

# **Dynamic Competition in Dynamic Markets: *A Path Forward in the APAC Region***

“UNFAIR COMPETITION” AND “UNEVEN BARGAINING  
POSITIONS”: ROLE IN COMPETITION ASSESSMENT



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“Unfair Competition” and “Uneven Bargaining Positions”:  
Role in Competition Assessment

CPI Live

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## Background Note:

- Behaviors such as excessive pricing and refusal to supply are classic antitrust abuses.
- However, in some Asian jurisdictions (such as Japan, Korea and Taiwan); as well as some EU member states (including Germany, France and Italy)), such conduct can be deemed problematic even without the company being dominant.
- Under these rules, companies can face scrutiny merely when another party is in a position of economic dependence in relation to them. The “victim” could be a customer, a supplier, a distributor, or a franchisee.
- This type of regulation is considered by some to introduce an additional, arguably relatively onerous, obligation on companies to treat counterparties “fairly” in these geographies.

## Participants:



**Carmelo CENNAMO** | Professor, Department of Strategy and Innovation, Copenhagen Business School



**Elizabeth WANG** | Executive Vice President, Compass Lexecon



**Andy CHEN** | Vice Chairperson, Taiwan Fair Trade Commission

## Moderator:



**Youngjin JUNG** | Co-Chair, Antitrust and Competition Law Practice, Kim & Shang

## Panel Summary

The Panel discussed the use of this concept to discipline tech companies. For example, in Japan, the JFTC took actions against Amazon; in Korea, the KFTC has adopted decisions concerning Apple.

- Specifically, the panelists explore whether this concept is the correct way of regulating this potential issue, and how rules should be articulated in a manner that maintains competition in digital markets.
- The Panel was chaired by **Youngin Jung**, Senior Partner and the Co-Chair of Kim & Chang’s antitrust and competition practice. The Panel included **Professor Carmelo Cennamo** from the Copenhagen Business School, **Andy Chen**, Vice-Chairperson at the Taiwan Free Trade Commission, and **Dr. Elizabeth Wang**, Executive Vice President at Compass Lexecon.
- The Panel explored various fascinating issues. Why regulate this issue to begin with? What is insufficient about current abuse of dominance laws? Should the application of such laws take an *ex post* or *ex ante* scenario into account when evaluating the facts? What are the welfare effects of such rules? The summary below touches on the key points raised by the speakers.
- At the outset, **Youngin Jung** noted that the idea of fairness has recently reentered the policy discourse underpinning competition law enforcement. Yet the boundary of fairness as a driver of competition enforcement is unclear. Over the years, the application of competition rules has been focusing on competitive restrictions with the effect of harming consumers.
- Second, Dr Jung noted competition on the merits and the effect on competition as the core criteria for a finding of infringement. A good example of unfair competition law that has been frequently used by some agencies, is the abuse of economic independence, also known as abuse of a superior bargaining position. A number of leading jurisdictions in Asia, including Japan, Korea, and Taiwan, have competition law provisions that prohibit such abuses of a superior bargaining position.

**Dr. Elizabeth WANG** first considered whether there is an analytical framework for us to consider fairness in competition law assessment.

## Key Talking Points | Dr. Elizabeth WANG

- Unfairness is not a pure economic concept to begin with. However, competition law, in general, has a very clear set of economic goals, which is to improve consumer welfare through protecting the competition process. In historical context, in Japan, Korea, and Taiwan, such laws also exist to help protect small and medium enterprises.
- There are two economic interpretations of unfairness. From an economic perspective, there is *ex-ante* unfairness versus *ex-post* unfairness. *Ex-ante* unfairness refers to fairness judged by the opportunity to compete, rather than the outcome of the competition process.
- For example, price discrimination is often only judged by the outcome, so after the competition process, different people paint different process. So from the outcome, perspective is different. In a sense it’s unfair.
- However, there is extensive economic literature showing that price discrimination can be beneficial in term of improved consumer welfare. So *ex-ante* unfairness may not lead to the same decision as *ex-post* unfairness. And from the consumer welfare point of view, maybe *ex-ante* unfairness is a better match.
- Ultimately, there is a tension between unfair competition and competition. Because competition analysis has a very clear goal, which is to protect the competition process, unfair competition is less defined. It needs to be better refined before we can fit the two things together.



**Dr. Elizabeth WANG** Executive Vice President, Compass Lexecon

**Carmelo CENNAMO** linked the discussion of “unfairness” with the rise of “digital platforms” or “ecosystems.” He queried what they bring to the market from a management and organizational perspective. Arguably, they are superior to current modes of organization that bridge markets (on the one hand), which are totally decentralized, and firms (on the other hand), that are totally centralized.

### Key Talking Points | Carmelo Cennamo

- Essentially, digital platforms address information problems, namely information asymmetry. Platforms are matchmakers or marketplaces. To link different sides of the market, they devise tools and rules, along with the digital architecture, governance rules and incentive systems to develop such solutions, in a way such that some of those externalities are internalized by the structure that they create.
- There are those situations where the customers themselves evaluate the quality of a given offer. Those involve well-defined market signals beyond price mechanisms. Sophisticated customers are capable of internalizing certain externalities.
- The other issue is where there are now very powerful engines of innovation that relate to information complexity and discovery problems. Exploring new opportunities and new options for value consumption are therefore of interest.
- Platforms produce value by steering demand and giving direction to firms, so that they actually trace a path for where innovation should go. They are also easy to use for customers.
- As such, platforms have become essentially architects of value, and as such, basically have a big say who captures most of this value.



**Carmelo CENNAMO** Professor, Department of Strategy and Innovation, Copenhagen Business School

**Andy CHEN** noted that superior bargaining position theory has been regularly applied in Taiwan, but not only in cases of unfairness. In the past, this theory has been applied to, for example, soften the rigidity of using market share as the starting point to initiate an investigation.

### Key Talking Points | Andy Chen

- For example, in 2016, the Taiwan Fair Trade Commission made a decision setting a bar of 15 percent market share at least for the initiation of an investigation in an abuse of dominance case, but only with one exception: where the parties hold a superior bargaining position.
- But this is an exception. Secondly, the superior bargaining position theory also has been applied in the past to franchise agreements. Because the franchisor will be able to control certain business management decisions, or even the appointment of personnel, there will be a kind of *de facto* merger. A party to a franchise agreement needs to file a merger notification, and the TFTC will review the case.
- Under Article 25 of the Taiwan Fair Trade Act there are guidelines that specify the factors that will be considered when the TFTC applies this theory. For example, there have been cases where the TFTC fined suppliers for changing contractual terms after the fact.
- There also have been cases concerning large distributors and their relationship *vis-a-vis* upstream suppliers. These are cases that dealt with, again, the larger distributor unilaterally changing the original contract terms and trying to impose additional contractual obligations on the upstream supplier.
- Post-contractual conduct is not a pre-contractual arrangement. In Taiwan, most of the cases focus on *ex-post* relationships.
- However, should the traditional definition of market power cannot be applied to analyze these kinds of cases? The traditional SSNIP approach is based on substitutability between different products.
- If a superior bargaining position means that one of the parties to the contract will rely on the other to complete or to facilitate a future transaction, that kind of dependence could also be revealed by a SSNIP test. We could still unequal bargaining position within the traditional framework of antitrust analysis.





**Andy CHEN** Vice Chairperson, Taiwan Fair Trade Commission

**Professor Carmelo CENNAMO** noted that the points raised above relate to how the existing frameworks depend on the definition of the market and related issues.

### Key Talking Points | Carmelo Cennamo

- This is problematic in the digital space because the unique and distinctive aspect of digital is that we don't have any more companies competing within markets, within defined markets. There are companies competing across markets. In other words, economies of scope.
- But one of the rationales for economies is the scope is that essentially one can start from a given a specific domain, and then add extensions and complementary products or services that are not necessarily part of the same domain, yet nonetheless bring value, particularly because they expand the boundaries of previously well-defined markets. That is the challenge.
- In a recent working paper, my colleagues and I speak particularly about two types of failures: one is in terms of functional failures, and the other relates to “increasing the pie.”
- The relevant unit of analysis here is the broader ecosystem and the new structures of economic relationship that they're putting in place, rather than just the individual, bilateral transaction between firm A and firm B. That would be too narrow a focus. There might be some conduct that might look uneven, or even unfair, if we take as a unit of analysis, the specific relationships (e.g. the *Apple/Epic* case).

**Dr. Elizabeth WANG** questioned the economic foundation under which “superior bargaining power” would cause harm?

### Key Talking Points | Elizabeth Wang

- It is an assumption that trading partners have uneven bargaining power to begin with. In reality, it is rare that trading partners would even have bargaining power all the time, so it is common that they will have uneven bargaining power.
- Second, of all, especially in the vertical relationship ethic, Andy mentioned earlier in the enforcement, one party, such as a small vendor, would enter into a contract with a huge retailer, and they're uneven. So, and that's for argumentative purposes, let's assume that the small vendor has to take a very low price to sell to this huge vendor.
- Then the question is there is cost savings from the retailer perspective because of low prices. How do we evaluate the consumer benefit from getting a lower price, a cost saving portion, versus the unfavorable pricing term the vendor has to suffer when dealing with a dominant supplier?

**Andy CHEN** continued by noting that whether superior bargaining position theory would be applied to digital platforms is still under discussion. There is still no consensus about whether Article 25 should be applied to the digital platforms, but it's an emerging issue.

### Key Talking Points | Andy Chen

- What is most important is ecosystem competition. Details about contractual terms, how many, are important, but that is really not a competition issue. That's probably more like an unfair contractual issue.
- Second, superior bargaining positions might be due to the unpredictability of enforcement.
- The traditional SSNIP test could solve many concerns. If one creates a narrow market, a contractual counterparty will have higher market power. We can still punish or stop the unfair conduct by relying on the conventional antitrust analysis.
- On the other hand, under a new theory, something like a superior bargaining position, the enforcement agency could be forced to look into a plethora of subjective motives in order to find out what kind of motive is behind certain transactions.

## SPEAKERS



### Professor Carmelo CENAMO

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Carmelo Cennamo is Professor with special responsibilities of Strategy and Entrepreneurship at Copenhagen Business School, where he is Co-Director of the Entrepreneurship Concentration studies of the MBA Program. As an Expert on Digital Platforms, Digital Markets, Ecosystems, he studies how firms manage their interdependent activities and how they try to shape the business context where these activities take place to gain competitive advantage. His work spans different sectors including videogames, mobile apps, oil and gas, automotive, hospitality, mobility, online news, blockchain, and initial coins offerings.



### Dr. Elizabeth WANG

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Elizabeth Xiao-Ru Wang is an Executive Vice President with Compass Lexecon and specializes in antitrust and intellectual property (IP) issues. She has provided economic analyses in merger review, commercial disputes and regulatory hearings, especially in cross-border matters. Dr. Wang has been involved in casework in a variety of industries, including technology platforms, life sciences, agriculture, financial markets, transportation, and consumer products. She has submitted reports to authorities in China and the United States, and has testified in courts.

Dr. Wang has been part of the leadership at the American Bar Association for nearly a decade. She was also named multiple times to the International Who's Who Legal: Competition Economists list. In addition, Dr. Wang has published and spoken frequently on antitrust and IP issues.

Dr. Wang has a PhD in Economics from the University of Chicago in the United States and a B.A. in Economics from Peking University in China.



### Andy CHEN

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Professor Chen served as Commissioner of the Taiwan Fair Trade Commission (TFTC) from 2007 to 2010 before resuming his academic career. During his term at the TFTC, he was responsible for the agency's international affairs, in addition to his case-reviewing obligations. He supervised submissions and led delegates to annual meetings of the OECD Competition Committee in Paris. His familiarity with international competition laws and policies has made him a regular speaker on related topics to both government agencies and private companies. He was an expert witness for the TFTC in a famous cement cartel case in 2005. His testimony and opinions assisted to the TFTC's successful prosecution of the cartel in the court. Professor Chen was nominated by the prime minister to serve as the vice chairperson of the Taiwan Fair Trade Commission. His nomination was confirmed by the congress in December 2020. Professor Chen is currently on leave to work for the TFTC for a four-year term.



### Youngjin JUNG

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Youngjin Jung is Co-Chair of Kim & Chang's antitrust and competition law practice. Dr. Jung has significant experience in all areas of antitrust enforcement in merger control, international cartel and abuse of market dominance (including abuse cases of major global technology companies) in major industries such as the technology and IT sectors. He also leads the firm's international trade practice (including trade remedies, WTO/FTA and sanctions).

Dr. Jung was a visiting professor at Duke Law School and an adjunct professor at Georgetown Law School. He has served as a Non-Governmental Advisor (NGA) for the ICN, and has served as an Officer of IBA International Antitrust Committee and a member of the International Cartel Task Force at ABA Section of Antitrust. He has also worked as the vice-chair of the International Antitrust Committee of ABA Section of International Law.