Southeast Asian Competition Regulators Ramp Up Merger Control Enforcement

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Global deal planning often overlooks merger control regimes in Southeast Asia. However, in recent months these regulators have become increasingly active and are enforcing failures to file relevant transactions for review. Indeed, multinational businesses may be subject to significant fines or divestiture orders under these Southeast Asian regimes for failures to notify or for implementing problematic transactions without approval.

Grab, a Singapore-based ride-hailing company, recently reached an agreement to acquire the regional operations of its competitor, Uber, spread across eight jurisdictions covered by the Association of Southeast Asian Nations (ASEAN): Singapore, Malaysia, Indonesia, the Philippines, Thailand, Vietnam, Cambodia and Myanmar. Grab announced on March 26, 2018, that it would acquire control of these Southeast Asian businesses in exchange for a minority 27.5 percent stake in the combined firm. Although Grab appears not to have anticipated needing pre-closing merger control review prior to implementation, close scrutiny by the antitrust authorities in Singapore, Vietnam, the Philippines, Indonesia and Malaysia has raised significant complications relating to deal completion.

Singapore has proposed a significant fine and potential divestitures, while the other regulators are contemplating additional remedial action that could materially impact the value of the transaction. Moreover, the ASEAN antitrust authorities have now publicly stated they plan to closely monitor future conduct and price increases going forward. This robust regional enforcement activity should raise flags for other global businesses considering acquisitions or joint ventures with significant activities in Southeast Asia.

Singapore: Fines of US$9.5 Million and Proposed Divestitures

While merger filings to the Competition and Consumer Commission of Singapore (CCCS) are technically voluntary, the CCCS can fine parties up to 10 percent of their turnover in Singapore if it finds that they have implemented without approval a transaction that substantially lessens competition.[1] The CCCS used this fining power for the first time on July 5, 2018, proposing total fines of SG$13 million (US$9.5 million) because the parties "carried the Transaction into effect despite having anticipated potential competition concerns" and "caused a substantial lessening of competition" in the ride-hailing service platform market in Singapore. The CCCS has also proposed remedies to remove exclusivity obligations on Grab drivers and to force a sale of certain assets to a potential competitor. Grab has indicated that it will appeal the decision.

Vietnam: Continuing Investigation With Preliminary Findings Against Grab

Vietnam has a mandatory pre-closing merger control regime, requiring notification if (i) the parties' activities or products overlap in Vietnam; and (ii) the combined market share of the parties in the relevant market in Vietnam is 30 percent or above. The Vietnam Competition Authority (VCA) has the power to impose fines of up to 10 percent of the parties' combined turnover in Vietnam if it finds the parties failed to file relevant transactions for review or implemented a prohibited transaction without approval.[2]

Grab elected not to notify the transaction to the VCA, on the grounds that the post-merger combined market share would be below 30 percent. The VCA announced that Grab did not provide satisfactory evidence to support this claim and launched a

[1] Sections 1.2 and 2.1 of CCCS Guidelines on the Substantive Assessment of Mergers 2016; Section 11.3 of CCCS Guidelines on the Major Competition Provisions 2016.

[2] *Id.* at Article 118.

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preliminary investigation in which it found that the transaction would lead to a combined market share of 50 percent or higher and could be considered a prohibited transaction. The VCA has now initiated a formal investigation, the outcome of which could include fines or proposed divestitures relating to the transaction.

Philippines: Contradictory Orders From National Regulators

In the Philippines, the transaction has resulted in contradictory orders from two different national regulators. On April 6, 2018, the Philippine Competition Commission (PCC) issued interim measures requiring preservation of the status quo (*i.e.*, preventing integration) pending PCC review of the acquisition. Just a few days later, however, the Philippines Land Transportation Franchising and Regulatory Board issued a conflicting order requiring Uber to end operations by April 16, 2018, because Uber's accreditation had expired. Grab subsequently stopped financing Uber's operations, leading the PCC to find the parties in violation of its interim measures order and demanding an explanation for the failure to comply. Indeed, the PCC noted that the burden of reconciling conflicting orders lay upon the parties and not the regulatory bodies. The PCC can impose daily penalties from PH$50,000 (US$950) to PH$2 million (US$38,120) for violating an interim measures order, although it has not issued a final decision yet in this case.

In a May 28, 2018, statement of concerns, the PCC found that Grab's post-merger market share would be 93 percent and found compelling grounds that the transaction would give Grab a "virtual monopoly of both the driver and customer base after the merger."[3] Grab has since proposed remedies, and the PCC is evaluating the proposal. The chairperson of the PCC, Arsenio M. Balisacan, has indicated that the PCC may still require Grab to sell Uber's local assets.

[3] PCC's press release on May 28, 2018, "PCC Flags Competition Concerns in Grab-Uber Transaction."

Indonesia and Malaysia: Notification of Transaction Not Required, but Authorities Will Now Closely Monitor Future Conduct

Indonesia's Business Competition Supervisory Commission (KPPU) agreed that a post-merger notification of the transaction is not required, because the transaction did not involve a notifiable acquisition of shares but was instead limited to a sale of assets. While asset sales are not currently notifiable in Indonesia, pending legislation would eliminate this exemption in the near future (and would also convert Indonesia's merger control regime from a post-closing review to a pre-closing review). Similarly, while the Malaysian Competition Commission (MyCC) does not currently have a merger control regime under its existing laws, the MyCC saw the local import of the transaction as so compelling that it will now contemplate instituting such a regime in the near future. In the meantime, both the KPPU and MyCC have indicated that they will closely monitor Grab's post-transaction conduct in these jurisdictions and police future pricing activity and potentially anti-competitive behavior closely.

Conclusion: ASEAN Antitrust Regulators Are Moving to Robust Merger Control Enforcement

Grab sought to implement a transaction with potentially material competition concerns without engaging with the relevant antitrust authorities in certain key areas of operations. However, ASEAN competition regulators have become more confident and experienced over the past few years, with agencies in Singapore and the Philippines moving toward robust enforcement, and even more recently invigorated authorities such as those in Vietnam, Indonesia and Malaysia have begun to take more active roles. Other multinational firms considering acquisitions or joint ventures with significant activities in Southeast Asia must now carefully account for this increased enforcement of the ASEAN antitrust authorities in deal planning, structure and strategy going forward.

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