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Contents

Algorithms in the spotlight of antitrust authorities 4

First implementing measures for Vietnam's Law on Competition 8

Information exchange between competitors – Competition Commission publishes decision on proposed pharmaceutical sales survey 12

Antitrust enforcement trends: an update from the 2019 ABA Antitrust Fall Forum Tech Summit 16

U.S. Department of Justice takes aim at criminal antitrust violations in public procurement 20

Germany's proposed digital antitrust law: an ambitious project to regulate digital markets 22

The rise of competition law in Asia 26

The BeNeLux competition authorities issue a Joint Memorandum on competition in a digital world 28

KPPU has issued a new merger control regulation 30

Belgian Competition Authority adopts guidelines on exchanges of information in the context of trade associations 34

Third Point to pay monetary penalty to settle allegations of HSR Act violations 36

This ACER Quarterly Newsletter includes Hogan Lovells articles, alerts, and blogs published between 1 September and 30 November. The content was produced around the time of the developments in question. Matters covered may therefore have been subject to further developments since initial publication.

Algorithms in the spotlight of antitrust authorities

Joint study by the Bundeskartellamt (German Cartel Office) and the Autorité de la concurrence (French Competition Authority) indicates need for higher compliance standards.

Digital ubiquity, and the resulting rules, do not only concern tech giants. To the contrary, digital regulation is relevant for companies in all market sectors (see our recently published global study on regulation in digital markets – A Turning Point for Tech). The ever-growing amount of data and its use inevitably involves the use of artificial intelligence and in particular algorithms. On the one hand, algorithms have increasingly become key in making (digital) business models more successful, efficient and innovative by creating significant competitive advantages.

On the other hand, algorithms can also have a negative competitive impact as they might be used by companies to facilitate collusion. Consequently, it is not a surprise that antitrust authorities, especially in Europe, have their radars set, even though there are still very few precedents.

On 6 November 2019, the German Cartel Office and the French Competition Authority published a joint study on the competition risks resulting from the use of algorithms (the "joint study") and a conference was held in Paris to present the study. That joint study was part of the broader context of their collaboration in relation to "Algorithms and Competition" initiative. The joint study, published more than a year after the report of the German Monopolies Commission on "Algorithms and Collusion" and just one month after the bill for digitalisation of the German civil code, illustrates that the German Cartel Office is determined to become a pioneer in antitrust law enforcement in digital markets. Other competition authorities are also tackling this issue. For instance, the UK Competition and Markets Authority published a working paper on pricing algorithms on 8 October, 2018 and the Italian competition authority participated in the conference held in Paris.

Algorithms in the spotlight of antitrust authorities

Although it is true that general use software is usually an innocuous product in terms of competition law, it does involve the heavy use of algorithms. Therefore, it is vital that the set-up of these algorithms complies with antitrust rules. Unsparingly, there have been hot debates as well as plenty of academic research in relation to algorithms in general, their use in businesses and their assessment in terms of competition law. Typically, the focus has been around the use of algorithms in a commercial context, i.e. on pricing (so-called "pricing algorithms"), as well as the potential effects of algorithms on competition in general. By contrast, in their joint study, the German and French competition authorities engage in a broader approach, in the sense that the joint study concerns the whole concept and mechanics of algorithms as well as their various fields of application and the possible anti-competitive aspects. In particular, the joint study doesn't deal only with the specific (market-related) application of algorithms, for example in pricing, but also with the underlying data used as input for the running of algorithms and the significance of algorithms in the context of machine learning, i.e. "artificial intelligence".

Algorithms and collusion

The joint study covers the mechanics of algorithms as well as their scope of application, focusing on the potential competitive impact through collusion. The joint study addresses the following three scenarios relating to the use of algorithms:

Scenario 1 – Algorithms and their facilitating and monitoring role in "traditional" cartels

According to the joint study, a scenario which is particularly prone to cause antitrust law violations is that of algorithms being used in order to enforce or monitor already existing anti-competitive agreements. Such situation, which is typically referred to as a "traditional cartel", in practice concerns only algorithms as a supporting and monitoring tool, facilitating the implementation of the illegal agreement.

The joint study further notes that algorithms could serve as collusion tools in both horizontal and vertical agreements. A vertical scenario for example could be one where algorithms are being used to detect price deviations in vertical retail price maintenance agreements, thereby facilitating the enforcement of the illegal agreements by manufacturers.

The joint study concludes that this first scenario does not raise specific antitrust issues as such practices could be sanctioned without any further consideration of the algorithms involved. However, the competition authorities point out that a deeper understanding of algorithms would allow them to analyse both efficiencies derived from such algorithms as well as the negative effects/aggravating circumstances resulting from the use of such algorithms.

Scenario 2 – Algorithm-driven collusion between competitors involving a third party

In this scenario, the algorithm-related conduct is one where an external consultant or software developer provides the same algorithm or coordinated algorithms to competitors. The interesting aspect of this scenario results from the fact that there is no visible (or event intended) coordination between competitors. However, there is effectively a coordinated behavior as a matter of fact. According to case law of the European Court of Justice (*VM Remonts and Eturas*), antitrust law infringements predominantly depend on whether the undertakings involved are aware of the behavior being unlawful, or whether at least they could have foreseen the anti-competitive behaviour.

Scenario 3 – Collusion induced by the parallel use of individual algorithms

The third scenario mentioned in the joint study explores cases where competitors use different and independently designed algorithms, i.e. without any communication or coordination between companies. However, as mentioned in the joint study, this is not necessarily enough to exclude a coordinated market behaviour. In particular, the fact that competitors would be relying on pricing algorithms might lead to a higher degree of convergence between the market activities of these competitors simply because of the computers' interaction.

Further, the joint study raises the interesting point of whether algorithms, in and of themselves, could reach a level of tacit coordination that would resemble the explicit forms of traditional collusion. However, algorithmic communication is still an unexplored territory and therefore algorithmic communication is usually discussed within the context of self-learning "black box" algorithms.

Such "black box" algorithms raise a question of liability for companies. The joint study indicates that some authors consider that these black box algorithms should be treated as company's employees and therefore trigger the company's liability for introduction and use of such algorithms. The joint study explains that other authors consider that companies should be held liable for their algorithms only if they breached " a reasonable standard of care and foreseeability" and concludes that the competition authorities' approaches may vary between these positions. However, during the conference held in Paris on November 6, 2019, Isabelle de Silva, President of the French Competition Authority, insisted on the fact that companies should consider themselves as responsible for the algorithms they use even when provided by third parties thereby hinting that the French Competition Authority may lean towards a stringent approach regarding 'black box' algorithms. This supports the approach taken by the EU Commissioner for Competition, M. Vestager, already a couple of years ago at a conference of the German Cartel Office, suggesting that "companies can't escape responsibility for collusion by hiding behind a computer program".

Unsurprisingly, algorithmic collusion is already on the radar of antitrust authorities. However, its plausibility as well as its concrete technical implementation and the resulting implications and risks are yet to be assessed in more detail. Admittedly, it would be of great interest to see if parallel uncoordinated market behaviour through self-learning algorithms would be deemed illegal, in particular given that conscious parallel behaviour is not prohibited. Therefore, if algorithms are used in a way that enable a company to adjust its market behaviour to that of its competitors on the basis of publicly observable behaviour, then, as the joint study points out, such behaviour should be categorised as market intelligence and not as illegal coordination.

Conclusion and outlook

Traditionally, collusive effects have been considered in the context of the game theory in terms of their economic competitive significance. Algorithms are the new 'players' in that 'game' and their use can have a great effect in maintaining the stability of anti-competitive agreements. This new situation begs the question of how competition law should be dealing with that issue.

Although the study does not give away the answer to this question, it identifies a key problem associated with the use of algorithms: i.e., in the future, collusion might not even depend on actual communication between competitors anymore.

Overall, the study emphasises that current antitrust rules are flexible enough to deal with competition law violations caused by the use of algorithms. Both at European and Member State level, competition authorities have indicated that they will not shy away from applying antitrust rules to the novel "digital cases". However, as it's pointed out in the joint study, it is still impossible to predict how competition authorities will apply competition law in practice in the context of digital cases. Similarly, it cannot be ruled out that there might be a real need for creating a new legal framework or analytical tools in the foreseeable future in order to deal with such issues more effectively.

Practical considerations and digital antitrust compliance

So far, there is no established practice as to how compliance and liability standards should be assessed in the context of algorithms (for a more in-depth analysis of this problem see Marx/Ritz/Weller, 'Liability for outsourced algorithmic collusion – A practical approximation' in Concurrences Review No 2-2019).

However, the joint study illustrates once more that antitrust authorities, and in particular the French and the German competition authorities, are seeking to achieve a higher level of expertise in the field of AI and algorithms through close cooperation both in terms research as well as in terms of enforcement priorities.

Companies should view this as an opportunity to adjust their antitrust compliance systems to the challenges of digitalisation. This is particularly so for compliance systems dealing with matters such as Big Data, algorithms and digital platforms.

In sum, companies should bear in mind the following when using price algorithms:

- Do not coordinate with competitors in relation to the set-up of pricing algorithms, i.e. in relation to the type and/or nature of the algorithms or data inputs used. Such coordination should be avoided even if it is indirect, i.e. through some external third party IT service provider.
- Ensure that the IT service providers (internal and external) are subject to strict compliance standards regarding the development and use of pricing algorithms (so-called Compliance by Design).
- Involve IT colleagues in compliance programs and training sessions, put in place a reporting system through which the IT department would be regularly reporting current and future plans in relation to the use of algorithms, and ensure that legal teams have a good understanding of algorithms used.

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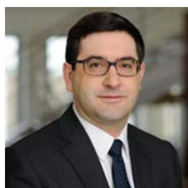

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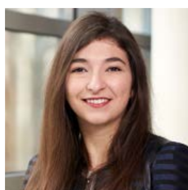

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First implementing measures for Vietnam's Law on Competition

Earlier this year, in July 2019, Vietnam's new Law on Competition took effect. This is the second version of the Law on Competition, originally enacted in 2004 and without amendment from then until now.

The Law on Competition is Vietnam's basic antitrust statute. Among the changes the new law brought about, a new authority will be set up, the National Competition Commission (NCC), which has the potential of creating an important impact on antitrust law enforcement in Vietnam going forward. However, on the substance and procedure of the new law, the amendments represent more of a gradual change rather than a complete revamp compared to the 2004 version of the law.

Some of the details in how to interpret the Law on Competition have been left open. The government is working to enact a set of implementing decrees to give guidance on how the law is to be enforced in practice.

Three decrees have now been released by the government. Two of them were circulated in draft form, and one was officially enacted. On 26 March 2019, the first draft decree was published on the government's website and comments by stakeholders were invited. However, the impact of this draft decree for businesses is more limited, as it mainly deals with the NCC's set-up, internal organization, and procedures.

Then, on 23 September, a draft implementing decree on a number of substantive matters was circulated. A few days later, on 26 September, another implementing decree – covering mainly procedural matters – was enacted, this time not as a draft but as a binding document.

23 September draft decree

On 23 September 2019, a draft implementing decree for the implementation of certain provisions and requirements under the Law on Competition **(Draft Decree**) was circulated unofficially for comments.

The Draft Decree has 30 provisions, covering both substantive and procedural aspects. On the substantive side, the Draft Decree deals with issues on anti-competitive agreements, abuse of dominance, and merger control (but not unfair competition practices).

The most important points in the Draft Decree concern the merger control arena. In particular, the Draft Decree provides clarifications on the concept of "control" and the filing thresholds – key concepts for companies to determine whether a filing to the NCC is required.

Control

Aside from mergers, the Law on Competition stipulates that the acquisition of the whole or part of property or shares sufficient to "control" the target is one of the situations amounting to a potentially reportable "concentration." The Draft Decree now provides guidance on what "control" means:

- ownership of more than 50% of charter capital or voting shares, or assets for one or more business lines of the target;
- the right to directly or indirectly appoint or dismiss a majority of members of the board of management, chairman of the members' council, director or general director of the target;
- the right to amend the target's charter; or
- the right to decide important matters of the target such as the target's business scope (in terms of products/services and geographies, or selection of the form of organization of the business).

In short, the Draft Decree follows a similar path as European Union (EU) competition law and other foreign antitrust laws in focusing on "control" as one of the factors delineating what kind of transactions amount to "concentrations." In contrast, unlike EU competition law, the Draft Decree does not put forward a concept of "negative control" where the acquirer is able to veto (rather than unilaterally determine) the key decisions of the target.

Filing thresholds

The amended Law on Competition brings about an important change to Vietnamese merger control in that it replaces the prior single filing benchmark (based exclusively on market share) with a multi-threshold approach. As such, the Law on Competition puts forward four benchmarks based on the value of assets; transaction value; revenue; and market share.

However, the Law on Competition left open the numeric amounts for these benchmarks. The Draft Decree now fills this gap. A filing with the NCC is required where:

- the total value of assets in Vietnam in the last financial year was at least VND 3 trillion (roughly USD 130 million);
- the transaction value is at least VND 1 trillion (roughly USD 43 million);
- the total revenues in Vietnam in the last financial year were at least VND 3 trillion; or
- the combined market share is at least 20%.

The Draft Decree stresses that the asset value and revenue thresholds refer to assets and revenues in Vietnam. Unfortunately, however, they do not explicitly require that two or more parties to the transaction (for example, the acquirer and the target in an acquisition) each have assets or revenues in Vietnam. If the Draft Decree is enacted in the present form, then the filing thresholds may arguably be triggered by only one of the parties to the transaction. If so, a merger filing to the NCC may be required even where the transaction is offshore and all other parties to the transaction are not present in Vietnam at all, which seems a rather weak "local nexus" to exercise jurisdiction.

In turn, the Draft Decree indicates that the transaction value threshold only applies to transactions inside Vietnam.

Beyond the question of when a transaction becomes notifiable to the NCC, the Draft Decree also provides some insights into how the authority will conduct the substantive merger control assessment. The "preliminary assessment" phase essentially appears to revolve around an analysis of the parties' market shares and increases in market concentration levels (Herfindahl-Hirschman Index, HHI). Both horizontal and vertical mergers with market share below 20% (and HHI increases below certain thresholds) will be waved through in the preliminary assessment phase.

If the transaction does not fall into these "safe harbors," a "formal assessment" phase will be opened. The Draft Decree provides some guidance on the substantive analysis to be conducted by the NCC in that phase. Generally speaking, the Draft Decree (implicitly) refers to internationally well-known concepts such as unilateral and coordinated effects in horizontal mergers and foreclosure effects in vertical mergers, and lists (relatively abstract and high-level) factors for analysis of these theories of harm. The Draft Decree also sets out factors for the analysis of a transaction's positive impact on competition – factors widely known in international antitrust law such as efficiencies and technological improvement, but also more local flavors such as the strengthening of the competitiveness of Vietnamese companies in international markets.

Anti-competitive agreements

The Law on Competition identifies different categories of agreements: cartel agreements; other horizontal agreements; vertical agreements; and certain additional agreements (such as bidding offenses) prohibited for both horizontal and vertical relationships. Horizontal agreements other than cartels and vertical agreements are subject to a "rule of reason" test, requiring a showing of a significant restriction to competition.

The Draft Decree sets out "safe harbors" for horizontal agreements other than cartels and vertical agreements: horizontal agreements where the parties have a combined market share below 5% and vertical agreements where the parties have less than 15% market share at each level are deemed not to lead to a significant restriction to competition.

The fact that the Draft Decree proposes safe harbors should be commended, but the currently proposed levels seem quite low by international standards.

Abuse of dominance

The Draft Decree is quite succinct when it comes to abuse of dominance. The Draft Decree does provide guidance on market definition, which will be important for the dominance analysis. In that respect, the Draft Decree largely follows international thinking in terms of demand-side and supply-side substitutability analyses, with some local flavors.

The Draft Decree also attempts to flesh out in more detail the criteria for finding dominance listed in the Law on Competition. However, the additional guidance remains high-level and generic, hence may be of limited use in practice.

26 September final decree

On 26 September 2019, the Vietnamese government enacted the first final implementing decree, Decree No. 75/2019/ND-CP ("Decree 75"). Decree 75 took effect on 1 December 2019. The main goal of Decree 75 is to lay out more specific rules on administrative sanctions, but also contains some guidance on other procedural aspects.

Tighter sanctions

Decree 75 increases financial penalties for anti-competitive conduct. Significantly, the fines for failure to file reportable transactions under the new merger control rules are set at a maximum of 5% of revenues in the last financial year. For anti-competitive agreements and abuse of dominance, the fines under the Law on Competition are capped at 10% of revenues.

In additional to fines, Decree 75 permits the NCC to impose a range of non-monetary sanctions such as revocation of practice license, business license or enterprise registration, or suspension of business for a period of 6 to 12 months. Suspension of business as a remedy for anti-competitive conduct is newly introduced under Decree 75.

Finally, Decree 75 updates the list of aggravating and extenuating circumstances that the NCC may consider when determining fines or other sanctions (with a maximum 15% increase or decrease applied to the standard level of fines). For example, Decree 75 adds "first time violation" to the list of extenuating factors, leading to an uplift in fines.

Effects-based jurisdiction

Decree 75 expands the scope of application of enforcement of the Law on Competition to include foreign enterprises and individuals having "operations in Vietnam." The decree is not very elaborate as to what will constitute having "operations" in Vietnam. However, it is possible that the Law on Competition now covers any entity engaged in anti-competitive activity with effects in Vietnam, irrespective of the location.

In contrast, in the past, the prior antitrust rules applied only to Vietnam-incorporated entities, and this was seen as a deficiency. Although the expanded scope looks like a case of "extraterritorial jurisdiction" of the new Law on Competition, depending on the issuance of further rules and actual enforcement practice, it may turn out to be more of a case of effects-based jurisdiction, much like in other antitrust regimes.

Conclusions

Circulated for comments on 23 September, the Draft Decree gives some useful guidance on the substantive provisions in the Law on Competition. The guidance on the merger control rules is particularly important, as it gives insights as to how to interpret "control" and putting forward specific numbers for the filing thresholds. As a result, likely shortly after the Draft Decree is finally enacted, the filing thresholds will be in force and the Vietnamese merger control regime will be up and running.

In turn, Decree 75 was officially enacted on 26 September and is now already in force. Its usefulness for businesses may be more limited, since it focuses on more procedural aspects. Still, Decree 75 sends important messages. On the one hand, it provides for significantly higher penalties than the prior antitrust rules, which may herald tougher enforcement going forward. Second, the rules on extraterritorial jurisdiction may likewise signal that the Vietnamese antitrust authorities are keen to catch up with international practices.

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Information exchange between competitors – Competition Commission publishes decision on proposed pharmaceutical sales survey

On 22 October 2019, the Hong Kong Competition Commission ("HKCC") published a decision that the proposed sales survey of the Hong Kong Association of the Pharmaceutical Industry ("HKAPI") is not exempted from the prohibition on anti-competitive agreements as a result of the efficiency exemption.

In Hong Kong, businesses may self-assess whether their conduct benefits from an exemption under the Competition Ordinance, or they may apply to HKCC for a decision as to whether the conduct is exempted.[1] In this case, to obtain legal certainty, HKAPI had applied to HKCC for a decision confirming that the proposed survey is exempted because it enhances overall economic efficiency.

This being the first decision under section 11 of the Competition Ordinance on the efficiency exemption, the decision is relevant for organizations participating in or conducting market surveys and, more generally, organizations considering an application for a decision based on the efficiency exemption.

The proposed sales survey

The proposed survey was a quarterly survey comprising data on the sales of pharmaceutical products (Western medicine) in Hong Kong. HKAPI would ask pharmaceutical companies to provide to it, on a voluntary basis, actual sales data by value and by pharmaceutical product each quarter. HKAPI would then process the raw data and produce a sales survey report, which would be published quarterly and be made available to any purchaser.

As described in HKCC's statement of reasons, the sales survey report would show (among other things) the value of sales to four sectors (i.e. Government, Private, Trade and Macau) in different formulations, including:

- the total sales of each of the participant companies to each of the four sectors;
- the total sales of participant companies' products falling within particular therapeutic areas; and
- the sale of specific, named products to each of the sectors, grouped according to the relevant participant company and separately according to the relevant therapeutic areas (**"Product Level Sales Data"**).

HKCC'S theory of harm

HKCC's theory of harm was that the proposed survey could permit the exchange of potentially competitively sensitive information between competing pharmaceutical companies by removing the inherent uncertainty between them in their market operations.

HKCC considered that certain data to be included could in principle be of "significant competitive sensitivity" because the data related to value of sales, appeared to be confidential, included individual company or product names and was very recent (with no more than a month's delay) and, for some categories, was insufficiently aggregated.

The Product Level Sales Data was considered most likely to give rise to competition concerns, as it permitted pharmaceutical companies to directly monitor the sales of competing products. The other categories of data were considered generally unlikely to give rise to competition concerns (unless the data related to an insufficient number of products or participant companies).

Finally, HKCC considered that the potential competition concerns are heightened when the characteristics of the markets in which the information exchange occurs are considered, that is, the potentially significant market coverage of the proposed survey and market concentration for particular products.

1 The Competition Ordinance provides for a number of "exclusions" (e.g. exclusion for agreements enhancing overall economic efficiency) and "exemptions" (e.g. public policy exemption) from the competition conduct rules. We refer to these as "exemptions" here for convenience.

HKCC's assessment of efficiencies

On the issue of burden of proof, HKCC cited the Competition Tribunal's recent decision in a price fixing and market sharing case which held that the person seeking the benefit of the efficiency exemption bears the persuasive burden of proving each of the cumulative conditions of the exemption.

In its application, HKAPI submitted that the proposed survey would give rise to the following efficiencies:

- better, more efficient allocation of stock for existing products (by allowing demand forecast);
- easier introduction of new products into the market;
- enhanced marketing and distribution efforts of pharmaceutical companies;
- greater investments in other patient welfare enhancing activities in light of the cost savings from better stock allocation; and
- development of public policy, academic and research and development generally.

While HKCC accepted in theory the possibility of efficiencies, it took the view that the submissions and evidence provided by HKAPI did not amount to "convincing" or "cogent and compelling" evidence of the claimed efficiencies.

In particular:

- HKCC expected there to be evidence of stocking difficulties, failures to launch new products in Hong Kong and ineffective marketing and distribution efforts following the suspension of HKAPI's similar surveys in the past (which HKAPI had suspended prior to the entry into force of the Competition Ordinance).
- HKCC was unclear as to why there would be a causal link between the proposed survey and the claimed efficiencies, when, for instance, the claimed efficiencies could be achieved from other sources of data, e.g. government statistics.
- In any event, according to HKCC, it was not indispensable to Product Level Sales Data in the proposed survey to achieve the efficiencies claimed.

Takeaways

The HKCC decision in this case provides guidance for market players beyond those active in the pharmaceutical sector. On a substantive level, it gives some insights into the authority's thinking on information exchange between competitors. From a procedural viewpoint, the decision sheds light on the application process for associations or companies to obtain an "exemption decision."

Information exchange

HKCC's First Conduct Rule guideline already sets relatively clearly that the exchange of competitively sensitive information between competitors can raise significant competition concerns. Now, HKCC's decision in the application by HKAPI provides some further guidance:

- **Type of information exchanged**. HKCC pointed out that information on the value of sales is among the most competitively sensitive.
- **Anonymized data.** The fact that the data included specific company and product names meant that it was not anonymized data and posed greater competitive sensitivity.
- **Historical data.** While past or current data is considered less likely to give rise to competition concerns, HKCC did not consider quarterly sales data with no more than a month's delay to be historical.
- **Aggregated data.** Competition concerns are likely to arise where the sharing of data permits "product-specific data to be directly or indirectly discerned or robustly estimated." To reduce competition concerns, the data should be sufficiently aggregated so that competitors cannot identify information relating to the competing product (e.g. by ensuring that the data relates to a number of products and/or companies).
- **Public information exchange.** While information exchanged in public is less likely to harm competition, concerns may nonetheless arise depending on the overall competitive sensitivity. HKCC noted that the information would in principle be shared in public since the proposed sales survey would have been available to any purchaser, but HKCC nonetheless considered the potential competitive sensitivity of the proposed survey data.
- **Frequency of information exchange.** HKCC took the view that the quarterly frequency of the exchange, with no more than one month's delay, would still "appear capable of softening competition or facilitating monitoring." HKCC considered that potential competition concerns were more likely where there were infrequent sales and price changes, so that a change in sales from the previous quarter would continue to be relevant.

Procedure

Prior to HKAPI's application, HKCC refused to grant an exemption for the Code of Banking Practice (based on the "compliance with legal requirements" exemption) and provided quite a narrow scope for the block exemption for the liner shipping industry (rejecting the application with regard to voluntary discussion agreements). Hence, even before HKAPI's application, it was clear that obtaining an exemption from HKCC is not a "shoo in." Still the HKCC decision on HKAPI's application gives some additional guidance on how an applicant can present its case in order to overcome the hurdles to obtain antitrust immunity:

- **Threshold requirement for application.** To be considered, the application for a decision has to first satisfy the "suitability factors" – does it pose novel or unresolved questions of wider importance or public interest? Is there any clarification in existing case law or HKCC decisions? Is it possible to make a decision based on the information provided?
- **Third party comments.** Before making a decision, HKCC is required to publish notice of the application and to consider representations made by interested parties to HKCC. In this case, HKCC received eight representations from third parties. The decision comments that these third-party "representations do not provide a strong indication one way or another as to whether the [Competition] Commission should issue a positive Decision... they do contain a number of useful indications, however, which have been taken into account in the [Competition] Commission's views."

- **Burden of proof and quality of evidence.** The applicant bears the persuasive burden of proving each of the cumulative conditions of the efficiency exemption.

  To meet this burden, the applicant must present "convincing" or "cogent and compelling" evidence and arguments in support of the application. In particular:

  The applicant must show a causal link between the agreement and the claimed efficiencies.

  HKCC will likely reject mere assertions or specifically prepared evidence for the purposes of the application (e.g. company executive views on the efficiencies).

  HKCC would expect an independent, objective source of evidence which could be used to verify the efficiencies.

  The upside is that a HKCC decision can provide legal certainty on the applicability of an exemption. In addition, even though it is not necessary for HKCC to assess the competition concerns, it may do so and potentially even provide guidance on specific scenarios which would be unlikely to pose competition concerns (as it did in this case).

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Antitrust enforcement trends: an update from the 2019 ABA Antitrust Fall Forum Tech Summit

On 18 November 2019, the American Bar Association's Antitrust Law Section hosted its annual Antitrust Fall Forum. This year, the Fall Forum focused its discussions on a range of issues that could arise from the agencies' ongoing and future investigations into the technology sector – particularly those that focus on "dominant internet platforms." We provide key highlights and insights from the Forum below.

Antitrust enforcement against tech platforms

The FTC's new tech division has multiple investigations underway

In Februay 2019, the Federal Trade Commission (**"FTC"**) announced the launch of a techonology task force aiming to focus its resources on U.S. techonology markets. On October 1, 2019, the technology task force was formally converted into a division, the Technology Enforcement Division (**"TED"**), which further underscored the Commission's increased focus on effective antitrust enforcement in the technology sector.

At the Summit, FTC Chairman Joe Simons mentioned the factors that led to the creation of TED: (i) the importance of big tech platforms in the economy, (ii) implications for consumer welfare of anti-competitive conduct in the technology sector, and (iii) the complexity of technology markets. "Creating a new section allows us to focus our resources on a very significant priority for the Commission," he added.

According to Simons, in addition to the already publicized investigation into Facebook, TED has "multiple other investigations going on with major platforms." Notably, Simons emphasized the need for additional funding to further support TED's efforts to generate more enforcement actions. "We would double the size of TED, not only in terms of lawyers but also in terms of technologists [if we have more resources]," he said.

FTC may also review consummated mergers in the technology industry

Simons also said that TED's agenda is not only to focus on the conduct side, but also on "consummated mergers," *i.e.*, a single acquisition or a series of acquisitions that have *already* closed. He noted that TED may also investigate allegations of anticompetitive unilateral conduct in conjunction with one or more acquisitions that harmed competition in the aggregate. Other commentators on the panel believed that Section 2 of the Sherman Act could also be considered as a tool to detect and prohibit a "pattern of acquisitions" by a monopolist if that monopolist was using such acquisitions solely for the purpose of acquiring nascent competitors in adjacent markets in a manner that foreclosed its competitors from establishing a foothold in its market.

DOJ will seek appropriate remedies in digital markets if warranted

The U.S. Department of Justice (**"DOJ"**) also confirmed that it is investigating several technology platforms. The DOJ expressed concerns over potential unlawful conduct in digital markets and stressed that it will thoroughly investigate the alleged conduct and seek appopriate remedies where necessary.

Deputy Attorney General Jeffrey Rosen, the keynote speaker, noted that "serious and substantive [antitrust] issues" have been raised about some "leading online platforms." However, he appropriately also cautioned that no conclusion has been reached in these investigations. He further noted that DOJ will seek appropriate remedies in digital markets "if it is warranted." (Full remarks from Jeffrey Rosen can be accessed here.) On the other hand, Rosen noted that antitrust law is not a "panacea" for every problem, and to provide comprehensive enforcement resources in this area, the DOJ is "keeping in mind other tools in areas such as privacy, consumer protection, and public safety as part of a broader review of online platforms, to whatever extent warranted."

State attorneys general note a concern about network effects and barriers to entry created by big data

Kim Van Winkle, Chief of the Antitrust Division at the Texas Attorney General's office, discussed the public comments that 43 state attorneys general submitted to the FTC in June 2019 regarding competition issues in digital markets. (The public comments by 43 state attorneys general can be accessed here.) Those public comments included:

- A concern that big data collected by dominant platforms can "entrench their dominance" by causing network effects and barriers to entry.
- The need for renewed antitrust focus on non-price aspects of competition, including quality, innovation, and privacy.

Other insights from the Summit

Various guidelines and commentaries from the FTC's recent hearings are expected to be published

The FTC held a series of public hearings from fall 2018 to spring 2019, including the Hearings on Competition and Consumer Protection in the 21st Century (**"FTC Hearings"**), to find out whether competition and consumer protection law might be required modifications or adjustments in accordance with the rapidly changing competitive dynamics in certain industries.

Simons previewed the expected outputs from the FTC Hearings as follows:

- The FTC is planning to issue a guidance document on "platform competition," in a similar format as the agency's Competitor Collaboration Guidelines, and will do its best to issue it jointly with the DOJ.
- The FTC is also planning to issue a vertical merger commentary similar what the agency had done in its the 2006 Commentary on the Horizontal Merger Guidelines.
- The FTC is developing an addendum to the 2010 Horizontal Merger Guidelines to deal with unique issues involving acquisitions of nascent competitors and nonprice aspects of competition (e.g., quality, innovation, and potentially privacy).
- The FTC might also publish new vertical merger guidelines, but Simons said he could make "no promises" there.
- The FTC is looking closely at what was produced during the hearings on issues regarding the competitive effects of common ownership. The FTC is also considering doing a study on that topic under its authority from Section 6(b) of the FTC Act.
- The FTC will take "a fresh look" at the consumer welfare standard and its alternatives, and it expects to have some output on that topic.

DOJ will seek to terminate the *Paramount* consent decrees

Assistant Attorney General Makan Delrahim used the Summit as an occasion to announce that the DOJ will ask a federal court in the Southern District of New York to terminate its 71-year-old *Paramount* consent decrees. He noted, however, that a two-year sunset period will be set for the bans on "block booking" (*i.e.*, bundling of multiple films) and "circuit dealing" (*i.e.*, single licensing to cover all theatres in a circuit). "The sunset period will allow the defendants and movie theatres a period of transition to adjust to any licensing proposals that seek to change the theatre-by-theatre and film-by-film licensing structure currently mandated by the decrees," he explained. (Full remarks from Makan Delrahim can be accessed here.)

In 1948, the DOJ and several major motion picture companies agreed to the so-called '*Paramount* consent decrees' after several years of litigation. The *Paramount* consent decree defendants were required to divest either of their distribution business or their theatres, and the consent decree prohibited block booking and circuit dealing, among other practices.

Delrahim pointed out changes in the movie industry and technological developments (e.g., multiplex theatres showing films from various distributors, and subscription streaming services such as Netflix) as the primary justifications for DOJ's decision to end the decrees. Nevertheless, the DOJ does not consider the vertical practices which had been prohibited by the *Paramount* decrees to be "*per se* lawful" and will continue to review them under the rule of reason.

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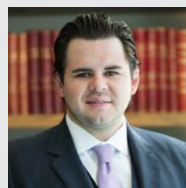

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U.S. Department of Justice takes aim at criminal antitrust violations in public procurement

Department of Justice (DOJ) Antitrust Division (division) forms a Procurement Collusion Strike Force.

The division is poised to launch a new strike force aimed at criminal antitrust violations in the public procurement arena. A notice published last week in the Federal Register identifies a proposed "Procurement Collusion Strike Force complaint form" designed to "facilitate reporting by the public of complaints, concerns, and tips regarding potential antitrust crimes affecting government procurement, grants, and program funding." DOJ's use of task forces has been successful in the past. For example, in October 2006 DOJ formed a similar National Procurement Fraud Task Force, which successfully targeted U.S. military procurement fraud related to conflicts in Iraq and Afghanistan. In less than three years, the efforts of the National Procurement Fraud Task Force led to more than 35 criminal convictions. As with the National Procurement Fraud Task Force, the newly developed "Strike Force" is expected to consist of a range of federal agencies and focus on high-dollar government programs.

Recently, there has been an uptick in division bid-rigging cases relating to government contracts. In the past year, DOJ has secured several significant guilty pleas from government contractors, including five South Korean companies accused of rigging bids on contracts to supply fuel to U.S. military bases, an insulation contractor accused of conspiring with competitors to inflate bids on public construction projects, and a private contractor accused of fixing prices for surplus government equipment in online public auctions. Moreover, the division has recently issued public statements prioritizing enforcement in this area. On 15 November 2018 Makan Delrahim – the division's assistant attorney general – emphasized that "the Justice Department and its law enforcement partners will investigate and aggressively prosecute without hesitation companies who cheat the United States government and the American taxpayer." Creation of a Procurement Collusion Strike Force demonstrates that DOJ is putting significant resources toward this effort and taking clear and visible strides to pursue these cases.

Now, more than ever, companies doing business with the U.S. government should be thinking about antitrust compliance. In July 2019 DOJ announced that it will give credit to defendants with robust antitrust compliance programs. Credit for compliance marks a major shift in division policy and is one of the significant benefits available to companies with effective compliance programs. Companies with questions or concerns about the proposed Procurement Collusion Strike Force or about aligning antitrust compliance with updated guidelines from DOJ should consider contacting experienced outside counsel.

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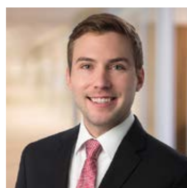

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Germany's proposed digital antitrust law: an ambitious project to regulate digital markets

Germany is about to implement an ambitious new "digital antitrust law" *("GWB-Digitalisierungsgesetz")* to effectively regulate online markets. The draft Ministerial bill on the 10th amendment of the German Act Against Restraints of Competition ("GWB"), published at the beginning of October, aims at continuing Germany's role as a pioneer in antitrust regulation of digital markets.

Regulation of digital markets – the broader context

"Divesture", "Break up", or "Regulation" of tech players. Political statements and requests on how to deal with "Tech Giants" from Silicon Valley or China have become more frequent, especially over the last 12 months. According to our global study on regulation of technology markets, there were more than 450 political initiatives in the first half of 2019 which supported a tougher regulatory stance on "Big Tech". However, so far most of these fairly populist proposals lack implementation.

Over the last few years, antitrust law has transformed into a particularly powerful tool against market power in the online market. EU Competition Commissioner Margrethe Vestager made a name for herself with billions in fines and tax reclaims against companies, especially from Silicon Valley. In the next term Commissioner Vestager will also be given responsibility for the digital sector. This dual role will further strengthen the importance of antitrust law. In Germany, the Federal Cartel Office *("Bundeskartellamt")* was no less ambitious and used its competences to deal with online marketplaces and social networks. Thus, it does not come as a surprise that our global study on regulation of technology markets around a quarter of the political initiatives opting for stronger regulation of tech companies.

By and large, these proposals have not made it through the discussion stage. However, with the now published draft German "digital antitrust" bill, Germany is focusing on an actual legislative project to endow the Bundeskartellamt with more competences, placing itself at the forefront of global regulators.

Main proposals on regulation of digital markets at a glance

About two years after the last revision of the GWB, the German government has decided to take the next step towards stronger antitrust regulation of companies with digital business models. Some parts of the current proposals will certainly attract particular attention in Silicon Valley and China. In particular, the German digital antitrust bill provides for:

- **Access rights to "data relevant for competition"**, making such data a factor in determining a dominant market position and refusal of access to such data being regarded as an abuse of market power;
- **Stricter antitrust regulation of digital platforms** through a mechanism that enables the Bundeskartellamt to not only declare by order that large digital platforms are such with "paramount significance for competition across the markets", but also to impose stricter antitrust rules on them in a second step;
- **Particular regulation of digital platforms:** so called "intermediaries", e.g. multi-sided digital platforms whose business model it is to collect, aggregate and evaluate data in order to reconcile supply and demand between user groups, will be subject to specific antitrust supervision;
- **Right of intervention against so-called "tipping" of markets,** i.e. the "overturning" of a market with several suppliers into a monopolistic or highly concentrated market **as well as new interim injunction measures** that make it easier for the Bundekartellamt to deal with possible violations of antitrust laws in the future;

- **Broader protection against so-called relative market power** that – under the new law – will not only protect small and medium-sized enterprises, but apply to any B2B situation where a company is dependent on other market participants.
- **More legal certainty for horizontal cooperations** through new rules entitling companies to a decision by the Bundeskartellamt on the legality of a planned cooperation with a competitor (instead of reliance on a self-assessment only) if the companies have a substantial legal and economic interest in such a decision. Over the last years Germany has seen itself as a pioneer of antitrust law regulation of digital markets. As the official title of the now proposed 10th amendment of the GWB shows, the German Government has proposed nothing less than a "Law digitizing the Act against Restraints of Competition" which – if adopted – will equip the Bundeskartellamt in the area of digital markets with far more tools than most other competition authorities. In the end, it remains to be seen whether Germany's legislative push will result in further fragmentation of regulation or, whether perhaps the German draft will become a blueprint for other European and non-European countries. If Germany, with its ambitious digital antitrust law, succeeds in setting standards for tools being made available to competition authorities and if the Bundeskartellamt manages to make use of them in a reasonable and successful way, Germany may soon belong to the digital avant-garde albeit in regulating big tech companies rather than attracting them.
- In any event, the proposed bill sets the scene for future antitrust enforcement in digital markets, probably not only in Germany. Companies should be aware of these changes and make sure their antitrust compliance systems are digital avant-garde as well.
- Germany breaks new ground with this proposed bill. However, it also raises plenty of questions that beg for answers: Unlike many other markets, the online markets are truly global. Big players are represented in almost all markets in the US, Europe and – with a few exceptions in China, South Korea and Japan which often have strong domestic digital companies – also in most Asian countries. That being said, what is the reason for a German rather than a European solution? Wouldn't the European Commission with its ambitious Competition Commissioner Vestager and the newly achieved digital portfolio be better equipped to create a Union "level playing field"?

Conclusion and outlook

Over recent years Germany has seen itself as a pioneer of antitrust law regulation of digital markets. As the official title of the now proposed 10th amendment of the GWB shows, the German Government has proposed nothing less than a "Law digitizing the Act against Restraints of Competition" which – if adopted – will equip the Bundeskartellamt in the area of digital markets with far more tools than most other competition authorities.

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The rise of competition law in Asia

SEA View, Article VII: October 2019

In our October (and seventh) issue of #SEAView, Adrian Emch looks at competition law in Southeast Asia (SEA). Adrian describes a competition framework which is new and full of nuance. His message is pervasive: international norms are arriving or settling into the area, but have local peculiarities which corporates must be attentive to.

The 21st century has been branded the "Asian century." That's also, or mainly, because Asian nations have embraced the market as the primary way to allocate resources.

As part of the growth of Asian market-based economies, there has also been a push to adopt a remedy against a certain type of market failure: anti-competitive practices. Indeed, over the past years, competition law has blossomed in Asia. Except for a few early birds, like Japan (which enacted the Anti-Monopoly Act in 1947) and South Korea (which adopted the Monopoly Regulation and Fair Trade Act in 1980), the competition laws of many Asian jurisdictions are far more recent.

The ASEAN Project

Let's take the Association of Southeast Asian Nations (ASEAN) as an example. Indonesia was the first ASEAN member state to adopt a competition law in 1999, closely followed by Thailand in the same year. Singapore and Vietnam adopted their competition statutes in 2004 and Malaysia in 2010. Somewhat of a gap followed until there was a concerted regional push: an ASEAN project whereby member states committed to adopting competition laws by 2015 to facilitate deeper integration of the ASEAN market. In 2015 - Brunei, Myanmar, Laos, and the Philippines passed their competition laws, complying with this informal commitment. Only Cambodia did not adopt a formal competition law by the 2015 deadline; it is still finalizing its draft law today. In short, the ASEAN project was largely successful. Nine out of 10 ASEAN member states have now enacted competition laws.

During the course of this ASEAN competition law push, some of the ASEAN member states with existing laws not only updated those laws, but also restructured their enforcement authorities.

For example, Thailand amended its law in 2017 and established the Trade Competition Commission in the same year. Similarly, in Vietnam, the new competition law, which took effect in July 2019, created the National Competition Commission.

If we look at the substance of the competition laws across the region, the scene is one of similarities rather than differences. Many Asian competition laws are broadly in line with international competition law (if there is even such a unity). But, of course, there are many local peculiarities, some shared among several Asian jurisdictions. For example, while most Asian jurisdictions subscribe to the rules of the market economy, these markets are punctuated by state-owned enterprises (SOEs).

Many competition laws in Asia don't have special rules for SOEs, but some do. In China, for example, there's a special clause in the Anti-Monopoly Law which contains some language, albeit ambiguous, on how to treat SOEs under the law. 'Ambiguous' as the clause appears to exempt conduct where the SOEs act under state regulation (such as regulated pricing), but at the same time keeping the scope of the exemption very narrow. In practice, against many observers' expectations, the clause hasn't worked like a blanket exemption for SOEs. On the contrary, in over 11 years of enforcement of the Anti-Monopoly Law, quite a number of SOEs have been fined for anti-competitive practices. However, in some areas, the scope of the Anti-Monopoly Law, in particular merger control, hasn't been a particularly effective tool against SOEs yet.

In Vietnam, both the old and the new competition laws have very similar clauses on SOEs. Those clauses exempt SOE conduct where the government directly determines the prices, quantities, or other parameters of the products, but at the same time applies the law's full force against SOE conduct outside this limited scope.

In some jurisdictions, there is even a conscious effort to create a level playing field between private market players and SOEs. For example, the Philippine Competition Act explicitly applies to government-owned and controlled corporations, as SOEs are called there, and the local competition authority has been keen to conduct a review of these corporations in order to ensure "competitive neutrality."

SOEs apart, there are allegations, mainly from Western sources, that companies subject to government investigations against anti-competitive practices enjoy fewer due process rights in Asia as compared to the United States or Europe. Whatever the merits of these allegations, it is clear that close communication with the investigating authorities, and creativity to seek mutually satisfactory solutions, are often key in competition law investigations in Asia.

To conclude, so far and to date, the Asian competition landscape is fresh; jurisdictions are more alike than not. Yet a one-size-fits-all approach to a region of differences will not work to navigate this terrain. The laws and many of the enforcement practices may follow international competition law practices, but with each nation's local peculiarities. Time will tell whether the "Asian century" will also see the emergence of a new, coherent, or Asian-brand of competition law.

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The BeNeLux competition authorities issue a Joint Memorandum on competition in a digital world

On 10 October 2019, the competition authorities of Belgium, the Netherlands and Luxembourg (the "Authorities") issued a "Joint Memorandum" which adds further (BeNeLux) perspective to the on-going debate regarding "competition law for the digital economy". The document shares the views of the Authorities in respect of the interplay of the "digital world" and (i) merger control, (ii) informal antitrust guidance by the Authorities, and (iii) the right antitrust enforcement tools (including the suggestion of a new ex-ante instrument allowing for the imposition of binding commitments on companies without the finding of an infringement).

Digitalization is increasingly playing a crucial role in all kinds of industries. Therefore, this Joint Memorandum is of importance to all companies active in the BeNeLux and the EU.

Merger control in the digital economy – a clear focus on killer acquisitions

The Joint Memorandum hints at the fact that merger control policy in the digital economy is of utmost importance and should be a focus area of the European Commission.

In that regard, companies active in the BeNeLux should take careful note of the fact that the Authorities are highlighting the challenges of assessing the competitive implications of acquisitions of "small targets" by (dominant) platforms. They suggest in the first place that these **"killer acquisitions"** might be escaping antitrust scrutiny entirely as start-ups typically do not generate revenues that exceed the current jurisdictional thresholds.

Three further points need to be noted from the Joint Memorandum in the context of merger control:

- The Authorities suggest that in concentrations involving dominant platforms more focus should be given to barriers to entry that might be created by such platforms' access to data and strong network effects; the Authorities consider that merger control should be stricter when reviewing the acquisition by a dominant platform enjoying strong network effects of a potential competitor;
- The Authorities also suggest **reversing the burden of proof** in some cases, obliging the parties to prove the transaction's pro-competitive nature (or absence of competitive harm), rather than the competition authority having to prove its anti-competitive effects; and
- Lastly, the Authorities urge the European Commission to commission an **economic study on merger control in the digital economy,** in particular to get a clearer picture on the prevalence of "killer acquisitions".

Informal guidance provided by the Authorities in fast-moving digital markets

According to the Authorities, relying on existing case law will not be sufficient to deal with competition issues that arise out of the digital economy. The Authorities are urging competition authorities (in the first place, the European Commission) to **issue ex-ante guidance papers** on specific issues raised by the digital economy (and do so before the adoption of infringement decisions in order for such guidelines to have an impact on new developments).

The Authorities also propose that competition authorities introduce fast-track procedures to issue **case-by-case guidance letters** to individual companies. Such procedures would not require changes in EU law but would in some cases require competition authorities to depart from the infringement route and give priority to a faster outcome that provides specific guidance, not only to the parties involved, but also to others.

Companies active in Belgium should note that the Belgian Competition Authority has a procedure for obtaining informal advice from the Authority's president. This tool is very frequently used in Belgium and the proposals of the Joint Memorandum seem to make this option more attractive and likely more frequent in the future.

Towards ex-ante remedies without the establishment of an infringement

One of the Authorities' most ambitious proposals is that competition authorities should be able to remedy alleged harm to competition (arising out of conduct in the digital economy) before any formal finding of an infringement. Competition authorities' current ex-post enforcement tools are sometimes said to be too slow to deal with competition concerns in the digital economy. According to the Authorities, there is a need for more ex-ante tools and capabilities (both at EU and at national level).

As a result, the Joint Memorandum suggests an ex-ante mechanism to prevent anti-competitive behaviour by dominant companies in the digital world. Such mechanism should allow competition authorities to **impose remedies on dominant companies in order to prevent competition concerns, without the establishment of an infringement.**

The Authorities are of the opinion that the non-punitive nature of the ex-ante tool could facilitate a constructive dialogue between competition authorities and dominant companies and that it may lead to voluntary acceptance of reasonable commitments at an earlier stage, avoiding long proceedings. Lastly, the Authorities envisage a punitive mechanism for companies not complying with such remedies.

Conclusion

Whether these proposals will be taken on board by the European Commission or national competition authorities remains to be seen. However, companies should note this very visible step taken by the BeNeLux authorities in focussing on the challenges perceived by these authorities and on the companies involved in the digital economy.

You can read the Joint Memorandum in full here. We would be happy to provide guidance on this topic and assist you with any questions/ clarifications in this regard.

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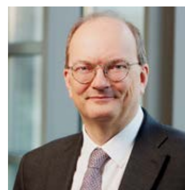

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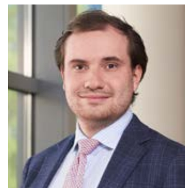

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KPPU has issued a new merger control regulation

On 2 October 2019, the Indonesian antitrust enforcer – Komisi Pengawas Persaingan Usaha (KPPU) – issued a new merger control regulation: Regulation No. 3 of 2019 on the Assessment of the Merger Consolidation or Share Acquisition that could result in Monopolistic and Unfair Business Practices (the New KPPU Merger Control Regulation). The new regulation came into force on 3 October 2019. The issuance of this new regulation is yet more evidence that the current KPPU leadership is in motion to revolutionize antitrust enforcement in Indonesia.

The most notable changes introduced in the New KPPU Merger Control Regulation are as follows:

Defined period for the KPPU to conclude the work

As a matter of practice, complete filing documents can be "waitlisted" for weeks until we hear something back from the KPPU. There is now a more defined period: within 60 working days of filing, the KPPU will have to conclude the clarification-and-research stage of checking completeness of the filing; and within 90 working days, the KPPU will have to conclude their substantive assessment.

That is a total of 150 working days, slightly more than six months on a rough calculation but at least there is certainty.

Simplified form

There is no longer a need to complete the M1/K1/A1 form for filing or the M2/K2/A2 form for consultation; there is now a unified form for both types of procedural steps, which makes life simpler for those companies which hesitate between, or follow both, steps. Information regarding competitors, customers, and suppliers is no longer required to be filled in for the initial filing. Only if the KPPU deems this information to be material and important, the KPPU will request it during the clarification-and-research stage.

Clarity on the conversion rate

The notification threshold is set in Indonesian Rupiah (IDR). However, an offshore transaction often requires conversion from the native currency used by the companies involved in IDR. The New KPPU Merger Control Regulation provides that the reference for currency conversion is the middle exchange rate issued by the Central Bank of Indonesia.

All assets are now accounted for (not just the ones located within the territory of the Republic of Indonesia)

As per Article 4 of the New KPPU Merger Control Regulation, the assets threshold calculation shall include all entities in the surviving/acquiring group in a direct ownership relationship up to the highest ultimate beneficiary and down to the lowest subsidiary as reported in the financial report.

The New KPPU Merger Control Regulation is silent about the territorial boundaries that were once provided.

Upon our informal discussion, the KPPU confirmed that they wish to see all assets as a whole, as per the financial statement, regardless on whether the assets are located within or outside the territory of the Republic of Indonesia.

Compared to the prior KPPU regulation, the New KPPU Merger Control Regulation changes the asset threshold – currently set at IDR2.5 trillion (around US$178.62 million[1]) – from a local to a global asset value. In practice, this means "lowering the bar" of the merger filing obligation, in terms of asset value, considerably.

The KPPU further clarifies that, for their ease of reference, filing parties can separate the assets based on location when filling in the form.

1 Conversion rate as of 24 October 2019

What about joint ventures?

The previous KPPU Regulation clearly provided what to do with joint ventures: if it's a newly established joint venture, there is no obligation to report. If the joint venture is created through share acquisition, then the notification threshold is met and there was an obligation to report.

Now, the New KPPU Merger Control Regulation is silent about joint ventures. It is unclear whether the prior approach to joint ventures is still the way to go. At the beginning of the enforcement of the New KPPU Merger Control Regulation, joint venturers may be advised to consult with the KPPU to gain more clarity. We hope a clearer KPPU practice will emerge in the longer term.

Asset transfers are now caught

Pursuant to Article 5.1 of the New KPPU Merger Control Regulation, asset transfers are now considered in the same way as share acquisitions and may become notifiable if: (1) they cause the transfer of control of the relevant assets; and/or (2) increase the ability of the acquirer to control a relevant market.

There is no further explanation of this provision (or any guidance has not yet been published). We are yet to see how this provision will be enforced by the KPPU.

This particular provision has received considerable criticism, as it overtakes the hierarchically superior legislations – the Company Law and Competition Law, as well as the Government Regulation on Mergers and Acquisitions – that has not regulated asset transfers.

No nexus offshore transactions now caught

Under Article 23.1 of the New KPPU Merger Control Regulation, offshore transactions without a clear local nexus are now caught and must be reported to the KPPU– regardless of whether they have any effect in the Indonesian market. The article reads:

A strictly literal interpretation of this article and our informal communication with the KPPU suggest that, under the New KPPU Merger Control Regulation, no local nexus is required for offshore transactions. As long as one of the parties to the transaction has a sufficiently large Indonesia presence and meets the notification threshold, any of its transactions would seem to be potentially reportable to the KPPU.

For example, if you're a Japanese company and you have a subsidiary in Indonesia, and you would like to acquire a company in India that has nothing to do with Indonesia (at all), the transaction will now be caught and must be reported to the KPPU if the thresholds are met.

"A Transaction related to Merger, Consolidation, or Acquisition of Share and/or Asset of a Company that meet the Notification threshold and took place outside of the Republic of Indonesia must be notified to the Commission [KPPU], if all of the parties or **one of the parties** who are involved in the Merger, Consolidation, or Acquisition of Share and/or Asset of a Company conduct its business orsales in the Territory of Republic of Indonesia"

How may this impact your business?

There are some positive changes introduced in the New KPPU Merger Control Regulation and, conversely, some more challenges remain. The scope of notifiable transactions is now wider and more varied, whilst the timeframe is set stricter. This begs the question whether the KPPU will be ready to handle a large number of transactions at the same time. Will their human and other resources be available and up for the challenge?

Corporations would need to take extra caution to ensure whether their transactions are now notifiable, or to think about alternate transaction structures, and to ensure compliance with the notification obligation – if triggered.

Changing regimes and regulations should not hinder your business; we must navigate the additional complexity of the law in a more pro-active and sophisticated way.

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AIA

Belgian Competition Authority adopts guidelines on exchanges of information in the context of trade associations

On 1 October 2019, the Belgian Competition Authority (BCA) adopted a new set of guidelines relating to exchanges of information in the context of trade associations. Following the lack of clarity highlighted by some market participants, the main objective of these guidelines is to provide legal certainty as to the type of information and market data that trade associations can exchange, internally and with their members, and what practices are certainly not allowed. As penalties for infringements can amount to up to 10% of the trade association's annual worldwide revenues (the sum of the revenues of each of its members active on the market(s) in question), trade associations should be vigilant. Since trade associations play a prominent role in Belgium, these guidelines come as no surprise and trade associations and their members should expect the BCA to keep a close eye on their dealings.

Guidance for trade associations

The guidelines are aimed at clarifying the current stance of Belgian and EU competition law and practice regarding exchanges of information in the context of trade associations. They provide a more detailed review of specific situations of information exchange that can arise in the context of a trade association: periodic overviews of markets; price comparison tools; provision of market forecasts to members; and the provision to members of cost and price calculation methods and formulas (such as price indices and benchmarking).

In particular, trade associations should take into account the following guidance given:

- Exchanging records on market developments is compatible with competition rules if the data is sufficiently aggregated, sufficiently old and if not exchanged overly frequently;
- Information exchanges relative to prices and pricing practices are more likely to be considered anti-competitive, especially when net prices are exchanged (as opposed to gross prices);
- Price comparison websites launched by trade associations are not considered per se illegal as long as objective criteria are applied to determine which prices are shown to users. Nonetheless, banning price comparison websites can be considered anti-competitive behaviour;
- Recommending a sale price corresponding to what the trade association considers to be the average sector price is strictly forbidden; and
- Trade associations cannot request that their members provide data related to prices when these members can access the individual replies of other members. In that respect, trade associations should make sure to implement the necessary internal safeguards, such as the setting-up of a so-called "black box".

Trade associations should also note that these guidelines set out general principles which will need to be interpreted and applied to the specific facts of the exchanges of information under review by the BCA, outside counsel or the trade association's in-house counsel. The specific characteristics of the information as well as its strategic/commercially sensitive nature will play a role. In that regard, specific attention must be given to the specificities of the markets and industries in which the trade association is active.

Main take aways

The guidelines reaffirm that the BCA is focussed on moving against anti-competitive conduct – conduct resulting from any form of information exchange and reduction of opacity in the market, be it directly among competitors or through the conduit of a trade association. As penalties for infringements can amount to up to 10% of the trade association's annual worldwide revenues (the sum of the revenues of each of its members active on the market(s) in question), trade associations active in Belgium should prioritize implementing these guidelines in their internal functioning.

Background

On 12 September 2018, more than one year before the adoption of the guidelines, the BCA launched a public consultation while simultaneously issuing a first draft of the guidelines. Various stakeholders, including specialized legal practitioners and industry participants commented in the context of the consultation. A number of significant changes have come about since the first draft of the guidelines, which shows the BCA's preparedness to actively listen to stakeholders.

We would be happy to provide guidance on this topic and assist you with any questions/clarifications in this regard.

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Third Point to pay monetary penalty to settle allegations of HSR Act violations

On 28 August 2019, investment advisor Third Point LLC (Third Point) and three funds under its control – Third Point Partners Qualified L.P., Third Point Ultra, Ltd., and Third Point Offshore Fund Ltd. (collectively, the Third Point Funds) – entered into a settlement agreement and agreed to pay US$609,810 in civil penalties based on the Federal Trade Commission's (FTC) allegations that the Third Point Funds violated the premerger notification and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act).

The HSR Act applies to acquisitions of voting shares, controlling interests in noncorporate entities, and assets if HSR threshold tests, which are adjusted annually, are satisfied as a result and no exemption applies. If the HSR Act applies, the parties to the acquisition must file HSR notifications with the FTC and the Antitrust Division of the Department of Justice (DOJ) and observe a waiting period before they may close on the acquisition. Penalties for failure to comply with these requirements are currently up to US$42,530 per day for each day in which the parties are in violation of the HSR Act.

Conversion of shares following 2017 Dow/DuPont merger triggered HSR filing requirement

According to a complaint filed by the DOJ on behalf of the FTC on 28 August 2019 in the District Court for the District of Columbia, the 31 August 2017 merger of Dow Chemical Company (Dow) and E.I. du Pont de Nemours and Company (DuPont) to form DowDuPont Inc. (DowDuPont) resulted in the conversion of the Dow shares held by each of the Third Point Funds into shares of the merged entity. See Compl., U.S. v. Third Point Offshore Fund, Ltd. et al., No. 1:19-cv-02593 (28 August 2019). The complaint acknowledged that the Third Point Funds had properly filed under the HSR Act when they had initially acquired voting securities of Dow in 2014. Therefore, under 16 C.F.R. Section 802.21, each could acquire additional shares of Dow for a five-year period without filing another HSR notification so long as each would not as a result cross a higher filing notification threshold. The government alleged, however, that the Section 802.21 exemption did not apply to the conversion of Dow shares held by the Third Point Funds since DowDuPont is not the same issuer as Dow within the meaning of the HSR Act because, among other things, it ow/DuPont merger on 31 August 2017, and satisfied applicable notification thresholds as a result.

The Third Point Funds ultimately filed corrective HSR notifications on 8 November 2017. Since the waiting period related to these filings expired on 8 December 2017, the complaint alleged that each of the Third Point Funds was in violation of the HSR Act from the date that the Dow/DuPont merger closed (31 August 2017) until the date the waiting period on their corrective filings expired (8 December 2017).

Third Point already had one bite at the apple

This is not the first time that Third Point faced allegations from the FTC concerning HSR Act violations. The complaint noted that Third Point and the Third Point Funds previously violated the HSR Act when they failed to observe the HSR Act's notification and waiting period requirements before acquiring voting securities of Yahoo! Inc. in 2011. Four years later, on 24 August 2015, the United States filed a complaint alleging that Third Point and the Third Point Funds had violated the HSR Act. In a stipulation filed the same day, Third Point consented to a five-year agreement imposing certain injunctive relief, including a requirement to maintain an HSR compliance program.

Lessons to be learned

The consent decree serves as an important reminder of the following:

1. Parties acquiring even minority voting shares in the context of mergers, conversions, or other acquisitions – even acquisitions that do not require payment – should consider in advance whether the HSR Act's filing and waiting period requirements could apply to their acquisitions.
2. The HSR exemptions (such as the Section 802.21 exemption described above) are technical and often narrowly construed. Moreover, the FTC occasionally amends its interpretation and application of exemptions. Therefore, parties should consult with HSR counsel before concluding that their acquisition of voting shares, noncorporate interests, or assets is exempt from filing requirements.
3. The FTC continues to apply a one bite at the apple policy, seeking civil penalties for inadvertent failures to file HSR only when a party has missed an HSR filing obligation in the past as the Third Point Funds had done in this case. However, the penalty the Third Point Funds agreed to pay was significantly less than the total fines that the government could have imposed (over US$4 million for each of the Third Point Funds). The government "adjusted the penalty downward from the maximum permitted under the HSR Act because the violation was inadvertent, Defendants promptly self-reported the violation after discovery, and Defendants are willing to resolve the matter by consent decree and avoid prolonged investigation and litigation." *Competitive Impact Stmt., U.S. v. Third Point Offshore Fund Ltd. et al.*, No. 1:19-cv-02593, Sec. III (28 August 2019).

Anyone who acquires voting shares, noncorporate interests, or assets (even if through automatic conversions or exchanges) should consult with experienced HSR counsel regarding adoption of an HSR compliance program to ensure that HSR filings are not inadvertently missed. An ounce of prevention in this area can prevent future headaches, costs, and fines.

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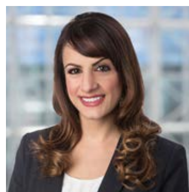

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