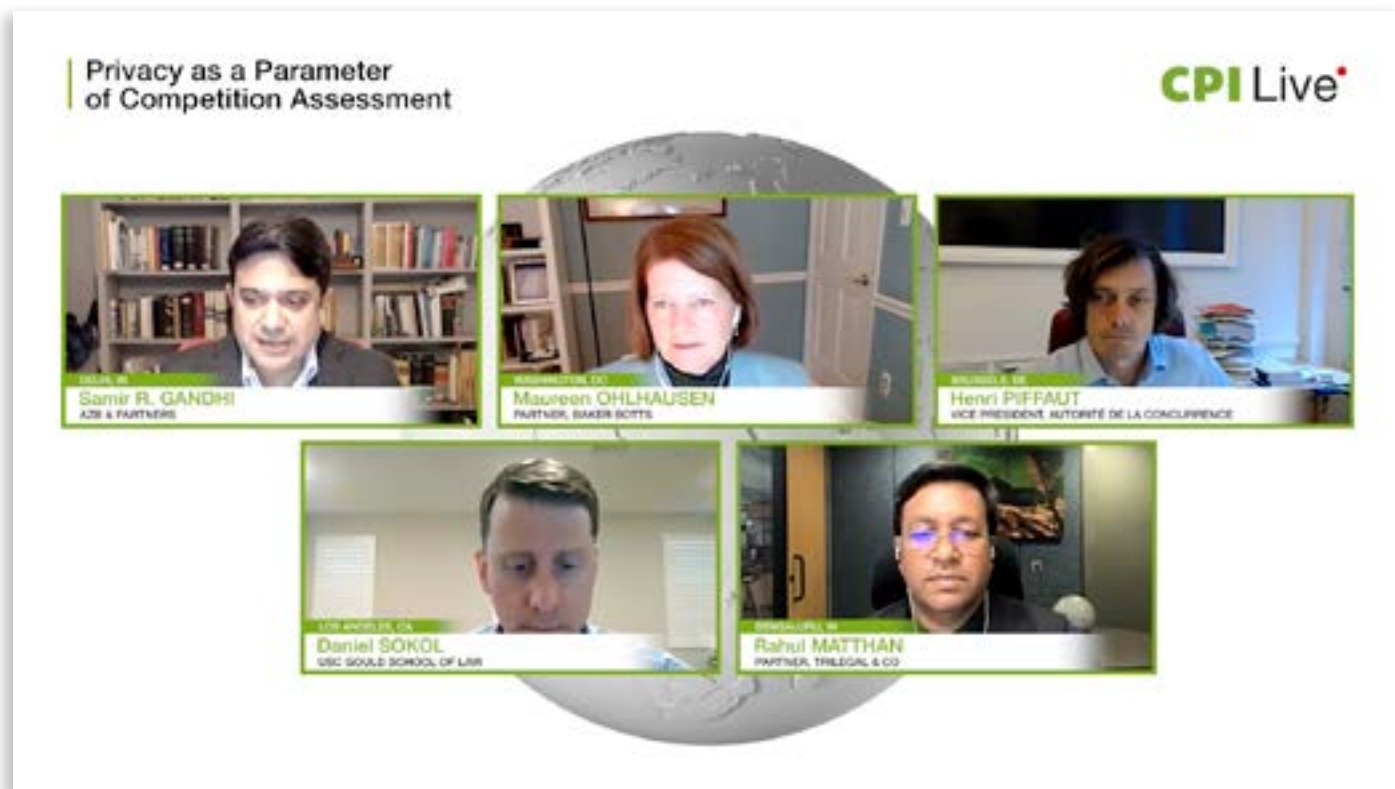


**Dynamic Competition in Dynamic Markets:
*A Path Forward in the APAC Region***

PRIVACY AS A PARAMETER
OF COMPETITION ASSESSMENT



PRIVACY AS A PARAMETER OF COMPETITION ASSESSMENT



Background Note:

- The speakers in this panel discuss how competition law has, in the past, assessed various privacy-related issues in enforcement activity. The panel will further consider the changes that are being proposed to this traditional approach.
- Panelists will also specifically examine how forced portability and sharing of data would comport with competition, on the one hand, and privacy values, on the other.
- The participants include **Daniel Sokol**, **Samir Gandhi**, **Maureen Ohlhausen**, **Rahul Matthan**, and **Henri Piffaut**. Each brings their unique perspective to this timely and fascinating set of questions.
- Key to the discussion is whether certain matters relating to privacy regulation are best dealt with through *ex ante* regulation specifically tailored to that issue? And if so, to what extent should such regulations overlap with parallel antitrust rules?
- This raises multivariate issues. To what extent do privacy rules raise barriers to entry? For example, would enhanced privacy protections inhibit antitrust remedies that might mandate data sharing between (actual or potential) competitors? Moreover, given the multinational nature of many of the tech platforms at issue in this debate, how can regulators ensure some form of consistent solution across the board?

Participants:



Rahul MATTHAN | Partner, Trilegal & Co



Maureen OHLHAUSEN | Partner, Baker Botts



Henri PIFFAUT | Vice President, Autorité de la concurrence



Daniel SOKOL | Law Professor, USC Gould School of Law

Moderator:



Samir R. GANDHI | Partner, Gilbert + Tobin

Panel Summary

The panelists discuss these and many other issues in an interchange that reflects the development of these debates over time and in recent months.

Samir GANDHI chaired the panel, and opened, noting that this conversation spans several factors surrounding privacy and competition law, not only in India but across the world.

Daniel SOKOL noted that sometimes privacy may work in tandem with competition, so that greater privacy leads to more competition and *vice versa*.

Key Talking Points | Daniel Sokol

- Sometimes it's neutral, sometimes the two may be at odds, but these are distinct areas. But there are going to be areas that are distinctive to a particular doctrinal area, and there will be areas of overlap.
- The question becomes, when should we be concerned about privacy? And it's when it impacts the competition. So when might we see it? We might see in one of two potential ways.
- In one way, we might be using privacy, as perhaps an excuse for anti-competitive activity. Of course we would want competition authorities to intervene when that's the case. Similarly, it could be that overly strong privacy protection, going the opposite direction, may be entrenching incumbents.
- The answers will depend on the facts. The authorities that have really understood this, the best, recently in a joint paper, were the UK's CMA and ICO, where they set out that where there's an intersection, both of us care. That's probably the right approach.



Daniel SOKOL Law Professor, USC Gould School of Law

Maureen OHLHAUSEN notes that cases over time that involved personally identifiable or consumer level data, frequently merger cases, involved assessing whether a combination created market power in some identifiable antitrust market.

Key Talking Points | Maureen Ohlhausen

- The idea that competition law has never had to deal with these issues, and we need to change everything, just isn't correct. One of the issues that has come to the fore, however, is this idea of whether aside from apart from creating any sort of market power in an identifiable antitrust market, does a combination of data through a merger going to reduce privacy somehow?
- On the conduct side, there's concern that a given company has been, through its own organic actions, not necessarily acquisition, gained a lot of consumer level data, and somehow that has given it an advantage. The question then is whether authorities must mandate remedies such that other competitors have access to that data, i.e. forced sharing.
- When does the combination of two data sets after a merger actually create an efficiency that allows the merged firm to then compete even better, or create new products, or something like that? That seems to be a negative in today's analysis, if it involves consumer data, where previously it would be a positive.
- The other concern focuses on online targeted advertising. It would really be beneficial to take a look at how many players are actually in that market? Has supply been going up in that market? I think it probably has. Have prices been going up?
- Many of these concerns would be much better addressed by adopting a federal privacy law that laid out the groundwork, rather than trying to distort antitrust law to deal with what are essentially privacy concerns.



Maureen OHLHAUSEN Partner, Baker Botts

Rahul MATTHAN addressed the question whether the existence of healthy competition guarantees better privacy or not. In his view, the answer is no.



Rahul MATTHAN Partner, Trilegal & Co

Key Talking Points | Rahul Matthan

- There are always circumstances where you will find that that is, actually not the case. And so if you are saying that, if there is healthy competition, we will always have greater privacy. I will point to a number of sectors, wherein the sectors themselves are extremely healthy, but privacy is not one of the factors on which they compete.
- When that becomes an issue that you compete on, that's when the existence of healthy competition is going to ensure that the market participants are going to then fight with each other to become more privacy preserving, more privacy-enhancing.
- Certain countries do not even have state privacy laws, a federal privacy policy, and so on. The fact that there are greater privacy restrictions being imposed on the market, does not, in and of itself, promote a competitive market.
- There are many examples of this. Apple recently introduced an app tracking transparency module. As a result, no longer can apps track your behavior, your actions, without being transparent about what they are doing. Yet, we know the implications that will have on the market. So there are these tensions between the steps to improve privacy and competition, and *vice versa*.

Henri PIFFAUT noted that access to data has been looked at primarily, at least in Europe and the Merger Control Review.



Henri PIFFAUT Vice President, Autorité de la concurrence

Key Talking Points | Henri Piffaut

- The question being asked, when a big data-based company is acquiring a smaller rival in an adjacent market, is whether the combination of the two data sets create a new data set which is indispensable for others to compete. And then are not replicable and therefore, should there be a mandate to provide access to data?
- In Europe, the so-called *Bronner* criteria govern. However, when you look at it from a business or economic perspective, access to data, or data sets, is a very different animal from traditional essential facilities.
- Initially, at least in Europe, when it was developed, the doctrine looked at physical facilities, like a port, or like a network infrastructure for gas transportation, for instance. If somebody would have access, others would not have access. In other words, it was a rivalrous asset, whereas data is not rivalrous.
- In short, it's very dissimilar, but the doctrine as to how, and when access should be provided or interoperability should be provided, has not yet been fully unblocked. There are some interesting precedents into gathering and sharing of information by insurance companies to assess risk. There's a fine balance to find, and the work for that has not been yet completed.

SPEAKERS



Rahul MATTHAN

Rahul Matthan is part of the TMT practice group at Trilegal.

Rahul has advised on some of the largest TMT transactions in the country. He has worked with companies across all sectors of the industry from big telecom operators, to ISPs, OSPs and managed data service providers and advised on matters ranging from regulatory matters to ongoing business issues relating to the rollout of operations.

Rahul has also advised on a range of sectors in the technology space including in relation to data protection, outsourcing, electronic commerce, new media, entertainment, biotechnology, pharma, and other new technologies. He has advised on new content delivery models for mobile value added services, regulatory issues surrounding the delivery of electronic content and legal and contractual issues in global e-commerce.



Maureen OHLHAUSEN

Maureen K. Ohlhausen joined Baker Botts after leading the Federal Trade Commission as Acting Chairman and Commissioner. She directed all aspects of the FTC's antitrust work, including merger review and conduct enforcement, and steered all FTC consumer protection enforcement, with a particular emphasis on privacy and technology issues. A thought leader, Ms. Ohlhausen has published dozens of articles on antitrust, privacy, IP, regulation, FTC litigation, telecommunications, and international law issues in prestigious publications and has testified over a dozen times before the U.S. Congress. Ms. Ohlhausen has relationships with officials in the U.S. and abroad, with a particular emphasis on Europe and China, and has led the U.S. delegation at international antitrust and data privacy meetings on many occasions. She has received numerous awards, including the FTC's Robert Pitofsky Lifetime Achievement Award. Prior to her role as Commissioner, Ms. Ohlhausen led the FTC's Internet Access Task Force, which produced an influential report analyzing competition and consumer protection legal issues in the areas of broadband and Internet.

In private practice, she headed the FTC practice group at a leading telecommunications firm, representing and counseling telecommunications and technology clients on antitrust compliance, privacy, and consumer protection matters before the FTC and the FCC. She also clerked at the U.S. Court of Appeals for the D.C. Circuit.



Henri PIFFAUT

Henri Piffaut is a Vice President of French Competition Authority. He is a former Adviser to the Deputy Director General for mergers at DG Competition of the European Commission. He has spent most of his career in the competition policy field. During the academic year 2016/17 he served as a fellow at Harvard University where he pursued research on the interaction of competition policy and platform industries. He has been a head of unit for merger control and for conduct cases. Both at DG Competition and in the private sector he dealt with pay-for-delay cases in the pharmaceutical industry, conduct and merger cases in the energy, payment systems, IT and telecom industries, State intervention in the transport industry and merger cases in a variety of industries. He holds degrees in science and engineering, political science and economics.



Daniel SOKOL

D. Daniel Sokol is a Professor of Law at the USC Gould School of Law and an Affiliate Professor of Business at the Marshall School of Business. He serves as faculty director of the Center for Transnational Law and Business and the co-director of the USC Marshall Initiative on Digital Competition. Additionally, in a part time capacity, he serves as Senior Advisor at White & Case LLP.



Samir GANDHI

Samir R Gandhi heads the competition practice at AZB & Partners and deals with a broad range of competition law and policy issues, as well as international trade and WTO matters.

Samir advises on all areas of competition law and policy and has previously served as counsel to the Competition Commission of India (CCI) in major litigation, including in CCI v SAIL, the first substantive competition law case decided by the Indian Supreme Court. He advises clients, both as complainants and as defendants, in behavioural cases before the CCI and appellate and writ courts.

Samir has worked on numerous merger filings and was part of the advisory team to the CCI that helped shape the 2011 merger regulations.