THE Dominance and Monopolies Review

Eighth Edition

Editors
Maurits Dolmans and Henry Mostyn

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PREFACE

Even before covid-19 disrupted the world as we knew it, competition law was at a crossroads, facing far-reaching and sometimes contradictory calls for reform – including with respect to monopolisation and abuse of dominance.

Some, such as President Macron and Chancellor Merkel, have argued that there is too much competition from abroad, and advocate for more permissive enforcement to facilitate 'European champions' to emerge: 'We need to adapt the EU competition law: [It's] too focused on consumer rights and not enough on EU champions' rights.'

Others maintain that there is too little competition, enforcement has been too permissive, and the rules should be tightened. Senator Elizabeth Warren, for example, has argued that 'competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere.' Similarly, Professor Joseph Stiglitz contends that 'current antitrust laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace'.

A third set of commentators believes that competition policy is misdirected, that the historic focus of competition law has been too narrow, and that the consumer welfare standard should be expanded to take account of social, industrial, environmental, and other considerations (sometimes referred to as 'hipster antitrust').

And a fourth critique, voiced by Maurice Stucke and Ariel Ezrachi, maintains that many of today's problems result from too much 'toxic' competition overall, driven by ideologues, lobbyists, and privatisation, and that we need to promote a kind of 'noble competition', where rivals mutually strive for excellence.

To address these challenges, a dizzying array of reports has emerged commissioned by governments in the US, EU, UK, Germany, France, Australia and elsewhere. And from those reports, a constellation of ideas has emerged to overhaul competition law, including: reorientating the goals of antitrust policy away from the consumer welfare standard towards a broader societal test; reversing the burden of proof; per se bans on certain categories of conduct (including prophylactic controls on vertical integration); lowering the standard of judicial review; injecting political oversight into competition law enforcement; loosening the standard to impose duties to share data with rivals; introducing market study regimes; allowing authorities to impose remedies without formally establishing an infringement; and establishing mandatory codes of conduct for digital platforms.

Where does this all leave busy practitioners and businesses that are trying to navigate the complex and constantly-evolving rules concerning abuse of dominance? Helpfully, this eighth edition of *The Dominance and Monopolies Review* seeks to provide some respite, providing an accessible and easily-understandable summary of global abuse of dominance rules. As with

previous years, each chapter – authored by specialist local experts – summarises the abuse of dominance rules in a jurisdiction; provides a review of the regime's enforcement activity in the past year; and sets out a prediction for future developments. From those thoughtful contributions, we identify three notable points from last year's enforcement.

Exploitative abuses pre- and post-covid-19

Exploitative abuses have in recent years enjoyed somewhat increased attention from regulators. The covid-19 pandemic intensifies that trend. It is leading to extreme demand and price volatility for certain products, as well as fluctuations in firms' costs. As firms struggle to manage these changes, agencies are aggressively seeking to show they are preventing consumer exploitation during the crisis. Charging excessive prices or imposing unfair terms and conditions constitutes an abuse of dominance in many countries, including almost all OECD members. In the US, excessive prices are not in and of themselves a matter for competition enforcement at the federal level, but many states have laws that prohibit price gouging and the current administration recently issued an executive order designed to prevent hoarding and price gouging.

Governments across the world have indicated that they will remain vigilant to sudden and significant price hikes during the pandemic. For example, in March 2020 the European Competition Network issued a statement identifying excessive pricing as a particular concern during the outbreak, noting that 'it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g., face masks and sanitising gel) remain available at competitive prices'. In a similar vein, on 27 March, Commissioner Vestager explained that 'a crisis is not a shield against competition law enforcement' and that the European Commission (EC) 'will stay even more vigilant than in normal times if there is a risk of virus-profiteering'. Several national authorities have opened investigations or created task forces dedicated to preventing excessive prices during the crisis.[1]

Even before covid-19, however, EU agencies were increasingly pursuing exploitation theories. In 2016, Commissioner Vestager stressed that the EC would seek to 'intervene directly to correct excessively high prices'. So far, most recent exploitation cases have been in the pharmaceutical sector, but the French and German agencies have pursued exploitative abuse theories in the technology sector. We pick out four developments over the last year.

First, the Court of Appeal judgment in *Pfizer/Flynn*, discussed in the UK chapter of this book, brings helpful clarity to evidence required to bring an excessive pricing case. As a recap: in 2016, the Competition and Markets Authority (CMA) imposed record fines on Pfizer and Flynn for charging excessive prices for phenytoin sodium capsules, an anti-epileptic drug. In July 2018, that decision was quashed by the Competition Appeal Tribunal (CAT) on the basis that the CMA had applied the wrong legal test and had failed to consider appropriately the economic value of the product. In March 2020, the Court of Appeal upheld the CAT's judgment that the case should be remitted to the CMA, though it agreed with the CMA on some issues (which will affect the remitted investigation) and the CMA welcomed the judgment as a 'good result.'

1 For further discussion, see Cleary Gottlieb, *Exploitative Abuse of Dominance and Price Gouging in Times of Crisis*, 31 March 2020.

In a nutshell, the Court of Appeal held that competition agencies have a 'margin of manoeuvre' in deciding how to prove their cases, including the 'Cost Plus' method that the CMA had used. Importantly, though, if a defendant adduces evidence that challenges the agency's methodology (as the defendants did in this case), the agency should consider that evidence. The extent of the agency's duty to consider the evidence adduced by the defendant will depend on the extent and quality of the evidence (i.e., there is no need to investigate each and every claim the parties bring up if those claims are not sufficiently substantiated). On the facts of the case, the Court held that there was an obligation on the CMA to evaluate the defendants' evidence regarding the prices of phenytoin capsules because it was prima facie evidence that prices were fair.

Second, in the *Sanicorse* case, discussed in the France chapter, the Paris Court of Appeal annulled the French Competition Authority's (FCA) decision of imposing a €199,000 fine on Sanicorse for imposing excessive price increases for medical waste treatment. The FCA had found that Sanicorse had abruptly, significantly, and durably increased the waste disposal prices it charged hospitals and clinics. In its ruling of November 2019, the Paris Court of Appeal clarified the conditions for establishing an exploitative abuse. Repeating the dictum from the *United Brands* ruling, the Court emphasised that an exploitative abuse arises in a situation where a dominant firm 'has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition'. The Court of Appeal found that the authority had failed to demonstrate that Sanicorse's price increases were unfair, and it accordingly annulled the decision.

Third, in December 2019, the FCA found in its *Gibmedia* decision (also discussed in the France chapter of this book) that Google's termination of three advertisers' Google Ads accounts was abusive. The authority's theory is that termination policies that allegedly lack objectivity and transparency, and are discriminatory, are a form of exploitation of customers. An apparent problem with the theory, however, is that a decision to terminate supply cannot, by definition, exploit the customer – it does not 'reap a trading benefit' from the trading partner, as required by United Brands and stressed by the Paris Court of Appeal in its *Sanicorse* decision.

Fourth, in February 2019, the Bundeskartellamt found that Facebook's terms and conditions relating to its collection of user data constitute an abuse (discussed in the Germany chapter). The Bundeskartellamt held that Facebook's terms and conditions, under which users agreed to the combination of their data from, for example, WhatsApp, Instagram and Facebook, violated the GDPR. Relying on German law principles that unlawful terms and conditions can constitute an abuse of dominance, the Bundeskartellamt held that Facebook committed an exploitative abuse by combining data from different sources. In August 2019, however, the Düsseldorf Court of Appeal granted suspensive effect to Facebook's appeal against the decision, holding that there are serious doubts about its legality. The Court found that users are not exploited by Facebook's use of data because, unlike financial payments, the data can be replicated and used again. Users freely decide whether to allow use of their data by balancing pros and cons of using ad-funded social network. The Court also held that the Bundeskartellamt had failed to prove the required causal link between Facebook's abuse and its market power: it failed to show that Facebook's terms deviated from the terms that would exist in a more competitive scenario. The judgment on the merits is pending.

Despite the renewed appetite to bring exploitation cases, these cases should in our view – in line with Advocate General Wahl's warning in the *Latvian Banks* case – remain rare and

exceptional. Otherwise, there is a risk that the concept of exploitative abuse is stretched to address policy issues beyond the scope of competition law and that require broader discussion outside individual cases.

A greater push for interim measures

The second notable development in abuse of dominance enforcement in 2019 was the EC's decision – for the first time in an antitrust case in almost 20 years – to impose interim measures on Broadcom (this decision is discussed in the EU chapter). The decision orders Broadcom to cease to apply exclusivity provisions in six agreements with manufacturers of TV set-top boxes and modems, while the Commission's full investigation continues. On announcing the decision, Commissioner Vestager stressed that interim measures decisions are 'so important', especially in 'fast-moving markets'. The Commissioner emphasised that she is 'committed to making the best possible use of this important tool' so as to enforce competition rules 'in a fast and effective manner'.

Like other developments at EU level, push for greater use of interim measures has been encouraged by national authorities, particularly in France, with the Commissioner citing France as a source of inspiration. The UK CMA has also stated that greater use of interim measures is 'essential if the CMA is to respond to the challenges thrown up by rapidly changing markets', and Germany is adopting new rules to accelerate proceedings and apply interim measures.

Two examples discussed in the French chapter illustrate the FCA's expansionist approach to interim measures, both in cases involving Google. First, in *Amadeus*, the authority found Google's decision to suspend the Google Ads accounts of a paid phone directory services operator to be an exploitative abuse (similar to the theory in the *Gibmedia* case discussed above). The Paris Court of Appeal subsequently partly annulled the decision. Second, in early 2020, the authority found that Google's refusal to pay news publishers for showing preview snippets in search results alongside a link to the publisher's site may also amount to an exploitative abuse. The decision orders Google to enter into good faith negotiations with publishers, although it also makes clear that the negotiations may result in zero monetary compensation to publishers (considering that Google sends traffic to the publishers that they can monetise via ads on their page or convert users to paid subscribers).

Several points of caution should be heeded from the appetite to bring interim measures cases. Interim measures decisions should focus on the most egregious and clear-cut abuses, such as exclusivity clauses by obviously dominant firms, rather than seeking to create new law or go against existing precedent. The efficiency and effectiveness of competition procedures should not come at the expense of investigative rigour, due process, and the right to be heard. Interim measures should not prejudge the final decision from the authority on the merits. Accordingly, they should be tailored to implementing measures that are possible in principle to reverse, if it subsequently turns out that on a full merits review there is no case to answer. Finally, the new appetite to impose interim measures should not slow down the speed of the main proceedings, as agencies get caught up duplicating investigations and satellite appeals.

Per se bans on self-preferencing

The third development is the wide-ranging proposals to overhaul competition rules to address the perceived challenges of the digital economy. Proposals in the pipeline include the EC's suggestion for further regulation of digital platforms; mandatory codes of conduct in Australia to address perceived bargaining power imbalances between platforms and media

companies; and, in the UK, the CMA's aim to develop 'a coherent and innovation-friendly approach to governing digital technologies to ensure their benefits are shared far and wide'.

Describing all these proposals is beyond the scope of the present editorial. We instead focus on one eye-catching suggestion: the suggestion – included in several of the reports commissioned by governments and agencies, such as the EU Special Advisors' Report, the Furman Report in the UK, the German ARC Amendments, and the Stigler Report – to introduce per se bans on digital platforms or companies that perform a 'regulatory function' from engaging in 'self-preferencing.' The reports, however, do not explain precisely what they mean by 'self-preferencing'. Self-preferencing is a generic expression that covers a range of different practices, for example, margin squeezing, tying and refusal to supply.

For example, keeping an indispensable asset to oneself and refusing to supply it to rivals is an example of abusive self-preferencing. But the refusal to deal in case law makes clear that it is, so far, not abusive for a dominant company to favour itself by reserving for its own use an asset that is not indispensable, but merely 'advantageous.' On the contrary, it is generally pro-competitive for companies to develop their own innovations, and use those innovations as the tools to compete against one another. As Advocate General Jacobs explained in *Bronner*:

> *it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business . . . Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it".*

This makes sense, for several reasons. First, there is an inherent contradiction between competition and duties to supply rivals; competition rules seek to encourage companies to compete vigorously against each other, not cooperate. Second, a duty to supply interferes with fundamental rights to dispose of property and to conduct business. Third, duties to supply reduce incentives to innovate for both the supplying company and the company that receives supply. Fourth, in industries with fast innovation cycles, a duty to integrate rivals into constantly-evolving technologies may delay – or preclude – new developments.

The Courts, therefore, only allow interference with the freedom to contract in exceptional and limited circumstances. By contrast, we are concerned that a per se ban on self-preferencing could have several unintended consequences: hampering vertical integration, which is presumptively efficient; eliminating synergies; and leading to delayed or mothballed product improvements.

Consider Google's introduction of a thumbnail map on its results pages in response to location-based queries: the UK High Court held that this was 'pro-competitive' and an 'indisputable' product improvement. Not only was Google's introduction of the thumbnail map not likely to harm competition, but the conduct was also objectively justified. This was because showing rival maps would have degraded the overall quality of Google's search services, for example, via delays in returning results. Under the contemplated presumptions against self-preferencing, however, companies would have to ask themselves before launching this type of improvement whether they could prove the negative (i.e., that it would not lead to long-run exclusionary effects). That appears to be a difficult threshold to cross before launch.

Accordingly, we believe we should be looking at measures that make a real improvement to consumer welfare and avoid chilling innovation and investment. Neat-sounding slogans – such as a presumptive and generic ban on self-preferencing – can prove harmful in practice.

As a recent CMA report into competition and regulation recognised, 'greater regulation is – on average – associated with less competition. For instance, countries with lower levels of product market regulation tend to have more competitive markets and enjoy higher rates of productivity and economic growth.' Similarly, in her speech on 'Remembering Regulatory Misadventure', FTC Commissioner Wilson recalled that attempts to prescribe 'fairness', 'non-discrimination', and 'reasonable and just' prices in the airline and railroad industries led to distortions of competition and restricted output. Removing these regulations 'significantly reduced consumer prices and increased output, generating billions of dollars in consumer surplus'. This is not to say that regulation is not desirable for objectives other than fostering competition, but regulation to encourage competition is likely to result in outcomes that any pro-competition and pro-innovation regime should avoid.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this eighth edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

Maurits Dolmans and Henry Mostyn
Cleary Gottlieb Steen & Hamilton LLP
London
June 2020

Chapter 19

MALAYSIA

Shanthi Kandiah[1]

I INTRODUCTION

The Competition Act 2010 (the CA 2010), which came into force on 1 January 2012, is a cross-sectoral legislation (subject to certain exceptions)[2] that aims to promote and protect the process of competition in the interests of consumers. The CA 2010 applies to any commercial activity both within and outside Malaysia (if the commercial activity has an effect on competition in any market in Malaysia). The CA 2010 presently sets out prohibitions on anticompetitive agreements (horizontal and vertical agreements) and abuse of dominant position. Section 10 of the CA 2010 prohibits enterprises from engaging, independently or collectively, in conduct that amounts to an abuse of dominance in a relevant market.

The CA 2010 does not provide for merger control powers. The absence of merger control powers deprives the enforcement agency and the government of a more direct influence over changes in market structures that may be adverse to competition.

The Malaysia Competition Commission (MyCC) is the enforcer of the CA 2010. To date, the MyCC has issued seven guidelines to act as reference to the public on how the MyCC interprets the CA 2010:

a Guidelines on Complaints Procedures;
b Guidelines on Market Definition;
c Guidelines on Anti-competitive Agreements;
d Guidelines on Abuse of Dominant Position (Guidelines on Abuse of Dominance);
e Guidelines on Financial Penalties;
f Guidelines on Leniency Regime; and
g Guidelines on Intellectual Property Rights and Competition Law.

Several sectors have been given carve-outs from the CA 2010 (set out in the First Schedule therein) as sector laws provide for competition rules.

Guidelines on market definition, agreements, conduct that substantially lessens competition and abuse of dominance were issued by the MCMC, the MAVCOM and the EC for their respective sectors.

A notable requirement within the communications and multimedia sector as well as the aviation services sector is the presence of a merger clearance regime. Guidelines have been issued by the MCMC and the MAVCOM respectively in respect of the notification

1 Shanthi Kandiah is a partner at SK Chambers. She was assisted in writing this chapter by Thong Xin Lin and Nimraat Kaur.

2 Section 3(3) (read together with the First Schedule) and Section 13(1) (read together with the Second Schedule) of the CA 2010.

and application process for any merger or acquisition or anticipated M&A. Both regimes provide for voluntary notification, but authorities can initiate investigations into any non-notified merger.

The GSA 1993 was amended to facilitate the third-party access network, which aims to provide easy access to new players into the gas market by substantially changing the licensing requirements of the gas supply chain.

In 2013, an amendment was made to the CA 2010 to exclude commercial activities undertaken under the Petroleum Development Act 1974 (PDA 1974) and Petroleum Development Regulations 1974 insofar as the activities are directly in connection with the activities of exploring, exploiting, winning and obtaining petroleum, whether onshore or offshore of Malaysia. The PDA 1974 grants exclusive rights to the national petroleum corporation, PETRONAS, which is, in effect, a statutory monopoly. All of PETRONAS' downstream activities or concessions granted by PETRONAS to third parties remain liable to be sanctioned under the CA 2010 or the ECA 2001 (for matters falling within the scope of the ECA 2001) where it is found to be anticompetitive.

II YEAR IN REVIEW

2019 saw robust reviews of competition law and policy in Malaysia, as evidenced by the government's action in the following industries:

a telecommunications: The implementation of the Mandatory Standard on Access Pricing, which requires that infrastructure providers give access to their networks at regulated prices, reduced broadband prices by 49 per cent on average since the end of 2018;[3] and

b sugar: As at 6 December 2019, the Ministry of Domestic Trade and Consumer Affairs (MDTCA) granted 11 sugar import permits for Sarawak food and beverage manufacturers, and with that, broke the monopolistic control over the sale of sugar in Malaysia's domestic market by two sugar refiners for many years. Mr Chong Chieng Jen, the Deputy Minister of the MDTCA (as he then was), stated that the next target in liberalising the sugar import industry is Sabah, signalling the government's continued efforts to break up monopolies in a bid to spur competition in business and reduce the cost of living.

Additionally, the government identified a number of companies as potentially having a monopolistic position in the market, namely Padiberas Nasional Bhd (Bernas), Pusat Pemeriksaan Kenderaan Berkomputer (Puspakom), Pharmaniaga Bhd and MyEG Services Bhd (MyEG). Datuk Seri Saifuddin Nasution bin Ismail, the Minister of the MDTCA (as he then was) was quoted as saying that the government believes that the increase in the cost of living was partly contributed to by resources being controlled by a small group of individuals and big conglomerates. This serves as part of the government's initiative to liberalise industry and promote competition and technological innovation in business and services. What is yet unclear is whether the approach, stance and initiatives taken by the MDTCA and the MyCC as elaborated above may potentially change following the recent change of government, which occurred on 1 March 2020.

3 https://www.malaysiakini.com/news/472565.

In terms of enforcement action by the MyCC, there has only been one abuse of dominance infringement finding to date and two proposed decisions.

Sector	Investigating authority	Conduct	Fines levied or proposed
Insurance (MyEG)[4]	MyCC	Section 10(2)(d)(iii) of the CA 2010: imposing different conditions in equivalent transactions in the purchase of mandatory insurances for the renewal of temporary work permits for foreign workers	Financial penalty of 2,272,200 ringgit and a directive to cease and desist its infringing conduct
Trade facilitation (Dagang Net Technologies Sdn Bhd (Dagang Net))	MyCC	Section 10(2)(c) of the CA 2010: monopoly provider of trade facilitation services under the national single window by refusing to supply electronic mailboxes to end users of the customs operating system	Proposed financial penalty of 17,397,695.30 ringgit and a directive to cease and desist its infringing conduct
E-hailing and transit media advertising (Grab Inc, GrabCar Sdn. Bhd and MyTeksi Sdn. Bhd (collectively, 'Grab'))	MyCC	Section 10 of the CA 2010: imposing a restrictive clause on its drivers, which prevented drivers from promoting and providing advertising services for Grab's competitors in the e-hailing and transit media advertising market	Proposed financial penalty of 86,772,943.76 ringgit and a daily penalty of 15,000 ringgit from the date of service of the proposed decision should Grab fail to take remedial actions as directed by the MyCC in addressing competition concerns

III MARKET DEFINITION AND MARKET POWER

Section 2 of the CA 2010 defines 'market' as a market in or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services. Defining a 'relevant market' means identifying all the close substitutes for the product under investigation.

Section 10 of the CA 2010 does not prohibit an enterprise from being dominant in a relevant market so long as the enterprise does not abuse its dominant position.

The MyCC adopts a two-stage test in determining if an enterprise has infringed Section 10 of the CA 2010:

a whether the enterprise being complained about is dominant in a relevant market in Malaysia; and

b if the enterprise is dominant, whether the enterprise is abusing that dominant position.

A 'dominant position' is defined as 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.[5]

In general, the MyCC will consider a market share of above 60 per cent to be indicative of dominance. However, the fact that the market share of any enterprise is above or below any particular level shall not in itself be conclusive of dominance.

The Guidelines on Abuse of Dominance clearly point out that dominance is not simply a conduct by a single enterprise, but can also include conduct of enterprises exercising significant market power together (i.e., 'collective dominance').[6] The MyCC will look at

4 Case No. MyCC (ED) 700-1/1/2/2015, 24 June 2016.

5 Section 2 of the CA 2010.

6 Guidelines on Abuse of Dominance, Paragraph 2.23.

each case on its merits but, in general, an infringement finding may be made if two or more separate enterprises, which have significant market power, act similarly in a market and that conduct excludes equally efficient competitors.[7]

In assessing whether an enterprise is dominant, first the relevant market must be defined in accordance with the MyCC's Guidelines on Market Definition. This involves determining both:

a the relevant product market; and

b the relevant geographic market.

In identifying the relevant market, the MyCC has said that it will employ the hypothetical monopolist test (HMT), and will rely on economic evidence in defining the relevant market, such as:

a market research surveys; and

b interviews with:

- industry associations;
- the initial complainant;
- competitors; and
- customers.

In practice, we have not seen significant evidence of an economic approach as the only infringement finding for abuse of dominance made by the MyCC involved a monopoly concessionaire.

i Aviation service sector

Apart from issuing the Guidelines on Abuse of Dominant Position, the MAVCOM has also issued the Guidelines on Aviation Service Market Definition, which adopts principles similar to those applied by the MyCC in defining a market.

ii Communications and multimedia sector

In the Guideline on Dominant Position issued by the MCMC, the MCMC outlines the general approach in identifying whether a licensee is dominant. This includes defining the boundaries of the relevant communications market and determining whether the licensee is in a dominant position in the relevant market.

The MCMC's approach to market definition is similar to the MyCC's in that it applies the HMT in identifying the relevant market. The CMA 1998 empowers the MCMC to pre-define markets for purposes of making a determination of dominance under Section 137 of the CMA 1998. There are currently 26 pre-determined markets, according to the 'Market Definition Analysis – Definition of Communications Market in Malaysia' dated 24 September 2014. The finding of a market does not pre-empt a finding of dominance, and instead, it identifies the boundaries of the field of rivalry that exists in the communications sector. In some markets, effective competitive constraints may exist and no dominance finding will need to be made. In other markets, effective competitive constraints may be dormant or inhibited and a finding of dominance may be made.[8]

7 Guidelines on Abuse of Dominance, Paragraph 2.24.

8 Market Definition Analysis – Definition of Communications Market in Malaysia, Paragraph 6.2.

When analysing market share data, the MCMC will consider the current market share of the licensee against market shares of its competitors and the changes in the licensees' market shares over time. A market share of more than 40 per cent will be considered a high market share. However, this does not preclude a licensee with a market share of less than 40 per cent from being found to be dominant if it is not subject to effective competitive constraints.[9]

The MCMC will consider certain key factors in determining whether a licensee is in a dominant position in the market. The non-exhaustive list is as follows:

a the structure of the market and the nature of competition in that market, including market shares;
b barriers to entry and expansion;
c the countervailing power of buyers; and
d the nature and effectiveness of economic regulation (if any).[10]

iii Gas supply sector

The Guidelines on Competition for the Malaysian Gas Market in relation to Market Definition, Anti-Competitive Agreements and Abuse of Dominant Position (the Gas Market Guidelines) issued pursuant to Section 37C of the GSA 1993 employs the MyCC's approach of applying the HMT in identifying the relevant market. The EC considers a market share of above 60 per cent as a strong indication of a dominant position in the relevant market and it is unlikely that an entity will be individually dominant if its market share is below 40 per cent.[11] However, market share is said to not be the sole indicator of dominance.

IV ABUSE

i Overview

Malaysian law recognises the same categories of abuse (i.e., exclusionary and exploitative abuses) as the European Union. Section 10(2) of the CA 2010 provides a non-exhaustive list of what an abuse of a dominant position may include:

a directly or indirectly imposing an unfair purchase or selling price or other unfair trading condition on any supplier or customer;
b limiting or controlling production, market outlets or market access, technical or technological development or investment, to the prejudice of consumers;
c refusing to supply to a particular enterprise or group or category of enterprises;
d applying different conditions to equivalent transactions with other trading parties;
e making the conclusion of contract subject to acceptance by other parties of supplementary conditions that have no connection with the subject matter of the contract;
f predatory behaviour towards competitors; and
g buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification.

9 MCMC Guideline on Dominant Position, Paragraph 4.17(a).
10 MCMC Guideline on Dominant Position, Paragraph 4.6.
11 The Gas Market Guidelines, Paragraph 5.3(c)(i).

The CA 2010 does not prohibit an enterprise in a dominant position from taking any step that has a reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor.[12] The MyCC has committed to an 'effects-based' approach when assessing a potential abuse of dominance.

ii Exclusionary abuses

The MyCC has said via its Guidelines on Abuse of Dominance that an assessment of exclusionary conduct is in terms of its impact on the competitive process and not its effects on competitors. Exclusionary conduct includes predatory pricing, price discrimination, exclusive dealings, loyalty rebates and discounts, refusal to supply and share essential facilities, buying up scarce intermediate goods or resources and bundling and tying.

By adopting an effects-based approach, the MyCC ensures that conduct that benefits consumers will not be prohibited and therefore ensuring that enterprises have the incentives to compete on merits. In assessing whether the effect of an exclusionary conduct is an abuse, the MyCC will use two tests for assessing anticompetitive effects:

a whether the conduct adversely affects consumers; and

b whether the conduct excludes a competitor that is just as efficient as the dominant enterprise.[13]

The MyCC's Guidelines on Abuse of Dominance in taking an effects-based approach, also references the fact that this approach ensures good economic outcome consistent with the aims of the CA 2010. To quote from the preamble to the CA 2010 which appears to embody a singular goal: "An Act to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith."

The following sets out key enforcement actions pursued by the MyCC for exclusionary abuse.

On 3 October 2019, the MyCC issued a proposed decision against Grab for allegedly abusing its dominant position by imposing a restrictive clause on its drivers that prevented the drivers from promoting and providing advertising services for Grab's competitors in the e-hailing and transit media advertising markets.

In July 2018, Dagang Net was provisionally found to have infringed Section 10(2)(c) of the CA 2010 for allegedly abusing its position as a monopoly provider of trade facilitation services under the national single window by refusing to supply electronic mailboxes to end users of the customs operating system. Dagang Net was also provisionally found to have imposed an exclusivity clause on its business partners that would have had the effect of distorting competition in the provision of trade facilitation services under the national single window, thereby creating a barrier to entry. The MyCC imposed a proposed financial penalty of 17,397,695.30 ringgit, as well as a directive on Dagang Net to cease and desist its infringing conduct and any future conduct that may disrupt competition. The directors and senior management of Dagang Net and its related companies were required to undergo a competition law compliance programme within three months of the issuance of the proposed decision.

12 Section 10(3) of the CA 2010.

13 Guidelines on Abuse of Dominance, Paragraph 3.9.

The MyCC, in its non-infringement finding against Megasteel Sdn Bhd,[14] initially provisionally found that Megasteel had abused its dominant position in the hot rolled coil (HRC) market by charging or imposing a price for its HRC that amounts to a margin squeeze that has an actual or potential effect of constraining the ability of reasonable efficient competitors in the downstream cold rolled coil market. Upon the submission of Megasteel's oral and written representations, the MyCC found that, while Megasteel was a dominant in the upstream market for HRC, it had not abused its dominance.

The MyCC made a non-infringement finding in the Pangsapuri Perdana case,[15] where a complaint was made to the MyCC alleging that there was a monopoly of renovation contracts by a single contractor at the Pangsapuri Perdana apartment building. The alleged abuse was in relation to an exclusivity given to the contractor. The investigations revealed that this was not the case and the owners of Pangsapuri Perdana were free to appoint any contractor to carry out renovation works.

iii Discrimination

An abuse of dominant position includes applying different conditions to equivalent transactions with other trading parties to an extent that may:

a discourage new market entry or expansion or investment by an existing competitor;

b force from the market or seriously damage an existing competitor that is as efficient as the dominant enterprise; or

c harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market.[16]

An example of the MyCC investigating a dominant player that has engaged in discriminatory conduct is the MyEG case. MyEG is an electronic government (e-government) service that enables employers to renew insurances for foreign and domestic workers. MyEG, via its subsidiary, is also engaged in the sale and purchase of insurance as an insurance agent. For renewals to be approved, employees must upload mandatory insurance policies through MyEG's e-government service. However, renewals of insurance policies purchased from other insurers were not approved as fast as renewal policies purchased from MyEG. The MyCC found that, as a dominant concessionaire, MyEG is obliged to grant equal access of its facilities and promote competition in the downstream market. MyEG's conduct of imposing different conditions on equivalent transactions in the purchase of mandatory insurances for the renewal of insurance policies for foreign workers constituted an abuse of dominance as per Section 10(2)(d) of the CA 2010.

MyEG appealed against the MyCC's decision. However, the Competition Appeal Tribunal (CAT) upheld the MyCC's decision and, on 22 January 2019, the High Court dismissed MyEG's judicial review application upholding both the MyCC and the CAT's findings of infringement. At the time of writing, MyEG had also filed for an appeal to the Court of Appeal against the MyCC and CAT's findings and against the penalty imposed by the MyCC.

14 Case No. MyCC/002/2012, 15 April 2016.

15 Case No. MyCC.700.2.008.2014, 12 February 2015.

16 Section 10(2)(d) of the CA 2010.

iv Exploitative abuses

Exploitative conduct, such as excessive pricing, may result from structural conditions in the market. For example, where there are high barriers of market entry, a dominant enterprise may set high prices to exploit customers. This type of conduct typically occurs where the enterprise is a sole concessionaire and would be able to abuse its dominance by imposing an unfair purchase or selling price to exploit suppliers or customers. The MyCC is only concerned with excessive pricing where there is no likelihood that market forces will reduce dominance in a market.

V REMEDIES AND SANCTIONS

Section 40 of the CA 2010 empowers the MyCC to impose a number of remedial actions against an enterprise that has infringed Section 10 of the CA 2010 by:

a requiring that the infringement be ceased immediately;

b specifying steps to be taken by the infringing enterprise to bring the infringement to an end;

c imposing a financial penalty; or

d giving any other direction that the MyCC deems appropriate.

These remedies are also available under the GSA 1993 and the MACA 2015.[17]

i Sanctions

The MyCC may impose a financial penalty of up to 10 per cent of the infringing enterprise's worldwide turnover for the duration of the infringement period.[18] The financial penalty that may be imposed pursuant to the GSA 1993 and the MACA 2015 is similar to the financial penalty that may be imposed by the MyCC pursuant to the CA 2010.[19] The MACA 2015 additionally provides that the MAVCOM may impose financial penalties of up to 1 million ringgit against an individual and up to 5 per cent of an enterprise's annual turnover for the preceding financial year for non-compliance of guidelines issued under the MACA 2015.[20] For the communications and multimedia sector, licensees under the CMA 1998 may be subject to criminal penalties of up to 500,000 ringgit or a term of imprisonment of up to five years, or both.[21]

In MyEG's case, the total financial penalty imposed by the MyCC was 2.272 million ringgit. The financial penalty was inclusive of the penalty imposed during the infringement period and a daily penalty for MyEG's ongoing infringement for failure to adhere to the directions imposed in the MyCC's proposed decision to provide an efficient gateway for all its competitors at the downstream market.

In relation to the Dagang Net case, the MyCC proposed to impose a financial penalty of 17.4 million ringgit. The provisional financial penalty is, however, subject to the final decision by the MyCC.

17 Section 59(1) of the MACA 2015 and Section 28N(2) of the GSA 1993.

18 Section 40(4) of the CA 2010.

19 Section 28N(5)(a) of the GSA 1993 and Section 59(1)(c) of the MACA 2015.

20 Section 65(4) of the MACA 2015.

21 Section 143 of the CMA 1998.

In the Grab case, the MyCC proposed to impose a financial penalty of 86.773 ringgit against Grab as well as a daily penalty of 15,000 ringgit from the date of service of the proposed decision should it fail to take remedial actions as directed by the MyCC. If an infringement finding is made against Grab, the proposed financial penalty imposed by the MyCC against Grab would be the highest financial penalty against a single company to date for an abuse of dominance case in Malaysia.

In determining the total financial penalty imposed against an infringing enterprise, the MyCC may have regard to the following factors:

a seriousness (gravity) or impact of the infringement;
b duration of the infringement;
c turnover of the market involved;
d degree of fault (negligence or intention);
e recidivism;
f the role of the enterprise in the infringement;
g aggravating and mitigating factors;
h existence of a compliance programme; and
i level of financial penalties imposed in similar cases.[22]

ii Behavioural remedies

Where an investigation has been initiated but not completed, the MyCC may impose interim measures if it has reasonable grounds to believe the infringement occurred, and considers the interim measures necessary as a matter of urgency to prevent serious damage or protect the public interest.[23] Interim measures are only available for *ex officio* investigations and not where an investigation is initiated pursuant to a complaint made to the MyCC. These measures include directing an infringing enterprise to desist from any suspected infringement.

The MyCC will first issue a written notice to the relevant enterprise and permit the enterprise to make written representations within seven days of the date of the written notice. The notice should indicate the nature of and reasons for the direction that the MyCC proposes to give.[24] The MyCC may bring proceedings before the High Court against any person that fails to comply with interim measures imposed by the MyCC under Section 35 of the CA 2010,[25] and where a person is found guilty of this conduct, the High Court shall make an order requiring the person to comply with the direction.[26]

While the MyCC has imposed interim measures in cartel cases, it has yet to issue any interim measures in cases of abuse of dominance.

Communications and multimedia sector

The MCMC or a person may seek an interim or interlocutory injunction against any conduct prohibited in Chapter 2 of Part VI of the CMA 1998 (e.g., prohibitions on anticompetitive conduct, entering into collusive agreements and tying or linking arrangements).[27]

22 Guidelines on Financial Penalties, Paragraph 3.2.
23 Section 35(1) and (2) of the CA 2010.
24 Section 35(4) of the CA 2010.
25 Section 42(1) of the CA 2010.
26 Section 42(2) of the CA 2010.
27 Section 142(1) of the CMA 1998.

The MCMC may also direct a licensee in a dominant position to cease conduct that has or may have the effect of substantially lessening competition, or to implement appropriate remedies.[28] The MCMC, however, may only issue such a direction if the MCMC is satisfied that the direction is consistent with the objects of the CMA 1998 and any relevant instrument under the CMA 1998.[29]

Aviation service sector

The provisions on interim measures under the MACA 2015 are similar to the interim measures as provided in the CA 2010.[30]

Gas supply sector

The provisions on interim measures under the GSA 1993 are similar to the interim measures as provided in the CA 2010.[31]

iii Structural remedies

Structural remedies are not available for infringements under the CA 2010.

VI PROCEDURE

The MyCC may initiate investigations:

a through an *ex officio* investigation;[32]

b under the direction of the MDTCA to investigate any suspected infringement under the CA 2010;[33] or

c upon receipt of a complaint.[34]

The procedural stages of an investigation once initiated are as follows:

a An *ex officio* investigation may only be launched if the MyCC has 'reason to suspect' that an enterprise has infringed or is infringing Section 10 of the CA 2010.

b If an investigation is initiated pursuant to a complaint, the MyCC may first make inquiries on the complainant to decide whether the matter should be investigated. If a complaint comes from an anonymous source, the MyCC may open an *ex officio* investigation instead.

c The MyCC will then proceed with an information-gathering process, which enables the MyCC to request the production of information or a statement of parties in relation to the requested information.[35] The MyCC also has the power to conduct a raid with or

28 Section 139(1) of the CMA 1998.

29 Section 139(2) of the CMA 1998.

30 Sections 57, 61(1), 61(2) and 61(4) of the MACA 2015.

31 Sections 28J, 28P(1), 28P(2) and 28P(4) of the GSA 1993.

32 Section 14(1) of the CA 2010.

33 Section 14(2) of the CA 2010.

34 Section 15 of the CA 2010.

35 Section 18(1) and (2) of the CA 2010.

without a warrant on any premises (i.e., dawn raids).[36] A raid can only be conducted without a warrant if the MyCC has 'reasonable cause to believe' that the investigation would be adversely affected owing to the delay in obtaining a search warrant.[37]

d An enterprise can make a legally binding undertaking to the MyCC.[38] If the MyCC accepts an undertaking, the MyCC shall close the investigation without making any finding of infringement and shall not impose a penalty on the enterprise.

e If the MyCC decides to make an infringement finding, it will first issue a proposed decision against the enterprise, which is essentially a written notice detailing the reasons for the proposed decision and any provisional penalties or remedial actions.[39] It will also inform the enterprise concerned of the period in which the enterprise may submit a written representation and for the enterprise to indicate whether it wishes to make oral representations before the panel of members of the MyCC.

f The MyCC will make an infringement or non-infringement finding. Final decisions are usually published on the MyCC official website.

The MyCC does not offer guidance or a review process to enterprises in regards to the interpretation and application of competition law. Enterprises that require such guidance would have to seek independent legal advice. In the Competition Act 2010 – Compliance Guidelines, the MyCC recommends Malaysian businesses to review all existing arrangements and practices to ensure compliance with the CA 2010 and to implement a competition law compliance programme.

The aforementioned procedures are also available under the GSA 1993.

i Aviation service sector

An authorised officer of the MAVCOM has the power to conduct an investigation where there is reason to suspect that, among other things, an offence, breach or infringement of any prohibition has been or is being committed in relation to the MACA 2015[40] – this includes entering into an anticompetitive agreement[41] and engaging in any conduct that amounts to an abuse of dominant position.[42]

If the MAVCOM determines that there is an infringement of a prohibition under Part VII of the MACA 2015, the MAVCOM shall, among others, require that the infringement be ceased immediately.[43] The MAVCOM shall also notify any person affected by the infringement decision within 14 days of making an infringement finding.[44] The MAVCOM may initiate court proceedings against an infringing enterprise that does not

36 Sections 25 and 26 of the CA 2010.
37 Section 26 of the CA 2010.
38 Section 43 of the CA 2010.
39 Section 36 of the CA 2010.
40 Section 83(a) of the MACA 2015.
41 Section 49 of the MACA 2015.
42 Section 53 of the MACA 2015.
43 Section 59(1)(a) of the MACA 2015.
44 Section 59(2) of the MACA 2015.

comply with any given directions or decision.[45] If the High Court finds that an entity has failed to comply with the directions or decision, the High Court will make an order requiring the entity to comply.[46]

An authorised officer of the MAVCOM can also issue a compliance order if satisfied of an infringement or likely infringement pursuant to the MACA 2015.[47] The compliance order can require a person to refrain from conduct in contravention of MACA 2015 or to take actions required in order to comply with MACA 2015.[48]

ii Communications and multimedia sector

The MCMC can conduct an investigation on any matter under the CMA 1998, either upon the direction of the Minister of the MCMC or if the MCMC has grounds to believe that a civil or criminal offence will be committed.[49] The MCMC may also conduct an investigation pursuant to a complaint received.

Upon concluding an investigation, the MCMC may prepare a report for the Minister of the MCMC, and the Minister of the MCMC may issue a direction to the MCMC to publish the report if satisfied that it would be in the national interest to do so.[50]

iii Appeals and judicial review

A person who is aggrieved or whose interests are affected by a decision of the MyCC under Sections 35, 39 or 40[51] of the CA 2010 may appeal to the CAT by filing a notice of appeal to the CAT. A decision of the CAT is final and binding on the parties to the appeal. However, parties aggrieved by the findings of the CAT may make a judicial review application to the High Court.

In this regard, it is worth noting that judicial review applications have in fact been made against the MyCC in recent years. The MyEG case was the first abuse of dominance case to have been judicially reviewed by the High Court, which upheld the decisions of both the CAT and the MyCC in making an infringement finding.

Two separate applications for judicial reviews were also made by enterprises in respect of notices issued by the MyCC to require provision of information and documents from these enterprises. The MyCC had investigated these enterprises for price-fixing. The applicants argued, among others, that the MyCC did not state in detail the particulars of the investigation conducted as well as the documents referred to in suspecting that the applicants were in breach of the CA 2010. In holding that the applications did not carry any merit, the High Court stated that the MyCC's investigations had not been completed and that the applicant was not entitled to obstruct the MyCC's investigations with frivolous excuses.

In March 2020, the High Court dismissed an application for leave to commence a judicial review filed by Grab that sought to challenge the legality of the proposed decision

45 Section 61(1) of the MACA 2015.

46 Section 61(2) of the MACA 2015.

47 Section 85(1) of the MACA 2015.

48 Section 85(3) of the MACA 2015.

49 Section 68 of the CMA 1998.

50 Sections 71 and 72 of the CMA 1998.

51 These sections are in relation to directions for interim measures made by the MyCC where the MyCC has commenced but has not completed an investigation, as well as findings of non-infringement or infringement by the MyCC.

against Grab on the grounds that the proposed decision was the product of a roving investigation and for failure by the MyCC to give Grab notice of the alleged infringement that it was being investigated for. Grab also challenged the fact that the directions issued by the MyCC that Grab was required to comply with commenced from the date of the proposed decision, failing which a hefty daily penalty of 15,000 ringgit daily would be applied, on grounds of this being evidence of pre-judgement of the case. Other procedural issues highlighted by the challenge included the lack of guidelines providing for procedural safeguards given the MyCC's role as investigator, prosecutor and judge and the fact that the MyCC acts on its own behalf in all of its enforcement actions.[52] The application for leave was dismissed on grounds that the action was premature. The court found that the proposed decision is not considered a final decision.[53] It is reported that Grab intends to appeal the High Court's dismissal of its leave application.[54]

Parties aggrieved by decisions of the MCMC or the EC may appeal to the respective appeal tribunal. The CMA 1998 also provides for an aggrieved party to further apply for judicial review if the party is dissatisfied with the decision of the appeal tribunal. The MACA 2015 only enables an aggrieved party to bring an appeal directly to the High Court.

VII PRIVATE ENFORCEMENT

Any person who suffers loss or damage directly as a result of an infringement of any prohibition under the CA 2010 can initiate an action for relief in civil proceedings against any infringing enterprise.[55] There is no requirement for the MyCC to make an infringement finding before a civil action may be initiated. The MACA 2015 and the GSA 1993 also provide for the right of private action.

While the CA 2010 does not specify whether collective actions are available in civil proceedings, such actions, commonly known as representative actions, are available.[56] The civil courts have the jurisdiction to award damages and equitable remedies, including injunctive relief, specific performance and declarations of illegality. In assessing the amount of damages to be awarded, a party claiming for special damages (where the amount of damages is quantifiable) would have to prove that the sum being claimed was reasonably incurred. If the party is claiming for general damages (where the amount may not be quantifiable), the court will assess the amount to be awarded.

While there does not appear to be a large number of cases actioned through the courts, there are cases where the civil courts were open to making declaratory orders if an enterprise infringed the CA 2010. In *Fantasy Ruby Sdn Bhd v. Padiberas Nasional Bhd*,[57] the plaintiff sought a declaration that the defendant's termination of a broken rice contract was unlawful, and the defendant argued that the contract was null, void and unenforceable owing to a

52 It is noteworthy that Section 27(2) of the Competition Commission Act 2010, provides that, inter alia, all monies lawfully received by the MyCC (including fines and penalties imposed by the MyCC) is to be paid into the Competition Commission Fund.

53 https://www.theedgemarkets.com/article/high-court-dismisses-grabs-legal-challenge-company-appeal-decision.

54 https://www.theedgemarkets.com/article/high-court-dismisses-grabs-legal-challenge-company-appeal-decision.

55 Section 64(1) of the CA 2010.

56 Order 15, Rule 12 of the Rules of Court.

57 [2018] 11 MLJ 618.

breach of the CA 2010. While the court considered the prohibitions set out under the CA 2010, it eventually concluded that no evidence was adduced to prove that any breach had occurred under the relevant sections of the CA 2010.

In *Honda Giken Kogyo Kabushiki Kaisha v. Dnc Asiatic Holdings Sdn Bhd & Ors and another suit*,[58] the plaintiff initiated an action for copyright infringement as the defendant distributed motorcycles that were based on the model created by the plaintiff's employee. A counterclaim was filed by the defendant for, among others, a declaratory order under the CA 2010 for unlawful interference with trade. In its counterclaim, the defendant claimed that the plaintiff's action in enforcing its copyright prevented 'legitimate competition'. However, the court dismissed the defendant's counterclaim and stated that the plaintiff would suffer unjust and unfair competition if its competitors were free to copy its copyright-protected works under the guise of the CA 2010.

Contingency fee or conditional fee arrangements are prohibited;[59] however, advocates and solicitors can enter into an agreement on the amount of legal costs in respect of contentious business pursuant to Section 116 of the Legal Profession Act 1976.

VIII FUTURE DEVELOPMENTS

There remains some level of uncertainty as to the policies and approach that will be taken following the recent change of government on 1 March 2020. It is unclear at this juncture whether the new Minister of the MDTCA will continue the initiatives (which were notably wary of monopolies and dominant entities, including government-linked entities) that were undertaken by the previous Minister of the MDTCA.

One such policy includes the MyCC's plans to seek for legislative amendments to include new provisions on merger control into the law by end 2020. Given the change in government, it is unclear whether this will continue as a priority for the new government. In the absence of merger control provisions, however, it is also likely that the MyCC will take a more aggressive tone in pursuing abuses of dominant positions.

The country continues to witness challenges to the MyCC's enforcement jurisdiction, particularly via judicial review. In some countries, regulations or guidelines exist to define investigative procedures or the manner in which the authority is to determine whether a proposed decision is warranted. These are seen as important safeguards to address any apprehension of bias. It will be interesting to see whether these challenges will bring about more transparency on enforcement procedures. Clearly, the MyCC has made some changes: earlier this year, the MyCC announced its new policy of not publicising the amount of the proposed fine at the stage of announcing its proposed decision.[60] This change will bring the MyCC's practices in line with that of other major competition authorities.

58 [2017] MLJU 1575.

59 Section 112 of the Legal Profession Act 1976.

60 https://www.theedgemarkets.com/article/mycc-proposes-fine-seven-warehouse-operators-price-fixing.

Appendix 1

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Shanthi Kandiah is the head of SK Chambers' legal and regulatory advisers, specialising in competition law, telecommunications regulation, data protection and cybersecurity. Her competition law practice covers antitrust litigation, cartels and sectoral competition regimes, including merger control. She regularly advises many corporations in sectors such as media and telecommunications, aviation, fast-moving consumer goods, construction, pharmaceuticals and other service industries covering issues ranging from competitor collaborations, cartels, pricing and rebate policies, and compliance. Recently, she acted as coordinating counsel in the largest enforcement action to date by the Malaysia Competition Commission involving fines exceeding 200 million ringgit. On mergers, her recent assignments include serving as local counsel on a multi-jurisdiction merger transaction led by a magic circle firm. She has also successfully advised on antitrust approval for acquisitions in the communications and multimedia sector. Shanthi has a master's degree in law and a postgraduate diploma in competition economics, both from King's College London.

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