COMPETITION POLICY IN THE DIGITAL AGE

Case Studies from Asia and Sub-Saharan Africa

2016

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The GSMA represents the interests of mobile operators worldwide, uniting nearly 800 operators with almost 300 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces industry-leading events such as Mobile World Congress, Mobile World Congress Shanghai and the Mobile 360 Series conferences.

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About this booklet

This booklet is for you if you have an interest in competition policy in the digital communications sector. There are chapters on Sub-Saharan Africa and Asia, so this booklet is for you specifically, if you are considering aspects of competition law and regulation in these regions. You are:

- **A lawmaker.** There is a need to consider the balance between sectoral regulation and competition law. The evidence presented in this booklet points overwhelmingly to the benefits (for the economy as a whole) brought about by enactment of a modern competition law, properly enforced by a well-resourced competition authority. More resources should therefore be allocated to competition authorities, and the balance with the sectoral regulator(s) reconsidered. The demarcation of the jurisdiction between the two agencies should be better understood and clarified, if necessary. This should be done both at the national level and in supra-national organisations.
- **An enforcer of regulation**, with or without concurrent competition law powers, who wants to understand how to regulate the telecoms sector in the digital economy, taking into account what competition law enforcers can do.
- **An enforcer of competition law** who wants to consider more deeply the interplay with sectoral regulation and gain a better understanding of the dynamics in the digital economy, where, due to historical reasons, some players are regulated and others are not. Enforcers of regulation and competition law who want to understand and improve the coordination between their respective areas. Collaboration between the agencies is important, both at the national level and in the supra-national context.

Acknowledgments

This booklet could not have been drafted without the help and cooperation of many contributors both from operators and industry players and internally.

Within the GSMA, special thanks go to Kalvin Bahia, David Darwin, Arran Riddle, Serafino Abate and Brett Tarnutzer. In this booklet, care has been taken to be as accurate as possible but all information is taken from publicly available resources which may not be accurate in all cases. The GSMA intends to update this case studies booklet regularly. Please send all comments to comphandbook@gsma.com

PDF Navigation Instructions

This booklet is intended as a reference, and is a companion to the GSMA Competition Policy Handbook. Following the review of the case studies, we have identified five main features of best practice in competition policy that are fundamental to a proper consideration of the issues that arise in the digital economy. We look at Sub-Saharan Africa and Asia to see whether these features are present in the geographies considered. We develop recommendations for policymakers and agencies that are responsible for devising and applying competition policy in the digital age.

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There are examples of more converged regulators for telecommunications and media in Hong Kong, Malaysia and soon Singapore – no regulatory regime applies to the players of the digital age in their entirety. This focus on regulating the telecoms sector is historical. As an example, regulation is required due to the link between WTO trade agreements and telecoms liberalisation and regulation, as described above (see The International Dimension in the introductory chapters).

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Foreword

This booklet is intended as a companion resource to the GSMA Competition Policy Handbook. Existing regulators and competition authorities have the task of enforcing competition policy. They can do a lot to ensure that regulation is only imposed where necessary, recognising that the application of competition law is best suited to the converged digital economy. A careful market appraisal, taking into account all products and services that are substitutable, leads to a market assessment in which all competitive forces are properly considered and therefore in which operators may, in fact, not enjoy a position of market dominance (in competition law) or significant market power (in regulation). For example, if at the retail level consumers can switch to 'free' messaging apps in response to an increase in price of SMS, then no operator can increase the price of SMS and therefore operators do not have significant market power. So too, in the world of internet platforms, it is important to define a multi-sided market in order to arrive at a proper assessment of the competition dynamics in that market.

There is obvious overlap between regulation of operators with significant market power and competition law enforcement. Competition law enforcement applies to all sectors and is a powerful tool for boosting productivity, innovation, competitiveness, and growth. Indeed, a recent report by the World Bank Group estimates that a proper enforcement of competition law has the potential to lift a significant amount of people out of poverty. One aspect that is perhaps less understood concerns the very fabric of the legal, policy and operational framework. If there is no special regulator for an industry, only the competition authority will be able to intervene. This is why issues that may arise in the IT sector, or in the internet provider sector are considered by the competition authority. This is why the cases against Microsoft in the 1990s were investigated by competition authorities. In the digital economy, this is why the existing cases against Google and Apple are pursued by competition authorities. Indeed, this is why cases in the pharmaceutical sector, or against chip manufacturers, supermarket or airlines, are carried out by competition authorities.

Therefore, competition principles need to be integrated between the different agencies that have the task to enforce them, in close cooperation between competition authorities and sectoral regulators. Because of the real risk of over-regulation, it is especially important to rely on competition law whenever possible and to regulate ex ante only when there is a clear case to do so. Because the digital economy is global, cross-border cooperation between competition authorities and regulators is necessary.

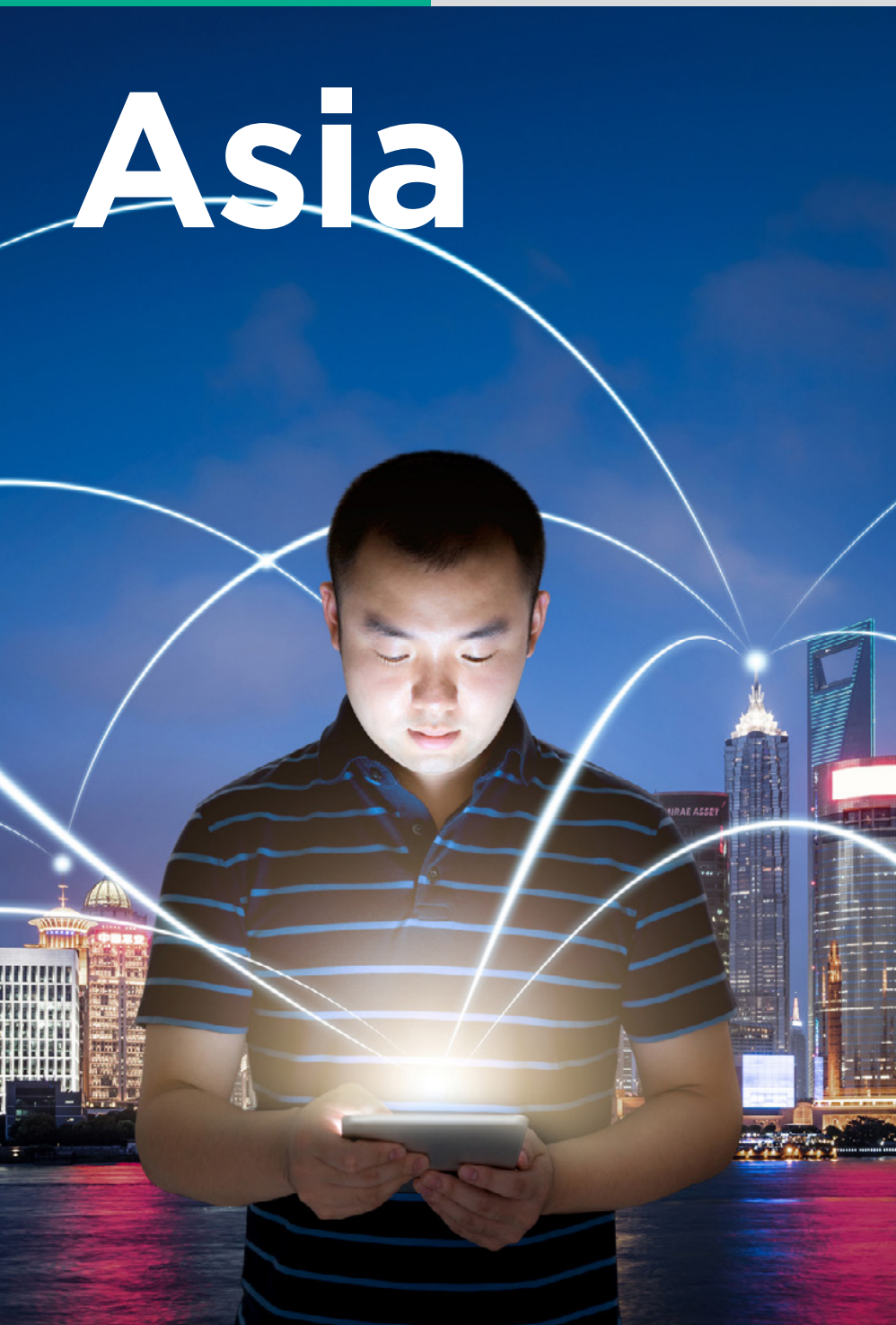
This only works if the legal and policy framework is in place; that is, if there is a competition authority in the country, and if the authority is properly set up and has the resources and expertise to operate. In this booklet, we review the situation in Asia and in Sub-Saharan Africa. Although in Asia there is a competition authority in all of the countries surveyed, bar one, the effectiveness of the authority varies greatly from country to country. In Sub-Saharan Africa, out of 50 countries surveyed, only 14 have a fully established competition authority. In all countries surveyed, there is regulation imposed on a sector: telecommunications (in some cases, telecommunications, media and broadcasting). Indeed, it is often a WTO requirement that countries implement a system of regulation of the telecommunications sector in order to gain access to international trade. There is no similar requirement to adopt a system of competition law. Not all telecommunications regulators apply regulation on operators with market power, after an assessment of market failures that require intervention.

In both Sub-Saharan Africa and in Asia, cross-border cooperation has improved in recent times. Common Market for Eastern and Southern Africa (COMESA) in Southern Africa is active as a supra-national competition authority in merger-control cases and is expanding its remit. The Association of Southern Asian Nations (ASEAN) in Southeast Asia is in the process of setting up its own frameworks. This is to be welcomed, although if the jurisdiction of supra-national bodies is not properly codified, instead of leading to a much-needed one-stop shop, it can lead to extra layers of bureaucracy and the risk of businesses facing multiple agencies, at the supra-national level and nationally. However, cooperation spreads knowledge and best practice and minimises the risks of diverging decisions and practices among agencies, between countries, making it easier for the market players to operate with legal certainty across borders.

Emanuela Lecchi, Head of Competition (Legal), GSMA

14 December 2016

Asia



Summary

To foster the development of the digital economy, the system of sector-specific regulation should be flexible; regulation should only be applied after a proper market assessment, and only where competition law is not sufficient to deal with the issues identified. Competition authorities and regulators should cooperate in-country and across countries. Across Asia, a number of countries are at the forefront of competition policy globally. Adopting the right regulatory framework would be a necessary step for so-called 'emerging' and 'transition' societies to move up the digital value chain.

Asia is "arguably one of the most diverse regions in the world", with a "varying degree of socioeconomic and digital society development" and "represents a very diverse landscape of emerging, transition and advanced digital societies" (GSMA Digital Societies Report 2016),[43] namely:

- **emerging digital societies** comprise countries where digitisation is mainly a tool for socioeconomic development, particularly in relation to improving social inclusion;[44]
- **transition digital societies** comprise countries where the focus is on personalisation of services, for greater engagement between individuals and institutions;[45] and
- **advanced digital societies** are those where it is possible to develop properly interconnected and interoperable processes and services across sectors for productivity and efficiency gains. Asia includes a number of digital societies among the most advanced.[46]

In the journey to move up the digital value chain, policymakers should focus on all elements of an interoperable digital ecosystem at the national level, including (i) fostering digital literacy and affordable devices; (ii) making it possible for the new services to be provided seamlessly; and (iii) supporting the development of the Internet of Things. The appropriate regulatory settings underpin the development of a digital society. Adoption of a regulatory regime based as much as possible on a proper understanding of the marketplace that is to be regulated is the key. Policymakers and agencies should consider the recommendations highlighted in Figure 3. The adoption of these recommendations will ensure that the five features of best practice in competition policy identified in Figure 2 are adopted. These are reproduced below.

43. GSMA, Advancing Digital Societies in Asia, 2016, available at: http://www.gsma.com/newsroom/press-release/new-gsma-study-tracks-digital-society-progress-asia/, page 20
44. In the Digital Societies Report, this category is represented by Bangladesh and Pakistan
45. In the Digital Societies Report, Indonesia and Thailand fall into this category
46. In the Digital Societies Report, Australia, Japan and Singapore were selected as representative countries

Figure 2: (reproduced again below) Five Features of Best Practice in Competition Policy

1. A **properly functioning competition authority** and a **properly functioning regulator**, i.e., that are independent of government, properly staffed and resourced.
2. Economic regulation must address **market failures**, based on evidence from up-to-date market reviews. Regulators must be clear about the reasons for, and impact of, regulation in all cases.
3. Ideally, **competition law should be enforced by a competition authority**. If the regulator has **sectoral competition law powers**, the need for cooperation between agencies is greatest.
4. Both competition authority and regulator understand **the interplay** between their respective jurisdictions and **work together** to address the issues identified.
5. There is appropriate, **meaningful cooperation** between competition authorities and regulators at the supranational level too.

Feature 1: A properly functioning regulator and a properly functioning competition authority

Figure 17 provides an overview of the position at the national level in the Asian countries listed. In all 23 countries surveyed, there is an active regulator with powers to regulate the telecommunications industry (at least). There are examples of more converged regulators for telecommunications and media in Hong Kong, Malaysia and soon Singapore – no regulatory regime applies to the players of the digital age in their entirety. This focus on regulating the telecoms sector is historical. As an example, regulation is required due to the link between WTO trade agreements and telecoms liberalisation and regulation, as described above (see The International Dimension in the introductory chapters).

Active regulators do not always perform their duties with clarity as to the reason why they regulate and after a properly performed market assessment, potentially leading to regulatory market distortions. (See Feature 2 below).

Twenty-two out of the t23countries surveyed in Asia have competition laws. **Cambodia** is the exception. A competition law has been adopted but is not yet in force in **Myanmar** and in **Brunei Darussalam**. The competition authority has only just started its operations in the **Philippines**, amongst reports of initial uncertainty surrounding the application of merger control in the telecommunications sector.[47]

47. The acquisition by Globe Telecom, Inc. and PLTD, Inc. of San Miguel Corp.'s telecommunications business was subject to a legal wrangle between the companies and the Philippine Competition Commission. See: http://cnnphilippines.com/business/2016/09/14/competition-body-fights-to-continue-investigating-Globe-PLDT-deal.html

Measuring the effectiveness of competition law enforcement in countries where the competition authority has been active for a number of years and benchmarking it against other countries and regions is a notoriously difficult task. The WBG African Competition Policy Report[48] measures effectiveness according to the Bertelsmann Stiftung's Transformation Index (BTI), derived on the basis of expert assessments.[49] Unsurprisingly, high-income regions are shown to have more effective enforcement of competition policy. Although the Report specifically considers the situation across Africa, it does conclude that competition policy enforcement could be improved in 'developing countries' in East Asia and the Pacific. This conclusion is borne out by the case studies the survey in this chapter.

As the cases shown exemplify, there is no doubt that competition law can and is applied in Asia, and has the potential to be relied upon in preference to regulation, whenever possible. Advanced digital societies in Asia are at the forefront of competition law enforcement anywhere in the world. **Australia**, **New Zealand**, **Japan, Singapore** and **South Korea** have an impressive history of application of the competition rules. South Korea's early investigation of Google remains one of the earlier cases where competition law was deployed to consider the issues posed in the digital economy (Figure 25). In **Australia**, the 2015 review of competition policy (the so-called Harper Report) is a model of clarity.

There is therefore plenty of precedent in Asia for emerging and transition societies wishing to step up the digital value chain to adopt a regulatory regime that encourages change and innovation. In regulatory terms, this involves the adoption of a system of competition policy where competition law is applied in most cases, and regulators concentrate on regulating only where it is truly necessary. Indeed, as early as 2005, the **Hong Kong** regulator provided an early example of a decision to lift existing price regulation on the incumbent telecoms operator, PCCW, in the light of the changed conditions of competition in the marketplace (see Figure 21).

48. WBG African Competition Policy Report, quoted, Figure A-4, page 4
49. As quoted in the WBG African Competition Policy Report: Transformation Index of the Bertelsmann Stiftung 2016. Gutersloh, Bertelsmann Stiftung. http://www.bti-project.org/en/home/ (referred to as '**2016b**,' accessed May 24, 2016).

Figure 17: Status of adoption of competition law and market power regulation in Asia

Societies	Regulation based on market power [50]	Competition Law
Australia	✓	✓
Bangladesh		✓
Brunei Darussalam	✓ [51]	✓ (adopted 2015. Not yet in force)
Cambodia		✗
China	✗	✓
Hong Kong	*Ex ante* regulation much reduced	✓ (adopted 2010. In force 2015)
India	✓ [52]	✓
Indonesia		✓
Japan	✓	✓
Laos		✓
Macau		
Malaysia	✓	✓ (applied by regulator)
Myanmar	✓	✓
New Zealand	✓	✓
Pakistan	Currently 25% SMP threshold. New SMP regime considered	✓
Philippines		✓ (adopted 2015. Just into force)
Singapore	✓	✓ (applied by regulator)
South Korea	✓	✓
Sri Lanka		✓
Taiwan	✓	✓
Thailand	✗	✓ (limited enforcement)
Vietnam		✓

50. An earlier example of a table bringing together the application of competition law and regulation in different countries was in Figure 10 of the Competition Policy Handbook - many thanks to those who sent us comments. Countries left blank are those for which we have no information. Details of the relevant provisions are to be found in the sections on competition law and regulation based on market power. It is possible that in countries where there is no formal system of market power regulation such as SMP regulation (marked with a cross) nevertheless the regulator applies SMP principles, as a matter of best practice.
51. In Brunei Darussalam, at present there are a number of instruments that refer to the market power of licensees (in the telecommunications sector) but a general overview on how the regulator will apply SMP regulation is not yet published. A Code has been drafted that will specify that SMP designated operators will have to comply with obligations, similar to the telecoms rules that apply in Singapore. At the time of writing (November 2016), the Code is awaiting publication in the Gazette, prior to coming into force.
52. In India there is no formal SMP regulation per se, but TRAI has published a Reference Interconnect Offer Regulation (2002) that considers SMP/market power. This is relied upon by the TRAI, to apply SMP principles as general principles of good regulation.

Feature 2: Economic regulation addresses market failures and the regulators are clear about reasons to regulate and impact of regulation

Appendix 2 provides guidance on the system of regulation of operators with significant market power (SMP), based on EU precedent, including flowcharts of two worked examples.

Ten out of the 23 countries listed in Figure 17 recognise formally that the regulator should apply economic regulation only after a proper market assessment and only to address issues that have been clearly identified. In **India**, there is no formal legislative framework for SMP regulation but the regulator in practice accepts a market analysis approach to regulation. Advanced digital societies tend to adopt such a framework, as demonstrated by **Australia**; **Hong Kong**; **Japan**; **New Zealand**; **Singapore**; **South Korea** and **Taiwan**.

Countries that have introduced their regulatory regimes at a comparatively later stage (such as **Myanmar**) include formal powers to impose regulation on "dominant licensees" but the regime is very new and the regulator is only now beginning to regulate.

Formal application of a system of SMP regulation is not generally a feature of emerging and transition digital societies. In **Pakistan**, currently there is a presumption of market power for all operators with a more than 25% market share. This has proven inflexible in practice (notwithstanding the theoretical ability to dislodge the presumption after a market analysis). Under ongoing plans for reform, the government recognises that the regime should be streamlined and increasingly governed by competition rules.

The difficulties that arise when retail regulation in particular is imposed without a proper understanding of its impact on the market regulated are exemplified in Figure 12. Further, it is particularly important that a proper market assessment underpins spectrum assignment. Failure to do so may result in a country having too many mobile operators, and being caught in a loop where: (i) too many operators are licensed. These find it difficult to compete; (ii) the government pushes for consolidation; (iii) mergers are often complicated by the need for multiple approvals and sometimes over-licensing of operators results in withdrawal of licences. The case of **Indonesia** provides an illustration of these issues (Figure 32). Spectrum assignment in the absence of a thorough understanding of the market may lead to undesirable consequences when new mobile operators find that they cannot meet the price of the spectrum (and all other regulatory requirements), as was the case recently in **Thailand** (Figure 31).

Setting the reserve price unrealistically high can happen in advanced societies too, as demonstrated by the **Australian** case in Figure 30.

Feature 3: Ideally, competition law powers should be exercised by the competition authority

In most countries surveyed there are two agencies with separate powers of application of the competition rules and regulation. The pros and cons of the different regimes are summarised in Figure 18. Overall, whenever there are two agencies, there will be a need for coordination and cooperation.

It seems that the **Singapore** model of exclusive application of the competition rules by the regulator may be achieving more acceptance across Asian countries. It was adopted in **Malaysia** and it seems that currently **Pakistan** is considering it, and **Myanmar** might adopt it when the competition law comes into force in 2017. If the regulator is granted sectorial powers to apply competition law, the competition authority should also be strengthened and the two agencies should work together effectively.

Policymakers considering this model should be aware of the potential for divergent application of the competition rules to the telecoms sector, differently from the rest of the economy and of the risk that resources may be diverted from funding the competition authority, towards funding a regulator with jurisdiction limited to the sector. This could limit the gains of proper enforcement of the competition rules for the economy as a whole, as seen here.

Policymakers considering a change to the system of competition policy overall may also consider a model where sectoral regulators could be integrated within competition authorities. This model has been adopted in New Zealand (and in Europe, in Estonia, in The Netherlands and in Spain). It has the potential to ensure properly consistent application of competition law and sectoral regulation of utilities and communications, across all sectors of the economy. Particularly where competition policy expertise may be scarce, the integrated model could achieve synergies and would harness the broad expertise of both regulation and competition specialists, enhancing the quality of decisions.[53]

53. Different possible models of institutional arrangements, including the integration model, are considered in detail in the GSMA, CEG report, *Resetting Competition Policy Frameworks for the Digital age*, quoted, Table 1, page 43.

Figure 18: Existing models in competition policy — Asia

	Two agencies: Competition authority and separate sectoral regulator	**Two agencies:** Regulator with concurrent powers in competition law	**Two agencies:** Regulator with exclusive jurisdiction to apply to telcos competition law	**One agency:** Only the regulator, only regulation	**One agency:** The Integrated Model
EXAMPLES	Most countries surveyed	Hong Kong	Malaysia, Singapore, Myanmar? Pakistan?	Cambodia	New Zealand
POSITIVES	Ensures that competition law is applied equally to all sectors of the economy	Ensures that competition law should be applied with sector knowledge, but competition authority retains ability to consider issues too	Ensures that competition law should be applied with sector knowledge. No safeguard of competition authority's involvement.	Convenience. Country complies with WTO Reference Paper	Properly consistent application of competition law and sectoral regulation across all sectors of the economy. Synergies
NEGATIVES	Need for the agencies to understand their roles and to cooperate	Evidence suggests that regulators tend to apply regulation more than competition law. The competition authority defers to regulator	Risk of over-reliance on regulation of the sector. Risk that regulator applies regulatory categories when applying competition law	Especially with convergence in the digital economy, only telcos are subject to scrutiny. Non-level playing field	If the agency is not properly resourced, risk of backlogs. Need for coordination across the different parts of the agency.

Source: GSMA

Feature 4: The competition authority and the regulator understand the interplay between their respective jurisdictions and work together

Advanced societies in Asia have systems for cooperation and coordination between the competition authority and the regulator. In **Hong Kong**, the two authorities have entered into an MoU. In **Malaysia** the competition authority, the MyCC, chairs a competition law group of which all regulators with competition law powers are members. In **Singapore**, the competition authority and the regulator have issued joint guidelines for the application of competition law to the telecoms sector.

The need to cooperate is greatest in cases of merger control where lack of clarity and the overlapping jurisdictions of the regulator (on spectrum issues, usually) and of the competition authority can lead to confusion and contradictory outcomes.

Feature 5: There is appropriate meaningful cooperation between competition authorities and regulators at the supra-national level too

There is appropriate meaningful cooperation between competition authorities and regulators at the supra-national level too

Figure 19 includes all 42 countries in the wider Asia Pacific area that are members of APT. Shaded in grey are those countries that are members of all three main regional inter-governmental organisations in Asia, namely **Brunei Darussalam**; **Indonesia**; **Malaysia**; the **Philippines**; **Singapore**; **Thailand** and **Vietnam**. Logically, these countries can be expected to have great influence in shaping competition policy at the supra-national level in Asia.

Intergovernmental organisations tend to be run along silos so that there does not appear to be sustained continued cooperation and coordination between the competition agenda and the telecoms regulatory agenda in the main three intergovernmental organisations surveyed in Asia. The creation within APEC of an ad-hoc steering group on the internet economy is a rare occurrence of cooperation amongst different branches within APEC.

ASEAN's newly created Economic Community aims to deliver a highly integrated economy through the ASEAN states. Early results include the adoption of Regional Guidelines on Competition Policy and the commitment of the members to introduce competition law by 2015. The adoption of competition laws for the first time in the Philippines and in Brunei Darussalam in 2015 is a direct consequence of the creation of the ASEAN Economic Community.

APT has had a very important role in achieving harmonisation at the global level for use of the 700 mHz band for mobile broadband.

More could be done to strengthen ties between regulators and competition authorities at the supra-national level.

There is one formally organised group, the South Asian Telecommunications Regulator's Council (SATRC). The ITU arranges periodic Asia-Pacific regulators' roundtable and international training programmes.

Cooperation at the supra-national level between competition authorities tends to be on the basis of bilateral MoUs between national authorities. The competition Commission of Singapore was the host of the 2016 annual conference of the International Competition Network. At the time of writing, it was announced that the Competition Commission of India will be the last of the annual conference of the ICN in 2018, in Delhi.[54] These events underscore the new pre-eminence of Asia in international competition enforcement.

54. http://currentaffairs.gktoday.in/india-host-2018-international-competition-network-annual-conference-11201637047.html

Figure 19: Membership of regional organisations in Asia

Country	APT	APEC[56]	ASEAN
Afghanistan	✓		
Australia	✓	✓	
Bangladesh	✓		
Brunei Darussalam	✓	✓	✓
Bhutan	✓		
Cambodia	✓		✓
China	✓		✓
Chinese Taipei		✓	
Cook Islands	(Associate member)		
Fiji	✓		
Hong Kong	(Associate member)	✓	✓
India	✓		
Indonesia	✓	✓	✓
Iran	✓		
Japan	✓	✓	
Kiribati	✓		
Laos	✓		✓
Macau	(Associate member)		
Malaysia	✓	✓	✓
Maldives	✓		
Marshall Islands	✓		

55. APEC includes economies that are geographically outside Asia Pacific, in America and Russia: Canada, Chile, Mexico, Peru, Russia and USA.

Figure 19 (continued): membership of regional organisations in Asia

Country	APT	APEC[56]	ASEAN
Mongolia	✓		
Myanmar	✓		✓
Nauru	✓		
Nepal	✓		
New Zealand	✓	✓	
Niue	(Associate member)		
North Korea	✓		
Pakistan	✓		
Palau	✓		
Papua New Guinea	✓	✓	
Philippines	✓	✓	✓
Samoa	✓		
Singapore	✓	✓	✓
Solomon Islands	✓		
South Korea	✓	✓	
Sri Lanka	✓		
Thailand	✓	✓	✓
Tonga	✓		
Tuvalu	✓		
Vanuatu	✓		
Vietnam	✓	✓	✓

56. APEC includes economies that are geographically outside Asia Pacific, in America and Russia: Canada, Chile, Mexico, Peru, Russia and USA.

Regulation

A regulatory regime that supports change and innovation is a precondition for a level playing field in the digital economy. A system of regulation based on regulatory forbearance when competition law is sufficient to deal with the issues identified, and on the finding of a market failure as the basis for regulation, reduces the risks of over-regulation. It is not a coincidence that advanced societies in Asia have predictable, fact-based system of regulation and a way for the competition authority and the regulator to cooperate and coordinate sectoral intervention. More coordination at the international level would help to ensure operators that work across Asian countries are faced with similar substantive rules can be heard more easily by all regulators involved in any one cross-border investigation.

National laws

The following countries recognise a system of regulation based on the market power of the operator:

- In **Australia**,[57] the competition authority,[58] the Australian Competition Consumer Commission (ACCC), is also responsible for access and pricing regulation across a number of utility sectors and for telecommunications. The ACCC can impose certain *ex ante* regulatory obligations at the access or wholesale level (there is no *ex ante* economic regulation at the retail level) on providers of telecommunications services by 'declaring' those services to be access services ("declared services" under Part XIC of the Competition and Consumer Act 2010, the so-called Telecommunications Access Regime). The ACCC can declare a service if it is satisfied that this will promote the Long-Term Interests of End-users (LTIE). In applying the LTIE test, the ACCC has regard to matters such as whether declaration will promote competition in downstream markets, facilitate any-to-any connectivity and promote efficient investment in, or use of, infrastructure. If a service is so declared, the ACCC must commence an access determination inquiry in order to make an access determination that specifies on an *ex ante* basis the terms of access (including price). In 2015, the Harper Report[59] considered issues of competition policy in regulation as well as in competition law. Recommendation 50 relates to *access and pricing regulations*. The recommendation is to transfer these competences to a new Access and Pricing Regulator with a remit to consider access and pricing across different regulated sectors, such as telecommunications, water, gas and electricity. This is considered important to ensure consistency of approach across all traditionally regulated sectors, although the Australian government did not support this recommendation, as seen in Figure 26 below. The report further considered that declaring that a service as an 'access service' and consequent access

57. Getting the Deal Through, Telecommunications and Media, 2016 (subscriber service): https://gettingthedealthrough.com/area/39/jurisdiction/5/telecoms-media-australia/
58. It is interesting that the ACCC is responsible for the investigation of 'misuse of market power' against firms possessing 'substantial market power' under the competition laws. This terminology effectively reverse the terminology in use in countries where competition law relates to 'abuse of a dominant position' (and regulation refers to 'Significant Market Power').
59. Harper Report, available at: http://competitionpolicyreview.gov.au/final-report/

determination should only occur when it is in the public interest. Specifically, "*the onus of proof should lie with those seeking access to demonstrate that it would promote the public interest rather than on infrastructure owners to demonstrate that access would be contrary to the public interest*".[60] The Harper Report also advocates for robust review of existing regulatory restrictions on competition, acknowledging that regulation may be necessary, but that *better regulation* may be needed. Specifically as regards the communications sector, in the report reference is made to the Australian Government reviews in the communications portfolio,[61] which "should consider the impact of current restrictions on competition in that sector".

- In **Hong Kong**, traditionally the regulator can impose price control measures for carrier licensees in a dominant market position to prevent anti-competitive behaviour (*section 7G, Telecommunications Ordinance (Cap. 106)*). These sectoral price control measures have been superseded by competition law when the Competition Ordinance came into force on 14 December 2015. In 2005, the regulator decided to remove requirement of prior approval of changes in retail price on the incumbent, PCCW.

Figure 20: Hong Kong withdraws *ex ante* tariff approvals on PCCW

In January 2005, the Hong Kong regulator announced the lifting of the prior approval requirement on the dominant operator, PCCW-HKT Telephone Limited's (PCCW-HKT) prices. This change was made by issuing a new licence, then called a 'fixed carrier' licence. Under this licence, PCCW-HKT did not have to get its prices approved by the regulator any longer.

This decision reflects a change from ex ante regulation to ex post competition law. The change was prompted by significant changes in market circumstances for the fixed telecommunications service segment in Hong Kong since ex ante tariff regulation was first implemented in 1995. Key market changes included:

- progressive market share erosion for the incumbent,
- the emergence of alternative products, and
- the lowering of barriers to entry.

From 1 August 2008, unified carrier licences have become the only carrier licences available for the provision of fixed, mobile and/or converged services in Hong Kong.

60. Harper Report, quoted, para. 2.1
61. In the Report, the reference is to "See, for example: Australian Government 2014, Spectrum Review, Australian Government Department of Communications, viewed 9 February 2015, http://www.communications.gov.au/consultation_and_submissions/spectrum_review>"

- In **Japan**, market liberalisation began very early (in 1985). Following the February 1997 WTO agreement on basic telecommunications services, Japan made significant changes to its regulatory regime such as elimination of the so-called 'supply-demand' standard for market entry and foreign ownership restrictions on carriers, (except NTT).[62] Competition policy moved towards the adoption of a system more based towards *ex post* application of competition laws in the new millennium. In 2004, the previous system of allowing entry by permission (licence) was abolished, as was the system of retail rate/tariff regulation. The current system includes *ex ante* regulation of "dominant carriers". The criteria for the designation of dominant carriers depend on whether the players are fixed or mobile,[63] bearing in mind that the regulator has introduced functional separation between the 'facilities department' (for access) and 'sales department' of NTT East and NTT West. Dominant carriers have specific obligations due to their position of market power, including for notification of reference interconnection offers and for accounting separation. Regulatory obligations are also imposed on the dominant carriers, not to engage in the activities prohibited by the WTO Reference Paper.[64]

- In **Malaysia**, the regulator is the Malaysian Communications and Multimedia Commission, which regulates under the terms of the Communications and Multimedia Act (1998). Malaysia has adopted a system of *ex ante* economic regulation similar to the Australian model under the Telecommunications Access Regime. The regulator applies the Long-Term Interest of End Users and Bottleneck Facilities as the key concepts which are of most direct relevance to the *ex ante* regulation of wholesale access to telecommunications facilities and services. Based on this analysis, the MCMC publishes an "Access List" of obligations imposed for the provision of certain services.[65] As seen in Figure 28, the regulator has also powers to enforce competition law exclusively to firms in the sector.

- In **Myanmar**,[66] a Telecoms Law was enacted in 2013. It contains some provisions for *ex ante* regulation for access and interconnection. According to the Interconnection and Access Rules, the relevant Ministry (Department) has the power, *inter alia*, to direct licensees to enter into an interconnection agreement and direct a dominant licensee to enter into an access agreement with another licensee. The Telecoms Law and the Telecoms Competition Rules (enacted in 2015) also provide *ex ante* regulation of anticompetitive practices. For instance, licensees must not engage in conduct or any arrangements that would hinder the nature of free competition in the communications market. In addition, licensees are precluded from restricting users or customers by requiring them only to acquire telecommunications equipment or services from such licensee. It is too soon to appreciate how the system will develop. Some speculate that the regulator will have jurisdiction over the application of competition law, exclusively, or jointly with the competition authority.

62. For a history of the early liberalisation of telecommunications in Japan, see OECD, *Regulatory Reform in Japan*, 1999, available at: https://www.oecd.org/regreform/2506744.pdf
63. A so called "Category 2 designated facilities" Rule applies to mobile operators: these are judged to be "dominant if they have: (i) a share of all terminals of over 10%; and (ii) a revenue share of over 40% over a period of time; or (iii) if they have above 25% but below 40% share, several criteria are considered to determine whether they are dominant, including the size of business, the brand power, the price elasticity of demand.
64. On the more recent history of liberalisation in Japan, see the two presentations: http://www.itu.int/ITU-D/finance/work-cost-tariffs/events/tariff-seminars/Japan-13/documents/Sess2-4_Japan_UMINO.pdf (ITU, 2013) and https://www.jointokyo.org/files/cms/news/pdf/Presentation_Mr_Yoichi_Iida.pdf (WTO, 2011)
65. The Access List was lately reviewed in 2015. See the Public Inquiry Report: http://www.skmm.gov.my/skmmgovmy/media/General/pdf/Access-List-PI-Report-2015.pdf
66. Getting the Deal through, quoted, https://gettingthedealthrough.com/area/39/jurisdiction/132/telecoms-media-myanmar/ (subscriber service)

- In **New Zealand**,[67] where the Commerce Commission is an integrated competition authority and sectoral regulator for all sectors of the economy,[68] Schedule 1 of the Telecommunications Act 2001 includes a number of wholesale designated access services and specified services that can be regulated, at the request of an access seeker. An access providers can also trigger a review of the regulation imposed. The Telecommunications Act imposes a requirement on the Commerce Commission to review the list every five years, to determine specifically whether existing services should be deregulated.

- In **Pakistan,** currently Section 17(1) of the Telecommunications Rules declares that an operator "shall be presumed to have significant market power when it has a share of more than 25 per cent of a particular telecommunications market." Section 17(2) gives to the regulator the authority to extend the SMP status to operators with less than 25 per cent market share or to relieve those with more than 25 per cent of the status after a comprehensive analysis of the market. A comprehensive review of the regulatory framework started in 2015, under the New Telecommunications Policy (NTP)[69]. Under the NTP, the market should be increasingly governed via competition rules and mechanisms. The Ministry of Information Technology and Telecommunications (MoITT) under its authority from the Telecoms Act[70] will have the task to develop rules to "identify product markets, determin[e] the respective market power of service providers within each market, determin[e] whether anti-competitive behaviour is prevalent and what remedies should be applied as *ex ante* or *ex post* measures."[71] It appears that Pakistan is therefore heading towards the adoption of a system where the regulator will have powers to apply the competition rules to the telecoms sector, similar to Malaysia and Singapore, as will be described below, under 'Competition'.

- In the **Philippines**, where a competition law has just been introduced, the regulator, "the NTC, retains residual powers to regulate rates of tariffs in cases where 'ruinous competition' results or when a monopoly, cartel or combination in adversely affects the public; in such circumstances, the NTC is empowered to establish a 'floor' or 'ceiling' on the rates of tariffs."[72] This appears to be a very interventionist approach by the regulator. Generally speaking, an interventionist approach may lead to over-regulation and micro-management of the telecoms sector, potentially leading to micromanagement by the regulator (see Figure 12).

- **Singapore** has a system of *ex ante* regulation for 'dominant licensees' (i.e, licensees with significant market power), under the terms of the Telecoms Competition Code 2012 (TCC). The regulator can classify a licensee as dominant, when it:

    - is licensed[73] to operate facilities that are sufficiently costly or difficult to replicate such that requiring new entrants to do so would create a significant barrier to rapid and successful entry into the telecommunications market in Singapore by an efficient competitor; or

    - has the ability to exercise significant market power in any market in Singapore in which it provides telecommunications services.[74]

67. See: http://www.comcom.govt.nz/regulated-industries/telecommunications/
68. The Commerce Commission is the competition authority and also the regulator in sectors as diverse as electricity; gas pipelines; dairy products and airports. It also has a remit in consumer protection, to apply fair trading rules and has oversight of consumer credit services. See: http://www.comcom.govt.nz/regulated-industries/
69. Available at: http://202.83.164.29/moit/userfiles1/file/Telecommunications%20Policy%20-2015%20APPROVED.pdf
70. "the Federal Government may make rules...(ad) preventing, prohibiting, and remedying the effects of anti-competitive conduct by licensees...". Pakistan Telecommunications (Re-organization) Act, 1996 (XVII of 1996), § 57(2).
71. NTP § 5.1.2. Under the NTP, the Ministry should use as guidance best practices of markets with comparable competition levels and to develop the new rules within six month (by the end of May). The regulator will then prepare a regulatory framework, to be reviewed by the competition authority, for the application of the MoITT's Competition Rules and for an "orderly transition of remedies." NTP § 5.1.14.
72. Maher M. Dabbah, quoted, pages 391 and 392
73. https://www.ida.gov.sg/~/media/Files/PCDG/Practice%20Guidelines/TCC/2012TCC_wef_2July2014.pdf
74. TCC, section 2.2.1

'Dominant licensees' are subject to a range of *ex ante* obligations under the TCC, such as accounting separation requirements; obligations to file tariffs with the regulator for approval; to provide unbundled services; and to allow resale of end-user services by any licensee. Dominant licensees may also be required to offer certain interconnection and access-related services on terms that are pre-approved by the regulator (the IDA, soon to be IMDA, after the merger between the IDA and the media regulator, MDA), by way of a standardised reference interconnection offer (RIO). As will be seen below, Singapore has a system of exclusive sectoral application of the competition rules.

- In **South Korea,** where the competition authority, the Korean Fair Trade Commission, is a very active competition authority (see the case study in Figure 24 for their early investigation of Google), under the terms of the Telecommunications Business Act,[75] the Ministry of Science, ICT and Future Planning has the duty to conduct an annual assessment of the telecommunications markets[76] and the power to impose obligations on carriers that
    - › possesses facilities which are essential to other telecommunications carriers in providing Telecommunications Service; or
    - › whose business size, market share, etc. of its Common Service satisfy criteria specified in a Presidential Decree: this provision would apply to carriers with a position of significant market power.
- In **Taiwan**,[77] telecoms operators are classified as Type I or Type II. A Type I telecoms operator is defined as a provider of facilities-based services; Type II services include all other services. The operation of services is subject to a franchise (Type I) or prior approval in the form of a licence (Type II). Fixed-line, submarine cable, mobile phones and satellite telecoms operators are all categorised as Type I telecoms services. Type I operators are subject to *ex ante* regulations, which include interconnection obligations (all interconnection arrangements shall be transparent, reasonable, non-discriminatory, and be entered into on cost-based pricing), separate accounting, non-cross-subsidisation requirements, number portability, and the NCC's prior approval of pricing and service terms. The regulator specifies what Type I operators are 'dominant'. These are subject to further restrictions such as:
    - › not to obstruct, through proprietary techniques, either directly or indirectly, requests for interconnection from other Type I service operators;
    - › not to refuse to disclose to other Type I service operators their calculation methods for interconnection charges and other relevant materials;
    - › not to improperly determine, maintain or change their tariff or methods of offering its telecommunications services;
    - › not to reject requests from other Type I service operators to lease network components without due cause;
    - › not to reject requests from other telecommunications service operators or users to lease circuits without due cause;

75. Available in English at: http://elaw.klri.re.kr/kor_service/lawView.do?hseq=33562&lang=ENG
76. Arts 34, 35, 39, 41 and 42, TBA. Interestingly, Article 50 outlines a number of regulatory obligations against 'prohibited acts' related to lessening competition (e.g. unfair or discriminatory conditions, service charges for equipment/facilities). These can be dealt with by notification to the regulator and the regulator have the power to conduct investigations and determinations of wrong-doing. In the case of determination of wrong-doing, they can apply remedies (though for wide-ranging remedies the opinion of the Ministry is required).
77. Getting the Deal Through, quoted,

- not to reject requests from other telecommunications service operators or users for negotiation or testing without due cause;
- not to reject requests from other telecommunications operators for co-location without due cause;
- not to discriminate against other telecommunications service operators or users without due cause; and
- not to abuse their dominant market position, and not to engage in any other acts of unfair competition.

Ex ante regulation of 'dominant' companies? A 'competition regulator'?

As seen above, throughout Asia, the terminology in use in Europe and other countries of 'SMP regulation' (significant market power regulation, for asymmetric regulation) is not widespread. Indeed, in countries such as Australia, Malaysia and New Zealand, regulation is based on whether a service is an 'access service', determined to be such by reference to specified criteria that take into account a combination of whether the service is offered through an underlying 'bottleneck facility' or whether access is generally in the interest of consumers, including by reference to the market power of the licensees.

Of the countries surveyed above, only Pakistan uses the SMP terminology. Myanmar, Singapore and Taiwan refer to *ex ante* regulation of 'dominant' companies. This is correct: indeed the definition of significant market power is the same as the definition of dominance (in countries that recognise the difference). However, using this terminology may be confusing in terms of competition policy enforcement, for the following reasons.

Although the definition of 'significant market power' and 'dominance' is the same and the economics tools used for market definition and market assessment are also the same, there are important differences between introducing ex ante regulation and enforcing the ex post prohibition against anticompetitive behaviour.[78] The starting point is different and this often determines a narrower market definition in competition law cases than in SMP regulation. This is because competition law cases often start with a complaint about a particular instance of anticompetitive behaviour whereas regulation considers the market as a whole, with a view to addressing market failures in the system. A narrower market definition often results in more targeted action under competition law. Because the competition authority is considering evidence of a specific instance of anticompetitive behaviour, it can intervene ex post, in markets where *ex ante* intervention (in the absence of a complaint) would not be warranted.

If this distinction is not appreciated (and use of the same word will make it more difficult to appreciate it), there is a risk of confusion, such as occurs when an agency feels that it needs to have determined that a company has SMP (is dominant) before it can investigate a complaint for abuse of dominance. This is not so. Competition law applies to all sectors, and therefore a regulatory determination that a company has SMP (or a regulatory determination that a company is 'dominant' for the purposes of regulation) is NOT a precondition for a

78. This is discussed in the Competition Policy Handbook, quoted, available at: http://www.gsma.com/publicpolicy/wp-content/uploads/2016/04/Competition-Policy-Handbook.pdf. See in particular the following chapters: *How Competition Policy Works Today* and Market Definition, *Key Concept 1, Market Definition in Practice*

competition law investigation. Confusion of this type happens even in countries where the two regimes are called 'SMP regulation' and 'competition law'. To refer to SMP regulation as 'regulation of dominant companies' may confuse regulation with competition law enforcement against abuse of a dominant position. If a competition authority is then referred to as a 'competition regulator', there is further risk of confusion.

The risk of confusion is greater when the regulator is given exclusive powers to apply competition law in the telecommunications sector. Whereas in advanced digital societies the regulator and the competition authority have in place a system for cooperation, in transition and emerging digital societies, the risk of diverging outcomes between the competition law applied to the sector by the regulator and the competition law applied to the economy as a whole by the competition authority is greatest. In the words of the Australian Harper Report:[79]

> *"the culture and analytical approach required to regulate an industry differ from those typically characteristic of a competition law enforcement agency. There is also a risk that an industry regulator's views about the structure of a particular market could influence a merger decision."*

Intergovernmental organisations

Three main regional intergovernmental organisations are active in Asia, namely APT, APEC and ASEAN. Figure 19 provides an overview of membership of these organisations. As shown there, seven countries (namely **Brunei Darussalam**, **Indonesia**, **Malaysia**, **the Philippines**, **Singapore**, **Thailand** and **Vietnam**) are members of all three organisations, raising the intriguing prospects that these countries could act as a conduit for best practice and know-how through the three regional organisations, leading to further coordination across Asia.

Overall, within each organisation, initiatives are in place that should lead to better regional coordination of regulatory regimes and a regional response to cross-border issues. The weakness in the case of all three organisations is that they "rely on a 'soft law' approach to consensus-building in order to mitigate political tensions among members. The non-binding nature of this approach often affects timely delivery or limits the efficacy of their initiatives."[80]

79. Harper Report, quoted.
80. GSMA The Mobile Economy, Asia Pacific 2016, page 60. https://www.gsmaintelligence.com/research/2016/06/the-mobile-economy-asia-pacific-2016/565/

Figure 21: ASEAN, the Association of South East Asian Nations

Members: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. This membership comprises a very divergent group of countries, making the goal of economic integration difficult to achieve.

History: ASEAN was created in 1967 as a regional organisation comprising countries in Southeast Asia.[81] In 2015, the ASEAN countries created the ASEAN Economic Community. The stated aim[82] is to have by 2025 an AEC "highly integrated and cohesive; competitive, innovative and dynamic; with enhanced connectivity and sectoral cooperation; and a more resilient, inclusive, and people-oriented, people-centred community, integrated with the global economy."

Cooperation in the ICT sector: The members of the AEC continue to organise cooperation in the ICT sectors through the 2000 e-ASEAN Framework Agreement and the 2007 Economic Community Framework. Initiatives taken in the ICT sector are steered by the ASEAN Telecommunications and IT Ministers (ASEAN-TELMIN) responsible for ensuring that a pan-regional ICT sector is developed through the AEC initiative.[83] To date, ASEAN has not created cross-sector channels linking telecommunications with other sectors (e.g., finance) at a working level.

Earlier ASEAN regulatory reform proposals (e.g., ASEAN ICT Masterplan 2011-2015) have had some concrete results.[84] ASEAN has adopted a new Masterplan for the period 2016-2020. Other initiatives have suffered from the limitations of ASEAN's multilateralism based on principles of non-interference, minimal institutionalisation, consultation, consensus and non-confrontation, with limited mechanism for ensuring compliance at the national level.[85]

More established ASEAN regional engagement has resulted in concrete results in the liberalisation of sectors such as aviation and finance, and to the lowering of tariff barriers. These could provide a precedent for the often mooted ASEAN Single Telecommunications Market, which would represent a major step towards the growth of a regional digital society.

81. For a history of ASEAN, see: http://asean.org/asean/about-asean/history/
82. http://asean.org/asean-economic-community/
83. GSMA, *Capitalising on ASEAN's Mobile Moment: Effective Mobile Policy and Regulation for the ASEAN economic community*, page 5, at: http:/, Digital Societies Report/www.gsma.com/aboutus/wp-content/uploads/2013/08/Capitalizing_on_ASEAN%E2%80%99s_Mobile_Moment_24ppWEB.pdf
84. The AIM 2015 completion report noted that some 87 projects had been completed. Nearly 50% of the available budget went to infrastructure development and bridging the digital gap, reflecting ASEAN's emphasis on connectivity and digital societies. See GSMA Digital Societies Report, quoted, pages 42 and 43.
85. This is dubbed 'the ASEAN way': see GSMA Digital Societies Report, quoted, pages 42 and 43

Figure 22: APEC, Asia-Pacific Economic Cooperation

Members: APEC refers to members as 'member economies', to emphasise the economics nature of their cooperation. The organisation includes a number of member economies in the Americas (Canada, Chile, Mexico Peru and the USA) and Russia, as well as the countries listed in Figure 19, namely: Australia, Brunei Darussalam, Chinese Taipei, China, Hong Kong, Indonesia, Japan, Korea Malaysia, New Zealand, Papua New Guinea, the Philippines, Singapore, Thailand and Vietnam.

Participation in APEC dialogue and fora is open to member economies, partnering regional organisation (e.g., OECD) and, in some cases, private-sector players, through the APEC Business Advisory Council (ABAC).

History: APEC was founded in 1990. In 2014, the members agreed on an APEC Accord on Innovative Development, Economic Reform and Growth and to concretise their vision of a Free Trade Area of the Asia-Pacific.[86]

Cooperation in the ICT sector: APEC's main focus of activity is the promotion of trade and economic growth in Asia-Pacific, through funding of specific projects and reducing trade barriers between members, harmonizing standards and regulations, and streamlining customs procedures for easier movement of goods across borders.

APEC Telecommunications and Information Working Group (TEL) focusses on the pre-conditions for a digital society, namely connectivity and technological development. TEL has the aim to ensure affordable access to ICT services and the internet. TEL conducts its work programmes through three main steering groups, the Liberalisation Steering Group, the ICT Development Steering Group and the Security and Prosperity Steering Group. The ICT Development Steering Group undertakes projects such as, currently, on Next Generation Networks (led by Japan), on IoT (led by China) and on TV Whitespaces (led by Singapore). Mutual recognition arrangements for technical equipment are considered by a special Task Force (MRATF).[87]

APEC has created an Ad-Hoc Steering Group on the Internet Economy (AHSGIE). This sits above existing committees and reports directly to the Senior Officials' Meeting (SOM). The group brings together different working groups within APEC and its remit is to focus on platforms such as e-identity, e-payments, cloud computing and cross-border data flows. For these purposes, it brings together the telecommunications and financial sectors.[88] This is an important step towards a more holistic regulatory approach for the digital society.

86. http://www.apec.org/About-Us/About-APEC/History.aspx
87. http://www.apec.org/Home/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Telecommunications-and-Information
88. GSMA, The Mobile Economy Asia Pacific 2016, quoted, page 60. See also the GSMA Digital Societies Report, 2016, quoted, pages 44, 45, 46.

Figure 23: Asia-Pacific Telecommunity

Members: APT's membership is the most comprehensive, bringing together all the countries listed in Figure 19.

History: APT was founded in 1979, on the joint initiatives of the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) and the International Telecommunications Union (ITU). APT is an intergovernmental organisation that operates in conjunction with telecoms service providers, manufacturers of communications equipment, and research and development organisations active in the field of communication, information and innovation technologies.

Cooperation in the ICT Sector: APT's focus is entirely on the development of telecommunications services and information infrastructure throughout Asia Pacific. APT assists members in the preparation of Global conferences such as the ITU Plenipotentiary Conference (PP), the World Telecommunications Development Conference (WTDC), the World Radiocommunication Conference (WRC), the World Summit on the Information Society (WSIS), the World Telecommunications Standardization Assembly (WTSA) and the ITU meetings. The APT is also involved in promoting regional harmonisation of their programmes and activities in the region.[89]

Specifically, APT advocates the harmonisation of spectrum assignment to bring about economies of scale for the cost of mobile broadband equipment and devices and to enable greater interoperability and international roaming between networks.[90] It is the only regional body in Asia through which submissions and opinions can be officially relayed to conferences such as WRC , on behalf of the APAC region. The important role of APT in achieving global harmonisation for use of the 700 MHz band for mobile broadband is explained below.

89. http://www.aptsec.org/
90. GSMA, Mobile Economy Asia Pacific 2016, page 60

Competition Law

One important element of a regulatory regime that supports change and innovation is that regulation should only be introduced when competition law is not sufficient to deal with the issues identified. For this to be a reality, it is important not only that there should be a competition authority properly functioning in a country but also that the relative jurisdiction of the competition authority and the regulator should be clear and, whether they are clear or not, that the authorities and the regulators should be able to cooperate. A properly functioning, well-resourced competition authority and an understanding of the role played by cooperation between agencies are both features of advanced societies in Asia. International cooperation under the umbrella of ASEAN in particular is becoming a reality.

National laws

Competition law includes the prohibition to engage in anti-competitive agreements and to abuse a dominant position, and merger control. Merger control in the telecommunications sector is an area that requires extra cooperation between the competition authority and the regulator and is dealt with separately below.

Asia Pacific is very diverse when it comes to the application of competition law. Indeed, the great diversity of regimes — from the substantive prohibitions to the level of economic and legal sophistication, and to the approach to enforcement — can be an issue. Asia Pacific includes jurisdictions with some of the most established competition laws, enforced by well-resourced and very competent competition authorities (as in **Australia**, **Japan**, **New Zealand**, **Singapor**e, **South Korea** and **Taiwan**); jurisdictions with very recently introduced competition laws where nevertheless enforcement is gaining momentum (as in **China**, **Malaysia** and **Hong Kong**); countries where the competition authority has put substantial efforts in the application of the competition rules (as in **India**, where the current competition authority only started to operate in 2009, and **Indonesia**[91] where, notwithstanding continuing difficulties with enforcement, the competition authority's credibility is on the ascent); countries where there is a competition law but enforcement is not as extensive as it could be (as in **Thailand**, **Bangladesh**, **Laos** and **Vietnam**); countries that have just adopted a competition law (as in the **Philippines**, **Brunei** and **Myanmar**); to countries where in fact there is as yet no competition law at all (**Cambodia**). **South Korea** remains one of very few countries to have completed a competition law investigation on a complaint against Google, as illustrated in Figure 24. Indeed, according to recently published statistics,[92] during the first half of 2016 alone, competition authorities in East Asia imposed fines totalling US$750million. South Korean authorities imposed fines totalling US$666.5

91. See Figure 33 for a case study concerning spectrum assignment practices in Indonesia.
92. See the report by the law firm Norton Rose Fullbright, *Competition law developments in East Asia*, available at: , http://www.nortonrosefulbright.com/knowledge/publications/140901/competition-law-developments-in-east-asia-june-2016

million in 25 cases, followed by Japan's US$67.1 million and Indonesia's US$11.3 million. China imposed the second highest ever imposed fine for breach of the competition rules (see Figure 26). Given these levels of competition law enforcement, it is clear that competition law plays a fundamental role across all sectors of the economy. Emerging and transition societies in particular should take notice of the effects of competition on welfare for the economy as a whole (see Figure 5) and consider a holistic approach towards achieving the right balance between regulation and competition.

No opinion as to the effectiveness or correctness of competition law enforcement

Throughout this booklet, we do not express any views as to whether the cases considered show a fair or good level of competition law enforcement. The selected cases show how competition law, properly understood and enforced, can be used to deal with issues of alleged abuse of a dominant position and to deal with merger control effectively. This reinforces the contention that more reliance on competition law should permeate the telecommunications sector, leading to regulatory forbearance.

Figure 24: South Korea probes Google Android

South Korea: Google Android Anti-Trust Probe
Years: 2011-13
Authority: Korean Fair Trade Commission (KFTC)

Legislative and Regulatory Framework:

Monopoly Regulation and Fair Trade Act (No. 11119, amended 2 Dec. 2011). Section 3-2.5, prohibiting dominant firms from unfairly excluding competitors, and Section 4.2, setting the threshold market share for presumption of single market dominance at 50 percent.

Chronology:

- April 2011: search engine operators Daum and NHN file complaints against Google, alleging unfair trade practices related to pre-loading of Google software on Android phones.
- September 2011: KFTC raided Google's Seoul offices.
- January 2012: KFTC accused Google of obstruction of investigations.
- May 2012: KFTC conducts a second raid of Google's Seoul office.
- July 2013: KFTC ended its probe on the narrow question whether Google had acted anti-competitively by pre-loading their search engine on Android phones.
- July 2016. Reports circulated that the KFTC was looking into opening a new investigation over whether Google had abused its dominance in the mobile operating system market more generally, to prevent the development and use of rival operating systems.
- October 2016: during a parliamentary review of the KFTC, the KFTC indicated that the matter will be re-opened due to changed market conditions.

Figure 24: South Korea probes Google Android

Background:

KFTC launched an anti-trust investigation into Google's Android business practices in spring 2011, following formal complaints to the commission from South Korea's two largest search engine operators.[93] While Daum and NHN held a combined 90 percent share of the computer search engine market in 2011, they claimed abuse of dominance by Google in its deployment of Android systems, alleging that Google forced phone manufacturers to pre-load only Google applications on their devices and delayed the production from equipment makers that did not comply. Nearly 70 percent of South Korean smartphones used the Android operating system at the time, and Google's competitors feared a lock-out of their search engine applications from those devices.[94] With Google search engine set as the default, NHN and Daum faced a more difficult task in acquiring mobile users.

The KFTC conducted raids of Google's Seoul office in September 2011 and again in May 2012. In January 2012, the KFTC accused Google of interfering with the raids by encouraging employees to work from home those days and to delete potentially problematic files. Google denied the accusations and vowed to cooperate fully with the commission's investigation.[95]

In July 2013, the KFTC ended its investigation after concluding that the claimed business practices had a "very small" impact on the search engine market. Noting that Google's market share had actually declined over those two years, the KFTC found it unlikely that the company's actions would be anti-competitive practices.[96] KFTC also pointed out that consumers could easily access other search engines on the Android system.[97]

Analysis:

The case presented the question of how to define market dominance. Google's Android is the main operating system in South Korea but the bundling of the search engine with the device seemingly had no effect on Google's market power in the search engine market. Google only held about 10 percent of the search engine market in South Korea at the commencement of the investigation, and, by the time of the conclusion of the investigation, its market share had not significantly changed. Indeed, KFTC relied on the online search engine's small market share and its consistency over time in making a determination of no finding.

The case is also interesting because it illustrates the possibility for a competition authority to close a case in the absence of compelling evidence of anticompetitive practices, but then being able to re-open it at a later stage if more evidence comes to light or if market conditions change.

93. *See* Matt Brian, "Google accused of blocking third-party Android search apps in Korean antitrust complaints," The Next Web, 15 Apr. 2011, *available at* http://thenextweb.com/google/2011/04/15/google-accused-of-blocking-third-party-android-search-apps-in-korean-antitrust-complaints/#gref.
94. *See* Song Jung-a, "Google faces S Korea antitrust complaint," Financial Times, 15 Apr. 2011, *available at* http://www.ft.com/cms/s/2/87d15ac0-673d-11e0-9bb8-00144feab49a.html#axzz4JCDxlgx1.
95. John Paczkowski, "South Korea Says Google Impeded Antitrust Probe," All Things Digital, 9 Jan. 2012, *available at* http://allthingsd.com/20120109/s-korea-says-google-impeded-antitrust-probe/; John Paczkowski, "Korea Fair Trade Commission Raids Google. Again." All Things Digital, 30 May 2012, *available at* http://allthingsd.com/20120530/korea-fair-trade-commission-raids-google-again/.
96. Charlie Osborne, "South Korea eyes up Google over antitrust laws, again," ZD Net, 12 Aug. 2016, *available at* http://www.zdnet.com/article/south-korea-eyes-up-google-over-antitrust-laws-again/.
97. Youkyng Lee, "South Korea's fair trade commission clears Google after 2-year probe," NBC News, 18 Jul. 2013, *available at* http://www.nbcnews.com/business/south-koreas-fair-trade-commission-clears-google-after-2-year-6C10669675.

In **China**, although competition law was only introduced in 2008, enforcement is increasing.[98] Indeed, the existing case law shows that the authorities are willing to use competition law to deal with perceived issues in the telecoms sector involving state-owned companies. Figure 25 provides details of the 2012 investigation of China Unicom and China Telecom. According to published sources[99], SIAC has announced further reviews of the telecommunications sector.

Figure 25: China investigates telcos

China: NDRC's First Investigation of State-Owned Enterprises
Years: 2011-2012
Authority: National Development Reform Commission ("NDRC")

Legislative and Regulatory Framework:

- Anti-Monopoly Law (promulgated by Order No. 68 of Aug. 30, 2007, of the President of the People's Republic of China) ("AMLaw").[100] Article 17.6, prohibiting abuse of dominance for differential pricing without justifiable reasons. Article 19, establishing presumption of collective dominant market position of two firms where both together hold a joint market share of more than two-thirds and each holds a market share of at least one-tenth.
- NDRC Regulations against Price Fixing (promulgated by Order No. 7 of Dec. 29, 2010, of NDRC). Amongst others, clarifying AML's rules for evaluating justifiable reasons for price discrimination.

Chronology:

- April 2011. NDRC initiates investigation of state-owned enterprises (SOEs) China Telecoms Corporation Limited ("China Telecom") and China United Network Communications Corporation Limited ("China Unicom").
- November 2011. NDRC publicly confirms the investigation.
- December 2011. China Telecoms and China Unicom submit commitments to the NDRC to deal with the allegations of price discrimination between customers, together with an application for a suspension of the investigation.
- February 2012. Each company submitted updated commitments, after NDRC rejects previous plans as too vague.
- March 2012. NDRC Anti-Monopoly Bureau Deputy Director notes progress in the companies' efforts to meet NDRC's concerns but insists investigation will continue.
- February 2014. Head of Bureau of Price Supervision and Anti-Monopoly announces at a press conference that the NDRC is still assessing whether China Telecoms and China Unicom had met their commitment obligation.

98. There are three competition authorities in China, namely MOFCOM for merger control and NDRC and SIAC for pricing and non-pricing anticompetitive behaviour. As seen in Figure 25, this can result in confusion about the jurisdiction of the different authorities.
99. The Guangdong Administration for Industry and Commerce, or AIC, launched "five investigations into anti-competitive conduct, including two administrative monopoly cases, and two cases of abuse of market dominance by China Mobile and China Unicom", *China Mobile, China Telecoms under anti-trust investigation in Guangdong Province*, mLex, subscriber service, 21 June 2016
100. Passed after 11 years of debate and enacted in 2008. Establishing guidelines for prosecution of monopoly agreement and abuse of dominant position investigations and for the imposition of penalties.

Figure 25: China investigates telcos

- Unusually, two government official media, CCTV and the People's Post – Telecommunications Daily ('PPTD'), expressed different views as to the NDRC decision. The CCTV was broadly in favour whereas the PPTD considered that price regulation should be left to the telecoms regulator, the Ministry of Industry and Information Technology ('MIIT').
- Present (as of October 2016). The investigation has been suspended, but it is not yet known whether it will resume, or if it has in fact been terminated.

Background:

In April 2011, the NDRC initiated an investigation into China Telecoms and China Unicom, alleging abuse of dominance by the two state-owned enterprises ("SOE"). According to complaints, the companies, each of whom offer both retail and wholesale broadband access services, charged discriminatory prices (higher prices) for backbone broadband network access to their competitors, violating AMLaw prohibition against price discrimination without legitimate reason. This was the first investigation by Chinese anti-monopoly authorities of any large SOE since the implementation of the AMLaw three years earlier.

The NDRC's public announcement in November 2011 of the investigation marked a departure from the typical process for anti-monopoly investigations in two manners. Firstly, such large-scale anti-monopoly cases had been prosecuted primarily by the Ministry of Commerce ("MOFCOM") and the State Administration for Industry and Commerce ("SAIC") up to that time. The NDRC had signalled its intent to engage more actively in anti-monopoly matters in the midst of, but before the announcement of, its China Unicom/China Telecoms investigation through the addition of three new divisions under the Price Supervision and Anti-Monopoly Bureau and an increase in its staff from 26 to 46 during the summer of 2011.[101] Secondly, such investigations had not typically been officially announced until a final decision had been reached.

Following the public announcement, China Telecoms and China Unicom submitted commitments to the NDRC in December 2011, pledging to lower prices and improve service speeds.[102] After the NDRC replied that the plans did not offer concrete enough terms, both firms offered new plans in February 2012. The Commission then reportedly gave China Telecoms and China Unicom three to five years to implement their plans, including lowering access prices by 35 percent and guaranteeing increased speeds.[103]

The NDRC has purportedly suspended the investigation and will issue no fine,[104] but as recently as February 2014, the head of the Bureau of Price Supervision and Anti-Monopoly stated at a press conference that the Commission continued to assess China Telecom's and China Unicom's progress in amending their business practices. As of August 2016, the NDRC has made no announcement of termination of the investigation.

101. Susan Ning *et al*., "NDRC Demands More Concrete Pledge from China Telecom," China Law Insights, King & Wood Mallesons, *available at* http://www.chinalawinsight.com/2011/12/articles/corporate/antitrust-competition/ndrc-demands-more-concrete-pledges-from-china-telecom/.
102. Announcement, China Telecoms Corporation Limited, Press Release, 9 Nov. 2011, *available at* http://www.chinatelecom-h.com/en/announcements/announcements/a111202.pdf.
103. "Telecoms & Media in China," GTDT: Market Intelligence, Law Business Research, Vol. 2 Issue 4, 26-27 (2015).
104. *See* "China," Cartels & Leniency 2016, International Comparative Legal Guides, 22 Nov. 2015, *available at* http://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2016/china; Thomas K. Cheng, "Competitive Neutrality from an Asian Perspective," Note, Roundtable on Competition Neutrality, Organisation for Economic Co-operation and Development, 11 June 2015, *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2015)49&docLanguage=En.

Figure 25: China investigates telcos

Analysis:

- Substance
  - › Up to the announcement of this investigation, commentators questioned whether the application of the AML would be skewed towards investigations of foreign entities. The launch of this investigation signalled for the first time that the NDRC intended to apply its authority to SOEs.
  - › The guidelines for determining unreasonableness of discriminatory pricing differ between the anti-monopoly regulatory authorities. NDRC's Regulations against Price Fixing included a list of allowances for otherwise prohibited conduct, such as to ensure the products' quality and safety, to preserve brand reputation and to reduce costs or increase efficiency for the benefit of consumers.[105] The SAIC's rules, on the other hand, direct investigators to consider whether the practice reflect usual operations for the benefits of the company and how the practice affects economic efficiency and growth and the public interest.[106]
  - › This case brings out the difficulties that arise in the overlap between competition law and regulation (explained above, see Figure 13). The MIIT is the professional regulator for the prices of broadband but the competition authority, the NDRC, retains the ability to investigate pricing generally.[107]
- Transparency
  - › As of August 2016, the NDRC has not publicly concluded its investigation. Article 45 of the AMLaw states that the regulatory authority "may" suspend its investigation if the company under investigation submits a commitment plan, in which case the authority "shall" oversee the company's fulfilment of its committed obligations. Article 45 also states that the authority "may" terminate the investigation once it finds the company to have fulfilled its commitments, but the Commission is under no legal obligation to publish its decisions or the terms of any potential commitments. Article 44 of the AMLaw establishes that, in the event of a finding of monopolistic conduct, the relevant authority "shall" make a decision as to how to deal with it but "may" make that decision known to the public. Accordingly, the industry and the public may only speculate as to the current status of the NDRC's investigation, including whether it continues.

105. *See* NDRC Rules, Article 16.
106. SAIC Regulations on the Prohibition of Abuse of Dominant Position (promulgated by order No. 54 of Dec. 31, 2010, of the SAIC), Article 8.
107. This issue is explained in detail in the Competition Policy Handbook, quoted, Assessing Market Power in the Digital Age, Key Concept 9, Leveraging of Market Power.

Figure 25: China investigates telcos

Areas for consideration:

The NDRC should consider clarifying through its regulations what constitutes legitimate reasons for price discrimination, offering companies clear guidelines as to what pricing practices they may implement.

The NDRC should also consider publication of its decisions at the conclusion of investigations and announcement of suspensions and terminations of investigations so that companies operating in China have a clearer idea of what to expect from anti-monopoly investigations and so that the relevant industry and the public are able to assess the status of the companies being investigated. Investigations and announcement of suspensions and terminations of investigations so that companies operating in China have a clearer idea of what to expect from anti-monopoly investigations and so that the relevant industry and the public are able to assess the status of the companies being investigated.

Also in **China**, the competition authority has imposed the second highest penalty ever, for abuse of a dominant position (Figure 26).

Figure 26: China imposes second highest fine ever for abuse of a dominant position

China: NDRC imposes Highest Fine to date
Years: 2013-15
Authority: National Development Reform Commission (NDRC)

Legislative and Regulatory Framework:

- Anti-Monopoly Law (promulgated by Order No. 68 of Aug. 30, 2007, of the President of the People's Republic of China) ("AMLaw").
- NDRC Regulations against Price Fixing (promulgated by Order No. 7 of Dec. 29, 2010, of NDRC). Amongst others, clarifying AMLaw's rules for determining fines for abuse of dominant position.
- NDRC Procedural Provisions on Administrative Law Enforcement against Price Monopoly (promulgated by Order No. 8 of Dec. 29, 2010, of NDRC). Amongst others, including AMLaw's rules for permitting a company to apply for administrative review or appeal for judicial review by the courts against a decision by the Commission.

Chronology:

November 2013. The NDRC commences its investigation of Qualcomm's practices, conducting dawn raids of Qualcomm's Beijing and Shanghai offices.

February 2014. The NDRC publicly announces its investigation into Qualcomm.

- February 2015. The NDRC issues its decision, imposing a fine of 6.088 billion yuan (approximately $975 million), and Qualcomm agrees to alter its patent licensing practices.

Figure 26: China imposes second highest fine ever for abuse of a dominant position

Background:

In November 2013, the NDRC commenced an investigation into the business practices of Qualcomm in China, asserting that Qualcomm had abused its dominant position and overcharged customers through its licensing terms.[108] The NDRC initiated its investigation based on complaints that Qualcomm (i) bundled patent licences with the purchase of chips that those customers used in their wireless devices, (ii) set royalty rates too high for those patent licences and that (iii) the licensing terms were unfair.[109]

Under Article 47 of the AMLaw, in an abuse of dominance case the NDRC holds the authority to impose fines of up to 10 percent of the company's total revenue in China in the previous financial year. Qualcomm's 2013 revenue in China was about $12.3 billion.[110] The NDRC's fine amounted to 8 percent of that, or approximately $975 million, a sum significantly greater than all fines imposed by the NDRC in 2014 combined.[111] This represents the largest anti-monopoly fine ever imposed in China and is the second largest single anti-monopoly fine imposed against a company by any competition authority in the world, falling just behind the €1.06 billion fine by the European Union against Intel Corporation in 2009.[112]

In addition, Qualcomm also consented to changing key elements of its patent licensing business model. It agreed, among other things, to offer its 3G and 4G essential patents separately from its other patents and to provide patent lists to its customers during initial negotiations. It also agreed to use in its pricing a royalty base of 65 percent of the net price of the device in which the chips are used.[113] Qualcomm announced that it would pay the fine.[114]

Analysis:

- Jurisdiction
  - › Both the SAIC and the NDRC have taken IP-related anti-monopoly cases. The SAIC holds jurisdiction over non-pricing-related abuse of dominance and monopolistic practices, while the NDRC oversees investigations of pricing-related abuse of dominance and monopolistic practices. However, the jurisdictional separation is not defined within the AMLaw, but rather is determined, per Article 10 of the AML, by the State Council, with lack of clarity in cases of overlapping subject matter. Given the differences between the agencies' implementing guidelines, this certainly matters. For example, the NDRC's rules provide for immunity from fines for the first

108. The investigation and the fines have attracted some criticism. For example, that Chinese authorities began investigating information technology firms such as Qualcomm (which manufactures chips for use in mobile wireless equipment) in order to lower costs in advance of the launch of 4G mobile network services in China in 2014. See: Kevin Yao and Matthew Miller, "China accuses Qualcomm of overcharging, abusing dominance," Reuters, 19 Feb. 2014, *available at* http://www.reuters.com/article/us-china-ndrc-idUSBREA1I0A820140219.
109. *See* Bureau of Price Supervision and Anti-Monopoly, People's Republic of China National Development and Reform Commission Administrative Penalty Decision, Qualcomm Incorporated, [2015] No. 1 (hereafter "NDRC Decision"), *available at* http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html.
110. Yao and Miller, *supra* note 1.
111. In 2014, all fines issued by the NDRC totalled about $300 million.
112. *See* Stephanie Bodoni, "Intel Fights Record $1.2 Billion Antitrust Fine at Top EU Court," Bloomberg Technology, 21 June 2016, *available at* http://www.bloomberg.com/news/articles/2016-06-21/intel-fights-record-1-2-billion-antitrust-fine-at-top-eu-court; Noah A. Brumsfield *et al*, "China imposes record fine of approx. US$975 million (€863 million) under its Anti-Monopoly Law," White & Case LLP, Lexology, 14 Feb. 2015, *available at* http://www.lexology.com/library/detail.aspx?g=0af93c61-9f5d-4ed4-b49a-f040c34f9ef9.
113. "Qualcomm and China's National Development and Reform Commission Reach Resolution," Qualcomm, Press Release, 9 Feb. 2015, 1, *available at* http://files.shareholder.com/downloads/QCOM/3864235320x0x808060/382E59E5-B9AA-4D59-ABFF-BDFB9AB8F1E9/Qualcomm_and_China_NDRC_Resolution_final.pdf.
114. Qualcomm Press Release, *supra* note 6, at 1; "Qualcomm fined CNY 6.1 bln in China competition case," TelecomPaper.com, 9 Feb. 2015, *available at* http://www.telecompaper.com/news/qualcomm-fined-cny-61-bln-in-china-competition-case--1064231.

Figure 26: China imposes second highest fine ever for abuse of a dominant position

firm to report a monopoly agreement and to provide evidence to the NDRC, while the second and subsequent firms to do so may receive a reduction of not less than half of a fine (for the first) and of not more than half of the fine (for the second and subsequent applicants), respectively. The SAIC, however, only provides for immunity to the first to come forward, but to no other firm.

- › This uncertain demarcation of jurisdiction can be seen in other cases too. The NDRC also opened an investigation against the licensing practices of US-based Interdigital. The SAIC has opened investigations into Microsoft involving IP rights. Accordingly, both the NDRC and the SAIC claim jurisdiction over such cases. However, the NDRC appears to hold a more prominent role in directing IP-related matters.
- › After the conclusion of the Qualcomm investigation in 2015, the SAIC published its rules governing IP anti-trust investigations. The NDRC announced in May 2015 that it would take the lead in drafting the IP Antitrust Guidelines for the State Council's Anti-Monopoly Committee.[115] Nevertheless, the jurisdictional lines remain largely undefined in cases involving pricing- and non-pricing-related claims.

- Substance
  - › Some speculated that the near-simultaneous investigations into Qualcomm and US-based Interdigital could signal targeting of foreign tech firms.[116] However, the settlement agreement allows Qualcomm to assert its patent and licensing rights in the Chinese market,[117] and since this decision, Qualcomm has entered into a number of agreements with Chinese firms.[118]
- Transparency
  - › The NDRC's decision explains that the 8 percent fine was based on "the serious nature of the party's abuse of market dominance behaviour, deeper level and longer duration,"[119] but the detailed reasoning still remains unclear. Indeed, as explained by Qualcomm in its 2014 annual US SEC filing, due to "the limited precedent of enforcement actions and penalties under [the AMLaw], it is difficult to predict the outcome of this matter or what remedies may be imposed by the NDRC."[120]

115. Susan Ning et al., Ip & Antitrust — China, King & Wood Mallesons, Global Competition Review, 30 July 2015, *available at* http://globalcompetitionreview.com/know-how/topics/80/jurisdictions/27/china/. These State guidelines have been met by international controversy, particularly in the United States, where government officials and industry players fear that an included essential facilities doctrine could impose heavy restraints on foreign companies, particularly in the telecommunications, pharmaceuticals and energy industries. See Michael Martina, "China antitrust proposals trigger foreign business fears over IP protection," Reuters, 1 Apr. 2016, *available at* http://www.reuters.com/article/us-china-antitrust-idUSKCN0WY4KG.
116. *See* Michael Martina and Xiaoyi Shao, "China's antitrust regulators defend probes; Qualcomm inquiry nearly over," Reuters, 11 Sept. 2014, *available at* http://www.reuters.com/article/us-china-antitrust-idUSKBN0H60J920140911.
117. *See* "Qualcomm Files Complaint against Meizu in China," Qualcomm, Press Release, 24 June 2016, *available at* https://www.qualcomm.com/news/releases/2016/06/23/qualcomm-files-complaint-against-meizu-china. Qualcomm launched a case against Meizu in the Beijing Intellectual Property Court in June 2016, relying on the NDRC's approval of its proposed settlement agreement detailing its licensing practices and terms to hold forth its right to charge and collect royalty fees in licensing agreements. Qualcomm notes that more than 100 other Chinese firms have accepted the terms as amended following the NDRC settlement agreement.
118. *See* "Qualcomm builds momentum in China with Oppo licensing agreement," OnQ, Qualcomm, 1 Aug. 2016, *available at* https://www.qualcomm.com/news/onq/2016/07/31/qualcomm-builds-momentum-china-oppo-licensing-agreement. In 2016, Qualcomm has successfully concluded licensing agreements with "more than 100 Chinese companies," including electronic giants such as Lenovo, Xiaomi, Haier and Oppo, under terms allowed under the 2015 NDRC agreement. According to one analyst, Qualcomm will end financial year 2016 with more than 75 percent of Chinese device manufacturers paying royalties under these licensing agreements. Mike Freeman, "Qualcomm signs another patent license in China," The San Diego Union-Tribune, 8 Aug. 2016, *available at* http://www.sandiegouniontribune.com/news/2016/aug/08/qualcomm-patent-license-china-smartphones/.
119. NDRC Decision, *supra* note 2.
120. Qualcomm Incorporated, Form 10-K, For the Fiscal Year Ended 28 Sept. 2014, United States Securities and Exchange Commission, file no. 0-19528, 26, *available at* http://investor.qualcomm.com/secfiling.cfm?filingid=1234452-14-320&cik=.

Figure 26: China imposes second highest fine ever for abuse of a dominant position

› The AMLaw provides mechanisms for fine mitigation under some of its provisions. For example, Article 46, on monopoly agreements, allows for the mitigation of or exemption from penalties for firms voluntarily reporting anticompetitive conditions in "monopoly agreements" and providing evidence. On the other hand, Article 47, governing abuse of market dominance, provides for no such explicit mitigation or exemptions. Rather, Article 47 merely grants the relevant authority the power to confiscate "illegal gains" and to impose a fine of between 1 and 10 percent of the previous year's turnover in China, and Article 49 directs the authority to consider "factors such as the nature, extent and duration of the violation, to decide the concrete amount of fine." Conversely, Article 52 permits the NDRC to impose harsher fines in the face of a firm obstructing its investigation. The NDRC's regulatory guidelines appear merely to reflect the leniency provisions and fine-setting language of the AML, and the NDRC's decision does not detail its specific considerations for reaching the 8 percent figure and does not mention "illegal gains."

Areas for consideration:

- The NDRC should consider clarifying through regulations its decision-making process for setting fines, particularly in abuse of dominance cases, and should provide greater elaboration in its decisions on how the percentage of the fine was determined. While the AML rules and the NDRC guidelines assert penalties for obstruction of an investigation, no similar provisions or guidance exist to exhibit mitigation for cooperation.
- Given the silence of the AML on the matter, the State Council should consider clarifying the jurisdictions of the competition authorities, providing guidance where investigations may involve both pricing and non-pricing elements. Particularly as IPR-related investigations have been conducted by both the SAIC and the NDRC and as both agencies have drafted or are drafting IPR-related guidelines, jurisdictional certainty would allow firms to understand the process better.

In **Hong Kong**, the new Competition Ordinance came into effect in December 2015. The new Hong Kong Competition Commission had a head start and prior to the entry into force of the law had already issued guidance on how it intends to apply the law, and a leniency programme to encourage disclosure of anticompetitive cartels. For the time being, the prohibition of mergers that substantially lessen competition in Hong Kong, (the Merger Rule in the Competition Ordinance) only applies to mergers which concern one or more parties that own or control, either directly or indirectly, a telecommunications carrier licensee. Merger control is a voluntary notification regime.[121]

In **Malaysia**,[122] the Communications and Multimedia Act 1998 (CMA) contains provisions that prohibit anti-competitive conduct by licensees (*Part VI, Chapter 2, CMA*). Similar to the regime in Singapore, the regulator has exclusive jurisdiction over anti-competitive conduct of licensees under the CMA, as the Competition Act 2010 does not apply to any activity regulated under the

121. Clifford Chance, quoted.
122. Communications: Regulation and Outsourcing Global Guide, Malaysia, Zaid, Ibrahim & Co, http://uk.practicallaw.com/resources/global-guides/communications-guide#tab2_tabsdefault

CMA. The system of enforcement of the competition rules in the telecoms sector therefore works separately from the Malaysia Competition Commission (MyCC), which is the main competition authority in Malaysia under the Competition Act 2010. TAs more particularly described in Figure 28, the substantive competition law provisions of the CMA differ somewhat from that under the Competition Act, which was enacted a little over a decade later, and is based on European competition law. The CMA (enacted in 1998) and the guidelines issued by the sector regulator are more similar to Australia competition law. As also explained in detail in Figure 28, in practice telecoms licensees are subject to merger control whilst merger control does not apply generally to the economy (it applies to the aviation sector). This means that licensees can be subject to scrutiny by the telecoms regulator when they merge but not internet players and others. There has been news that the CMA is being amended, and this may be an opportune time for the communications regulator to bring the substantive competition laws under the CMA more in line with those under the Competition Act.[123]

In **Myanmar,** a competition law was introduced in 2015 and will come into force in February 2017. The law includes the main substantive anti-trust principles, but reportedly is not very clear as regards its exact scope of application (particularly at the border between competition law and regulation) and about the relevant legal tests.[124]

In the **Philippines,** a new competition law was introduced in July 2015 (after several failed attempts in the past). The passing of the law coincides with the creation of the ASEAN economic union: Member States have committed to introduce national competition policy and law by 2015.[125] Prior to the introduction of the Act, the Philippines did not have a comprehensive competition law regime, but there were sector-specific laws dealing with competition. This industry specific approach, leading to a number of diverse laws, meant that competition was not being dealt with equally across all sectors of the economy, leading to inefficiencies, inconsistencies and conflicting policies by different agencies and a general lack of expertise in addressing competition issues. **Brunei's** competition law was also passed in 2015 in compliance with the same ASEAN commitments but is not yet in force. It is "very similar to the Singapore regime, and is understood to include a similar exemption for vertical agreements".[126]

In **Singapore,** like in Malaysia, competition law in sectors such as telecommunications, media, post, gas and electricity is enforced by the industry-specific regulators, as these industry sectors are carved out from the application of the Competition Act. On cross-sectoral competition matters, the competition authority will work with the relevant sectoral regulator to determine which entity is best placed to handle the case in accordance with the legal powers given to each. The Competition Commission and the sector-specific regulators will cooperate and coordinate closely to prevent double jeopardy and to minimise the regulatory burden in dealing with the case.[127]

123. Another sector regulator, the Aviation Commission established in 2015 through the Malaysian Aviation Commission Act 2015, also has competition regulation powers, and the substantive law is modelled on the Competition Act, with the added provisions of merger control through a voluntary system - this is presently the only merger control regime in Malaysia.
124. http://www.allenovery.com/publications/en-gb/Pages/MYANMAR-COMPETITION-ACT.aspx
125. Bird & Bird, quoted.
126. Drew & Napier, *A New Era for Competition Law in the ASEAN region*, available at: https://www.expertguides.com/articles/a-new-era-for-competition-law-in-the-asean-region/arezehbk
127. See the competition authority's Guidelines on the Major Provisions, para. 3.7, at: https://www.ccs.gov.sg/legislation/-/media/custom/ccs/files/legislation/ccs%20guidelines/majorprovisionsjul07final.ashx. See also: https://gettingthedealthrough.com/area/20/jurisdiction/58/merger-control-singapore/

In **Taiwan**, the competition authority, the Taiwan Fair Trade Commission (TFTC) has issued guidelines on the application of competition laws to the telecommunications sector.[128] Mergers "in highly-regulated industries, such as telecommunications and the mass media sector, are still subject to a higher degree of scrutiny and are normally cleared with conditions".[129]

Thailand[130] was an early adopter of competition law, as the Thai Competition Act came into force in 1999. The Trade Competition Commission, chaired by the Minister of Commerce has the task to enforce it. Although the TCC has issued guidelines concerning cartels, abuse of a dominant position, and anti-monopoly or a lessening of competition, there are very few reported cases. No detailed regulations for merger control have yet been issued.[131]

Efforts are being made to modernise competition laws in some countries. In **Singapore**, where competition law was introduced as early as 2004, in November 2016 the Competition Commission announced the publication of a set of fully revised competition guidelines intended to streamline its competition practices, in line with best international precedent simplifying compliance and clarifying certain aspects, such as the way that fines are calculated.[132] **Australia** has a well-established system of competition law, both at the state level and at the federal level. Yet the Government has commissioned a panel review of the application of competition policy in Australia, resulting in the publication of the so-called Harper Report in 2015 (Figure 27).

Figure 27: Australia, Harper Report

In March 2015 a panel chaired by Ian Harper published the Harper Review report,[133] following the Government's request that he conduct a 'root and branch' review of Australia's competition laws. The report made sweeping recommendations to Australia's state and national competition laws. The government provided its response to the final report in late November 2015, supporting many of the recommendations and indicating it will provide monetary support to states that take up some of the recommendations it supports.[134]

In the context of a federal State such as Australia, the Harper Report notes "the importance of an agreed framework [for competition policy], which can then be applied by governments in their own jurisdictions and adapted to local conditions as necessary." This interesting observation can be applied to any supra-national intergovernmental organisation seeking to adopt a common framework. Another interesting observation for the telecommunications industry is the recognition that priorities change as technology changes. The example given in the Australian context is that the development of the state-owned National Broadband Network (NBN) and mobile telephony infrastructure "have meant that access to the 'unbundled local loop' (i.e., the copper network) is a less significant issue than it was in 1995."

Below are the salient recommendations that are of special interest in the context of this Booklet. Appendix A to the Harper Report comprises "Model Legislative Provisions" for competition law.

128. Clifford Chance, quoted
129. Clifford Chance, quoted
130. See Figure 32 for a case study on a recent spectrum auction in Thailand that lead to a potential new entrant, Jasmine, defaulting, forfeiting its licence and paying a fine.
131. Clifford Chance, quoted
132. Published on 1 November 2016. See: http://www.mlex.com//Attachments/2016-11-01_X168W2232Q874E25/ccs%20media%20release%20-%20revised%20guidelines%201%20nov%202016.pdf
133. http://competitionpolicyreview.gov.au/final-report/
134. Bird & Bird, quoted.

Figure 27: Australia, Harper Report

Recommendation 1 - Competition Principles

- Government policy and regulations should not restrict competition, unless (i) the benefits of the restriction to the community as a whole outweigh the costs; and (ii) the objectives of the legislation or government policy can only be achieved by restricting competition.
- Government business activities that compete with private provision, whether for-profit or not-for-profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership.
- A right to third-party access to significant bottleneck infrastructure should be granted provided that it would promote a material increase in competition in dependent markets and would promote the public interest.

Recommendation 6 - Intellectual property review

- An overarching review of intellectual property should be undertaken, to be a 12-month inquiry and focus on competition policy issues in intellectual property arising from new developments in technology and markets; and the principles underpinning the inclusion of intellectual property provisions in international trade agreements.

Recommendation 8 - Regulation review

- All Australian governments should review regulations, including local government regulations, in their jurisdictions to ensure that unnecessary restrictions on competition are removed. There is a specific Recommendation 10 that a priority area for review should be all regulations that restrict numbers of taxi licences and competition in the taxi industry, including from ride-sharing and other passenger transport services that compete with taxis.
- Legislation (including Acts, ordinances and regulations)[135] should be subject to a public interest test and should not restrict competition unless it can be demonstrated that: (i) the benefits of the restriction to the community as a whole outweigh the costs; and (ii) the objectives of the legislation can only be achieved by restricting competition.

Recommendation 30 - Misuse of market power[136]

- Misuse of market power should prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.
- To mitigate concerns about inadvertently capturing pro-competitive conduct, the legislation should specify that when determining whether conduct has the purpose, effect or likely effect, of substantially lessening competition in a market, regard must be had to: (i) the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or

135. A separate Recommendation 9 focuses on the potential for planning and zoning legislation to be anticompetitive
136. The proposals seem to mirror the European model relating to the prohibition of abuse of dominance.

Figure 27: Australia, Harper Report

price competitiveness; and (ii) the extent to which the conduct has the purpose, effect or likely effect of lessening competition in the market, including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

Recommendation 31 — Price discrimination

- There is no need for a specific prohibition on price discrimination. Where price discrimination has an anti-competitive impact on markets, it can be dealt with by the general competition law.
- International price discrimination should be addressed through market solutions that empower consumers. These include removing restrictions on parallel imports (Recommendation 13) and ensuring that consumers are able to access the cheaper (legitimate) goods.

Recommendation 35 — Mergers

- The competition authority (ACCC) should be the decision-maker at first instance.
- The ACCC should be empowered to authorise a merger if it is satisfied that the merger does not substantially lessen competition or that the merger would result, or would be likely to result, in a benefit to the public that would outweigh any detriment.
- The formal process should be subject to strict timelines that cannot be extended except with the consent of the merger parties.
- Decisions of the ACCC should be subject to review by the Australian Competition Tribunal under a process that is also governed by strict timelines.
- Merger review processes and analysis would be improved by implementing a program of post-merger evaluations, looking back on a number of past merger decisions to determine whether the ACCC's processes were effective and its assessments borne out by events.

Recommendation 42 — National Access Regime (does not apply to telecoms sector)[137]

- Third-party access to infrastructure should only be mandated where it is in the public interest. To that end: (a) access on reasonable terms and conditions through declaration should promote a substantial increase in competition in a dependent market that is nationally significant; (b) it should be uneconomical for anyone (other than the service provider) to develop another facility to provide the service; and (c) access on reasonable terms and conditions through declaration should promote the public interest.
- The Australian Competition Tribunal should undertake merits reviews of access decisions, while maintaining suitable statutory time limits for the review process.

Recommendation 43 — Australian Council for Competition Policy — Establishment

- A new Australian Council for Competition Policy (ACCP) should be established to provide leadership and drive implementation of the evolving competition policy agenda.

137. The access regime applicable to telecommunications in Australia is briefly described above, Regulation, National Laws. This notwithstanding, the recommendation is sensible and there is no reason why the same considerations should not apply to all access regimes, including in telecommunications.

Figure 27: Australia, Harper Report

Recommendation 44 — Australian Council for Competition Policy — Role:

- advocacy, education and promotion of collaboration in competition policy;
- independently monitoring progress in implementing agreed reforms and publicly reporting on progress annually;
- identifying potential areas of competition reform across all levels of government;
- making recommendations to governments on specific market design issues, regulatory reforms, procurement policies and proposed privatisations;
- undertaking research into competition policy developments in Australia and overseas; and
- ex-post evaluation of some merger decisions.

Recommendation 45 — Market studies power

- The ACCP should have the power to undertake competition studies[138] of markets in Australia and make recommendations to relevant governments on changes to regulation, or to the competition authority (ACCC) for investigation of potential breaches of the competition law.

Recommendation 50 — Access and Pricing Regulator There should be a single national Access and Pricing Regulator[139] with the following functions:

- the telecommunications access and pricing functions of the ACCC;
- price regulation in the water sector;
- the powers given to the ACCC under the National Access Regime;
- the functions undertaken by the Australian Energy Regulator under the National Electricity Law, the National Gas Law and the National Energy Retail Law;
- the powers given to the NCC under the National Access Regime; and
- the powers given to the NCC under the National Gas Law.

The Access and Pricing Regulator should be constituted as a five-member board. The board should comprise two Australian Government-appointed members, two state and territory-nominated members and an Australian Government-appointed Chair. Two members (one Australian Government appointee and one state and territory appointee) should be appointed on a part-time basis.

Decisions of the Access and Pricing Regulator should be subject to review by the Australian Competition Tribunal.

138. The Government supported this recommendation but decided that the ACCC should continue to exercise this power – no change to the current regime.
139. The Government "remains open" to this recommendation but at this stage it does not appear that this recommendation will be implemented.

Intergovernmental organisations

Of the three regional intergovernmental organisations, ATP, APEC and ASEAN, ATP does not appear to have an active role in promoting competition law.[140]

ASEAN appears to have had the greatest impact on competition law and practice in Asia to date and has been active in promoting the introduction of competition law among member states. The ASEAN Regional Guidelines on Competition Policy[141] were published in 2010. These are a non-binding set of reference rules. Member States have committed to introducing national competition policy and law to cater to the substantial economic opportunities and growth in the region, expected following the ASEAN free trade agreements. ASEAN Member States committed to introduce competition laws by 2015. This resulted in Brunei Darussalam and the Philippines, introducing for the first time a comprehensive competition law. Cambodia still lacks competition laws,[142] however, while Thailand and Laos have enacted a competition law, this does not appear to be effectively enforced, as seen above.

APEC's work in this area is carried out through the Competition Policy and Law Group (CPLG). The CPLG promotes understanding of regional competition laws and policies, examines their impacts on trade and investment flows, and identifies areas for technical cooperation and capacity building among member economies. The CPLG, formerly known as Competition Policy and Deregulation Group,[143] was established in 1996.[144] In 1999, APEC Ministers endorsed the APEC Principles to Enhance Competition and Regulatory Reform and approved a 'road map' that established the basis for subsequent work on strengthening markets in the region.

140. Although competition issues are one of the areas under review by the APT Policy and Regulatory Forum: see http://www.aptsec.org/APTPRF
141. http://asean.org/?static_post=asean-regional-guidelines-on-competition-policy-3
142. OECD, quoted, page 156
143. In 2008, members agreed to change the name of the group to the Competition Policy and Law Group to reflect the fact the regulatory aspects of competition are now being discussed within the framework of the Economic Committee (EC).
144. when the Osaka Action Agenda (OAA) work programmes on competition policy and deregulation were combined.

The Need for Coordination and Cooperation

Cooperation is important:

- Between agencies at the **national level** (i.e., between the national competition authority and the regulator)
- Between agencies at the **international level** (i.e., between supra-national groupings of regulators and competition authorities, and between the groups that, in each intergovernmental organisation, deal with regulation and competition law)
- Between regulators at the **international level**
- Between competition authorities at the **international level**

At the national level — cooperation between agencies

When there are two different agencies, there is a need for cooperation in each country between the telecommunications regulator and the competition authority. As seen in Figure 18, a different model involves setting up one agency with powers to enforce both competition law and regulation. This, the 'integrated model', applies in New Zealand.

Two agencies, three models in competition policy

Three possible models can be adopted when there are two agencies with competition policy enforcement powers, depending on whether the regulator has the powers to apply competition law to the sector it regulates. These are exemplified in Figure 18, reproduced again below for ease of reference.

Figure 18: Existing models in competition policy — Asia

	Two agencies: Competition authority and separate sectoral regulator	**Two agencies:** Regulator with concurrent powers in competition law	**Two agencies:** Regulator with exclusive jurisdiction to apply to telcos competition law	**One agency:** Only the regulator, only regulation	**One agency:** The Integrated Model
EXAMPLES	Most countries surveyed	Hong Kong	Malaysia, Singapore, Myanmar? Pakistan?	Cambodia	New Zealand
POSITIVES	Ensures that competition law is applied equally to all sectors of the economy	Ensures that competition law should be applied with sector knowledge, but competition authority retains ability to consider issues too	Ensures that competition law should be applied with sector knowledge. No safeguard of competition authority's involvement	Convenience. Country complies with WTO Reference Paper	Properly consistent application of competition law and sectoral regulation across all sectors of the economy. Synergies
NEGATIVES	Need for the agencies to understand their roles and to cooperate	Evidence suggests that regulators tend to apply regulation more than competition law. The competition authority defers to regulator	Risk of over-reliance on regulation of the sector. Risk that regulator applies regulatory categories when applying competition law	Especially with convergence in the digital economy, only telcos are subject to scrutiny. Non-level playing field	If the agency is not properly resourced, risk of backlogs. Need for coordination across the different parts of the agency

Source: GSMA

In the first model, the regulator does not have competition law powers. Competition law is applied by the competition authority in all sectors of the economy. At first sight, this model suffers from the disadvantage that the competition authority will not have the same in-depth knowledge as the sectoral regulator. This disadvantage can be overcome by close cooperation between the agencies: when the sector under investigation by the competition authority is the specific sector regulated by an independent regulator, the competition authority needs to take into account the views of the regulator. The advantage of this model is that, when the agencies cooperate properly, competition law is applied equally to all sectors of the economy and the competition authority acquires the necessary know-how. The intense focus on subjecting one sector, telecoms, to enhanced scrutiny, to the exclusion of other sectors of the economy, may lead to foregoing the very real benefits of competition policy enforcement for the economy as a whole, that were described above.

The second model is an intermediate model. The regulator can apply competition law to the sector, but the competition authority retains the powers to apply the rules to the sector also. This is known as the 'concurrency model',

adopted in Mexico and in some European countries (Ireland, Greece, Iceland and the UK). In Asia, this is the model adopted in **Hong Kong**. This model has a theoretical appeal: the regulator can act under competition law but if it does not, then the competition authority retains the powers to do so. In practice, in the countries that have adopted the concurrency model, the competition authority rarely interferes with the powers of the sectoral regulator. There is evidence that, given the choice, a regulator with competition law powers does not use them often, preferring the tried and tested regulatory route.[145] In all reviews carried out in the UK, concerns were expressed about the small number of cases brought by the sectoral regulators using their competition law powers and the apparent preference of the sectoral regulators to rely instead on their sector-specific (regulatory) powers. There is also the risk that the regulator and the competition authority would reach different views about the same behaviour, perhaps allowing it in the wider economy and restraining it in the telecoms sector. And finally, there is still a need for an MoU or other means to agree between the agencies which has jurisdiction, in cases where a complaint is received that a telecoms operator has entered into an anticompetitive agreement with a company not subject to the jurisdiction of the regulator, for example.

The third model posits the *exclusive application by the regulator of competition policy (law and regulation) in the sector.* The reason to adopt this model is that the telecoms sector is complex. The regulator has a head start over a competition authority when it comes to understanding market dynamics. **Singapore** has adopted this system and arguably in Singapore the agencies have found a way to make this work. In Singapore, however, the competition authority and the regulator have issued joint guidelines for proper cooperation, and there is an established history of application of the competition rules upon which the regulator can draw. **Malaysia** has adopted this system and the issues described in Figure 28 illustrate the potential drawbacks.

145. In the UK, the country in which the regulators have been granted powers to apply competition law to their sectors for the longest time, the operation of this system has been reviewed on several occasions, including: (i) a joint report by the then Department of Trade and Industry and HM Treasury in 2006 (*Concurrent competition powers in sectoral regulation*, a report by the Department of Trade and Industry and HM Treasury (TSO, 2006)); (ii) a report by the House of Lords Select Committee on Regulators in 2007 (House of Lords Select Committee on Regulators, UK Economic Regulators, HL 189-I (TSO, 2007); (iii) a report by the National Audit Office in 2010 (National Audit Office, *Review of the UK's competition landscape* (TSO, 2010)); and (iv) BIS, *A competition regime for growth: a consultation on options for reform* (TSO, 2011), the precursor to some limited reform intended to give to the competition authority more powers to intervene if the sectoral regulators do not apply their competition powers properly.

Figure 28: Malaysia: exclusive sectoral application of competition rules

The approach in **Malaysia** is similar to the Singapore model. The telecoms sector is excluded from application of competition law by the competition authority, the Malaysia Competition Commission (MyCC). Instead, the regulator is empowered to apply competition law to the telecommunications and media sector, exclusively, under the terms of the Communications and Multimedia Act 1998 (CMA). It is interesting to note that although the substantive competition law provisions of the CMA address similar issues and advocate a similar approach (especially on the need for a market definition and a market assessment) they differ from the provision under the Competition Act, which was enacted a little over a decade later, and is inspired by European competition law. The CMA and the guidelines[146] issued by the sector regulator are more similar to the Australian competition law. This highlights the potential difficulties when a sector is subject to competition rules that are not entirely aligned with the competition rules that apply to the rest of the economy.

In an effort to coordinate the activities of the regulators and the competition authority, the latter, MyCC spearheaded the creation of the so-called Special Committee on Competition in 2011. This was created in order to ensure consistency in the application of the law. The Special Committee on Competition comprises representatives from the sector regulators, namely the Malaysia Communications and Multimedia Commission (MCMC), the Land Public Transport Commission (SPAD), the Central Bank of Malaysia (BNM), the Energy Commission (EC), the National Water Services Commission (SPAN) and the Securities Commission (SC). The Committee is chaired by the MyCC.[147]

There has been news that the CMA is being amended, and it may be an opportune time for the communications regulator to bring the substantive competition laws under the CMA in line with those under the Competition Act. Another sector regulator, the Aviation Commission established in 2015 under the Malaysian Aviation Commission Act 2015, also has competition policy powers, and the substantive law is modelled on the Competition Act, with the added provisions of merger control through a voluntary system; this is presently the only statutory merger control regime in Malaysia. Interestingly, the existing Guideline on Substantial Lessening of Competition issued by the MCMC[148] expressly state that the regulator considers that mergers involving telecommunications licensees must be investigated as "conduct which has the purpose of substantially lessening competition in a communications market" (under s.133 of the CMA). This is another instance showing how telecoms operators are under enhanced scrutiny, as compares to the players in the digital economy.

146. See in particular the Guideline on Substantial Lessening of Competition (http://www.skmm.gov.my/Resources/Guidelines/Guidelines/Guideline-on-Substantial-Lessening-of-Competition.aspx) and the Guidelines on Dominant Position in a Communications Market (http://www.skmm.gov.my/Resources/Guidelines/Guidelines/Guideline-on-Dominant-Position-in-a-Communications.aspx)
147. http://www.mycc.gov.my/sites/default/files/media-releases/News%20Release%20-%20Special%20Committee%20on%20Competition%20November%202015%20(english).pdf
148. Quoted, paragraphs 4.40-4.45

Emerging societies should consider their options carefully when reconsidering their existing frameworks. As seen above, it appears that a reconsideration is under way in **Pakistan**, under the terms of the New Telecommunications Policy. A system similar to the Malaysia/Singapore system may be the system preferred in **Myanmar**, when the new competition law comes into force in February 2017. There may be reasons to go down this route but, as always, policymakers should be clear that this is the best route for their country and about the interplay between agencies.

Cooperation is needed

Whatever the model chosen, close cooperation between the regulator and the (separate) competition authority is crucial to ensure that the competition authority has access to relevant sector specific information and can apply the competition rules consistently.

This issue is recognised in Asia. In some countries, there is a statutory system for determination of the jurisdiction between the regulator and the competition authority, as seen below.

- In **Hong Kong**, where the competition authority and the regulator have concurrent jurisdiction to apply the competition rules, they have an agreement backed by a Memorandum of Understanding.[149] Specifically for merger control (which applies to the telecoms sector only), they have also issued joint guidelines to the market to explain how they will apply their powers.
- The Telecoms Regulatory Authority of **India** is tasked with overseeing the telecommunications sector in India. However, the jurisdiction of the Competition Commission of India to proceed with an investigation is independent of other specialist regulatory agencies. To facilitate dialogue between the competition authority and the sectoral regulators, the legislative framework provides for a reference mechanism. In a proceeding before a sectoral regulator, where there is a risk of a decision that may run contrary to competition law, the regulator may refer the issue to the competition authority. Conversely, the competition authority may also make references to the relevant regulator. However, in either case, such references are not mandatory.[150]
- In **Singapore** the Minister of Trade and Industry may make regulations for the purpose of coordinating the exercise of powers by the Competition Commission of Singapore and the sectoral regulators. Such regulations may prescribe the circumstances where the competition authority or sectoral regulators should solely exercise their powers and where these powers may be concurrently or conjunctively exercised. The circumstances in which the latter will occur are limited.[151] As seen above, the sectoral regulators have mostly exclusive power to apply competition law to the sector that they regulate. In Singapore, the competition authority has issued guidelines explaining that when a competition investigation relates to cross-sector activities, they will coordinate with the relevant sectoral regulator and the agency best placed will take the lead.
- In **Indonesia**, the regulator (BRTI) and the competition authority (the KPPU) have a process of coordination through KPPU's Policy Harmonisation Mechanism. The KPPU identifies industrial policies it believes would affect competition and then initiates discussions as required.[152]

149. https://www.compcomm.hk/en/about/inter_agency/memorandum.html
150. See Clifford Chance, *A Guide to Antitrust and Competition Law in Asia Pacific*, January 2014, https://www.cliffordchance.com/briefings/2014/02/a_guide_to_antitrustandcompetitionlawinasi.html
151. Clause 5 of the Third Schedule of the CA and Clause 1 of the Fourth Schedule of the CA
152. Maher M. Dabbah, quoted, page 382. "Working together in this way, the hope is that KPPU and BRTI will be able to internalise a competition culture and competition values in the telecommunications sector while not detracting from the special considerations needed to effectively manage the telecommunications sector."

Even when there is a statutory recognition that issues may arise, therefore, the rules may not be mandatory. In all cases where there are no rules, or the rules are not very specific or not mandatory, the agencies themselves should consider signing informal MoUs to specify in advance how each agency will deal with the issues in cases of overlap. In Asia, it appears that MoUs are entered into at the supra-national level, more than at the national level.

At the international level — cooperation between agencies

If coordination between the agencies tasked with application of the competition rules and those tasked with application of sectoral regulation is desirable at the national level, this should also be desirable at the supra-national level, within the various regional organisations that have a remit for the digital ecosystem. However, often these organisations tend to operate in silos, such that the creation within APEC of an Ad-Hoc Steering Group on the Internet Economy that includes different branches of APEC itself is a rare occurrence. The silo approach extends to the way competition law and regulatory efforts are viewed even within the same regional organisations.

Indeed, cooperation is easier among regulators that meet at a supra-national level, and among competition authorities equally organised in supra-national groups.

Cooperation among competition authorities at the international level

As of 2015,[153] there has been growth in cooperation among competition authorities. The Australian competition authority, ACCC, has signed formal cooperation agreements with all three of China's competition agencies. These agreements allow for increased engagement between the two countries on matters of anti-competitive conduct, international cartel investigations and price supervision, subject to confidentiality and privacy restrictions under the laws of each of country. The ACCC has also signed an MOU with the Philippines Department of Justice that aims to contribute to the effective enforcement of the competition laws in each country.[154] Cooperation between the ACCC and the agencies of other nations in the region including Hong Kong, Malaysia and Singapore is also expected to increase.

In 2016, the Competition Commission of Singapore played host to the annual conference of the International Competition Network, bringing together competition authorities, practitioners and intellectuals from around the world.[155] At the time of writing, it has been announced that the Competition Commission of India will host the ICN annual conference in 2018. These announcements underscore the new pre-eminence in competition law that Asia has acquired.[156]

153. Bird & Bird, *Competition Law in Asia Pacific — highlights from 2015 and what's coming next in 2016,* http://www.twobirds.com/en/news/articles/2015/global/competition-law-in-asia-pacific-highlights-from-2015-and-what-s-coming-next-in-2016
154. Bird & Bird, quoted
155. Drew & Napier, quoted.
156. See: http://currentaffairs.gktoday.in/india-host-2018-international-competition-network-annual-conference-11201637047.html

Cooperation among national regulators at the international level

The other area of supra-national cooperation comprises the regional organisations that group national telecommunications regulators. In Asia, the main formal regional organisation of regulators is the **South Asian Telecommunications Regulator's Council (SATRC).** This was formed in 1997 by an initiative of APT and the ITU Regulatory Forum for South Asia. At present, SATRC includes the regulators of nine South Asian countries, namely: **Afghanistan, Bangladesh, Bhutan, India, Islamic Republic of Iran, Maldives, Nepal, Pakistan and Sri Lanka**. SATRC is responsible for discussion and coordination of issues relating to regulations in telecommunications and ICT which are of common interest to the telecommunications regulators in South Asian countries. These issues included radio frequency coordination, standards, regulatory trends and issues, strategies for telecommunications development and telecommunication-related international affairs. The council also identifies and promotes areas of potential cooperation in telecommunications among South Asian countries, and facilitates the exchange of information in these areas through activities such as seminars, training and workshop. SATRC activities are conducted by involvement of the highest level representations by the regulatory bodies of the South Asian countries. SATRC meetings are held annually.[157]

Merger control in the mobile sector

There are good reasons why merger control should be applied by the competition authority. If the regulator has the task of applying (competition law) tools to mergers, there is a real risk of diverging outcomes:

> *"the culture and analytical approach required to regulate an industry differ from those typically characteristic of a competition law enforcement agency. There is also a risk that an industry regulator's views about the structure of a particular market could influence a merger decision."* Australian Harper Report.[158]

In the case of mergers in the mobile sectors, concentrations are often motivated (among others) by a wish on the part of the merging companies to acquire the spectrum held by the acquisition target. Spectrum assignment is however the prerogative of regulators and governments, so that:

- on the one hand, the competition authority should consider the effects of the merger on the market as defined, to determine whether after the merger there will be a "substantial lessening of competition", as described in the Competition Policy Handbook.[159] The competition authority should consider, as part of this review, whether post-merger there could be barriers to entry: in conducting this analysis, the competition authority should consider all potential barriers, including spectrum scarcity; and

157. http://www.aptsec.org/APTSATRC -
158. Harper Report, http://competitionpolicyreview.gov.au/final-report/ , referred to in more detail in the Asia Chapter
159. Quoted. See in particular Assessing Market Power in the Digital Age, Key Concept 3, Mergers.

- on the other hand, regulators and governments are often nervous about spectrum assignment. They have the technical know-how to assess the consequences of a merger on spectrum availability, perhaps better than the competition authority.

Therefore, nowhere is the need for coordination greater than in merger control cases in the mobile sector. Cooperation between the competition authority and the regulator should lead to a decision that would take into account all aspects capable of affecting the market. The risk otherwise is that the competition authority and the regulator/government conduct parallel investigations, leading to the possibility of divergent decisions, the involvement of the courts and suboptimal results.

In Asia, in some countries there is no merger control at present at all. This is the case in **Thailand**, where there are provisions for merger control in the competition law, but crucial enabling legislation has not been enacted yet.[160] In **China,**[161] responsibility for merger control resides with the Ministry rather than an independent competition authority (or regulator).

Some countries have adopted a system that imposes extra scrutiny on the telecommunications sector, as compared to other sectors of the economy, leading to issues for a level playing field, particularly in the digital economy. For example:

- A sectoral approach applies to **Hong Kong**, at least for the time being. The Competition Ordinance modernises aspects of the merger control regime in anticipation of a possible extension of the regime to all sectors of the Hong Kong economy in the future. For the time being, the competition authority and the regulator have concurrent powers to investigate mergers in the telecommunications sector and have together issued guidelines setting out how they intend to interpret and give effect to merger control.[162] The merger control regime in Hong Kong is *voluntary*,[163] meaning that there are no penalties for non-notification, but that the relevant authority can investigate mergers after they have been entered into. The risk of having to "undo" a merger following an investigation ("unscrambling the eggs") is often sufficient to make notification the preferred option when the parties to a merger consider that there may be issues. The adoption of a voluntary system of merger control can be efficient, allowing the competition authority to prioritise the investigation of mergers that may lead to a substantive lessening of competition. The vast majority of mergers in the economy do not give rise to competition concerns but, under a system of *mandatory* merger control, all mergers that meet the requirements would need to be investigated.
- In **Japan**, foreign shareholding in Japanese companies is limited by specific sectoral legislation: NTT, the holding company of the national telecoms carrier, must be less than 33.3 per cent foreign-owned. Also, foreign shareholdings must be less than 20 per cent for terrestrial and radio broadcasters (and less than 33.3 per cent for domestic airlines).[164] This means that in these sectors, the possibility to merge is limited by application of foreign shareholding limitations.

160. https://gettingthedealthrough.com/area/20/jurisdiction/60/merger-control-thailand/
161. In **China**, the Ministry of Commerce (MOFCOM) has sole jurisdiction among China's three competition enforcement agencies for merger control enforcement. MOFOCOM has adopted new guidelines in 2014. Special rules apply to acquisitions by foreign enterprises of Chinese companies. https://gettingthedealthrough.com/area/20/jurisdiction/27/merger-control-china/
162. https://www.compcomm.hk/en/legislation_guidance/guidance/merger_rule/merger_rule.html
163. Australia also has a voluntary system of merger control: https://gettingthedealthrough.com/area/20/jurisdiction/5/merger-control-australia/
164. https://gettingthedealthrough.com/area/20/jurisdiction/36/merger-control-japan/

- In **Malaysia** competition law does not include the control of concentrations, although a special regime that includes merger control applies to the aviation industry since 2015.[165] As seen above, an informal system of merger control applies *de facto* to mergers involving telecoms licensees.
- In **Singapore,** where the regulator is also responsible for merger control in the telecommunications sector, merger control is voluntary, except in specific sectors. Specifically for telecoms, when an acquisition results in a party acquiring at least 12 per cent of the voting rights in a designated licensee, then the approval of the regulator must be obtained.[166]

Although in these countries the merger control regime that applies to the telecoms sector raises issues about whether the playing field is level and how the rules could be applied in a non-discriminatory way, the jurisdiction of the regulator and of the competition authority seem to be relatively clear. Not so in a number of countries in 'emerging' and 'transition' societies, where there is an urgent need to clarify the boundary of the respective jurisdictions. This is the case, for example, in **Bangladesh** and **Pakistan**.

The recent merger between Robi and Airtel in Bangladesh (Figure 29) provides an illustration of the difficulties that arise when the jurisdiction of the regulator and of the competition authority are not properly set out in the legislative framework.

Figure 29: Bangladesh: Robi/Airtel Merger

Bangladesh: Robi/Airtel Merger
Years: 2015-2016
Authorities: Bangladesh Telecommunications Regulatory Commission ("BTRC"), High Court, Prime Minister's Office ("PMO"), Ministry of Post and Telecommunications ("MoPT")

Legislative and Regulatory Framework:
Telecommunications Act 2001 (Act No. XVIII of 2001). Under paragraph 55, setting out, in part, that spectrum rights shall not be transferable.

Competition Act 2012. Establishing a national competition commission.

Chronology:
- September 2015. Robi and Airtel announce their intention to merge and send a letter to the BTRC seeking permission.
- January 2016. Robi and Airtel sign a merger agreement.
- March 2016. The BTRC issues its recommendation to the government and to the High Court that the merger be allowed based on specified conditions.
- August 2016. The Prime Minister, based on an inter-ministerial committee's advice, grants permission for the merger, conditioned on the new entity's payment of merger and spectrum fees and other conditions, including to ensure that there is a voluntary retirement

165. Malaysia has adopted a sectoral approach to competition law, granting the regulator exclusive powers to apply competition law to the telecoms sector (and indeed in other sectors too, such as the energy sector). http://globalcompetitionreview.com/reviews/78/sections/300/chapters/3172/malaysia-overview/.
166. https://www.ida.gov.sg/-/media/Files/PCDG/Practice%20Guidelines/TCC/2012TCC_wef_2July2014.pdf, chapter 10

Figure 29: Bangladesh: Robi/Airtel Merger

scheme for employees not willing to work for the merged company.

- End of August 2016. The High Court gives final clearance for the merger, ending the approval process and allowing Robi and Airtel to proceed.

Background:

In September 2015, Robi Axiata Limited ("Robi") and Bharti Airtel Limited ("Airtel") announced their engagement in merger talks and applied for merger consent from the BTRC. The merger of the third- and fourth-largest operators would mark the first step towards consolidation in Bangladesh's eight-operator mobile market, creating the second-largest operator by number of subscribers.

The approval process appeared unclear, particularly given the Telecommunications Act's prohibition on transferring spectrum and the fact that, despite the 2012 Competition Act's establishment of a Competition Commission, no chairman had been selected and the Commission was not yet operational. While the companies acknowledged that they would conduct their merger process according to the requirements of the general Companies Act 1994, there was no established process for the evaluation of a proposed merger or for the processing of a merger proposal from two mobile operators.

With no precedent for such a merger, the BTRC decided in December to seek consultation from the other operators before holding a public hearing to further assess its position and commissioned to external consultants, university professors, to conduct an analysis of the impact of the proposed merger.[167] Following Robi's and Airtel's formally signing their merger agreement in January, the High Court ordered the regulator to submit its recommendation to the Court in the spring.

In March, the BTRC issued its recommendation and report to the High Court and to the MoPT that the merger be approved with conditions attached, including that the merged entity pay substantial merger fees and spectrum fees related to Airtel's spectrum licences and that Airtel not be allowed to withdraw before the expiration of its spectrum licences in 2028.[168]

At an inter-ministerial meeting in July chaired by the Finance Minister, the government finalised the fee terms to be attached to the proposal, and at the end of July, the government submitted to the Prime Minister, who is also the Minister for Post and Telecommunications, the final summary of the merger proposal, inclusive of conditions, for her consent, which she gave at the beginning of August.[169]

On August 31, the High Court issued its formal approval of the proposal, ordering the new entity to pay approximately $12.8 million in merger fees and approximately $65 million in spectrum fees to the BTRC.[170]

167. Ahmed Shawki, "Robi-Airtel Merger: BTRC to seek opinion form other telcos," NEWAGE, 30 Dec. 2015, *available at* http://newagebd.net/188435/robi-airtel-merger-btrc-to-seek-opinion-from-other-telcos/.
168. "BTRC offers gesture to Robi-Airtel merger," Bangladesh News 24, 19 Mar. 2016, *available at* http://www.bdnews24us.com/article/1194/index.html.
169. Ishtiaq Husain, "PMO Clears Robi-Airtel merger proposal," Dhaka Tribune, 2 Aug. 2016, *available at* http://www.dhakatribune.com/business/2016/08/02/pmo-clears-robi-airtel-merger-proposal/.
170. "Bangladeshi High Court approves Robi-Airtel merger," Telegeography, 2 Sept. 2016, *available at* https://www.telegeography.com/products/commsupdate/articles/2016/09/02/bangladeshi-high-court-approves-robi-airtel-merger/.

The recent merger between Mobilink and Warid shows that similar concerns exist in Pakistan (Figure 30).

Figure 30: Pakistan: Mobilink/Warid Merger

Pakistan: Mobilink/Warid Merger
Year: 2015-16
Authority: Ministry of Information Technology and Telecommunications (MoIT), Pakistan Telecommunications Authority (PTA), Competition Commission of Pakistan (CCP).

Legislative Framework:

- Competition Act 2010. Establishing the CCP and setting the framework for the merger review process.
- Competition (Merger Control) Regulations 2007. Setting procedures and thresholds for CCP's merger review.
- Telecommunications (Re-organisation) Act, Section 57. Requiring the MoIT/ Federal Government to make rules to prevent, prohibit and remedy the effects of anti-competitive conduct by telecoms licensees. Sections 4 and 6 of the Act empower the PTA to regulate competition in the telecommunications sector to ensure that fair competition exists and is maintained.
- Pakistan Telecommunications Rules 2000. Rule 11 requires a licensee to give prior notice of a proposed change in substantial ownership or control of a licensee. The PTA may impose additional conditions in case it holds the opinion that this change will adversely affect the ability of the licensee to provide licensed telecommunications services.
- Pakistan Telecommunications Authority (Functions & Powers) Regulations 2006. Regulation 22 requires a licensee to give prior written notice of any proposed merger and the Authority shall give its decision on the desirability or otherwise of such proposed merger.
- Telecommunications Policy 2015. Drafted by the MoIT with input on regulatory and policy changes from the PTA. Section 8.17 declaring that spectrum management issues should not stand in the way of merger approval.

Chronology:

- December 2013 — Pakistan Telecommunications Company Limited (PTCL) launches bid for Warid.
- March 2014 — PTCL/Warid merger deal collapses when operators are unable to agree on price.
- November 2015 — Mobilink (VimpelCom) and Warid (Abu Dhabi Group) announce merger.
- March 2016 — CCP approves the merger, subject to conditions and certain remedial actions.
- May 2016 — PTA approves the merger, subject to certain conditions.

Figure 30: Pakistan: Mobilink/Warid Merger

Background:

The Pakistani mobile market has a penetration rate of less than 70 percent and a mobile broadband penetration rate of about 15 percent.[171] As operators continue to expand, they are looking for additional LTE spectrum resources and economies of scale. Accordingly, at least three of the five operators have looked to acquire the smallest of the five mobile operators (Warid). Warid has a market share of less than 10 percent of connections.

In December 2013, Telecommunications PTCL launched an initial bid for Warid, but talks collapsed by March 2014 due to inability to agree on the price. Zong and Mobilink each considered making a bid at the time for Warid but did not proceed.[172]

In November 2015, VimpelCom and the Abu Dhabi Group, the parent companies of Mobilink and Warid, respectively, announced the first mobile telecommunications merger in the Pakistani market. The merger of Mobilink, Pakistan's largest mobile wireless operator, and Warid, the fifth largest, would give to the new entity a combined customer base of approximately 50 million, according to company sources.

The CCP reviewed the proposed merger and granted its approval in March 2016. Following a phase 2 investigation, the CCP granted approval, subject to several remedial actions, mostly intended to address spectrum concentration in LTE bands. To mitigate any potential anti-competitive harm, the CCP not only imposed monitoring requirements and operational restrictions on the merged entity but also made recommendations to the PTA to develop infrastructure and spectrum sharing guidelines, noting that the Telecommunications Policy 2015 already called for such a framework. The CCP's review of the deal extended to a broader market analysis, leading it to make further recommendations the PTA, such as a re-evaluation of its MVNO framework to impose wholesale access obligations not only on Mobilink/Warid, but also on all operators.[173]

The PTA's approval followed two months later, in May 2016. The PTA took into account the CCP's recommendations related to telecommunications regulation.[174] The PTA's substantive analysis largely mirrored that of the CCP, first focusing on changes in level of competition, based on change to the HHI, followed by a review of "necessary safeguards," including maintenance of BTS sites, quality of service standards and interconnection mandates.[175] The PTA also conducted public consultation with the general public and government agencies.

Analysis:

- Jurisdiction: While the CCP and the PTA appear to abide by an understanding of their respective roles in the process of merger review, there are no formal guidelines in place regarding each agency's role. In July 2014, it was announced that the CCP and the PTA

171. GSMA Intelligence, Pakistan — Market Data (subscription service).
172. Tim Ferguson, "Pakistan Telecom-Warid merger talks falter," Mobile World Live, 6 Mar. 2014, http://www.mobileworldlive.com/featured-content/home-banner/pakistan-telecom-warid-merger-talks-falter/.
173. Aamir Attaa, "A Detailed Look at CCP's Approval of Mobilink-Warid Merger," ProPakistani, 25 Mar. 2016, http://propakistani.pk/2016/03/25/a-detailed-look-at-ccps-approval-of-warid-mobilink-merger/.
174. PTA Approval, § 3.
175. *Id.* at § 7.1.2.

Figure 30: Pakistan: Mobilink/Warid Merger

would sign a Memorandum of Understanding (MoU) regarding the role of each agency in the review of competition matters in the telecoms sector.[176] However, no MoU appears to have been signed, and neither agency makes reference to such an MoU in its opinion. This leaves a lack of clarity in the review process. Furthermore, the dual jurisdiction of the telecom-specific PTA and the general competition authority CCP adds an extra layer of potential conditions and costs for merging parties. In this merger case, each agency reviewed both market concentration issues as well as telecommunications regulatory issues. This approach raises the risk of different agencies reaching conflicting outcomes.

In addition, under the Telecommunications Policy 2015, the MoIT is required to draft new Competition Rules for the telecommunications sector,[177] including a review of market definitions and significant market power. However, the Telecommunications Policy 2015 makes no reference to the jurisdiction of the CCP, and it remains unclear how such competition rules will affect, if at all, the standards of merger review for the PTA and the MoIT.

Areas for consideration:

- The CCP and the PTA should sign an MoU to clarify for operators and the market the respective roles for each agency in the merger control process. Policymakers could consider a consolidated merger review process in which the PTA would advise on telecommunications sector issues.
- The MoIT, in drafting the new Competition Rules, should consult with the CCP to ensure that licensees seeking to merge do not face multiple different definitions of the market and competition thresholds.

The MoIT should also take a holistic view of the digital market, considering all sources of competition in the communications market, including those attributable to market players not directly licensed or authorised by the PTA or other government agency.

176. "PTA and CCP will prepare MoU about roll in Telecom," Teleco Alert: Pakistan Information Communication Technology News Network, 24 July 2014, http://www.telecoalert.com/pta-and-ccp-will-prepare-mou-about-roll-in-telecom/.
177. The Telecommunications Policy 2015 gives the ministry a deadline of six months from its December 2015 issuance to issue the new competition rules. However, as of November 2016, these rules have not yet been issued.

Spectrum Issues in Asia Pacific

Four issues will be considered.

First, spectrum harmonisation is an obvious area where supra-national organisations can make a difference. In Asia, the APT Wireless Group (AWG)[178] was instrumental in the global acceptance of its plan to harmonise the 700 MHz band for mobile broadband, after the digital switchover of television broadcasting.

The AWG has the important goal of studying spectrum sharing methodologies and spectrum harmonisation and to provide advice on national frequency band planning. As countries started digitising television services, making the recovery of a portion of the analogue TV spectrum bandwidth possible (the so-called digital dividend), the 700 MHz band was considered the ideal band for future low-band LTE requirements. AWG developed an APT Report on "Implementation Issues Associated With Use of the Band 698-806 Mhz By Mobile Services" in 2011. In 2013, the APT band plan to harmonise the 700 MHz band for mobile broadband obtained global acceptance.[179] This has unfortunately not resulted in universal harmonisation in Asia. **Thailand** and the **Philippines** are yet to commit to the assignment of the 700 MHz band for mobile broadband services. Both countries need to move quickly to harmonise use of the 700 MHz to keep pace with the rest of the region. Countries that have committed to harmonisation need to meet their digital switchover targets to realise the potential of the band to boost internet connectivity.[180]

Second, as considered generally in appendix 1, it is important that spectrum assignment takes place in a way that incentivises efficient use of the spectrum, through competitive selection methods. When assigning spectrum through the use of auction mechanisms, these should be designed to maximise auction efficiency. When the criteria are not properly thought through, or the reserve price is too high, the aims of the auction may not be met (such as in Australia, Figure 31) or there could be confusion in the market place (e.g., in Thailand, see Figure 32).

178. a specialist work program Group within APT, dealing with various aspects of spectrum and emerging wireless systems
179. Stuart Davis, APT 700 MHz Band Plan, *ITU SEMINAR ON SPECTRUM MANAGEMENT AND TERRESTRIAL TV BROADCAST IN PACIFIC*, 10th July 2015, Nadi, Fiji. Available by internet search
180. GSMA The Mobile Economy Asia Pacific, page 60

Figure 31: Australia's auction of digital dividend concludes with 1/3 of spectrum unsold

Australia

- In May 2013, Australia's auction of digital dividend spectrum concluded with one-third of the 700 MHz band unsold.
- The auction, which also included lots of 2.6 GHz spectrum, generated considerably less revenue than the government had predicted.
- It was reportedly the first occurrence of any digital dividend spectrum being left unsold.
- The Australian government has since been criticised for setting the reserve price unrealistically high at $1.43/MHz/ population.
- Of the country's three incumbent mobile operators, Telstra and Optus bought less of the 700 MHz spectrum than they were allowed to under the auction rules, and Vodafone Hutchison Australia chose not to bid at all.
- Vodafone Hutchison Australia made a proposal to buy 2x10 MHz of the unsold spectrum earlier in 2016. As a result the Federal Government decided to conduct a new auction for the remaining 700 MHz lots, most likely to be held in 2017. [181]

Figure 32: Thailand's auction leads to default on spectrum payments by new licensee

Thailand: Default on Spectrum Payment by New Mobile Licensee
Years: 2015-16

Authority: National Broadcasting and Telecommunications Commission ("NBTC")

Legislative and Regulatory Framework:

- Act on Organization to Assign Radio Frequency and to Regulate the Broadcasting and Telecommunications Services, B.E. 2553 (2010), §§ 41, 45. Empowering and obliging the NBTC to auction spectrum frequencies and to set adequate criteria for the qualifications of bidders.
- Notification of the NBTC, Criteria and Procedure for the Licensing of Spectrum for Telecommunications Service in the Frequency Band of 895-915 MHz/940-960 MHz (2015), §2. Establishing qualifications of auction applicants.

Chronology:

- December 2015. Jasmine won a 900 MHz spectrum license through auction, becoming the country's fourth mobile operator.
- February 2016. Reports indicated that Jasmine had begun seeking a foreign investor to help it pay cost of the licence and the capex necessary for the network buildout.

181. See: https://www.communications.gov.au/have-your-say/draft-ministerial-direction-unsold-700-mhz-spectrum

Figure 32: Thailand's auction leads to default on spectrum payments by new licensee

- March 2016. Jasmine forfeited its licence after missing the deadline to pay the initial instalment of the licence fee.
- May 2016. The NBTC sold the 900 MHz licence to market-leader AIS.
- June 2016. Jasmine paid a fine of approximately $23 million to the regulator for its failure to pay the licence fee.

Background:

During a December 2015 spectrum auction conducted by the NBTC, Jasmine International, Thailand's second-largest broadband provider, won a 4G spectrum licence in the 900 MHz band, positioning the company to become the country's fourth operator in the mobile market with an already high penetration rate, sparking fears of a price war. Industry analysts, however, expressed concerns over the pressure on the operator's financial position, considering the 10 MHz-block price tag of more than $2 billion and the need to build some 10,000 base stations to operate a mobile network.[182] Jasmine's international partners—rumoured to be SK Telecom, Temasek and Chunghwa Telecom—withdrew their support over the unexpectedly high cost of the spectrum block.[183]

These high prices were stoked by an extended period of uncertainty created by multiple delays in the auction of 900 MHz and 1800 MHz bands and expired concessions. Following a military coup in May 2014, the planned July 2014 auction of 900 MHz bands and the August 2014 auction of 1800 MHz bands were put on hold while the ruling Council assessed the NBTC's plans.

Operators' previous concessions in the 1800 MHz band expired in September 2013 and the concessions in the 900 MHz band expired in September 2015. Operators were allowed to continue their use of those frequencies until the auction was eventually held—a moving target of a deadline.[184] Eventually, Jasmine was awarded the licence in December 2015.

Facing a March 21 deadline to pay the first instalment of the licence fee, Jasmine began seeking a foreign partner to purchase up to a 30 percent stake in the company in order to help cover the costs.[185] However, Jasmine failed to make the payment of approximately $230 million by the deadline and thus forfeited its claim to the licence. Jasmine's CEO explained that, while the company had found a Chinese partner, delays in the Chinese regulatory approval process would mean that the deal could not be completed until mid-April. Jasmine reportedly asked for an extension from the NBTC or the ability to make a partial payment, but to no avail.[186]

182. "Thailand's True, Jasmine win 4G licences for record," Mobile World Live, 21 Dec. 2015, *available at* http://www.mobileworldlive.com/asia/asia-news/thailands-true-jasmine-win-4g-licences-for-record-4-2b/.
183. "Jasmine fails to make payment, forcing Thai 4G re-auction," Mobile World Live, 22 Mar. 2016, *available at* http://www.mobileworldlive.com/asia/asia-news/jasmine-fails-to-make-payment-forcing-4g-re-auction/.
184. Toby Youell, "Thai junta delays spectrum auctions for a year," PolicyTracker, 2 Sept. 2014, *available at* http://www.policytracker.com/headlines/thailands-junta-delay-900-mhz-and-1800-mhz-auction-for-one-year.
185. "Thai telecoms firm Jasmine faces tough quest for financing-analysts," Reuters, 3 Feb. 2016, *available at* http://www.reuters.com/article/thailand-telecoms-4g-idUSL3N1561GE.
186. "Jasmine CEO reveals reason for Thai 4G licence default," Mobile World Live, 23 Mar. 2016, *available at* http://www.mobileworldlive.com/asia/asia-news/jasmine-ceo-reveals-reason-for-4g-licence-default/.

Figure 32: Thailand's auction leads to default on spectrum payments by new licensee

Then, in May 2016, the NBTC re-auctioned the forfeited 900 MHz licence. The re-auction comprised stricter conditions than the original process, including a pre-determined fine of approximately $327 million if the winner defaults on its licence payment.[187] The NBTC required bidders to put up 5 percent of the new reserve price, set at the same level as Jasmine's original winning bid. The regulator also noted that Jasmine would remain liable for any shortfall should the re-auction process fail.[188]

Operator True collected the bidding documents but did not submit a bid in the auction.[189] True would have been barred from participating due to spectrum caps, but the government ruled that all operators, except for Jasmine, qualified to bid for the block.[190] AIS then offered simply to pay the amount of Jasmine's bid, without need for auction, but the government insisted, for the sake of the regulator's credibility, that the auction proceed.[191] AIS was the sole bidder and ultimately won the auction, paying the new reserve price.

In June, the NBTC issued a fine of approximately US$23 million to Jasmine for its failure to pay for the spectrum licence. The regulator determined the amount by considering costs incurred during the December 2015 auction, the cost to re-auction the spectrum and interest from the default date.[192]

Analysis:

- Jurisdiction
  - › While the 2010 Act on Organization grants the authority over the spectrum auction process to the NBTC, the existing rules of the NBTC were not adequate to handle this unique situation of having only one applicant for the auction in a way that maximised the country's economic interests and industry competition. Going forward, careful considerations should be made on how to enhance the rules to provide regulators with more flexibility to deal with similar unexpected situations without having to rely on government intervention.
- Substance
  - › The NBTC's Notification setting the rules for the 2015 spectrum auction required applicants to submit a consent letter disclosing confidential information, including "[i]nformation relating to business operations plan, network deployment plan, policy, information relating to financial status, marketing and cost, operating plan as well as cost of regulatory assessment."[193] Jasmine would have submitted this information with its application, along with information regarding its intended international

187. "Thailand's AIS shows interest in forfeited 900MHz spectrum," Mobile World Live, 5 Apr. 2016, *available at* http://www.mobileworldlive.com/asia/asia-news/thailands-ais-shows-interest-in-forfeited-900mhz-spectrum/.
188. "Thailand sets out 900 MHz re-auction terms," Telegeography, 30 Mar. 2016, *available at* https://www.telegeography.com/products/commsupdate/articles/2016/03/30/thailand-sets-out-900mhz-re-auction-terms/.
189. See "True Move drops out of 900 MHz re-auction, at http://www.bangkokpost.com/tech/local-news/976685/true-move-drops-out-of-900mhz-re-auction
190. "Thailand's True is big winner in walking away from 900 MHz re-auction," Mobile World Live, 18 May 2016, *available at* http://www.mobileworldlive.com/asia/asia-blogs/blog-thailands-ais-to-participate-in-uncontested-900mhz-re-auction/.
191. *Ibid.*
192. "NBTC fines Jas Mobile THB200m for failure to pay for 900MHz spectrum licence," Telegeography, 3 June 2016, *available at* https://www.telegeography.com/products/commsupdate/articles/2016/06/03/nbtc-fines-jas-mobile-thb200m-for-failure-to-pay-for-900mhz-spectrum-licence/.
193. Consent Letter of Applicant, Notification of the NBTC, Criteria and Procedure for the Licensing of Spectrum for Telecommunications Service in the Frequency Band of 895-915 MHz/940-960 MHz (2015).

Figure 32: Thailand's auction leads to default on spectrum payments by new licensee

partners. While the information submitted to the NBTC remains confidential, the failure of Jasmine to secure financing and therefore to pay the first instalment of the price of the licence indicates the likely existence of apparent flaws with the operator's application which were not picked up, notwithstanding the very high price.

Areas for consideration:

- The independence of the regulator is important, to nurture confidence in a predictable regime characterised by regulatory consistency and the regulator's credibility.
- It is important to ensure that applicants meet the requirements for financial health and capacity not only to pay for the price of the licence, but also to finance network build out and operation. In fact, bidders were only asked to submit a bank guarantee for 5% of the reserve price, and there was no way to ask for a higher one, as prices increased.
- A different packaging of spectrum (smaller blocks) could have led to more efficient outcome.
- Lack of spectrum roadmaps, the comparatively small amount of spectrum in Thailand, combined with legal uncertainties could have led to a "now or never" consideration from Jasmine.

Third, if a country is considering the introduction of a new entrant, it should do so only after a proper market assessment to determine whether there is a need to affect the market structure in such a fundamental way, as with reserving spectrum for new entrants. Failure to do so may result in overcrowded mobile markets. In Figure 33, the case of Indonesia, where seven mobile operators were licensed, resulting in four not being able to compete (and seeking to merge), is considered.

Figure 33: Indonesia ends up with seven operators then pushes for consolidation

Indonesia: Government Push for Consolidation
Year: 2015-16
Authority: Ministry of Communications and Informatics (MoCI), Competition Commission (KPPU).

Legislative Framework:

- Law on Telecommunications, 1999, No. 36, Article 10. Prohibiting monopolistic practices and unfair business competition, and referencing the Prohibition of Monopolistic Practices and Unsound Business Competition Law to establish standards for review.
- Prohibition of Monopolistic Practices and Unsound Business Competition Law, 1999, No. 5. Defining dominant position and setting merger notice periods. Also establishing the Business Competition Supervisory Commission.

Figure 33: Indonesia ends up with seven operators then pushes for consolidation

Chronology:

- September 2013 — XL Axiata announces merger with Axis
- November 2013 — MoCI approves the merger and allows the merged entity to keep Axis' 1800 MHz spectrum but not 2100 MHz.
- March 2014 — KPPU issues a pre-merger non-objection to the merger, finding no resulting monopoly or unfair competition, but requiring the merged entity to report market conditions, products and tariffs for three years to ensure its commitment to competitive tariffs.
- January 2016 — Minister Rudiantara of MoCI, appointed in Oct 2014, threatens to revoke the licences of the operators for continued non-compliance with their obligation to roll out, as per their licence conditions.

Background:

The Indonesian mobile market has experienced rapid growth in the past several years, with a market penetration rate increasing from just under 90 percent at the beginning of 2011 to nearly 135 percent at the beginning of 2016.[194] As of June 2016, the Indonesian MoCI had licensed seven operators. The top four operators account for a total of about 95 percent market share.[195]

The smaller operators attempted to scale up. Beginning with price wars in the late 2000s, operators have struggled with low ARPUs and significant operating losses.[196]

The MoCI has long recognised the need for consolidation in the market. Early in 2016, Minister Rudiantara of the MoCI aggressively renewed the public campaign to encourage mergers or exits among the operators. In January 2016, he threatened to revoke licenses if the holders do not move soon to build out their networks and encouraged smaller carriers without sufficient resources for network investments to merge with one another or with larger carriers.[197] By 2019, says Minister Rudiantara, Indonesia should have only a maximum of four operators.[198]

In order to merge, operators must gain multiple, separate governmental approvals and opinions, most importantly from the KPPU and the MoCI. While the KPPU's process focuses on whether a monopoly will result, its opinion is not tantamount to approval or disapproval. Rather, the KPPU issues a pre-merger opinion upon prior notification, with a finding of either an opinion of "no indication" of monopolistic practices or unfair competition, of "indication" or of "no indication" with remedies required. The opinion is not legally binding. However, all such mergers require the parties to notify the KPPU within 30 days of completion of the transaction, and the KPPU will then issue within 90 days an objection letter, a no objection letter or an objection with remedies letter. A negative would subject the merged entity to

194. GSMA Intelligence, Market Data — Indonesia (subscription service) (2016).
195. GSMA Intelligence, *supra* note 1.
196. "Consolidate to accumulate: A reduction in the number of players could help shore up ARPU
197. *E.g.*, Yudith Ho and Fathiya Dahrul, "Build Network or Lose License, Indonesia Telecoms Minister Says," Bloomberg Technology, 19 Jan. 2016, http://www.bloomberg.com/news/articles/2016-01-19/build-network-or-lose-license-indonesia-telecom-minister-says.
198. Ho and Dahrul, *supra* note 3.

Figure 33: Thailand's auction leads to default on spectrum payments by new licensee

sanctions contained in the Prohibition of Monopolistic Practices and Unsound Business Competition Law.

Independent of the KPPU process, the merger process in the telecommunications sector is subject to the approval of the MoCI regarding spectrum assignment and operational telecommunications licence adjustment.[199]

Earlier in 2013/14, XL Axiata completed its acquisition of smaller rival Axis. The KPPU gave its post-closing opinion that the merger should be approved without permanent conditions in spring 2014, noting that the merger would not risk creating a monopoly, considering its 21 percent projected market share compared to the much larger market shares of operators Telkomsel and Indosat and finding this tolerable delta in the HHI.[200] The MoCI approved the merger in November 2013 but as required by Indonesian law, XL Axiata had to return Axis' frequency allocations in the 2100 MHz bands.[201] MoCI however allowed the retention of Axis's 1800 frequency allocation.

Analysis:

- Jurisdiction: The dual jurisdiction of the industry-specific MoCI approval and the KPPU places not only an additional layer of risk that mergers be blocked but also an additional layer of potential conditions to the merger. While both the KPPU and the MoCI look to the standards set out in the 1999 Prohibition of Monopolistic Practices and Unsound Business Competition Law, their applications are not dependent on one another and differ in objective. The KPPU looks for potential market dominance. The MoCI measures additional, undefined market dynamics in addition to the potential for market dominance based on the perspective of licensing authorisations and spectrum holdings, often the most valuable element and motivator of a deal.

Areas for consideration:

- The licensing of many operators in Indonesia did not lead to increased competition. This is a cautionary tale for countries wishing to introduce new entrant licensees. Entry should only be considered when the need for entry is established, and only if the conditions for network roll out can be satisfied by multiple mobile operators.
- Indonesian policymakers should consider streamlining and clarifying the jurisdiction of the different authorities with power to approve or block mergers, in the interest of predictability.
- In addition, current provisions limiting the ability of operators to achieve greater scale efficiencies e.g. spectrum trading, active network sharing, should be reviewed.

199. *See* Dewie Pelitawati and Melanie Hadeli, *Indonesia*, in The Technology, Media and Telecommunications Review 197-98 (John P. Janka ed., 2d ed. 2010).
200. "XL Axiata secures approval on Axis merger," Mobile World Live, 12 Mar. 2014, http://www.mobileworldlive.com/featured-content/home-banner/xl-axiata-secures-axis-merger-approval/.
201. "XL Welcomes Approval from the Ministry of Communications and Informatics for M&A with AXIS," Press Release, Axiata, https://www.axiata.com/mroom/news-article/10/; "XL Axiata completes Axis acquisition," Telegeography, 21 Mar. 2014, https://www.telegeography.com/products/commsupdate/articles/2014/03/21/xl-axiata-completes-axis-acquisition/.

Fifth, as the Indonesian case demonstrates, there is an obvious interplay between licensing and merger control rules. If, on the one hand, too many operators are licensed, then wishing for them to merge, will only be possible if the merger rules are clear and if the merging parties can have transparency as to the spectrum that they will retain. In Indonesia, seven mobile operators found it difficult to compete, but, although the Government pushed for consolidation, the merger control rules are far from clear and supportive of consolidation.

Merger control is an area where regulators and governments wish to retain control on spectrum assignment, and the competition authorities are often required to approve mergers under merger control rules. As seen above, in some countries the regulator has jurisdiction to consider mergers in the telecoms sector, leading to a further potential distortion of the regulatory regime, where the telcos continue to be assessed under a separate framework.