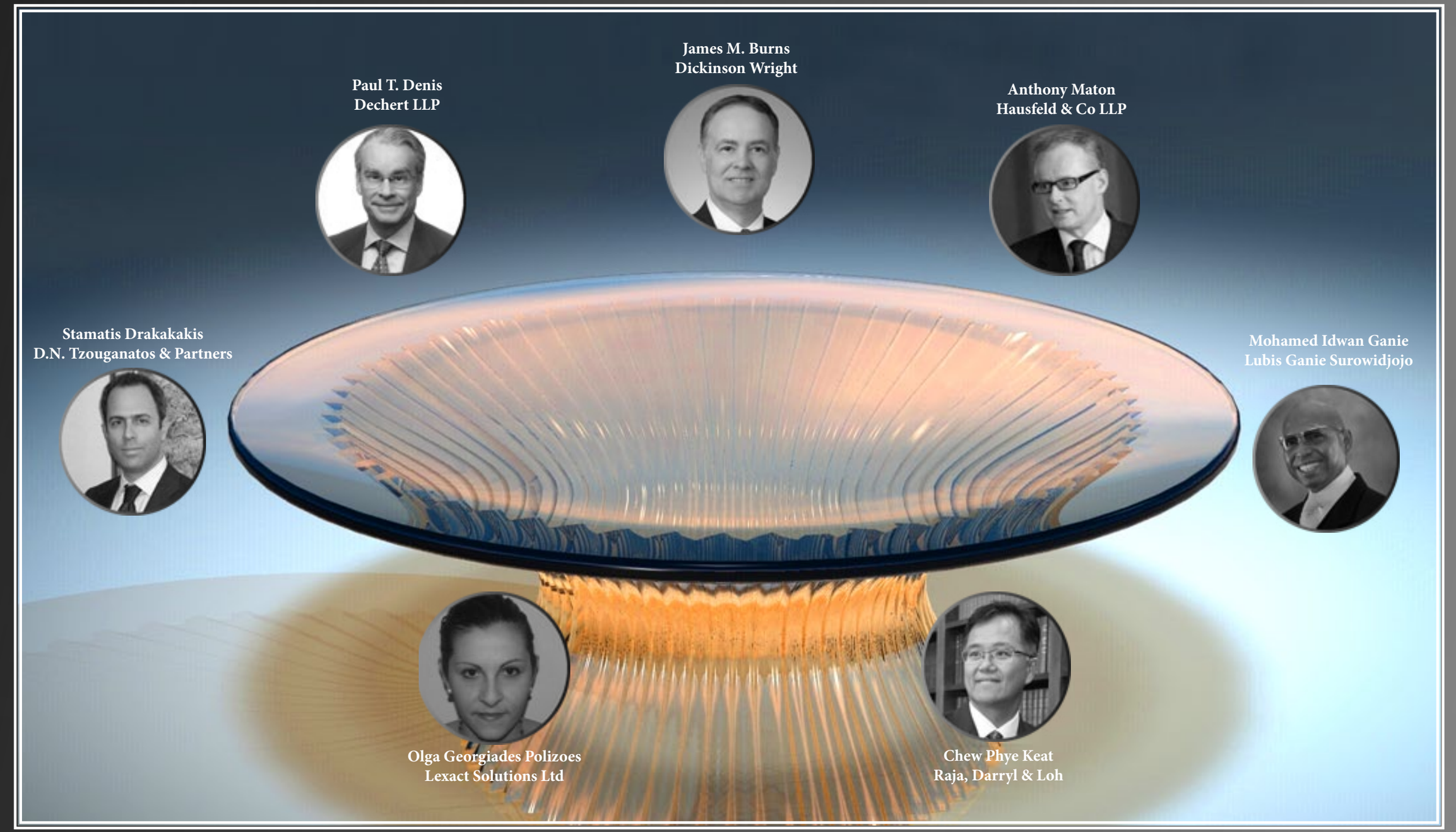
Round Table: Competition & Antitrust



The Experts

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Stamatis Drakakakis obtained his Law Diploma at the University of Athens (1999) and graduated from the College of Europe in Bruges, Belgium (LL.M. in European Legal Studies -2001). He was a trainee at the Chamber of Judge Vasilios Skouris at the European Court of Justice from September 2001 to March 2002. Subsequently, he worked as an associate in the Brussels office of Howrey LLP (as part of the original Brussels team, 2002-2007) and Arnold & Porter LLP (2007-2008). He joined "D.N. Tzouganatos & Partners" in January 2009. His practice covers the full range of EU and Greek competition work including both mergers and contentious matters. He also advises on sectoral regulatory issues related to telecoms, media, energy and aviation. He has particular experience in EC State aid law and he has authored a number of relevant articles and commentaries. He is admitted in the Athens (2002) and Brussels Bar Association (2002). Languages: English, French and Greek (mother tongue).

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Mr. Denis was the principal draftsman of the U.S. DOJ and FTC 1992 Horizontal Merger Guidelines, the foundation for merger guidelines around the world, including the current U.S. and EU merger guidelines.

He recently represented Medco Health Solutions in its $29 billion merger with Express Scripts securing unconditional clearance after an eight month investigation by the FTC, over 30 state attorneys general and committees in both houses of Congress.

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Mr. Burns has focused his practice on antitrust law for over 25 years. During that time, he has litigated antitrust and related claims in trial and appellate courts all across the country, advised clients on antitrust compliance issues, and represented clients before the DOJ Antitrust Division and the Federal Trade Commission on a wide variety of antitrust matters, including mergers and governmental investigations. While his antitrust practice is broad-based, he has had a particular focus on the representation of healthcare and insurance industry clients in antitrust matters.

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Anthony Maton is a Partner specialising in competition and financial services litigation in the European Office of Hausfeld & Co LLP in London. He has extensive experience of complex international dispute resolution including litigation, arbitration and mediation in a number of different jurisdictions. He has acted for Governments, in regulatory investigations, for multinationals and for private business, and has worked in the USA and extensively throughout Europe, the Middle East and the Gulf.

Mr. Maton is a Solicitor with over 15 years experience, having been a Partner in McGrigors and an Associate at Slaughter & May. He is a member of the Chartered Institute of Arbitrators (having arbitrated under many rules including the LCIA, ICC and LME), an accredited Mediator and former Secretary and present Committee Member of the London Solicitors Litigation Association.

His recent experience includes acting in the Air Passenger settlement against BA/ Virgin, acting against BA in the London arm of the global air cargo cartel litigation being run by Hausfeld, developing the Cartel Key funding methodology for cartel claims in the London Court and acting on the Parker Settlement in the Marine Hose cartel.

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Dr. Ganie specializes in commercial transactions and commercial litigation, including alternative dispute resolution and has acted as an expert in a number court and arbitration proceedings.

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A particular focus of Dr. Ganie's practice is corporate governance and compliance. This includes legal compliance audits and legal ratings, which is a unique product of the firm.

Dr. Ganie is the Managing Partner of Lubis, Ganie & Surowidjojo. Under his management the firm has become Indonesia's largest law firm, and has obtained its ISO certifications for (1) quality management, (2) legal services and (3) environmental quality management system (all issued by UK based Lloyd's Register Quality Assurance) which has made LGS the only Indonesian law firm that has acquired and maintains such international quality standard certifications. Dr. Ganie is an Independent Commissioner of P.T. Global Mediacom Tbk, the owner of Indonesia's largest media company (television, radio, online news and printed media).

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A graduate of the University of Malaya with Honours in 1986, Phye Keat was admitted as an Advocate and Solicitor of the High Court of Malaya in March 1987, whereupon he joined the Firm. He was admitted as a partner of the Firm on January 1, 1991. Phye Keat obtained a Master of Laws degree from the University of Malaya in 1996 majoring in Advanced Company Law, Copyright, Construction Law and Alternate Dispute Resolution. Phye Keat is a commercial and corporate lawyer with a current focus on intellectual property and competition law. This portfolio also include laws on personal data protection. He was part of the consultation group interacting with the Government on the drafting of the Competition Bill.

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Olga Georgiades Polizoes* has been practicing law since 2001 when she was admitted to the Cyprus Bar Association. She specialises in Corporate, European, Competition, Mergers & Acquisitions, Pharmaceuticals, Information Technology and Energy Law. She is the Director of Lexact Solutions Ltd, a company formed for the purpose of providing corporate advice, publishing corporate books, providing practical education on legal and tax issues and corporate translations in more than 50 languages.

She is the holder of a Bachelor of Laws in English Law and French Law from the University of East Anglia, UK (LL.B Hons, 1998) and a Master's in Laws in European Law with Competition and Telecommunications Law from the University College London (UCL), UK (LL.M, 1999). She is also the holder of a Diploma of French Higher Legal Studies from the University of Robert Schumann, Strasbourg (1997). Olga has trained at the European Commission, Information Society Directorate and holds a Diploma for Teaching Law at University Level from UCL. She is a frequent speaker at various conferences.

She is appointed as Arbitrator by the European Commission for domain name disputes concerning the .eu European top-level domain. She has published a number of articles and reports for major law publishers such as Sweet & Maxwell, Lexis Nexis, Thomson, Kluwer Law International, as well as for the European Commission.

Competition & Antitrust

Competition Law & Anti Trust has seen a number of interesting developments and changes around the world and has become a very important issue for businesses and business owners in recent years. We spoke to seven of the worlds leading experts to cast their views on everything from cross-border jurisdictions to anti-monopoly laws.

Questions

1. Can you summarise any interesting developments or recent changes in the law?

Drakakakis: In terms of new developments, the treatment of leniency applications and private litigation has become one of the most controversial issues involving the EU and national courts, the European Commission and the European Competition Network (see for example the judgment of the Court of Justice on 14 June 2011 in case C-360/09, Pfleiderer AG v Bundeskartellamt). How to protect leniency policy and at the same promote damage claims against cartel participants is an on-going debate.

Moreover, the European Commission is currently revising the rules for the assessment of licensing agreements for the transfer of technology under EU competition law, as well as its maritime transport antitrust guidelines. Earlier this summer, it published its guidance on application of competition rules in car sector.

Denis: Antitrust law evolves at a relatively slow pace in the U.S. The Supreme Court, the nation's highest court, takes very few antitrust cases. However, the current term, which starts in October, has three antitrust cases on the docket involving proof requirements in antitrust class actions, reverse payments in patent infringement settlements, and the extent to which action by state governmental entities can immunise conduct that otherwise would violate the antitrust laws. The Court's rulings in these cases could have substantial implications for substantive and procedural law affecting antitrust disputes.

Burns: In the criminal antitrust area, one interesting recent development was the US DOJ's request that AU Optronics, which was recently convicted of unlawful price fixing, be sentenced to a fine of $1 billion, and that its top executives serve ten years in prison and be fined $1 million each. The sentence requested by the DOJ was double that of the previously highest fine ever imposed ($500 million imposed on Hoffman-LaRoche in 1999), and the jail terms requested were more than double the longest jail sentence ever previously imposed. While the court ultimately imposed a $500 million fine on AU Optronics, and three years in jail for each executive, the DOJ's position on sentencing reflects an aggressive approach to antitrust penalties that appears to be increasingly common.

Maton: In 2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd. the Competition Appeal Tribunal awarded £94,000 to the claimant for losses suffered as a result of the defendant's abuse of a dominant market. This is the first follow-on damages claim to proceed to final judgment in the UK and also the first time there has been an award of exemplary damages for a competition infringement by a UK court. This has set an excellent precedent for claimants as far as exemplary or restitutionary damages are concerned. Claimants have mostly preferred to issue proceedings in the High Court, but with the High Court previously ruling such damages unavailable, this could be a turning point for the CAT's future as the favoured forum for follow-on claims, especially when considered alongside the extended limitation period that was clarified in Deutsche Bahn AG v Morgan Crucible Company Plc. The case also makes clear that: (a) interest is to be added to such claims at base rate +2%; (b) it is for the Court to assess the loss, based on the evidence, which does not necessarily mean accepting one set of evidence in preference to another.

Looking at the EU, England & Wales is arguably the premier forum for competition claims considering the access to leniency documents following the decision in National Grid Electricity Transmission Plc v ABB Ltd & Others. The High Court took the position that leniency was not sufficient to shelter a cartelist from disclosing documents used to obtain leniency. This is in contrast to other jurisdictions, such as Germany, were such access has been refused, and will assist claimants in obtaining the information they need to bring an effective action against cartelists.

Georgiades: On 1 May 2012, by a decision of the Council of Ministers, the new Cartel Immunity and Reduction of Fines Regulations of 2011 (the Leniency Regulations) were approved and entered into force. The Leniency Regulations are in line with the ECN Model Leniency Programme.

Ganie: Following the 1999 Antitrust Law and the concurring establishment of the antitrust body (KPPU / Commission for the supervision of Business Competition), Indonesian antitrust enforcement has been very active when compared to other developing markets. Also of note is the increased scrutiny of the KPPU, which has been increasingly active across a number of business sectors in the recent past. In fact, the KPPU has on a number of occasions sought to expand the types of arrangements that can fall under its purview, including the advancement of a 'business group' / 'single economic entity' concept that has greatly expanded the definition of control.

Keat: Our Competition Act just came into force this year on January 1st, 2012 – hence there have been no developments yet.

2. What sectors remain key priorities for Competition Authorities?

Drakakakis: On the antitrust front the European Commission's (DG COMP's) enforcement is lately focused on financial markets, energy and high-tech industries. In particular;

- With regard to the energy market, the EC has opened formal proceedings against Gazprom whereas the decision of an abuse of dominance case involving the Czech utility CEZ is expected in the course of the year.
- With regard to the IT and communications industry, the Commission is reviewing the commitments offered by Google; is investigating the standard-patent issues among smartphone manufacturers (Apple, Samsung, Microsoft and Motorola); is also investigating possible Microsoft's failure to keep the commitments it took back in 2009; is about to close via commitments the e-Books case involving Apple and four publishers.
- With regard to financial services, there is a cartel investigation involving a number of financial institutions which we are suspected for manipulating reference benchmarks – LIBOR, EURIBOR and the Tokyo index TIBOR.

Denis: Healthcare is a high priority for the federal antitrust enforcement authorities and this priority extends to the practices of payors (insurance companies and managed care organisations), providers (doctors and hospitals), suppliers (particularly pharmaceutical companies) and a variety of intermediaries (drug wholesalers, pharmacy benefit managers and the like). The intersection of antitrust and intellectual property law is another area of keen interest to the federal agencies, sometimes overlapping with their interest in health care. In recent years, agriculture, energy and residential real estate markets have received close attention. State attorneys general are particularly attuned to consumer goods and other sectors that most directly affect individual citizens.

Burns: United States antitrust regulators, at both the federal and state levels, remain extremely interested in healthcare antitrust issues. We have seen closer scrutiny of proposed mergers – both of health insurers and providers – and increased enforcement activity as well. The most notable development is perhaps the renewed attention being given to the use of "most favoured nation" clauses by health insurers. The Justice Department has publicly acknowledged that it is investigating the use of such clauses by insurers in several markets, and is litigating one such matter in Michigan. At the state level, several states have banned the use of such clauses in the last several years, and other states have also considered doing so.

Maton: The banking sector is currently a key focus for competition authorities, with the European Commission focusing on the LIBOR investigation. A number of banks are subject to this investigation in which there was collusion to align rates in order to benefit their positions in interest rate derivative products to the detriment of non-colluding companies. Any banks found guilty face a fine from the EU and claims for damages in jurisdictions, including the UK, in which they operate. Further, the Commission is pushing for such manipulation of benchmarks to become a criminal offence.

Georgiades: Fighting monopolies in the milk and gas sector.

Ganie: Initially the target of antitrust actions was bid rigging, which was, and to a certain extent remains, a pervasive issue that is closely connected to corrupt practices that permeate certain aspects of Indonesian business. However, the KPPU has since moved on to quite aggressively target a range of abuses of a dominant position, actual as well as potential. As a result many transactions of significant size, or in a concentrated business area, risk attracting the scrutiny of the KPPU, and, as such, should be reviewed to ensure that the risks of regulatory disruption to the envisioned transaction are adequately managed.

Keat: They appear to be focussing on cartel activities and activities of trade associations.

3. How is Competition Law enforced in your jurisdiction?

Drakakakis: Within the EU, competition law is enforced by the European Commission (DG COMP), the European Courts in Luxemburg (Court of Justice of the EU, and General Court), the national competition authorities of the Member States and the national courts. The allocation of competences and the cooperation between the various institutions is set out in EU Regulation 1/2003 and its accompanying Notices.

Denis: In the U.S. there are multiple enforcers with different enforcement tools and different procedures. The Department of Justice (DOJ) and Federal Trade Commission (FTC) share jurisdiction for federal enforcement of the antitrust laws. Only the DOJ can bring a criminal action resulting in jail sentences or fines, but only the FTC can bring an unfair competition action. Nearly all state attorneys general have independent criminal and civil enforcement authority, as well as the ability to bring treble damage actions under federal law as parens patriae on behalf of citizens of the state. Finally, in some circumstances, private parties who are damaged or face threatened loss or damage from a violation of the antitrust laws may be able to bring actions for treble damages or injunctive relief.

Burns: In the United States, competition law is enforced by both governmental regulators and private parties. At the federal level, the Department of Justice Antitrust Division and the Federal Trade Commission have concurrent jurisdiction to enforce the federal antitrust laws. The Antitrust Division brings both criminal and civil actions for antitrust violations; the FTC's actions are all civil matters. The Antitrust Division and the FTC also have concurrent responsibility for the review of proposed mergers and acquisitions under the Hart Scott Rodino Act. Private parties can also bring actions under the federal antitrust laws where they have been harmed by anticompetitive action, and can recover treble damages and attorneys fees. At the state level, State Attorneys General enforce the antitrust laws, typically pursuant to state antitrust laws, bringing enforcement actions and challenging proposed mergers where the conduct has particular impacts in the state. Private party plaintiffs can also bring actions for damages under state antitrust laws.

Maton: Competition law in England & Wales is enforced through a combination of public and private law and is affected by English and European law. The Office of Fair Trading (OFT) is the primary regulatory body for competition law enforcement in the UK and the European Commission enforces EU law. These bodies aim to ensure free competition and have the ability to fine those found to be abusing their market power.

Those harmed by the violation of competition law may bring an action in either the High Court or the Competition Appeal for Tribunal for damages and other relief. This private enforcement has both deterrent and compensatory effects. If a decision has been made by a competition authority, such as the European Commission, the claim can be brought as a follow on action in which the claimant has to show causation and loss. An investigation may take a significant length of time, but a type of quasi-follow-on claim in which investigations are ongoing has been deemed acceptable. If there is no such decision an action can be brought in the High Court only as a standalone claim, in which the claimant will also have to prove the breach of competition law.

England & Wales has seen an increasing number of collective actions, where substantially similar claims are brought by lead claimants, and group litigation orders, where individual claims are collected and brought together. The preference for these methods comes from the allowance of the sharing of costs and greater leveraging power in drawing early settlements from defendants.
Georgiades: By the Cyprus Commission for the Protection of Competition which has exclusive competence under the Law for the Protection of Competition of 2008. The Commission's decisions may be the subject of judicial review by the Supreme Court.

Ganie: The antitrust body (KPPU / Commission for the supervision of Business Competition) consists of two branches – investigatory and adjudicative. The investigatory branch receives reports of mergers and acquisitions, as well as complaints, and conducts its reviews based on such or based on its own initiative. If an offence under the antitrust law if found to have occurred it is brought by the investigatory branch to the adjudicative branch (KPPU panel), which essentially functions as a specialist court. Following a decision by the KPPU panel an appeal path exists that ultimately leads to the Indonesian Supreme Court.

Keat: The regulator, the Malaysian Competition Commission(MyCC) is able to investigate and impose penalties on infringers. Meanwhile aggrieved persons can also take legal action against infringers for damages.

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4. What are the procedures for mergers and acquisitions with regards to the Merger Control provisions in your jurisdiction?

Drakakakis: Merger control at EU level is set out in the EU Regulation 139/2004 and the relevant Jurisdictional, Substantive and Procedural Notices issued by the European Commission. Concentrations which entail a change of control and meet certain thresholds (community dimension) are notifiable to the European Commission and must be approved before their completion (standstill obligation). Mergers and acquisitions which fall outside the said thresholds may well fall within the scope of national merger control of one or more member states.

Denis: The Hart-Scott-Rodino Act imposes a suspensive pre-merger notification and waiting period regime in the U.S. Regulations establish reporting thresholds and exemptions that, in most cases, are unrelated to presence or absence of substantive antitrust issues. At the most basic level, transactions that result in holdings valued at in excess of $68.2 million are subject to the Act if the parties to the transaction are of the requisite size. Reporting thresholds are indexed to GNP. There is a 30-calendar day waiting period that may be extended by the authorities seeking additional information. Filing fees range from $45,000 to $280,000, depending on the value of the acquired company's holdings.

Burns: Under the Hart-Scott-Rodino Act, where a merger or acquisition is above a certain size the parties must file a pre-merger notification with the DOJ and FTC and receive approval before such transactions may be consummated. At present, notification is generally required, absent an applicable exemption, where the stock or assets to be held as a result of the acquisition are worth more than $68 million. Numerous exemptions to this general rule exist, however, for circumstances where the transaction is presumed not to have any competitive impact. For example, an exemption exists for some transactions where the parties are relatively small in size or where the transaction is being made "solely for the purposes of investment." Notably, even transactions that do not require pre-merger notification are still subject to challenge by regulators if they are considered to raise competitive harm.

Georgiades: Concentrations of major importance that meet specific criteria must be notified to the Competition commission within seven days from the date of signing of the relevant agreement, or the publication of the relevant offer of purchase or exchange, or the acquisition of a controlling interest, whichever of these events occurs first. Then the Commission will evaluate the concentration and issue a relevant report depending on whether it is compatible with the competitive market or not. If it raises concerns, it goes into "Second phase" full investigations.

Ganie: Recently, a Government Regulation implemented the voluntary pre-merger consultation and the mandatory post-merger notification requirements that stem from the antitrust law, but failed to introduce the mandatory pre-merger notification that was expected in some circles. This leaves the current merger control procedures with voluntary pre-merger consultation, which is not binding on the antitrust authorities (but is generally sought to provide a degree of certainty), and mandatory post-merger notification for transactions of a sufficient scale (as per thresholds set in the regulation).

Keat: There is no merger control in our law.

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5. With firms facing tighter financial constraints and policy makers shifting focus to end consumer goods, pricing related dominance cases are in their heyday. How can a firm use effective pricing strategies while bearing in mind Anti-Monopoly Law?

Drakakakis: Firms must pro-actively check any pricing strategy with EU competition law experts to the extent that they trade their goods/services within the EU and irrespective of their origin/location (extraterritoriality doctrine). Pricing must be checked not only in the context of anticompetitive (horizontal or vertical) agreements, but also in the light of abuse of dominance position. The European Commission has published a relevant Guidance Paper focusing on exclusionary practices where abusive pricing (rebates, predatory pricing and tying) are discussed. Recent case-law and Court judgments must be also taken into account. A good balance between traditional jurisprudence and recent trends (more "economic approach") is needed.

Keat: The main concern for a dominant player is to ensure it does not abuse its dominance by imposing unfair prices and terms or blocking competitors with predatory pricing or other foreclosing activities.

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6. Intellectual Property is often referred to as Intellectual Monopoly with a whole host of corporations collecting patents for fun. With IP and Competition Law becoming increasingly intertwined how has/will this affect monopoly and anti-trust?

Drakakakis: EU competition policy focuses more and more on IP interface with competition. In terms of horizontal agreements, a special section on Standardisation is found in the European Commission's Guidelines on Horizontal Agreements; moreover, the Commission constantly investigates patent cases in the pharmaceutical (e.g. illegal settlements) and high-tech industries (e.g. patent pools). In the context of vertical agreements, there is a Technology Transfer Regulation setting out the rules for licencing.

Besides, the European Commission has decided a lot of cases involving unilateral (abusive) behaviour e.g. patent ambush (Rambus), refusal to licence (Microsoft) and misleading public authorities to prolong patent rights (Astrazeneca).

Burns: Some of the most significant antitrust issues at present arise at the intersection of intellectual property rights and the antitrust laws. For example, over the last several years the FTC has repeatedly maintained that settlements of patent infringement litigation between branded and generic drug manufacturers, in which the branded manufacturer settles by paying the generic defendant not to enter the market for a period of time (so-called "pay for delay" settlements), can be anticompetitive and has brought challenges seeking to have such agreements held unenforceable. Quite recently, in the K-Dur Antitrust Litigation, the 3rd Circuit Court of Appeals agreed, creating a split in the circuits on this issue. The issue has been presented to the Supreme Court for review, and is likely to be taken up by the Supreme Court next term.

Keat: The IP vs. Competition issue is currently still new to Malaysia – we will need to see how MyCC issues guidelines on this issue.

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7. What other key issues currently concern you?

Denis: The federal enforcement agencies in the U.S. are placing increasing emphasis on the protection of potential or future competition. Frequently, but not exclusively, we see this in the pharmaceutical industry with regard to products for which regulatory approval is uncertain.

Yet, at the same time, they are ever more reluctant to give any credence to the possibility that dynamic response of current and future market participants might deter or counteract perceived competitive harm resulting from mergers or other forms of market conduct. The two trends seem inherently contradictory but each creates a different risk of precluding efficiency enhancing conduct.

Maton: We are concerned by the continued apprehension and lack of awareness in potential victims of cartels in their ability to bring claims. The primary concern for cartel victims is the costs risk in bringing a claim; although more recent funding models should allay those concerns.

For example, under a conditional fee agreement the fee only accrues in the event of a successful claim and is recovered in large part from the defendant. The UK government also plans to allow the use of contingency fees. These are popular in the US and lawyers recover only a share of damages obtained if the claim is successful.

A secondary concern for cartel victims is the fear of jeopardising relationships in markets where suppliers cannot easily be changed. Confidential settlements may allow a reasonable and private outcome. We would like to see any retaliatory conduct to be punished by increased fines in the regulatory decisions.

Ganie: The antitrust body's (KPPU) attempts to expand the types of arrangements that fall under its purview is an on-going development that has to be carefully monitored. The success of the KPPU's extensive 'single economic entity' doctrine at the Supreme Court is sure to result in more cases that seek to capture, even passive, shareholders. Finally, copycat class action cases, which follow and mirror the cases brought by the KPPU, appear to be an emerging trend. Such consumer lawsuits have to be handled with extreme care both in and out of court, due to potential pro-consumer attitudes of judges at courts of first instance and the potential for disastrous public relations missteps as a result of how such class action cases are defended.

Keat: The ability of MyCC to effectively enforce the Act in the light of their manpower challenges.

8. In what way does a firm benefit by utilising an expert who is well versed in Competition and Anti-Trust Law?

Denis: When a competition lawyer really gets to know the client's business, he or she can help shape the way the company is positioned in both internal and external documents. Competition authorities, particularly in the U.S., are putting greater emphasis on the internal documents of companies under investigation. A good competition lawyer will be able to educate the company on how casual comments on colloquial phrasing could be used against it. But this is not all defensive. The right positioning can help a company get approval to cheaply acquire assets that competitors are forced to divest as a condition to getting other mergers approved.

Burns: Over the last five to 10 years, the economic principles underlying antitrust theory have continued to evolve, with old principles repeatedly being reconsidered and new theories of anticompetitive harm emerging over time. For example, resale price maintenance, which for almost one hundred years was considered per se unlawful, is no longer subject to condemnation in all circumstances (at least under federal antitrust law).

Conversely, other types of conduct that were previously considered to be pro-competitive, or at worst benign – for example, the use of "most favoured nation" clauses – are now being viewed with greater suspicion by economists and antitrust authorities. Only an expert well-versed in both underlying antitrust doctrine and the most cutting-edge developments can guide a firm to safety in this ever-changing area.

Georgiades: Depending on the type of activity, it will avoid possible fines from the Competition Commission and will draft its agreements properly without anti competitive restrictions, thus ensuring smooth operations.

Ganie: Missteps in following the administrative procedures or in dealing with the antitrust body (KPPU), should a transaction attract regulatory scrutiny, can quickly transform an attractive investment prospect into a quagmire, which typically could be easily avoided if the antitrust aspects are considered from the start. Considering this, having counsel that has experience in antitrust law advising on a deal from an early stage can help in avoiding such pitfalls.

Keat: Of course the firm will be privy to proper legal advice.

9. The last five to 10 years have seen a rapid introduction of new competition regimes, particularly in major Asian jurisdictions. What advice would you give to businesses trading in jurisdictions such as Hong Kong, Singapore, China and India for which modern competition laws are a relatively recent phenomenon?

Burns: Over the last 10 years, there has been a significant increase in both the number of countries that have enacted competition laws and the vigour with which the competition laws have been enforced, both in those countries and elsewhere. The lesson learned from these developments is that cartel activity, anywhere in the world, is now much more likely than ever before to be uncovered. In addition, now, unlike in the past, given the high degree of international cooperation among competition regimes, such conduct will likely result in enforcement activity by multiple competition regimes, leading to even greater penalties. The only protection from such danger is an active compliance program that educates company employees all around the world about the antitrust laws and their obligations to obey them.

Maton: In addition to those business based in Asian jurisdictions which have recently introduced competition regimes, businesses located outside of these jurisdictions may be impacted if they sell into the Asian markets, and potentially, agreements formed outside Asia may be caught if they impact Asian markets. Businesses should conduct a review to understand which rules apply and introduce a competition compliance policy. Training should be given to staff and management, with senior management being made aware of any penalties that could be levied on their company as the result of any infringements. All businesses should consider whether they qualify for any exemptions available. Although the competition laws are relatively recent and there are still areas to be tested by case law, some laws, such as the Conduct Rules in Hong Kong, are based on the laws of more mature jurisdictions, like the EU. There is therefore some benefit to consulting with lawyers that are knowledgeable in European law, as well as those that understand the specifics of the Asian jurisdiction in question.

Keat: Understand the implications of the competition law but do not go overboard with over-compliance if the regulator is not yet clear how it will deal with key issues.

10. What must a firm take into consideration when operating in a new jurisdiction?

Georgiades: The relevant product and geographical market conditions, in order to be prepared in case dominance issues arise.

Ganie: The administrative procedures, and the actual antitrust offences themselves, derive not only from the antitrust law, but also from a range of implementing regulations and guidelines. It is essential that these are considered and fully complied with to avoid sanctions that include administrative fines, invalidation of agreements, orders (prohibitory injunctions and forced divestment) to imprisonment.

Keat: Do not assume the laws are the same.

11. If you discover that the business has been involved in a cross-border cartel, how can the damage be minimised? And is it possible to take advantage of a leniency option at the discretion of the authorities?

Keat: Get the advice of lawyers on the other side of the border – leniency options are usually possible.

12. What key trends do you expect to see over the months ahead? And in an ideal world, what would you like to see implemented or changed?

Denis: We are in the final stages of the presidential election campaign in the U.S., and the result could change the direction of federal enforcement. As I write this, the election is too close to call. Recent changes in the political party of the sitting president have not had a major effect on antitrust enforcement since the core antitrust principles in the U.S. enjoy bi-partisan support. However, a shift to a Republican president should shift antitrust policy, at the margin, placing greater weight on market forces and less weight on the benefit of government intervention.

Burns: As the United States (and much of the world) continues to struggle with a "down economy," we increasingly see those companies that have been less successful than others attributing their lack of success to anticompetitive conduct by their more successful competitors. While this may be accurate in some cases, it is unlikely to be correct in anywhere near the number of cases in which this claim is made. Consequently, we see cases brought by desperate plaintiffs that are "rolling the dice" on the prospect of a big antitrust damages award (or a settlement) as an alternative to the generation of profits. This dynamic would be materially altered if, as in some other countries, a prevailing defendant was more able to recover its attorney's fees.

Maton: With the Department for Business Innovation and Skills looking to reform private actions in competition law, we expect to see the introduction of opt-out collective actions. In such an action, claims are pursued on behalf of a group of claimants unless individuals actively opt out. They provide redress where individual claims might not be great enough to support legal action, and being able to bring a claim on behalf of the entire market would be an effective remedy against cartels.

We would like to see the increased involvement of claimants in Competition Authority investigations, which can assist Authorities in gaining insight into specific technical aspects of different markets. In addition, involvement in the investigations would close the informational disparity between claimants and defendants as Authorities such as the OFT become party to a great deal of information and representations that is not normally available to follow-on damages claimants post OFT investigation.

Ganie: Indonesia has a modern antitrust law and a robust enforcement framework, considering this, it is not expected that major changes will occur in the near term. What will happen is that the existing law will be further fleshed out in the coming months and years, both through regulations and through the antitrust body (KPPU) attempting to advance new concepts in the courts. The antitrust body (KPPU) will also continue to issue implementing regulations in the form of guidelines, which further fill out the meaning of the antitrust law by setting out specific procedures to be followed, and the exact components and method of analysis of the antitrust offences outlined under the Law.

Keat: I see competition law as becoming more and more complex as businesses continue to evolve. I think a balance needs to be struck to protect consumers with free competition on the one hand but on the other, not to over restrict a business such that it is not able to use its competitive edge.