficient allocation of resources. The effective coverage, operation and enforcement of IP rights is therefore vital for the promotion of competition by creating the right incentives for investments in innovation.

The importance of an effective IP rights system

- 14.1.4. If there are inefficiencies in IP rights systems, the development of markets may be inhibited as firms’ incentives to invest are diminished. This is true in both brick-and-mortar and online markets. However, issues relating to IP rights are particularly important in E-commerce markets, for example in new digital content markets which have emerged where IP rights are required, such as for E-books. In this regard, two out of the five questionnaire respondents cited IP rights as a barrier to the development of E-commerce markets in their jurisdiction.
- 14.1.5. Infringement of IP rights is not only a form of economic inefficiency. The growing risk of counterfeit goods poses a threat for the innovative businesses that hold IP rights, and also consumers, relating to the safety, health and security implications of goods that are sold through E-commerce.³⁴⁸

Structure of this section

- 14.1.6. This section first outlines how IP rights can create a barrier to the development of E-commerce markets, before discussing the territorial nature of IP rights and the importance of an effective IP rights system for the development of a single digital market in ASEAN. Finally, the role of competition authorities in promoting an effective system of IP rights allocation and enforcement is also considered.

³⁴⁴ WIPO (2017).

³⁴⁵ OECD (1993).

³⁴⁶ OECD (1993).

³⁴⁷ OECD (2015b), page 12.

³⁴⁸ OECD (2007b).

14.2. Intellectual property rights as a barrier to E-commerce

- 14.2.1. IP rights are crucial for the development of E-commerce markets as they provide firms with the confidence that the outputs from their investments will be protected, therefore incentivising such investment by ensuring sufficient returns.³⁴⁹
- 14.2.2. By contrast, in the absence of an effective system of IP rights in E-commerce markets, firms will not have the incentive to invest, thus harming the development of such markets. For example, if piracy is common in digital content markets, there is less incentive for firms to develop such content. One questionnaire respondent highlighted that this is currently the case in its jurisdiction. In addition, IP rights must be effectively enforced to give firms the confidence and security to make investments.
- 14.2.3. The rise of E-commerce has fuelled globalisation as it has allowed firms to manufacture and market their goods and services on a global scale. Therefore, for firms in the global market which rely on licenses for IP, these rights now need to apply globally, rather than nationally. As a result, differences between licensing rules around the world can potentially prevent firms from engaging in cross-border trade in both online and offline markets.³⁵⁰ Lack of harmonisation of IP rights among AMS may therefore create a barrier and prevent firms from operating and trading effectively on a global scale.

14.3. Intellectual property rights as a barrier to a single digital market in ASEAN

- 14.3.1. IP rights are typically granted on a territorial basis; i.e. giving a firm protection in a certain location for a specified period of time. Currently in ASEAN, IP rights are granted and enforced on a national basis. As a result of the territorial nature of IP rights, firms may not be able to offer consumers in another AMS a particular good or service. This may inhibit cross-border trade and form a barrier as ASEAN continues to move towards an integrated market.

IP rights in digital content markets

- 14.3.2. This is particularly relevant in digital content markets. In its Final Report on the E-commerce Sector Inquiry, the European Commission (2017b) considers IP rights in digital content markets in detail as these issues are highly relevant for a single digital market such as the European Union. It is highlighted how the emergence of digital markets has led to the development of a range of complex licensing arrangements, with rights typically licensed on an exclusive or non-exclusive basis for certain territories over a specified length of time. It is concluded that exclusive licensing on a territorial basis is not in itself problematic, but competition concerns may arise if certain other contractual restrictions are present, such as restrictions on cross-border passive sales. However, the European Commission does not commit to a firm stance either way, but rather suggests that it will assess licensing arrangements on a case-by-case basis, taking into account *“the characteristics of the content industry, the legal and economic context of the licensing practice and / or the characteristics of the relevant product and geographic markets.”*³⁵¹ Additionally, the European Commission explains how bundling of digital content (for instance alongside offline content) may raise concerns if such conduct leads to a restriction of output, for instance if a licensee does not fully exploit the online rights it has acquired. The duration of contracts, or the terms of renewal may also constitute barriers for new entrants.

Allocation and enforcement of IP rights in AMS

- 14.3.3. For a firm seeking to obtain IP rights across ASEAN, it must do so separately in each AMS, as IP rights and patents are only valid in the territory in which they are granted, thereby raising an additional administrative burden and cost for firms. Although firms may be able to register IP across the entire region, lengthy processes for obtaining IP rights in some countries may deter firms from making the investment, as highlighted in Table 13. Furthermore, if region-wide sales are required in order to make a sufficient return on an investment, investment across the region as a whole may be inhibited, thus restricting the growth and development of E-commerce markets. The differences between IP offices in AMS are highlighted in Table 13 below. A number of performance metrics are presented, and compared with the equivalent figures in the US.

³⁴⁹ OECD (1997).

³⁵⁰ US Department of Justice (2004).

³⁵¹ European Commission (2017d), page 256.

Table 13: AMS IP Office performance

ASEAN Member State	Average time to register a patent (2011)	Average time to register a trademark (2011)	IP Protection Rank (out of 138) (2016)	Timeliness of Receiving Office to transmit copies of PCT filings to the International Bureau (proportion where the application transmittal delay was 2 weeks or less) (2016)
Brunei Darussalam	-	-	58	-
Cambodia	3 years	3 months	130	-
Indonesia	5.6 years with normal process, 4.9 years via PCT	14 months	50	14.3%
Lao PDR	4 years	6 months	96	54.8%
Malaysia	1.6 years via fast-track basis without objections; 5.4 years via Paris Convention; 2.2 years via PCT	17 - 24 months	27	-
Myanmar	-	1 month	-	-
The Philippines	4 - 5 years	10 months	74	30.0%
Singapore	3 - 4 years	6 - 8 months	4	99.5%
Thailand	3 years	12 - 18 months	121	20.6%
Vietnam	2 - 3 years	15 - 18 months	92	16.7%
USA	2.3 years	10 months	16	58.0%

Source: Average time to register a patent/trademark in AMS - Bernard and Wedel (2011); Average time to register a patent/trademark in US - IP Spotlight (2016); IP Protection Rank - World Economic Forum (2017); Timeliness of Receiving Office to transmit copies of PCT filings to the International Bureau - WIPO (2016); Notes: IP Protection Rank based on World Economic Forum Expert Opinion Survey "In your country, to what extent is intellectual property protected?"; The Patent Cooperation Treaty (PCT) supports applicants get quicker international patent protection. The first stage of this process is for the Receiving Office (where the patent is first submitted) to transmit the filing to the International Bureau.

14.3.4. There are also currently differences in the level and speed of IP rights enforcement across AMS, as highlighted by the varying IP Protection Ranks among the AMS in Table 13. Some countries such as Singapore and Malaysia perform relatively strongly, and are ranked in the top quartile of countries, however it is evident that improvements in IP enforcement are required in other AMS. Specific issues outlined by the European Commission (2015c)³⁵² include high levels of piracy and counterfeit goods, as well as a lack of regulatory data protection. It is also highlighted that the process of undertaking judicial processes can be lengthy, therefore firms are less inclined to pursue such forms of enforcement. Consequently, cross-border trade is inhibited as firms' incentives to invest are reduced due to fears that their investments will not be protected even if they are granted IP rights.

³⁵² Available at: <https://euipo.europa.eu/ohimportal/documents/11370/0/Report+on+the+protection+and+enforcement+of+intellectual+property+rights+in+third+countries>

Harmonisation of IP rights allocation and enforcement

- 14.3.5. Improvements in, and consistency of IP rights enforcement among AMS are therefore highly important. All AMS are members of the World Trade Organization (WTO) and are required to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which sets minimum standards on IP rights protection and enforcement,³⁵³ therefore basic legislative frameworks are in place. Furthermore, progress is being made across the region to improve IP rights enforcement. For example, the Philippines has recently granted new IP rights enforcement and inspection functions to the Philippines IP Office, processes which were previously only granted to the Philippine National Police, the National Bureau of Investigation, the Bureau of Customs and the Optical Media Board.³⁵⁴ Indonesia has also followed a similar trajectory of improvement, for example by introducing new legislation to tackle online infringement in its Copyright Law (No. 28/2014).³⁵⁵
- 14.3.6. As ASEAN continues to move towards a single integrated market following the creation of the ASEAN Economic Community and implementation of the single digital market, cooperation between competition and IP authorities is vital, both nationally and within ASEAN. Coordination between these groups is important to help to bridge the gap between parliaments that set the IP rules, and IP authorities and competition authorities who enforce these rules. The work of the ASEAN Working Group on Intellectual Property Cooperation (AWGIPC) will help to drive this across ASEAN through initiatives such as the ASEAN Intellectual Property Rights Action Plan 2016-2025 which outlines 19 new initiatives for the coming 10 years.
- 14.3.7. Cooperation of this kind should cover the following issues:³⁵⁶
- a. Exchange of technical information;
 - b. Sharing of procedural routines, guidelines and standards for the treatment of mergers or anti-competitive practices involving IP;
 - c. Sharing of studies concerning the relationship between IP rights and antitrust; and
 - d. Mutual training of personnel from IP and competition authorities.
- 14.3.8. These principles are reflected in the 19 initiatives included in the ASEAN IP Rights Action Plan (2016-2025).
- 14.3.9. An important step forward in the harmonisation of patents regimes across ASEAN is through the Patent Cooperation Treaty (PCT), of which all AMS except Myanmar (which is a member of TRIPS) are members. The PCT, originated in 1970, provides a unified procedure for filing patents in each of its Member States, and provides assistance to businesses and national patent offices. Therefore, a firm that files an international patent application under the PCT can benefit from protection for its invention across a large number of countries.³⁵⁷ This is important for breaking down the barriers to cross-border trade that arise from the territorially limited nature of IP rights, and ensuring the effective operation of a single digital market. Table 13 does, however, highlight differences in the performance of AMS IP offices in passing on patent applications to the International Bureau as part of the PCT process.

³⁵³ US commerce department, (2017).

³⁵⁴ European Commission (2015c).

³⁵⁵ Ibid.

³⁵⁶ WIPO (2017).

³⁵⁷ At time of writing there are 152 PCT contracting states.

14.4. The role of competition authorities

Interaction between IP law and competition law

- 14.4.1. IP rights promote innovation and lead to economic growth, competitiveness and job creation, therefore competition law should complement IP law. Through their advocacy role, competition authorities are well positioned to promote the effective enforcement of IP rights, in particular by encouraging coordination between different countries. However, the current interaction between IP law and competition law is limited. The main reason for this is that IP rights typically have checks to limit the possibility of abuses that would violate competition law, although issues are more likely to occur in relation to new subject matters which were previously unprotected by IP law.³⁵⁸
- 14.4.2. There is a risk that IP law by itself does not promote consumer welfare as innovators may attempt to stifle future competition, or consumers may not benefit from fair access to these innovations.³⁵⁹ Competition authorities can therefore help to find the right balance between the interests of distributors, artists, inventors and creators, and the interests of consumers.³⁶⁰ Effective competition rules enforced by competition authorities are part of the answer, though if there is a fundamental flaw in IP rules, this can only be solved by IP legislation. Nevertheless, competition authorities can support IP legislators to effectively design these rules.

Supporting the harmonisation of IP rights allocation and enforcement

- 14.4.3. Competition authorities can support the improvement and harmonisation of IP rights allocation and enforcement across ASEAN by providing guidance and support to IP offices in ensuring that the optimal level of IP rights is granted throughout the region. Competition authorities within ASEAN should listen to local businesses and consumers communities in order to understand when IP rights may be unfairly impacting competition, and therefore harming consumers. As highlighted by WIPO (2017b), too much IP may inhibit competition when firms are granted exclusivity for non-differentiating features. However, WIPO (2017b) also outlines how too little IP is sub-optimal due to under-investment resulting from a lack of protection for the returns from firms' innovation.

Competition authority intervention

- 14.4.4. Many firms hold patents for technology that is regarded as 'standard' for that industry to function, such as the technology required to send a picture message via a mobile phone. Regardless of the manufacturer of the phone, or the mobile network that is used, it is assured that the picture will be delivered.³⁶¹ This is the result of Standard Essential Patents, or SEPs. SEPs are common in E-commerce markets, in particular in the electronics, computing and communications sectors.³⁶² Owners of SEPs should licence their technology through fair, reasonable and non-discriminatory (FRAND) terms, to encourage stakeholders to use and implement an industry standard, whilst still ensuring that owners of SEPs are appropriately rewarded.³⁶³ A key practice that competition authorities should be wary of is when an SEP holder imposes unreasonable terms and/or excessively high prices on those who require the use of this technology, therefore restricting access to the technology and harming both consumers and innovation within the industry.
- 14.4.5. Competition authorities should also intervene when IP rights are abused more generally by rights holders, though this is only likely to be in exceptional circumstances. For example, intervention may be required if technology transfer agreements include price-fixing restrictions, limitations of output, or allocation of customers or markets.³⁶⁴ Refusals to license can be deemed as an abuse of dominance, as seen in the case against Microsoft for refusing to disclose interoperability information.³⁶⁵ Further concerns may arise if a licensing firm forecloses competitors through tying or bundling strategies.

³⁵⁸ Thomson Reuters (2007).

³⁵⁹ European Commission (2015d).

³⁶⁰ European Commission (2015d).

³⁶¹ European Commission (2015d).

³⁶² Thomson Reuters (2007).

³⁶³ DLA Piper (2015).

³⁶⁴ Slaughter and May (2016).

³⁶⁵ Case reference: T-167/08

15

Recommendations on the strategies, tools or approaches AMS can adopt to help government bodies within their respective countries to understand the impact of their policies and initiatives on competition in the E-commerce sector

15.1. Introduction

Importance of effective policy implementation

15.1.1. It is important that governments maintain and promote competitive markets in order to foster productivity growth in their countries. Over the past thirty years the competition policy, law, and economics debate has highlighted how overly regulated product markets can inhibit the development of competition and thereby hamper productivity growth. It is therefore important that governments attempt to minimise the degree of regulation in markets when the same objective (of preventing consumer detriment) can be achieved by the effective application of competition law. At the same time, this could minimise the regulatory burden on businesses, hence promoting entry and fostering further competition. This is particularly true in E-commerce markets, where there is significant growth potential and the pace of innovation is particularly fast.

Structure of section

15.1.2. This section presents a roadmap to aid government bodies in conducting an assessment of the likely impact of new policies on competition in E-commerce markets, and in evaluating the effect of a new policy following implementation. These guidelines can also be used to determine whether it is beneficial to remove a particular policy or regulation from a market. This section first considers the role that competition authorities can play in supporting government bodies to conduct such assessments, and then provides guidance on conducting ex ante and ex post assessments of policies in E-commerce markets.

15.2. Role of competition authorities and regional bodies

Support that competition authorities can provide government agencies

- 15.2.1. In order to foster a broad approach to policy-making which considers the implications on competition and markets of new proposed policies, central governments as well as competition authorities can play a significant role. This role is essentially twofold. First, they can promote a wide debate across agencies which fosters the exchange of experience and expertise, thus providing a voice to competition authorities in a constructive dialogue with sector regulators and other relevant government bodies. Relevant examples in the UK are the UK Competition Network,³⁶⁶ and the UK Regulators Network (UKRN),³⁶⁷ whose aims are to support and enable competition in various sectors across the economy. In ASEAN, there is the CCS's Community of Practice for Competition and Economic Regulations (COPCOMER) which provides an inter-agency platform for CCS, sector regulators and other government bodies to share best practices and experiences on competition and regulatory matters. Second, a requirement to conduct a competition impact assessment for newly proposed policies can be an extremely effective tool in reducing barriers and mitigating potential regulatory challenges for businesses.

Support for government agencies assessing proposed policies

- 15.2.2. Competition authorities should support government bodies in applying the guidelines provided in sections 15.3 and 15.4 when deciding whether or not to intervene in a particular E-commerce market, and, if so, how best to do so without harming competition. For instance, competition authorities can provide advice on the best data to use, and the quantitative techniques that should be adopted, drawing on experiences from previous investigations or market studies in related industries.
- 15.2.3. There are a number of resources that competition authorities have produced which should be shared with government bodies to assist them in assessing the impacts of policies. Further information on these resources are highlighted in Section 15.3.
- 15.2.4. Competition authorities can also work alongside government bodies to conduct joint market studies, especially when there are both regulatory issues and competition concerns in a particular market. Sharing of knowledge between the two bodies can ensure that all relevant information is being considered, and the correct conclusions are reached.
- 15.2.5. To ensure that government bodies conduct assessments before implementing a new policy, competition authorities can also play a stronger advocacy role by pro-actively reaching out to government bodies to explain the importance of conducting competition assessments, and by highlighting the adverse effects that can occur in the absence of a thorough assessment. In such dialogues, competition authorities should also explain the support that they can provide in conducting these assessments, and highlight previous experience that the authority has in that market, or other related markets. Competition authorities should also draw upon their network of other competition authorities across ASEAN, and in other jurisdictions, who may also have relevant experience in a particular market.

Role of regional bodies

- 15.2.6. Regional bodies, such as the ASEAN Experts Group on Competition (AEGC) also play a vital role in assisting government bodies to understand the impact their policies have on competition. A body such as the AEGC helps to strengthen the regulatory environment across ASEAN by hosting training, workshops and seminars to strengthen the capabilities of competition-related agencies, and operates as a forum to discuss and coordinate competition policies in the region.

³⁶⁶ <https://www.gov.uk/government/groups/uk-competition-network>

³⁶⁷ <http://www.ukrn.org.uk/>

15.3. Ex ante evaluations of policies

Overall approach

- 15.3.1. A sound assessment of the implications to competition which a proposed policy may bring about would start from considering the following set of questions:³⁶⁸
- a. Will the measure directly or indirectly limit the number or range of suppliers?
 - b. Will the measure limit the ability of suppliers to compete?
 - c. Will the measure limit suppliers' incentives to compete vigorously?
 - d. Will the measure limit the choices and information available to consumers?
- 15.3.2. If the answer to any of these questions is yes, policymakers should conduct a more thorough review of whether or not to implement the policy, and evaluate the effect on competition from alternative forms of the policy intervention.
- 15.3.3. Firstly, government bodies should identify all of the affected markets. Importantly, this may extend beyond the products or services immediately affected (both horizontally and vertically – up and downstream) and geographic areas that the policy directly targets. Additionally, as discussed throughout this handbook, many E-commerce markets are multi-sided in nature. In these instances, all sides of the market should be evaluated, and related markets considered; for example, in the online search market both web browsers and advertisers would be covered. Next, in each of the affected markets, government bodies should assess the extent to which competition will be adversely affected, and compare this to a counterfactual scenario of no intervention. Comparisons with alternative ways in which the policy objective may be achieved (e.g. through a different policy or alternative form of intervention) should also be undertaken.
- 15.3.4. In addition to the four questions above, further questions for a competition impact assessment in an E-commerce market include the following: (for all questions, if the answer is yes, competition is more likely to be harmed)
- a. Is exclusivity granted to a single firm, or licenses given to a restricted number of companies?
 - b. Are firms' costs increased as a result of the policy, and will this increase the likelihood of firms finding it difficult to operate or leaving the market as a result?
 - c. Will it be harder for new firms to enter the market as a result of the policy?
 - d. Will some firms (e.g. small firms) be more adversely affected than others as a result of the policy?
 - e. Will firms have less flexibility to set prices?
 - f. Will firms be less able to compete on the quality of goods and/or services offered?
 - g. Will the policy favour either brick-and-mortar or online retailers more than the other?
 - h. Does the regulation make it easier for competing firms to work together as opposed to in competition?
 - i. Will customers have less degree of choice as to which firm they purchase a good or service from?
 - j. Will consumers have access to the less information following implementation of the policy, or is information be harder to understand?
 - k. Will it be harder for customers to switch from one firm to another?
 - l. Will it be harder for consumers to multi-home following implementation of the policy?
 - m. Will the policy result in a tipping point in the market as a result of network effects?
 - n. Will the market grow at a slower rate as a result of the regulation?

³⁶⁸ CMA (2015b), page 7.

Types of assessment

- 15.3.5. Assessments of proposed policies may be qualitative or quantitative in nature. Qualitative assessments may combine economic arguments with insights from research, and studies on similar previous policies. For example, conclusions may be reached following a comparison between the merits and weaknesses of different interventions. Although relatively easy to understand and implement, qualitative assessments are unable to put values on certain costs and benefits. It is therefore difficult to weight the respective advantages and disadvantages of various policies, and come to a conclusion as to which is best. For more robust analysis enabling such weighting, quantitative approaches can be used (e.g. cost-benefit analysis), though these methods are typically harder to implement, and are to a large extent reliant on the availability of data.
- 15.3.6. In conducting quantitative assessments in E-commerce markets, governments may look at the effect of similar policies in related product or geographic markets (controlling for market- or place-specific factors respectively), or previous policies in the targeted market (controlling for time-variant factors). However, given the rapid growth and changing nature of E-commerce markets, it may be difficult to control for time-variant factors.
- 15.3.7. Specific data that government bodies may find helpful to consider when conducting assessments in E-commerce markets include:³⁶⁹
- a. Levels of market concentration (i.e. the distribution of market shares of firms);
 - b. Levels of entry into the market by firms (considering both the overall level and the level of entry among online and brick-and mortar retailers separately);
 - c. Levels of information available to consumers and the degree to which this information can be understood and easily accessed by consumers;
 - d. Costs of entry to the market for firms;
 - e. Costs of exiting the market for firms;
 - f. Levels of innovation or R&D spend in the industry by firms (e.g. new features available on website);
 - g. Levels of consumer switching between firms;
 - h. Switching costs for consumers;
 - i. Extent to which consumers multi-home;
 - j. Costs to consumers in multi-homing;
 - k. Interoperability between online platforms;
 - l. Price levels in the market;
 - m. Efficiency of firms in the market (e.g. costs of production);
 - n. Quality of services provided to customers (e.g. delivery success rates, delivery times, returns policies, features of websites);
 - o. Quality of goods provided to customers;
 - p. Degree of diversity offered by firms in products/services (e.g. diversity of features available on different websites); and
 - q. Quantity of goods/services provided (and/or rate of growth in this).

³⁶⁹ CMA (2015b), page 9.

- 15.3.8. For a more detailed outline of the principles and approaches competition authorities should follow in conducting impact assessments such as these, the OECD (2015), CMA (2015c) and CCS (2016) provide useful discussions, including examples of previous assessments.

15.4. Ex post evaluations of policies

- 15.4.1. If a government body decides to implement a policy in stages, it can assess the policy's initial impact on competition before deciding whether to continue to implement the policy, or expand it more widely. A government body may also want to evaluate how accurate it was in its ex ante evaluation in order to learn lessons for future assessments. For both of these purposes a government body may want to conduct an ex post evaluation of a policy, and consider the effect that its intervention had on competition in the market.
- 15.4.2. When conducting ex post evaluations such as these, the market being evaluated should be compared to a baseline market unaffected by the policy. Examples of such baselines may be: the same market in the period before the policy was implemented (controlling for time-variant factors); a geographic area where the policy was not implemented (controlling for place-specific factors); or a similar related market that does not have an equivalent policy in place (controlling for market-specific factors). Ex post evaluations can also be conducted relative to a baseline of alternative policies that were considered in the ex ante assessment. As discussed in the previous sub-section, controlling for time-variant factors may be challenging in E-commerce markets where market characteristics are often quick to change, therefore the first of the three approaches above may be hard to implement in practice.
- 15.4.3. Data to be considered in these ex post evaluations are the same as those discussed in the previous sub-section for quantitative ex ante evaluations.
- 15.4.4. The OECD (2015) advise that the time period to wait before conducting an ex post evaluation should be carefully considered, ensuring sufficient time for the policy to have an effect, but not waiting too long such that it becomes difficult to separate the effect of the policy from general shifts in the market. A case-by-case approach should be adopted, though the OECD (2015) recommend that government bodies should typically wait 2-3 years before conducting an ex post assessment. Additionally, a different team should conduct the ex post evaluation to that which conducted the ex ante assessment, in order to ensure that the approach taken is not biased in any way, and that mistakes can be identified and lessons learned.

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Conclusions

16 Conclusions



E-commerce markets in the six largest economies in ASEAN have reached a total market size of

US\$7
billion

B2C E-Commerce sales in Southeast Asia alone are predicted to grow

17.1%
annually

- 16.1.1. E-commerce markets have rapidly emerged and grown across ASEAN over the past decade. Currently E-commerce markets have reached a total market size of US\$7 billion across the six largest economies in ASEAN;³⁷⁰ and markets are predicted to continue to grow across the region. Over the coming 3 years, B2C E-commerce sales in Southeast Asia alone are predicted to grow at an annual rate of 17.1%.³⁷¹
- 16.1.2. There are, however, a number of barriers which may raise hurdles for this growth to be achieved. The level of development of technological infrastructure in the region is one such barrier. Legal and regulatory frameworks can also inhibit cross-border trade by failing to provide full and adequate protection to consumers from online threats to personal data and financial information. Piracy and the sale of counterfeit goods are also common threats to consumers and businesses alike.
- 16.1.3. Consumers have however largely benefitted from the emergence and growth of E-commerce in the region, in particular due to:
- a. A reduction in search costs;
 - b. Greater price transparency; and
 - c. Wider diversity of goods available.

³⁷⁰ AT Kearney (2015), page 2.

³⁷¹ Frost & Sullivan (2016b).

- 16.1.4. In ensuring these benefits are fully realised, competition authorities around the world have encountered a series of challenges in applying their competition law to ensure that E-commerce markets remain competitive, notably:
- a. Many new multi-sided markets have emerged, such as online marketplaces and PCWs. Multi-sided markets are not a new phenomenon. However, the increase in their prevalence in digital markets has made the need to rethink traditional tools designed for the analysis of competition in single-sided markets all the more apparent, from market definition to the assessment of market power;
 - b. Markets are more dynamic in nature. The importance of innovation for the growth and competitiveness of online markets has emphasised the need to examine potential competition and move beyond the static framework of analysis adopted for competition assessments;
 - c. New vertical restraints have emerged or existing restraints have increased in prevalence (e.g. MFN clauses, platform bans, geo-blocking strategies, and dual-pricing systems). These restraints have been the object of in-depth scrutiny both via a Sector Inquiry conducted by the European Commission and through a number of cases investigated in several jurisdictions around the world. Broad consensus indicates that most of these restraints have been adopted to address potential problems such as free-riding, and incentivising investments. Nevertheless, some specific instances have raised questions as to their compatibility with competition rules and/or wider single digital market objectives; and
 - d. Horizontal coordination between competing firms has become easier due to the emergence of price monitoring tools and price-setting algorithms.
- 16.1.5. By reviewing relevant cases from jurisdictions around the world, this handbook has found that the existing legal framework has been broadly sufficient to deal with the emerging challenges resulting from the growth of E-commerce. There are, however, a small number of instances which require a broader approach in investigations in E-commerce markets that have been identified from cases and economic literature in the field. Specifically:
- a. In investigating multi-sided markets, a holistic approach is required which goes beyond the application of traditional antitrust analytical tools. All sides of the market should be considered in any assessment, taking into account the presence and direction of network effects and feedback effects. This applies when defining relevant markets, assessing market power, evaluating alleged harm, and reviewing proposed mergers;
 - b. In assessing actual or potential market power, and when reviewing proposed mergers, dynamic competition should be considered i.e. will a merger result in the removal of a potential future entrant to a market, or are there other competitive constraints, including other potential entrants, which can mitigate this concern; and
 - c. To enable competition authorities to review mergers that may lead to a lessening of competition in the long run, a transaction value threshold may be needed in merger control rules.

- 16.1.6. There are, however, a number of areas where international consensus has not yet been reached. Competition authorities in ASEAN should therefore closely monitor emerging case law in jurisdictions around the world, in addition to the ongoing debate in the antitrust community in the following areas:
- a. The analytical frameworks to use when assessing multi-sided markets;
 - b. The use of wide and narrow MFN clauses by firms. Although wide MFNs have been broadly regarded as giving rise to anti-competitive effects, different jurisdictions have provided different responses to the adoption of narrow MFNs, with some banning them altogether in the hotel booking market (e.g. Germany, Italy, France, and Austria), and others, including the US and the UK, allowing such clauses;
 - c. The use of platform bans and restrictions on PCWs by firms. Though marketplace bans typically do not constitute a total ban on internet sales, there is ongoing debate on whether such restrictions may be justified. A landmark judgement in Europe is due within the next year. Similar debate regarding restrictions on PCWs is also taking place simultaneously; and
 - d. The potential for price-fixing algorithms to self-learn that coordination is optimal. Although the effect of such tools would undeniably be anti-competitive, the lack of direct object to coordinate in the firms' adoption of such tools raises an important question on the applicability of existing competition law.
- 16.1.7. Finally, to support the growth of E-commerce markets across ASEAN, it is recommended that AMS competition authorities should consider:
- a. Working towards harmonisation on some key areas which are at the heart of the development of online markets. Harmonisation on the interpretation of existing competition policy and law in the region in E-commerce markets (e.g. on the use of MFNs, geo-blocking strategies, platform bans, and restrictions on PCWs) and clear communication of these interpretations to businesses would also foster the development of E-commerce markets;
 - b. Working alongside regulatory bodies and cross-ASEAN groups to support the harmonisation and improvement of the regulatory regime that firms face, for instance with regards to IP rights enforcement and cybersecurity; and
 - c. Fostering dialogue and support government bodies in designing policies such that competition in E-commerce markets is not adversely affected.

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The background is a solid orange color. It features several abstract geometric elements: large, overlapping, semi-transparent polygons in various shades of orange and yellow, some with thin yellow outlines. A network of thin yellow lines connects small dots of varying sizes (orange and yellow) scattered across the page. In the center, there is a faint, dotted orange map of the Philippines. The word "Annexes" is written in a large, white, sans-serif font, centered horizontally and partially overlaid by the map and geometric shapes.

Annexes

Annex 1:

Technical Information

A1.1. Multi-sided markets

Definition of a multi-sided market

A1.1.1. A two- or multi-sided market is one in which distinct but related customer groups are connected by a common platform. Evans and Schmalensee (2007)³⁷² explained how “the core business of the two-sided platform is to provide a common (real or virtual) meeting place and to facilitate interactions between members of the two distinct customer groups.” For example, a newspaper connects readers and advertisers; a hotel booking website connects hotels with travellers; and a satellite television company connects viewers with advertisers and TV channels.

Externalities between sides

A1.1.2. Each side of a multi-sided market typically gives rise to externalities which impact the other, and this can affect the way in which firms set their pricing structures.³⁷³ Considering, for demonstrative purposes, an offline market, such as newspapers: in order to attract advertisers, many newspapers are sold below cost to readers, or even given away for free. This is as a result of an externality imposed by one side of a market (readers) on another side (advertisers) i.e. the more readers there are, the higher the value to advertisers, and, therefore, the more they are willing to pay to advertise in that newspaper. Similar dynamics are in play in online markets such as social media and online search or shopping.

A1.1.3. Externalities can be positive or negative. In the example above, a higher number of readers generates a positive externality for advertisers. Conversely, as the number of adverts in the newspaper increases, a negative externality for the reader emerges, as the value the reader derives from the newspaper falls. Therefore, newspaper companies will need to find the right balance between the need to increase demand by advertisers, as well as by readers, in setting their prices. If they were to charge a higher price for newspapers, the number of readers would decrease, thus reducing the value to advertisers and their demand for adverts. Conversely, if they set a low or zero price for newspapers, they can increase demand by readers, thereby increasing demand by advertisers. Newspapers may be able to recoup the costs faced on both sides of the market by charging advertisers a higher price.

A1.1.4. In assessing competition cases in multi-sided markets, it is therefore important that authorities consider the relationship between each side of the market; for example, when assessing the market power held by a platform. As demonstrated by the example above, if the newspaper is sold at a price below cost to readers, this does not necessarily mean that the newspaper in question is pursuing a predatory pricing strategy. The price charged for adverts, which covers the costs incurred in serving both sides of the market, would compensate the newspaper.

A1.1.5. The externalities discussed here are also defined as network effects. Network effects arise when “the utility that a given user derives from the good depends upon the number of other users who are in the same “network” as is he or she”.³⁷⁴ For example, network effects exist in social media markets where the value one individual places on a platform increases as more of that individual’s friends also use the same platform. The self-reinforcing nature of network effects can enable a platform to grow rapidly, and also impose a barrier to entry and expansion on new entrants and smaller players (as discussed in Section 4). In assessments of multi-sided markets, competition authorities should therefore carefully examine if network effects are present. For example, as discussed in Section 10, there may be concerns that following a merger of two competing platforms (and the combining of their networks) a ‘tipping point’ may be reached, and, as a result, smaller firms are no longer able to compete.

³⁷² Evans, D. and Schmalensee, R. (2007); page 151.

³⁷³ “Externalities refers to situations when the effect of production or consumption of goods and services imposes costs or benefits on others which are not reflected in the prices charged for the goods and services being provided.” (OECD, 1993).

³⁷⁴ Katz, M. and Shapiro, C. (1985); page 424.

Importance of single- and multi-homing

A1.1.6. In such assessments, an important factor competition authorities should consider is the extent to which users multi- or single-home. A user who single-homes will only use one platform in a given market; for instance, someone who uses only the social media website Facebook. Contrastingly, an individual who multi-homes uses a number of competing platforms; for example, someone who uses both Facebook and Twitter would be said to multi-home in the social media market. A relevant example would be in the assessment of a proposed merger between two platforms in a market. If users typically multi-home, the merger would be less of a concern to authorities than a merger between two platforms in a market where users typically single-home, *ceteris paribus*. For a tipping point to occur, it may be sufficient for only one side of a multi-sided market to single-home. As a result, when assessing the likelihood of a tipping point occurring, all sides of the market should be considered.

A1.2. Block exemptions and hardcore restrictions

Block exemptions

- A1.2.1. A block exemption allows certain practices to be exempt from the application of competition law, where pro-competitive benefits are deemed to significantly outweigh any anti-competitive effects, or where a company holds a very small share of the market, making anti-competitive effects unlikely to arise.
- A1.2.2. Block exemptions may apply to certain vertical and horizontal agreements, such as technology transfer agreements, or research and development agreements, in order to promote sustainable competition within certain industries. In some jurisdictions, such as the EU, many vertical restraints fall under block exemption regulation, as long as the parties' market shares are below a certain threshold.

Hardcore restrictions

- A1.2.3. However, competition authorities may establish a list of hardcore restrictions that fall outside of an exemption. For example, the European Commission regards minimum and fixed resale prices as hardcore restrictions (see Section 7.4 on Resale Price Maintenance), meaning they are excluded from the scope of block exemption regulations.

Example of block exemption on vertical agreements in Europe

- A1.2.4. Economic theory suggests that “unless firms possess and exercise market power, they are unable to affect competition adversely”.³⁷⁵ Consequently, in Europe, firms that have entered into vertical agreements are granted an automatic exemption from the application of Article 101 of the TFEU for certain clauses if they have a market share of less than 30%, as it is unlikely these agreements will give rise to anti-competitive outcomes given the position of the firm in the market. If, however, the vertical agreement in question contains a hardcore restriction, then the infringing firm will be subjected to the application of competition law.

Annex 2:

Government initiatives on E-commerce



A2.1. Brunei Darussalam

A2.1.1. In 2015, the Government of Brunei Darussalam announced the Digital Government Strategy, with the mission “to lead the digital transformation and make government service simpler, faster and more accessible”. Six focus areas have been identified to achieve this mission. These are:

- a. **Service innovation:** With an increasingly sophisticated and dynamic society, government agencies must develop new and innovative ways to deliver services to citizens and businesses with greater transparency and accountability;
- b. **Security:** Following on from the previous strategic plan 2009-2014, security will remain a key focus area. The government needs to maintain situational awareness of its digital assets and environment at all times. Adequate measures will be taken to minimise risks and increase capabilities to respond to cyber-incidents effectively;
- c. **Capability & Mind-set:** People will always remain the key that will lead to the successful implementation of any technology. It is essential to foster a forward-thinking mindset and collaborative culture. This will help to increase the speed of adopting new systems, rate of utilising systems and proficiency of government officials;
- d. **Enterprise Information Management:** With today’s knowledge driven economy, information is a fundamental building block that can advance a nation. It is critical that the government manage the explosive growth of data by structuring, describing and governing information assets that can then be used to generate insights that aid decision-making;
- e. **Optimisation:** To keep pace with the rapid development of technology, the government has been implementing various IT systems and platforms. Moving forward, the government needs to optimise the use of these digital assets to ensure effectiveness, minimise redundancy and maximise value for money; and
- f. **Collaboration & Integration:** Government agencies are required to work together to face an increasingly complex environment. This requires a Whole-Of-Government approach to enhance the collaboration and integration of government business processes.

A2.1.2. Six programmes have been identified to realise the vision and to achieve the Brunei Digital Government Strategy 2015-2020:

- a. **Advancing digital services:** Ensuring key services are accessible anytime anywhere, and managing the Government Revenue Collection digitally;
- b. **Implementing Universal Access for Government Systems:** One ID for citizens, businesses, and services that supports one ID;
- c. **Strengthening Securities:** An integrated approach by all sectors toward national cybersecurity;
- d. **Enhancing Stakeholder Engagement:** Creating a new platform for stakeholder engagement, and a governance framework for managing stakeholder engagement;
- e. **Optimising Digital Assets:** Maximising the value of existing digital assets; and
- f. **Developing Enterprise Information Management Capability:** Processes, tools and capabilities for Enterprise Information Management.



A2.2. Cambodia

A2.2.1. The Government of Cambodia is close to approving an E-commerce law. In November 2016, the Cambodian Ministry of Commerce announced that the 90 articles long Act is being finalised. The objective of the E-government policy of the Royal Government is “to connect the public administration in order to provide efficient public services to the citizens”, and the law will be consistent with this. The Ministry of Commerce website states:

“E-Commerce Law will create a new business environment, called Cyberspace and allow youths doing trade without borders at any time with million consumers around the world to bring more revenues for the company and the country. Moreover, the E-Commerce will help promote the country's reputation on the international stage because this business will facilitate the integration of Cambodia's goods into the regional and global production network.”³⁷⁶



A2.3. Indonesia

A2.3.1. In November 2016, Indonesia announced its 14th economic reform package, which includes the E-commerce roadmap. The roadmap involves eight focus areas aiming to support the development of E-commerce in Indonesia. These are:³⁷⁷

- a. **Funding:** Including micro credit programmes to cover platform and app developers, grants for business incubators and start-up mentorship programmes;
- b. **Taxation:** Including lowering the tax rate for local investors investing in start-ups and an ease in the taxation procedures for E-commerce ventures with a total turnover of Rp4.8 billion (US\$357,191) and below per year, thereby levelling the playing field in taxation for all E-commerce players;
- c. **Consumer protection:** Involving regulating electronic transactions to allow for transactions and government spending through E-commerce;
- d. **Education and human resources:** The government will start a national E-commerce awareness campaign along with a national incubation programme, and E-commerce education programme for all stakeholders;
- e. **Logistics:** Including allowing E-commerce players to leverage on the National Logistics System. In 2001, the blueprint was set up for this to be created from scratch (Sislognas), however, despite this, development has seen extremely slow progress. Of the 30 first programmes listed in the annex to the Sislognas Perpres, which are intended to improve Indonesia's logistics network, only a handful are in operation;³⁷⁸
- f. **Strengthen communications infrastructure:** Through national broadband development;
- g. **Cyber security:** Including setting up a national surveillance and E-commerce monitoring system; and
- h. **Form an operating management structure:** to manage, monitor, and evaluate the implementation of the E-commerce roadmap.

³⁷⁶ Cambodia Ministry of Commerce (2016).

³⁷⁷ Digital News Asia (2016).

³⁷⁸ Indonesia Infrastructure Initiative (2015).



A2.4. Lao PDR

A2.4.1. Lao PDR has an E-government Develop Plan (2013-2020). There are three key stages to the plan. These are:

- a. **Presence Stage (2013-2015):** Focus on G2G applications (maintain and rebuild these applications, which was established under the E-government project phase I: 2006-2012, mainly in some government offices in Vientiane and provincial governors. Some district and village administration offices will be setting up and distributing IT equipment in phase II);
- b. **Interaction Stage (2016-2018):** This involves integrating the government data into one single service, and initiating G2B service applications; and
- c. **Transaction Stage (2019-2020):** This includes fully computerising the administration system and e-Service, especially E-commerce by government officers. It also includes initiating G2C service applications.³⁷⁹



A2.5. Malaysia

A2.5.1. An important initiative is the National E-commerce Strategic Roadmap,³⁸⁰ which was setup by the Malaysian Government and launched in October 2016. This roadmap has six key areas, listed below:

- a. **Accelerate seller adoption of E-commerce;**
- b. **Increase adoption of eProcurement by businesses;**
- c. **Lift non-tariff barriers.** This includes increasing the level of maturity in the domestic E-fulfilment sector (which will be done by providing economic incentives and preferential schemes for the online environment, offering companies to convert warehouses into fulfilment centres and increasing ICT spending, with accelerated capital allowances), an increase in the adoption of E-payments (which will be done by offering more innovative payment products, improving service levels, and encouraging adoption and use. Initiatives such as enhancing the infrastructure to keep pace with innovation and meeting user's needs, and putting caps on fees for using credit cards), and augmenting and increasing mass awareness of consumer protections (which involves rolling out advocacy programs to protect consumers' welfare on E-commerce platforms and to increase awareness of consumers' rights and redress channels);
- d. **Realign existing economic incentives;**
- e. **Make strategic investments in select E-commerce player(s),** by providing economic incentives and preferential schemes which will be aligned for the online environment. This will include offering companies incentives to convert warehouses into fulfilment centres and to increase ICT spending; and
- f. **Promote national brand to boost cross-border E-commerce.** In Malaysia, MATRADE has launched a nationwide advocacy program via eTRADE, a government initiative to accelerate exports by encouraging SMEs to participate in leading international online marketplaces. The objectives of the program are to widen market access, establish cooperative relationships with already-established online marketplaces, and reduce the cost of exporting products. Ongoing eTRADE initiatives include assessing potential online marketplaces, establishing strategic collaborations, compiling a list of E-fulfilment providers, promoting Malaysian products to potential online buyers, creating an international sourcing program for buyers, raising awareness about E-commerce among Malaysian exporters (SMEs and non-SMEs), matching Malaysian companies with e-marketplaces, and monitoring the impact of E-commerce adoption for stakeholders' reporting.

³⁷⁹ Center of the International Cooperation for Computerization.

³⁸⁰ Malaysian Digital Economy Corporation, (2016).

A2.5.2. Critical success factors which will influence the likely trajectory of E-commerce within Malaysia include:

- a. **Favourable demographic and economic trends:** Healthy GDP growth, a high level of internet usage and a technologically savvy population;
- b. **The current level of E-commerce infrastructure:** Two thirds of the population use the internet, four-fifths of whom have purchased online. Credit card usage is 12%,³⁸¹ the second highest in ASEAN, and there are already large E-commerce platforms in existence; and
- c. **Government interventions which are required to boost E-commerce development:** The Electronic Commerce Act and the Personal Data Protection Acts have been passed recently with the aim of supporting the development of the E-commerce market.

A2.5.3. The Malaysia Digital Economy Corporation roadmap identifies the potential for these initiatives to almost double the growth rate of E-commerce in the region, from a CAGR of just under 11% in the business as usual scenario, to just under 21% with these interventions.³⁸²

A2.5.4. Although the National E-commerce Strategic Roadmap is the principle policy to promote E-commerce, there are more than 40 E-commerce related initiatives or programmes involving more than 20 ministries or agencies. Another example of a key initiative is the Business Acceleration Programme 2.0, which aims to provide capacity-building initiatives to assist SMEs to grow their business locally and abroad. A Memorandum of Understanding has been signed between the Malaysian Government and PayPal, eBay and Google to encourage SMEs to go digital and sell online.³⁸³



A2.6. Myanmar

A2.6.1. The Myanmar E-government ICT Master Plan, the draft of which was issued in January 2017, has the following objectives:

- a. To form specific organizations involved in the implementation of E-government in Myanmar, and to define their responsibilities;
- b. To be aware of the existing implementation progress of E-government and the benefits of E-government in Myanmar;
- c. To shape the requirements of the implementation of E-government based on the information collected from discussion meetings with implementing agencies of E-government in Myanmar and feasibility studies;
- d. Based on analytical studies of best practices of countries with successful E-government systems, to put a project management framework in place to better prepare for E-government projects;
- e. To create a better and more comprehensive integrated computer system for government by reviewing existing ICT infrastructure, and the application of E-government systems in Myanmar;
- f. Evaluating the skills and the gaps in skill development, and to set necessary measures for narrowing these gaps;
- g. To provide feedback on the required organizational structures and administration, and defining responsibilities in forming the implementing agency for the effective implementation of government systems;

³⁸¹ Malaysian Digital Economy Corporation (MDEC), (2016).

³⁸² Malaysian Digital Economy Corporation (MDEC), (2016).

³⁸³ Ministry Of International Trade & Industry, Malaysia, (2017).

- h. To constitute policies and standards required for the effective and efficient implementation of the E-government system in Myanmar;
- i. To ensure the accessibility of the system for the users (government, businesses, citizens and other stakeholders organization); and
- j. To develop a road map to specify budget allocations required for implementing the project.³⁸⁴



A2.7. The Philippines

A2.7.1. The Philippines Government Department of Trade and Industry E-commerce Roadmap 2016-2020,³⁸⁵ has six key recommendations to facilitate growth in E-commerce in the country:

- a. **Infrastructure:** The need for an appropriate supply chain, communications, and applications infrastructure. This is to be addressed by rolling out internet infrastructure via a National Broadband Masterplan, setting up an 'E-government' which entails mandating elements of government to have electronic filing and electronic payment facilities. Guidelines on E-commerce implementation will also be issued, and work will be done to digitise banking, tax and logistics;
- b. **Investment:** The ability to promote and support a range of investment opportunities from Foreign Direct Investments to capital flows. This will be addressed by providing an incentive package for digital start-ups and amending the Corporation Code to allow one person corporations;
- c. **Innovation:** The ability to foster and support innovation, including the ability to protect innovation and investment in research and development. This will be addressed by amending the Retail Trade Liberalization Act and assessing other legislation;
- d. **Intellectual Capital:** The ability to foster the appropriate skills and training, ranging from technological to linguistic and entrepreneurial. This will be addressed by offering E-commerce training in colleges, government training programs in E-commerce, and including E-commerce subjects throughout all school levels;
- e. **Information Flows:** The ability to use, transfer, and process information – the currency of the digital economy – while promoting privacy and a trusted internet environment. This will be addressed by creating the Data Privacy Commission, Data Privacy Guidelines for the government and updating Data Privacy Guidelines for the Information and Communications Systems in the Private Sector, as well as promoting Cybercrime Online Reporting and Legal Assistance Network, and setting up a Cybercrime Investigation and Coordination Centre and National Computer Emergency Response Centre; and
- f. **Integration:** The ability to connect domestic industries with the global economy. This will be addressed by identifying and promoting E-commerce platforms, implementing capacity building to promote international networking, encouraging the availability of next generation high-speed broadband, and identifying and promoting policies and regulatory frameworks for creating a conducive environment for E-commerce.

³⁸⁴ Ministry of Communications and Information Technology, (2017).

³⁸⁵ Philippine E-commerce roadmap, (2017).

A2.7.2. There are also a number of other initiatives alongside this roadmap, such as the National Broadband Plan and the National Retail Payment System project.³⁸⁶ Critical success factors of the project are:³⁸⁷

- a. 100,000 SMEs participating in E-commerce;
- b. 40-50% of internet users engaging in E-commerce;
- c. Cybercrime enforcement and protection; and
- d. Online and connected government.

A2.7.3. Key requirements to facilitate these outcomes being met include:³⁸⁸

- a. Increasing internet speeds (which should be met by successful implementation of the National Broadband Plan). Currently the average connection within the country is 4.2Mbps, which compares to an average of 11.4Mbps in Asia-Pacific as a whole;³⁸⁹
- b. Investing in education to better explain how E-commerce works;
- c. Organising training for SMEs to assist them in exploring other potential sales channels;
- d. Improving security of websites (including adding secure payment methods); and
- e. Diversifying the types of products and services which are sold online.



A2.8. Singapore

A2.8.1. There are many government policies aimed at the development of E-commerce. The SMEs Go Digital Programme has over SGD\$80 million set aside by the Government to encourage SMEs to make use of technology. SPRING Singapore, an agency under the Ministry of Trade and Industry, partnered with SingPost to launch an integrated end-to-end E-commerce solution to support and enable SMEs in Singapore to expand their E-commerce business. Outputs from this include the Market Readiness Assistance programme, which provides a grant of up to 70% of eligible third-party costs, which cover activities such as setting up in overseas markets, identifying business partners, and overseas market promotion. Another is the Global Company Partnership programme, which grooms globally competitive companies through building internal capabilities, developing manpower, accessing markets, and providing access to financing through grants. Both of which aim to help businesses in Singapore enter markets overseas.

A2.8.2. In 2016, SPRING Singapore launched the Retail Industry Transformation Map (RITM), with the aim of creating a vibrant retail industry and increasing productivity. As part of this transformation, SPRING, and the Info-communications Media Development Authority of Singapore (IMDA) are working together on initiatives aimed at boosting the role of E-commerce, and attempting to encourage traditional brick-and-mortar companies to adopt a strategy with the use of desktop or mobile E-commerce.

A2.8.3. One of the ways in which this is being undertaken is by using E or M-commerce to teach digital marketing masterclasses, which are aimed at retail executives, and focus on web analytics and search engine optimisation. By doing this SPRING and IMDA hope to improve the productivity of the retail workforce within Singapore.

A2.8.4. Singapore plans to drive E-commerce and other areas of the digital economy within the region, when it assumes chairmanship of ASEAN next year. This could include streamlining E-commerce rules. Singapore will use its chairmanship to streamline regional trade rules governing E-commerce, improve digital connectivity in the region and lower operational barriers to entry. The Government also intends to make trade more efficient by working closely with other ASEAN states to set up a self-certification regime. This will allow authorised exporters to self-certify that their goods meet ASEAN requirements for preferential treatment. Another initiative is to speed up customs clearance via the electronic exchange of information across borders, facilitating the movement of goods and lowering costs for businesses.

³⁸⁶ Philippine E-commerce roadmap, (2017).

³⁸⁷ Ibid.

³⁸⁸ Ecommerce IQ Asia (2017).

³⁸⁹ Philippine Competition Commission (2017a).



A2.9. Thailand

A2.9.1. Thailand has recently launched its latest economic growth plan, entitled Thailand 4.0, which aims to make Thailand a value-creating digital economy. It plans to achieve this by facilitating key sectors of the digital economy, such as E-commerce. Initiatives include providing affordable broadband services nationwide, as well as improving IT services across the government. Thailand also has an E-commerce plan over the next four years (2017-21), the vision of which is “increasing volume and value”. The four elements to this vision are E-commerce system development, standards development, building and ecosystem and public-private collaboration. There are five strategies under this:

- a. Improving E-commerce capabilities of entrepreneurs and enterprises
- b. Trade facilitation and development
- c. Ecosystem Development to support E-commerce
- d. Create opportunities and experience for anyone to buy and sell through E-commerce
- e. Build trust and confidence for consumer.³⁹⁰



A2.10. Vietnam

A2.10.1. The government have approved a plan for developing E-commerce over the period 2016-20.³⁹¹ Key targets of this plan include:

- a. Bolstering the efficiency of government administrative services;
- b. Ensuring 30 per cent of the population buy goods and services online;
- c. Ensuring an average spend of US\$350 per person online;
- d. Increasing revenue from online B2C to US\$10 billion;
- e. Ensuring B2B revenue accounts for 5% of total retail spend; and
- f. Ensuring online B2B turnover is worth 30% of total turnover in 2020.

A2.10.2. As well as this, the government is aiming for:³⁹²

- a. 50% of enterprises to update their websites on a frequent basis;
- b. 80% of orders coming from E-commerce applications;
- c. All supermarkets to accept POS and non-cash payments;
- d. 70% of electricity, water, telecommunications and TV providers to accept non-cash bill payments; and
- e. 50% of individuals and households in major cities to use non-cash payments when spending.

³⁹⁰ Electronic Transaction Development Agency, (2017).

³⁹¹ Vietnam Net (2016).

³⁹² Vietnam Net (2016).



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