Nicolas Charbit
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Frédéric Jenny

Standing Up for Convergence and Relevance in Antitrust

Liber Amicorum

Volume I

Igor Artemiev, Svetlana Avdasheva, Helmut Brokelmann, Caron Beaton-Wells, Zeynep Buharali, Julie Clarke, John Davies, Allan Fels, Albert Foer, Eleanor Fox, David Gilo, Svetlana Golovanova, Gönenç Gürkaynak, Marc Ivaldi, Yannis Katsoulacos, Vicente Lagos, Philip Lowe, Santiago Martínez Lage, Robert Ian McEwin, Andreas Mundt, Hiroyuki Odagiri, John Pecman, Duy Pham, Enrico Adriano Raffaelli, Daniel Rubinfeld, Frederic Michael Scherer, Pablo Trevisán, Han Li Toh, Ali Kağan Uçar, Diane Wood

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FRÉDÉRIC JENNY

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Liber Amicorum - Volume I

Foreword by Sir Philip Lowe

Editors

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Foreword

Sir Philip Lowe

I am sure that Volume I of Liber Amicorum will contain many learned articles that will honour the work of Fred Jenny. With his renowned intellectual curiosity and rigour, Fred will certainly read all of them thoroughly and may even provide some feedback to the authors on the robustness of their arguments…

This contribution has a much more modest objective. It is to pay tribute to Fred Jenny's enormous contribution to the development of competition policies throughout the world, and in particular to the substantial international convergence in law and practice which he has tirelessly and successfully promoted for more than 25 years.

In 1994, when Fred first became Chair of the Organisation for Economic Co-operation and Development (OECD) Competition Committee, there were only a limited number of jurisdictions in the world which could claim to have anything resembling an established tradition of competition law or competition policy. There were also considerable differences in the stated objectives, the tests, the analytical methods and the institutional structures in different countries. Even within individual countries, laws and policies changed over time with little obvious parallelism or convergence with developments in other countries.

On substance and methods, there were major differences. To name but a few, the US had a strong record in antitrust, but what had started as a policy built on trust-busting, protecting the small and weak against the big and strong, evolved over time into one based on maintaining and promoting consumer welfare. Detailed economic and effects-based analysis of the actual or potential market impact of a business transaction or conduct displaced previous presumptions of anti-competitive harm. Influenced as it had been by previous US law and policy, German cartel law, and subsequently European law, was more ordoliberal and object-based. It sought to guarantee the process of competition on the market, not consumer welfare. French and UK competition policies were explicitly aimed at promoting "the public interest", while Canada adopted a "total welfare" criterion.

As far as processes and institutions were concerned, countries had also gone down different competition roads. Some, like the US, had a prosecutorial enforcement system, while most jurisdictions in Europe had administrative systems. Similarly, some pursued cartels on the basis of criminal rather than administrative law. Some fined the companies responsible, others put their employees in jail.

More generally, many countries preferred to regulate to deal with competition whereas others argued that you should "let the market work".

To make sense of this diversity of laws and policies and to make recommendations as to what might be best practice in competition law and policy, a clear thinker with exceptional powers of enquiry and analysis was required. It required someone who knew how markets worked and also how they sometimes don't work. It required someone who could easily grasp the interplay between economics and law. It also required someone who was prepared to listen patiently to all views but be prepared to stimulate debate and critically comment on those views.

In this respect, Fred Jenny has certainly been the right man in the right place at the right time. In a sense, in addition to being professor of economics, he has also had to be a professor of comparative (competition) religion.

The Socratic method has certainly been Fred's trademark. It is said that Socrates "asked questions but did not answer them, claiming to lack wisdom concerning the subjects about which he questioned others." If Fred Jenny asks the questions, you can be sure that he has got his answers prepared, even if diplomacy and politeness hold him back from letting you know what they are. Within the OECD Committee, heads of competition authorities such as I, have been only too aware of the formidable nature of a Fred Jenny inquisition. In the first place, the topics which the Committee has been asked to discuss have been carefully chosen by Fred and usually relate to the key challenges you are facing (or you are about to face although you don't know it) in the work of your authority. So, it was in your interest to prepare your presentation well. Woolly thinking, "langue de bois", reading out of formal statements without understanding them, as well as long, repetitive tedious interventions would be punished unmercifully by further questioning by the Chair or simply by Fred's unfailing ability to bring back the discussion to the essential issues he wanted us to address.

If Fred's principal analytical tool has been dialectic, a host of OECD recommendations and reports on competition issues – on hard core cartels, on merger review, on public utilities, on the conduct of investigations and on exchange of information – bear witness to his equally remarkable powers of synthesis.

The fruits of Fred Jenny's efforts are evident in the degree of international convergence already achieved in competition laws and policies, as well as in the use of best-practice institutional structures, procedures and analytical methods. Under his chairmanship, the OECD Committee, together with the International Competition Network, has made a major contribution to the progressive establishment of compe-

tition laws and policies in most countries of the world. And Fred Jenny's personal commitment and advocacy has arguably had as much impact in emerging and developing countries as in member countries of the OECD.

No one who has been involved in efforts for more international convergence in competition laws and policies over the last 30 years would want to claim any major breakthrough. If 10 years ago, there seemed to be an emerging consensus on the need for an exclusively competition-related test for mergers, today many voices are again arguing for a public interest test of some kind. Perhaps too many thought, at that time, that the case for criminal rather than administrative sanctions against cartels was gaining ground. Yet, today, the record of criminal enforcement (outside the United States) looks modest.

At least one can say, thanks to the outstanding intellectual leadership of Fred Jenny, that we know much more clearly why competition laws and policies are still very different and why the challenge of international convergence is likely to be a more or less permanent one.

In Oliver Goldsmith's poem "The Deserted Village" he recalled how all those who knew him revered the knowledge and wisdom of the formidable village schoolmaster:

> and still they gazed, and still the wonder grew,
> That one small head could carry all he knew.

All of us who have been taught, orchestrated and impressed by the now outgoing Chair of the OECD Committee would express the same sentiment about Fred Jenny.

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Frédéric Jenny
Biography & Publications

Career

Frédéric Jenny is professor of Economics at ESSEC Business School in Paris. He is Chairman of the OECD Competition Committee since 1994, and Co-Director of the European Center for Law and Economics of ESSEC since 2008.

Positions in French Government & Judiciary

2004 - 2012: Conseiller en Service Extraordinaire, Cour de cassation
1993 - 2004: Vice Président, Conseil de la concurrence
1986 - 1993: Rapporteur Général, Conseil de la concurrence
1984 - 1985: Rapporteur Général, Commission de la concurrence
1978 - 1984: Rapporteur, Commission de la concurrence

Academic Positions

Since 1972: Professor of Economics (ESSEC Business School)
2017: Global Professor of Law (New York University School of Law's Hauser Global Law School Program)
2014: Global Professor of Law (New York University School of Law's Hauser Global Law School)

2012: David Tadmor Visiting Professor of Antitrust (Haifa University Law School)
1991: Visiting lecturer (University of Cape Town, South Africa)
1984: Visiting Professor (Keio University, Tokyo, Japan)
1983: Visiting Professor (Wuhan University, China)
1978: Visiting Professor (Northwestern University, United States)

Other Positions

Since 1994: Chairman, OECD Competition Law and Policy Committee
Since 2004: Chairman, International Advisory Board Concurrences Review
Since 2015: Chairman, Ethics Commission of the French Federation of Insurance Companies
2016 - 2018: Senior Fellow in the Online Global Competition and Consumer Law Masters Program, University of Melbourne
Since 2015: Member of the Advisory Board of the Centre for Competition, Regulation and Economic Development (South Africa)
Since 2016: Member of the CRESSE Advisory Board
Since 2016: Member of the Advisory Board of the Florence Competition Programme (Institut Européen de Florence)
Since 2017: Member of the Advisory Board, Fordham Corporate Law Institute
Member Scientific Advisory Board of the Interdisciplinary Center for Competition Law and Initiative, Middle East Initiative
Chairman, Scientific Advisory Board, Consumer Unity Trust (CUTS) (India)

Other Past Positions

April 2007 to April 2014: Non Executive Director, Office of Fair Trading, United Kingdom
April 1997 to December 2003: Chairman, WTO Working Group on Trade and Competition Policy
2003 to 2007: Member of the "Conseil scientifique de la mission Recherche, Droit et Justice", French Ministry of Justice

June 1990 to June 1996: Member of the "Conseil scientifique de l'evaluation des politiques publiques"
1988 to 1990: Chairman of the Working Group "Formation des prix et fonctionnement des marchés dans les économies des pays en transition" (Mission Stoleru, Secrétariat d'Etat au Plan)

1982 to 1986: Member of the Advisory Committee of INSEE (National Institute of Statistics)

Education

1977 Doctorat d'Etat en Sciences Economiques, Université de Paris II
1975 Ph.D in economics, Harvard University
1971 Master in economics, Harvard University
1966 E.S.S.E.C. Business School

Distinctions

Officer, Ordre de la Légion d'Honneur (France)
Officer, Ordre National du Mérite (France)
Knight, Order of the Star (Romania, December 2017)
GCR Lifetime Achievement Award 2016

Selected Publications

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Industrial Policy and Competition Policy: Preliminary thoughts, in Conference Proceedings, New Frontiers of Antitrust, Concurrences Review, N° 2-2013, May 2013, p. 74-78

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Convergence and Divergence in Singapore's Competition Law Regime

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Competition and Consumer Commission of Singapore

Abstract

The importance of working towards convergence among the various competition law regimes in the world has been a recurring theme in Professor Frédéric Jenny's publications and presentations over the course of his career. With this theme in mind, this chapter analyses the extent to which the competition law regime in Singapore, which was enacted only 13 years ago, has converged and/or diverged with the regimes in the UK and the EU, on which Singapore's Competition Act was based. By examining the areas of legislative design, decisional practice and case precedents, this chapter will show that while there has been a large degree of convergence in these respects, there remain notable differences, which are primarily due to Singapore's unique status as a small but open economy. It is hoped that this primer on Singapore's experience will provide some useful lessons for the Competition and Consumer Commission of Singapore's counterparts in countries with nascent competition law regimes.

* Han Li Toh is the Chief Executive and a Commissioner of the Competition and Consumer Commission of Singapore. He also serves on the Military Court of Appeal, the Copyright Tribunal and the Monetary Authority of Singapore's Appeals Advisory Panel.

I. Introduction

In the course of his 24 years as the Chairman of the OECD Competition Committee, Professor Frédéric Jenny has been a strong advocate for convergence in the international antitrust community. In a recent interview with *Competition Policy International*, Professor Jenny noted that:

While the autonomy of each national competition authority should be protected, collective thinking about the challenges we face and exchanging experiences among competition authorities and economists could be helpful to promote a *much desired soft convergence* in enforcement.[1]

Similarly, in the context of merger control, Professor Jenny has argued that the convergence of merger control laws is desirable in an increasingly internationalised business world with an increasing number of multi-jurisdictional mergers.[2] Indeed, from the early meetings of the OECD Global Forum on Competition, Professor Jenny had already identified the need to "promote convergence whenever possible" as one of the three important tasks for the antitrust community.[3]

With the overarching theme of convergence in mind, this chapter will provide a brief overview of the fairly recently enacted competition law regime in Singapore, before proceeding to examine the extent to which Singapore's competition law regime has converged and/or diverged with that of the UK and EU, on which it was primarily based, in respect of legislative design, decisional practice and case precedents. By analysing Singapore's legislative framework, the Guidelines promulgated by the Competition and Consumer Commission of Singapore (CCCS), case law, the exemptions under the Competition Act and some procedural elements of the regime, it is hoped that there will be useful lessons for countries seeking to enact, or that have recently enacted, competition laws.

II. Background on the CCCS and Competition Law in Singapore

As with most other countries in Southeast Asia, Singapore's competition law regime is still a relatively new one.[4] Prior to the enactment of the Competition Act (Chapter

1 CPI Talks…, Interview with Frédéric Jenny – Professor of Economics at ESSEC Business School in Paris and Chairman of the OECD Competition Committee (15 February 2017), <www.competitionpolicyinternational.com/wp-content/uploads/2017/02/CPI-Talks.pdf> accessed 2 August 2018 (emphasis added)

2 Frédéric Jenny, "Substantive Convergence in Merger Control: An Assessment" [2015] 1 Law & Economics – Concurrences, 21-41, 21.

3 Frédéric Jenny, "Introductory Comments" (the 3rd Global Forum on Competition, 10 February 2003).

4 Competition legislation was only enacted in Thailand, Indonesia, Vietnam and Malaysia in 1999, 2000, 2005 and 2012, respectively.

50B) (the Act), in 2004, there was no generic competition law in the nation-state – while sector-specific competition laws and regulators governed the telecommunications, media and energy sectors, these did not apply to all other areas of commercial activity in Singapore. This changed after the Economic Review Committee (ERC), which was chaired by then Deputy Prime Minister Lee Hsien Loong and comprised ministers, academics, union leaders and private sector representatives, noted that a generic competition law was needed to create a level playing field for businesses of all sizes to compete on an equal footing.[5] Apart from the ERC's recommendations, another driving force for the passing of the Act was the US–Singapore Free Trade Agreement of 2003, which saw Singapore committing to the enactment of a generic competition law by January 2005.[6]

The Competition Commission of Singapore (CCS), the predecessor of the CCCS, was established on 1 January 2005 as a statutory board under the Act. On 1 April 2018, the CCS was renamed the CCCS after taking over the administration and enforcement of the Consumer Protection (Fair Trading) Act (Chapter 52A).[7] Statutory boards are autonomous government agencies, established by legislation, that specify the purpose, rights and powers of the body. There are currently 64 statutory boards in Singapore that perform diverse functions. For example, government housing falls under the purview of the Housing and Development Board, which was constituted by the Housing and Development Act (Chapter 129), while the Inland Revenue Authority of Singapore, constituted under the Inland Revenue Authority of Singapore Act (Chapter 138A), has oversight over tax-related issues. What makes the CCCS different from other statutory boards is that it adopts a commission structure, and decision-making lies with the Commission level and not with the Ministry of Trade and Industry, of which it is part.

Singapore has chosen the administrative model of competition enforcement. As such, the CCCS is staffed primarily by lawyers and economists, and enforces the Act by using its statutory powers to conduct investigations and dawn raids, take enforcement action, and impose administrative financial penalties in respect of anti-competitive activities or transactions by commercial entities that have an impact on competition in Singapore.[8] Another complementary role is its advocacy function, where the CCCS works with government agencies, the business community and the public to advocate pro-competition policies and promote a strong competitive culture and environment.

It bears mention that the life cycle of a competition case may not end with the imposition of a financial penalty by the CCCS. Under the Act, the parties named in

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5 Vivian Balakrishnan, Senior Minister of State for Trade and Industry, "Speech on Second Reading for the Competition Bill in Parliament" (19 October 2004) (Second Reading Speech).

6 United States–Singapore Free Trade Agreement (6 May 2003) <http://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta> accessed 2 August 2018, Chapter 12

7 The term "CCS" will be used in this Chapter where the context involves matters which took place prior to 1 April 2018.

8 The Act, ss 61-70.

a CCCS Infringement Decision (ID) may appeal to the Competition Appeal Board (CAB) if they are dissatisfied with the CCCS's findings and/or the penalties imposed. The CAB is an independent body chaired by a person qualified to be a judge of the Supreme Court and comprising members with expertise in competition law, economics or business, who are appointed by the Minister for Trade and Industry.[9] Thereafter, the parties may also appeal to the High Court and the Court of Appeal, but only on points of law or on financial penalties in a given case.[10]

Since its establishment, the CCCS has issued 13 infringement decisions in total, including 1 infringement decision involving the abuse of dominance and 12 infringement decisions involving anti-competitive agreements such as price-fixing, bid-rigging and the exchange of price information. The CCCS has made 16 decisions on notifications relating to anti-competitive agreements and has assessed more than 60 mergers. The CCCS has extended the Block Exemption Order for Liner Shipping Agreements until 31 December 2020 and has undertaken market studies into the industrial property, retail petrol, airline, formula milk and car parts sectors.

III. Convergence and Divergence in Singapore's Legislative Framework

1. Convergence

In drafting the Act, Singapore's Ministry of Trade and Industry (MTI) studied the competition legislation of various major jurisdictions, including the UK, Australia, Ireland, the US and Canada.[11] The MTI also held two rounds of public consultation on the draft Competition Bill in April and July 2004 to seek feedback from relevant stakeholders and members of the public on the document, and conducted several briefings for the business community. The final bill that was tabled in Parliament was largely modelled on the UK Competition Act 1998 (UK Competition Act), which was itself based on the EU regime, with some modifications to account for Singapore's specific economic characteristics and requirements. In this section, the similarities and differences between the Act and the regimes in the UK and EU will be analysed, with a view to showing that while Singapore's competition law has substantially converged with that of both jurisdictions, such convergence has not taken the form of mere mimicry.

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9 The Act, ss 72 and 73.

10 The Act, s 74.

11 Second Reading Speech, n 5.

The three main prohibitions under the Act can be found in sections 34, 47 and 54. Section 34 of the Act prohibits agreements that restrict competition by object or effect. Section 34 was modelled closely after Chapter I of the UK Competition Act[12] and Article 101 of the Treaty on the Functioning of the European Union (formerly Art 81 of the European Community Treaty) (TFEU).[13] Similarly, section 47 of the Act, which prohibits abuses of dominance, was modelled on section 18 of the UK Competition Act and Article 102 of the TFEU.[14] Finally, the prohibition in section 54 of the Act on mergers that may result, or have resulted, in a substantial lessening in competition in any market in Singapore was modelled on s 22(1)(b) of the UK Enterprise Act 2002. The high degree of convergence in relation to these three prohibitions is plain from the Act itself; the sections of the foreign statutes that the prohibitions were based on are set out in parentheses after the corresponding sections of the Act.

2. Divergence

Despite Singapore's reliance on UK and EU legislation in formulating the prohibitions in the Act, however, there have been differences in a number of aspects. The subsequent paragraphs in this section will non-exhaustively set out a number of these differences, along with the reasons for the divergence, where these are available.

First, it is well-established that in the UK and the EU the predominant policy objective in competition law is the maximisation of consumer welfare. In a speech by Neelie Kroes, who was then a Member of the European Commission, it was noted that:

> **Consumer welfare as a standard in anti-trust work**
>
> Consumer welfare is now well-established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing *consumer welfare* and ensuring an efficient allocation of resources…[15]

Similarly, the UK Competition and Markets Authority (CMA) also explicitly states in its document on "Prioritisation Principles for the CMA" that:

> 1.3 We therefore focus our efforts and resources on deterring and influencing behaviour that poses the greatest threat to *consumer welfare*, and intervene in order to protect *consumer welfare*, and, in the process,

12 UK Competition Act, ss 2(1), 2(2), 2(4)–(6).

13 *Re Pang's Motor Trading v Competition Commission of Singapore. Appeal No 1 of 2013* [2014] SGCAB 1, [33].

14 *Re Abuse of a Dominant Position by SISTIC.com Pte Ltd* [2012] SGCAB 1, [287] (*SISTIC*).

15 Neelie Kroes, "Delivering Better Markets and Better Choices" (Speech at the European Consumer and Competition Day, 15 September 2005) (emphasis added).

> drive higher productivity growth. We also recognize the need to avoid imposing unnecessary burdens on business.[16]

This emphasis on consumer welfare is immediately apparent in legislation as well. In Article 101(3) TFEU, for instance, the "economic benefits" exemption only applies to agreements that, among other factors, allow consumers a fair share of the resulting benefit.

In contrast to the approaches taken in the UK and the EU, Singapore's competition law regime adopts a total welfare approach. The CCCS has categorically stated its preference for a total welfare standard, as opposed to one that favours consumer welfare, in public forums and Infringement Decisions.[17] Although there have been no official statements to explain the basis for this difference, it has been posited that this reflects the fact that Singapore is a small and open economy which depends heavily on foreign trade and investments, and thus requires the competitive process, as opposed to consumer welfare, to be protected.[18] It has been observed that as a result of this focus on total welfare, the CCS has cleared a number of airline alliance agreements that involved the coordination of flight schedules and ticket prices as the benefits arising from the promotion of Singapore as a regional air hub were found to outweigh the harm to competition in the relevant markets.[19]

The second way in which Singapore's competition law regime has diverged from that of the UK and the EU is in respect of vertical agreements. In Singapore, the Act contains a blanket exclusion in respect of vertical agreements. Paragraph 8 of the Third Schedule to the Act states that the prohibition in section 34 of the Act shall not apply to *any* vertical agreement, other than such vertical agreement as the Minister may specify by order.[20] On the contrary, the European Commission regulation on vertical agreements only *presumes* that vertical agreements are exempted from the scope of Article 101 TFEU if they have a market share of less than 30%, and expressly excludes vertical agreements that contain "severe restrictions of competition such as minimum and fixed resale prices" etc., from the scope of the block exemption.[21] This means that resale price maintenance, which refers to any attempt by a supplier to restrict the buyer's attempt to determine its resale prices, is expressly prohibited in the EU and the UK but is completely excluded from the scope of section 34 of the Act in Singapore. The CCCS has stated that the reason for the blanket exclusion

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16 CMA, 'Prioritisation Principles for the CMA" (CMA April 2014) (emphasis added).

17 CCS, "The Interface Between Competition and Consumer Policies" (Global Forum on Competition, Contribution from Singapore to Session IV, 17 December 2007), [17]. See also *Re Abuse of a Dominant Position by SISTIC com Pte Ltd* [2010] SGCCS 3, [7.3.3] and [7.10.8].

18 Daren Shiau, quoted in CCS, *10 Years of Championing Growth and Choice* (CCS 2015), 24.

19 Burton Ong, "Competition Law and Policy in Singapore" (ERIA Discussion Paper Series, 2015), 4–6.

20 The Act, Sch 3, para 8(1). However, the exclusion does not apply to certain agreements that concern intellectual property rights.

21 Commission Regulation (EU) No 330/2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices [2010] OJ L 102, [8]–[10], [48]–[49], and [222]–[229] (EU Vertical Regulations).

of all vertical agreements is because it recognises that most vertical agreements have pro-competitive effects which outweigh the potential anti-competitive effects, and such an exclusion would reduce the compliance costs imposed on businesses to determine whether their vertical agreements infringe the Act.[22]

A third area where clear divergence can be seen is in respect of the treatment of exploitative conduct under the Act. As stated above, section 47 of the Act prohibits conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore. Section 47(2) sets out a list of four types of conduct which may infringe the Act, including predatory behaviour towards competitors and limiting production, markets or technical development to the prejudice of consumers, but it does not expressly prohibit the imposition of unfair purchase or selling prices. This differs from section 18(2) of the UK Competition Act, which mirrors Article 102 TFEU in expressly prohibiting such unfair pricing.

Fourth, Singapore maintains a notification regime that allows businesses to apply to the CCCS for guidance or decision on whether individual agreements or conduct will infringe section 34 or section 47 of the Act.[23] This was based primarily on the UK Competition Act, which itself mirrored Council Regulation 17/624 in the EU, although the latter is no longer in force.[24] The main differences between guidance and a decision from the CCCS relate to the level of confidentiality afforded to the parties and the circumstances in which CCCS will be able to take enforcement action against a party after its clearance.[25] Generally speaking, notifications for guidance would be treated more confidentially by the CCCS while notifications for decision must be included in the public register on its website.[26] Further, while the CCCS retains the prerogative to take enforcement action against the parties if there have been material changes in circumstance since the guidance or decision was given and/or if the outcome was based on false, incomplete or misleading information from the parties, the CCCS's guidance can be reviewed if there has been a complaint about the agreement or conduct or if one of the parties to the agreement applies to the CCCS for a decision.[27]

The continued operation of the aforementioned notification regime shows a clear divergence from the position in the UK and the EU, given that the notification regime

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22 CCCS, "Frequently Asked Questions" (4 May 2015) <www.cccs.gov.sg/faq/scope-of-the-competition-act> accessed 2 August 2018.

23 See the Act, ss 43 and 50, for notifications for guidance in respect of the s 34 and s 47 prohibitions, respectively, and ss 44 and 51 for notifications for decision in respect of the s 34 and s 47 prohibitions, respectively.

24 See UK Competition Act, ss 12–16 and Council Regulation No 17: First Regulation Implementing Articles 85 and 85 of the Treaty (6 February 1962) 13 OJ 204, Articles 4–8.

25 CCCS, "Difference between Guidance and Decision" (31 March 2018) <http://www.cccs.gov.sg/approach-cccs/seeking-guidance-and-decision/difference-between-guidance-and-decision> accessed 2 August 2018.

26 ibid.

27 The Act, ss 45(2) and 46(2).

in the EC was wholly abolished by EC Regulation 1/2003.[28] The UK has also abolished its notification system by deleting the relevant provisions from the UK Competition Act.[29] In Regulation 1/2003, the European Commission noted that the notification scheme hampered application of the EU competition rules by the courts and competition authorities of its Member States, prevented the European Commission from concentrating its resources on curbing the most serious infringements, while also imposing considerable costs on undertakings.[30] The European Commission also stated that the notification system had become unnecessarily bureaucratic as companies operating in Europe had become familiar with competition rules.[31] In Singapore, there have been no such signs that the notification regime has fallen out of favour – the CCCS's website states that undertakings which apply for guidance or decision would benefit from having greater clarity on whether their agreements or conduct infringe or are likely to infringe the Act.[32] In total, more than 30 such notifications have been filed to the CCCS since its inception and indeed the notification scheme has proven useful to allow the CCCS to articulate what form of conduct would qualify for the net economic benefit exclusion.[33]

IV. Convergence and Divergence in CCCS's Guidelines

1. Convergence

In addition to the similarities that can be seen in legislation, convergence is also apparent in the guidelines issued by the CCCS. The CCCS has, to date, issued 13 sets of guidelines (CCCS Guidelines) which cover the major aspects of the CCCS's work such as the three key prohibitions, market definition, investigation, enforcement and notification procedures. The CCCS Guidelines seek to provide greater transparency and clarity on how the CCCS would interpret and enforce the prohibitions contained in the Act, and were predominantly adapted from the guidance issued by the UK Office of Fair Trading (which is now known as the CMA).

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28 Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 72 of the Treaty [2003] OJ L 1 (16 December 2002).

29 Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, Schedule 1 [9].

30 Regulation 1/2003, (n 28) [3].

31 European Commission press release, "Commission Finalises Modernisation of the EU Antitrust Enforcement Rules" (30 March 2004).

32 CCCS, "Benefit from Getting Guidance or Decision" (31 March 2018) <www.cccs.gov.sg/approach-cccs/seeking-guidance-and-decision/benefit-from-getting-guidance-or-decision> accessed 2 August 2018.

33 See, for example, *Re Proposed Commercial Alliance Between Etihad Airways PJSC and Jet Airways (India) Limited* [2014] SGCCS 9, where the CCS cleared a cooperation agreement between the airlines on the basis that there were net economic benefits in the form of enhanced products and services, an expanded network and more destinations, among others. Other notification cases like *Re Acquisition by Cebu Air Inc of Southeast Asian Airlines (Seair), Inc* [2014] SGCCS 1 and *Re Proposed Conduct Between Qantas Airways Limited and Jetstar Airways Pty Limited in relation to the Jetstar Pan-Asia Strategy* [2013] SGCCS 4 were also cleared after the CCS found that the net economic benefit exclusion was made out in those cases.

One example is the CCCS "Guidelines on the Appropriate Amount of Penalty 2016" (CCCS Penalty Guidelines) which set out the methodology used to determine the amount of financial penalty to be imposed. CCCS had followed the methodology adopted by the UK in the Office of Fair Trading's "Guidance as to the Appropriate Amount of a Penalty" imposed under s 36, UK Competition Act. The CCS Penalty Guidelines have also been accepted as persuasive in CAB decisions. In *Konsortium Express*, the CAB stated that it will have regard to the CCS Penalty Guidelines where appropriate in reaching its conclusion, unless it is shown that the CCS Penalty Guidelines are wrong or that the CCS has erroneously applied them.[34]

Notably, in 2016, there was further convergence between the CCS Penalty Guidelines and the approach adopted by the EU and UK, as the CCS clarified that the calculation of financial penalties was a six-step process, and made amendments in the calculation of the base penalty following the *Ball Bearings* appeal case.[35] Instead of relying on the relevant turnover of the undertaking's last business year in the financial year preceding the year when the decision is issued, the approach was amended to rely on the relevant turnover of the undertaking in the financial year preceding the year the infringement ended.

2. Divergence

However, despite the large degree of convergence in the CCCS Guidelines with the UK and EU positions, there are still a number of differences that exist. The following paragraphs in this section will set out three such differences.

First, the indicative market shares to assess the dominance of an undertaking in abuse of dominance cases differ between the UK and Singapore. Paragraph 3.8 of the CCCS Guidelines on the Section 47 Prohibition 2016 states that as a starting point, the CCCS will consider a market share above 60% as likely to indicate that an undertaking is dominant in the relevant market. This contrasts with paragraph 4.18 of the UK Office of Fair Trading Guidance for Abuse of a Dominant Position, which states that the CMA will consider it unlikely that an undertaking will be individually dominant if its share of the relevant market is below 40%. It is posited that Singapore has chosen to adopt a higher indicative market share to assess dominance as Singapore has a small and open economy which results in the lack of economies of scale for companies to be run efficiently. This leads to fewer players in the market and a higher concentration of companies in many markets as compared with larger economies. A higher indicative threshold will also ensure that the CCCS is able to target more likely harmful effects, and ensure that there are net economic benefits from any

34 *Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand: Konsortium Express and Tours Pte Ltd, Five Stars Tours Pte Ltd, GR Travel Pte Ltd and Gunung Travel Pte Ltd* [2001] SGCAB 2 [144] (*Konsortium Express*).

35 *Infringement of Section 34 Prohibition in Relation to the Supply of Ball and Roller Bearings: Nachi-Fujikoshi Corporation and Nachi Singapore Private Limited* [2016] SGCAB 1; *Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand: Transtar Travel Pte Ltd and Regent Star Travel Pte Ltd* [2001] SGCAB 2 (*Transtar Travel*).

intervention, having taken into account the costs of such intervention.[36] Be that as it may, it bears highlighting that the indicative market share threshold of 40% does not preclude the CCCS from investigating alleged anti-competitive conduct at a lower market share, if other relevant factors provide strong evidence of dominance.[37] The CCCS has also made it clear that while undertakings which may have less than 60% market share, such as small or medium enterprises, are rarely capable of engaging in conduct that has an appreciable adverse effect on competition in Singapore, it still retains the prerogative to investigate an undertaking's conduct if this is warranted on the facts.[38]

Secondly, notwithstanding the fact that Singapore had drawn on the experiences of both the EU and UK in drafting the Fast Track Procedure (FTP) that was introduced in 2016, there are still slight differences in the approaches adopted by the above-mentioned jurisdictions. For instance, the FTP is made available for both section 34 and section 47 cases, and not just for cartels, which is the case in the EU under Commission Regulation (EC) No 622/2008. Further, CCCS has set out, at paragraph 2.3 of the CCCS Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases, that the FTP will only be applied when all parties under investigation in the case indicate interest in utilising the FTP.[39] This is in contrast with the EU where the settlement policy can apply to some of the parties to the proceeding who may be prepared to acknowledge their participation in a cartel, and their liability in respect of such participation.[40] The CCCS has also chosen to grant a fixed penalty reduction of 10% to parties who admit liability so as to provide parties with certainty as to the discount they will receive, which differs from the UK, which sets a discount of up to 20% for settlement pre-Statement of Objections and up to 10% for settlement post-Statement of Objections, depending on the circumstances of the case, as set out in paragraph 14.27 of "Guidance on the CMA's Investigation Procedures in Competition Act 1998 Cases".

A third notable area, where the CCCS's practice departs from the position in the EU while converging with that of the UK, is in relation to whether the existence of a compliance programme constitutes a mitigating factor in determining the financial penalty to be imposed on an undertaking that has infringed competition law. In Singapore, the CCCS has made it clear at paragraph 2.16 of the CCCS Penalty

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36 International Competition Network, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies* [2007], Chapter 7: Dominance/substantial market power assessment in small and isolated economies.

37 CCCS Guidelines on the Section 47 Prohibition 2016 [3.8].

38 ibid [3.9].

39 CCCS, "Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases" (2016) [2.3].

40 Commission Regulation (EC) No 622/2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases [2008] OJ L 171, 3, [2].

Guidelines that the existence of a compliance programme is a mitigating factor.[41] However, the weight to be accorded to the existence of such a programme would depend on factors that include whether the programme has been actively implemented, whether it is supported and observed by senior management, and whether there is ongoing training for the relevant employees.[42] This is similar to the position in the UK, where:

evidence of adequate steps having been taken to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation (from the top down) – together with appropriate steps relating to competition law risk identification, risk assessment, risk mitigation and review activities – will likely be treated as a mitigating factor."[43]

While the CMA is in the midst of reviewing its penalties guidance, the draft guidelines which it released for its public consultation in connection with the review do not show any intention on its part to change its position in this regard.[44] The willingness of the CCCS and the CMA to consider the presence of a compliance programme as a mitigating factor shows a significant divergence from the European Commission's categorical refusal to accord any weight to the presence of such programmes. The European Commission's position was aptly summarised in a speech by Joaquin Almunia, the Vice President of the European Commission responsible for Competition Policy, where he stated that companies should not be rewarded for operating compliance programmes when they are found to be involved in illegal commercial practices, as there is no reason for the European Commission to reward a failed compliance programme.[45]

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41 For example, in the recent case of *Infringement of the Section 34 Prohibition in relation to the Market for the Sale, Distribution and Pricing of Aluminium Electrolytic Capacitors in Singapore* (CCS 700/002/13), the CCS accepted a party's argument that its compliance programme, which was in place during the period of infringement and included clear instructions to employees and a Code of Conduct, was a mitigating factor. However, the CCCS has generally not afforded any discounts for the existence of compliance programmes where these were only put in place after the commencement of any investigations.

42 CCCS Penalty Guidelines, [2.16].

43 OFT, "Guidance as to the Appropriate Amount of a Penalty", which was adopted by the CMA (its successor) at ote 26.

44 CMA, "Guidance as to the Appropriate Amount of a Penalty" (Draft for Consultation) (2 August 2017), at note 38.

45 Joaquin Almunia, "Speech at the Business europe & US Chamber of Commerce Competition Conference" (25 October 2010).

V. Convergence and Divergence in Singapore's Competition Law Jurisprudence

1. Considerable Convergence in Case Law

There has been considerable convergence between Singapore's competition law jurisprudence, which comprises decisions by the CCS/CCCS and CAB, with the decisions taken in the UK and EU.[46] As stated above, this is because section 34 and section 47 of the Act were closely modelled after their equivalent provisions in the UK and the EU. This section will set out the cases where UK and EU decisions were adopted or followed in Singapore.

In establishing the legal test for abuse of dominance cases under section 47 of the Act, the CAB in *SISTIC* agreed with the CCS's submission that the decisions of the EU and UK courts were highly persuasive in this regard, given that section 47 of the Act was modelled on section 18 of the UK Competition Act and Article 102 TFEU.[47] After reviewing cases from the EU General Court (then known as the Court of First Instance) (GC or CFI, as appropriate),[48] the European Court of Justice (ECJ),[49] and the UK Competition Appeal Tribunal (CAT) and Court of Appeal,[50] the CAB concluded that the "correct and proper test in determining the abuse of a dominant position" was the one established in EU and UK law, which was summarised by the CCS as follows: (i) the competition authority only needs to show a likely effect on the process of competition; and (ii) the undertaking can advance an objective justification for its conduct to show a net positive effect of welfare that would outweigh the likely effect of its conduct on competition.[51]

The abovementioned case of *Konsortium Express*, which was also decided by the CAB, similarly illustrates the significant degree of convergence between Singapore's competition law jurisprudence and that of the UK and EU. In that case, the CAB had to decide whether the CCS had correctly imposed financial penalties on five bus

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46 To date, no appeals against the CAB's decisions have been heard in Singapore's High Court. Of the 12 appeals decided on by the CAB thus far, 11 have been in relation to section 34 infringements, while 1 has been in relation to a section 47 infringement. There have been no appeals against the CCCS/CCS's merger decisions.

47 *SISTIC* (n 13) [287].

48 *British Airways Plc v Commission of the European Communities*, Case T-219/99, where the CFI held that it was sufficient for the European Commission to show that the abusive conduct was likely to restrict competition; the concrete effect of the conduct on competition did not have to be demonstrated.

49 *British Airways Plc v Commission of the European Communities,* Case T-95/04 P (*British Airways (Appeal)*), where the ECJ upheld the GC's decision below and held that there was no need for an actual quantifiable deterioration in the competitive position of the dominant undertaking's businesses partners to establish an abuse of dominance.

50 *National Grid plc v Gas and Electricity Markets Authority* [2009] CAT 14, which affirmed the ECJ's decision in *British Airways (Appeal*), and *National Grid Plc v Gas and Electricity Markets Authority* [2010] EWCA Civ 114, where the UK Court of Appeal held that there was no need to prove direct harm to consumers in an abuse of dominance case.

51 *SISTIC* (n 13) [290].

operators that were parties to an agreement to fix a minimum selling price for the sale of one-way express bus tickets from Singapore to Malaysia and Southern Thailand. In order to make this decision, section 69(3) of the Act required the CAB to determine if the infringements by the parties had been committed "intentionally or negligently". However, as the CAB pointed out, the Act is silent on how this phrase ought to be defined.[52] The CAB then looked to and adopted the approaches taken in the UK CAT[53] and the EC[54] and concluded that the CCS should find that an infringement has been committed intentionally if: (i) the agreement has the restriction of competition as its object; (ii) the undertaking is aware that its actions will be or are reasonably likely to be restrictive of competition but still proceeds or intends to carry them out; or (iii) the undertaking could not have been unaware that its agreement or conduct would infringe section 34 of the Act.[55] This position has been consistently applied by the CCS in its infringement decisions relating to bid-rigging by pest control operators, bid-rigging by electrical and building works companies, and price-fixing in the freight forwarding industry, among others.[56]

As regards the calculation of financial penalties proper, the CAB in *Konsortium* also endorsed the UK CAT's approach to the appellate body's role in dealing with appeals against financial penalties,[57] as well as the European Commission's guidelines on the setting of fines.[58] In a related appeal, *Transtar Travel*,[59] the CAB also accepted the test for agency used in *Minoan Lines v Commission,*[60] which established that overlaps in revenue between an agent and a principal can be accounted for in determining the appropriate financial penalty to be imposed. *Transtar Travel* also saw the CAB incorporating the European Commission's test for identifying a single economic entity, as set out by the European Commission in *Akzo Nobel,* into Singapore's competition law jurisprudence.[61]

Finally, Singapore has not only applied the principles enunciated in UK and EC decisions, but has also accepted that remedies accepted in these jurisdictions would address the competition concerns in Singapore. For example, in the CCS's decision

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52 *Konsortium Express* (n 34) [141].

53 *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13 [221] (*Argos*).

54 *Luxembourg Brewers*, Case COMP/37.800/F3 (5 December 2001) [89]

55 *Konsortium Express* (n 34) [141]–[143].

56 *Re Certain Pest Control Operators in Singapore* [2008] SGCCS 1; *Re Collusive Tendering (Bid-Rigging) in Electrical and Building Works* [2010] SGCCS 4; and *CCS Decision of 11 December in relation to Freight Forwarding Services from Japan to Singapore* (2014).

57 *Konsortium* (n 34) [177], endorsing *Argos* (n 53) [168]–[169] and [172]

58 *Konsortium* (n 34) [183], endorsing the European Commission, "Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003" [13].

59 n 35.

60 ibid [73]–[75], endorsing the CFI's decision in *Minoan Lines v Commission* ECR II 5515; [2005] 5 CMLR 1597 [6]–[7].

61 *Akzo Nobel v Commission of the European Communities* [2009] ECR I-08237 [54].

on the anticipated merger between The Manitowoc Company Inc and Enodis plc,[62] the CCS found that there were competition concerns as the parties' businesses overlapped horizontally in the supply of cold-focused food service equipment and the merger could substantially lessen competition in that market, given that it would result in a large market share for the merged entity.[63] However, the CCS noted that the parties had undertaken to sell all of Enodis plc's global ice machine businesses, save for the facilities in Shanghai, to independent purchasers within nine months of the anticipated merger.[64] As such, the CCS cleared the merger on the ground that the divestment commitments sufficiently addressed the competition concerns arising from the transaction.

VI. Conclusion

Singapore's experience with competition law in the past 14 years exemplifies Professor Jenny's argument that it is important for each country to choose the best possible institutional design, given the constraints it faces.[65] In this chapter, it has been demonstrated that while Singapore's competition law regime has substantially converged with the UK and EU systems in respect of its statutes, guidelines and case law, there have also been significant points of divergence in view of local circumstances, such as Singapore being a small but open economy, especially in relation to the focus on total (as opposed to consumer) welfare, as well as the blanket exclusion of vertical agreements from the ambit of the Act, among others.

Be that as it may, the CCCS is committed to working towards convergence where possible and continuing Professor Jenny's legacy of promoting convergence in not only the OECD, but also in other global forums such as the International Competition Network (ICN). Further, EU and UK case law and decisional practice will continue to be persuasive in Singapore and will contribute significantly to the development to the Singapore jurisprudence on competition law. After all, as Professor Jenny observed in 2011, there has been "significant convergence among competition law systems in the past two decades … [and] there is no reason to believe that further progresses cannot be achieved on convergence, even if there is no one size fits all."[66]

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62 *Notification for Decision: Anticipated Merger between The Manitowoc Company, Inc. and Enodis plc* CCS 400/002/08 [39].

63 ibid [28].

64 ibid [44].

65 Frédéric Jenny, "The Institutional Design of Competition Authorities: Debates and Trends, Legal and Economic Aspects", in Frédéric Jenny et al. (eds.), *Competition Law Enforcement in the BRICs and in Developing Countries* (Springer 2016) 1, 55.

66 Frédéric Jenny, "Deep Globalization and Antitrust" (Presentation at the American Antitrust Institute, 23 June 2011), 39.

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