

THE DIGITAL WORLD IN ASIA - NEW OPPORTUNITIES AND CHALLENGES AMIDST A NEW ANTITRUST ENFORCEMENT HORIZON

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Legal Briefings

With the onset of an increasingly digital world across the APAC region and the interest of regulators in the sector, we examine the antitrust enforcement horizon in Asia as well as the new opportunities and challenges brought about by the specific characteristics of the sector.

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THE DIGITAL WORLD - THE NEW ANTITRUST ENFORCEMENT HORIZON IN ASIA

The interest of Asian competition authorities in the digital sector is spiking as they increase their focus on the sector and begin to discuss the unique antitrust issues raised by companies operating in the digital space.

China

Press reports have noted that China's National Development and Reform Commission (the "**NDRC**") stated in January 2018 that its top enforcement priorities for 2018 would include tackling antitrust violations involving intellectual property. The NDRC also reportedly stated that it would be keeping close tabs on high tech manufacturers, for example manufactures of storage chips for mobile phones. Subsequently, in late February 2018, it was reported that the NDRC had requested that Samsung Electronics does not further increase the prices of mobile phone storage chips and accords priority to Chinese firms in the supply of such chips.

The NDRC is also understood to be drafting guidelines on the pricing of standard essential patents. In addition, the China State Council's Anti-Monopoly Commission is expected to publish the final guidelines on intellectual property rights later this year. Moreover, according to public sources, a State Administration for Industry and Commerce ("**SAIC**") official commented in February 2018 that, while a cautious approach had been taken to regulating internet based businesses, innovative new tech companies may find themselves occupying monopolistic positions.

Furthermore, public sources suggest that another potential antitrust concern in the digital sector could relate to the use of either-or restrictions on Chinese e-commerce platforms. These restrictions typically operate so as to prevent e-retailers from selling on rival platforms (for example, e-retailers are required to exclusively use one platform in order to take part in promotional periods). The use of such either-or restrictions has reportedly been discussed in the legislature.

The above developments, coupled with the arrival of Liu Jian (who has experience working on cases involving Qualcomm, LCDs and semiconductors) as the new Head of Enforcement Department II of the NDRC's Price Supervision and Antimonopoly Bureau, and SAIC Minister Zhang Mao's statement that the SAIC will curb market monopolies, suggest an increased interest in the digital world in China.

Japan

In Japan, the Japan Fair Trade Commission (the "**JFTC**") has stated that the digital economy will be a priority sector in 2018 in terms of the promotion of fair competition. The JFTC has already investigated Amazon, Qualcomm and Apple. In these cases, the JFTC found that there had been no serious violations, although Amazon subsequently changed some of its rules relating to selling on its online platform.

According to public sources, the JFTC has set up a dedicated contact point and investigative unit to collect information and investigate cases related to the digital sector. This follows the setting up of a group by the JFTC looking at competition policy and data in 2017, which is evaluating antitrust issues relating to Big Data. A report released by the study group in June last year discussed the beneficial aspects of data accumulation and utilization, but also noted that data hoarding and refusal to supply data to competitors and/or consumers could result in antitrust violations.

Korea

In Korea, the Korea Fair Trade Commission (the “**KFTC**”) raided the headquarters of tech giant Naver Corporation on 23 January 2018 in relation to a suspected abuse of dominance probe in the online search market. The tech company is alleged to have abused its dominant position to promote NPay, its own payment system, through search results and its shopping site. The initial probe into the company commenced in September 2017 and followed discussion of the matter by a lawmaker, namely Kim Hae-young of the ruling Minjoo Party, at a committee meeting of the National Assembly.

Further recent discussion in the Fourth Industrial Revolution Special Committee of the National Assembly in February 2017, in which lawmakers from both ruling and opposition parties urged the KFTC to increase its investigatory and regulatory efforts in respect of the sector, could pave the way for greater enforcement action by the KFTC in the digital space.

Australia

In Australia, on 20 February 2018, the Australian Competition and Consumer Commission’s (the “**ACCC**”) Chairperson Rod Sims referred to the net economy and the need to adopt “the competition and consumer principles we champion...in these new technology frontiers”, suggesting an increased interest in this sector on part of the ACCC. Indeed, the ACCC is currently undertaking a public inquiry into the impact of digital platforms on competition in media and advertising services markets, in particular in relation to the supply of news and journalistic content. The ACCC’s preliminary report is expected later in 2018. The ACCC’s final report on its Communication Market Study, which focused on, amongst other things, price competition between the major service providers in both fixed and mobile retail markets, is expected in the second quarter of 2018. The use of consumer data by companies is anticipated to be another aspect of the ACCC’s key focus in 2018, with Rod Sims stating that “data portability increases competition, particularly for more complex products and services”. The use of consumer data is also an aspect of the public inquiry into digital platforms.

Indonesia and Singapore

Indonesia’s Commission for the Supervision of Business Competition (the “**KPPU**”) will continue to focus on the digital economy as a key priority in 2018, according to a speech made in December 2017 by the KPPU’s Chairman Syarkawi Rauf. The Chairman said e-commerce and digital platforms could help the Indonesian economy to keep growing. In February 2018, the Head of the Competition Commission of Singapore (the “**CCS**”), Toh Han Li stated that the CCS is looking at the use of big data as its next project and will also focus on digital comparison tools in 2018. He further commented that the CCS already has the necessary tools to deal with competition cases involving digital disruptor firms.

NEW ANTITRUST CHALLENGES REQUIRING NEW TOOLS?

There is an ongoing debate as to whether the pace of change in the digital world requires new tools to deal with the antitrust issues raised in the sector. In the EU, there has been a sector inquiry into the e-commerce sector which resulted in a lengthy final report that provided some guidance on how the EU would look at cases in the sector. There are also ongoing EU investigations involving online geo-blocking, pricing algorithms and other behaviours specific to the digital sector. There has been no clear indication from the European Commission that new tools may be needed to deal with the antitrust issues raised in the digital space. However, the fact that there is a dedicated Digital Single Market taskforce to deal with the antitrust issues raised in the sector means that there is already a level of expertise being built up within a specific unit in the European Commission. Moreover, there have been suggestions from some quarters that the revision of the Vertical Agreement Block Exemption Regulation in 2022 could include changes designed to deal with antitrust issues specific to the digital world.

The UK Competition and Markets Authority (the “**CMA**”) announced in February 2018 that it would be setting up a specialized unit to focus on tackling companies’ illicit use of machine learning, algorithms and Big Data. The CMA would like to be “reasonably active” in dealing with questions raised by the impact of advancing technology and the unit is the means for it to realise this ambition. There have been no suggestions of any wider reforms to the UK regime to keep pace with the developments in the digital sector. However, the CMA has already published reports on the use of Big Data and separately digital comparison tools which provide some insight into the handling of the antitrust issues relating to the sector by the regulator.

In Asia, there is an ongoing debate as to whether a new approach to antitrust issues raised by the dynamics of the sector is warranted, including in relation to the rise of disruptive technologies. In late 2017, at the Second Jakarta International Competition Forum hosted by the KPPU, senior officials from the ACCC and CCS agreed that there was a need to strike a balance between price competition and encouraging innovation in technology markets. The KPPU Chairman stated that although robust enforcement is needed to oversee these new and often confusing markets, competition authorities should also “adapt to a new model”. It remains to be seen whether Asian competition authorities will amend their existing laws, guidelines and tool box for dealing with antitrust issues relating to the digital sector (for example, in the context of the amendments of Indonesia’s antitrust laws or expected amendments to China’s Antimonopoly Law). However, we expect that Asian authorities will begin to adopt a change in approach to the assessment of issues in the sector. This change in approach could extend to a greater analysis of alleged anticompetitive conduct in multi-sided markets and the greater use of market studies and monitoring mechanisms (as opposed to enforcement action) by authorities. Indeed, this process has already begun with the JFTC’s study group on big data, the ACCC’s market studies and the issuing of guidelines by some regulators (such as the NDRC).

CONCLUSION

The fast paced and dynamic digital world (including the rollout of 5G and connected and autonomous driving technology, which will be the topics of our next two e-bulletins) is increasingly attracting the interest of Asian competition authorities. This presents many opportunities and challenges for both companies and competition authorities. For companies, the key focus should be on maximizing the opportunities while managing the antitrust risks in an environment of increased scrutiny of activities in the sector. For competition authorities, the key challenges include how to assess new technology markets and/or multisided markets in the context of a fast moving sector. The approach of competition authorities to antitrust issues in the digital space will in turn provide further guidance to companies (whether as a result of enforcement action, market studies or guidelines/reports), and shape the regulatory landscape in which tech companies have to do business in the future.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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