Bird & Bird & A Year in Review

Competition Law in Asia Pacific: Highlights from 2016 and what's coming next in 2017

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Regional overview

The enactment of competition laws in the region continues to grow. 2016 saw the newest competition authorities on the block find their feet as they started to educate the community and businesses and enforce their national competition law.

The 6th ASEAN Competition Conference in August 2016 identified that while nine ASEAN states in the region have implemented competition laws, there is still a need to strengthen the capabilities of the antitrust authorities to detect, investigate and deter cartels in the region. This includes working on closer cooperation between the national competition authorities to effectively combat domestic and international cartels.

So, the foundations for effective national competition regimes and regional cooperation continue to be laid. While 2015 saw a number of jurisdictions in the region enact competition laws for the first time, 2016 saw the Hong Kong Competition Commission and Philippine Competition Commission through their first year. 2016 also saw the Malaysian Competition Commission take steps to reform its relatively new competition laws while the country also enacted industry specific competition laws when it introduced specific competition laws in the aviation industry and set in motion steps to strengthen competition laws in the gas industry. These developments introduce merger control in the aviation sector (which is not currently a feature of the general competition law) and a third party access regime for the gas industry. The Singapore Competition Commission, meanwhile, has revised a whole suite of guidelines to reflect the changing landscape and international best practices. And not to be outdone in a year of firsts, the Australian Competition and Consumer Commission successfully brought its first criminal cartel case in 2016. The enforcement of China's competition regime is slightly more predictable as the competition agencies endeavour to become more transparent and publish more guidelines. However, China continues to exert its position as the dominant player in the Asia Pacific region which is felt by its record breaking fines.

We expect that 2017 will see greater regional cooperation, and that as a first step, this will involve agencies continuing to put in place regional cooperation arrangements on competition law and policy. We also expect the competition agencies to step up enforcement as they continue to receive more support and resources to fight unlawful conduct that damages competition in the region. This is likely to see businesses face action from more than one competition agency, requiring them to juggle multi-jurisdictional investigations.

In this publication we take a look at some of the more significant competition law events in the region in 2016 and anticipate the likely course which competition law will take in a number of key jurisdictions throughout 2017.

The region in depth

Australia

The ACCC's year in court: new cases and appeals

The Australian Competition and Consumer Commission (**ACCC**) was very active in its enforcement efforts in 2016, cracking down on illegal conduct but also pushing the boundaries in marginal cases. It has had a mixed record of success. The ACCC appealed a number of the cases it lost in 2016. Of these it won a significant High Court appeal in the Flight Centre case which held that parties in an agency relationship could, in some circumstances, be competitors. As a result Flight Centre was found to have engaged in attempted price-fixing.

Australia's first criminal cartel case was filed this year

Australia introduced criminal cartel provisions in 2009. After a slow start, the ACCC foreshadowed that 2016 would be the year it sought its first set of criminal sanctions for cartel conduct. It did not disappoint, with its first case brought to court in July 2016, another in November 2016, and with more to come. The ACCC has reported it has 10-12 ongoing criminal investigations and its goal is to file one to two criminal cases per year.

The ACCC's first case involved a number of global shipping companies that transport vehicles, including cars, trucks, and buses, to Australia. It had been investigating this case for a number of years and finally laid criminal cartel charges against Nippon Yusen Kabushiki Kaisha, which subsequently pleaded guilty to the charge. The ACCC similarly charged Japanese-based company Kawasaki Kisen Kaisha for criminal cartel conduct and is continuing to investigate other alleged participants.

Businesses operating in Australia should certainly be put on notice that cartel conduct is a criminal offence and the ACCC is now actively pursuing criminal cases.

ACCC appeals lost cases to clarify fundamental competition issues

The ACCC has not been deterred by a recent string of losses. It has appealed most of the significant decisions it has lost this year, some of which we are still awaiting the outcome. Some of the appeals include:

- The Flight Centre case which the ACCC appealed to the High Court to settle the position of how Australian competition laws apply in the context of agency relationships – the High Court held that Flight Centre, despite the agency relationship between the parties, could and did compete with the airlines for the supply of international airline tickets to customers. It's attempts to get the airline to agree to stop selling tickets at prices lower than the amount it was required to remit back to the airlines amounted to an attempt to price-fix. This decision will have wide implications for businesses with dual distribution models, price parity clauses, most favoured nation clauses, price-beat guarantees and general communications between suppliers and distributors concerning their terms of supply.
- The Pfizer decision in which the ACCC appealed to the Full Federal Court on issues relating to misuse of market and exclusive dealing concerning Pfizer's cholesterol lowering drug Liptor. The ACCC appealed this case to seek clarity matters to determine market power and anti-competitive purpose. We are still awaiting this judgment.
- The Australian Egg Corporation Limited decision, to clarify what issues will and will not constitute an 'attempt' to induce cartel conduct. We are still awaiting this judgment.

ACCC pursues penalties that are not just 'a cost of doing business'

Businesses should expect to pay multi-million dollar penalties for serious, deliberate and repeated breaches of the law.

The ACCC is pushing for penalties that are not just seen as a cost of doing business.

The ACCC has appealed a number of cases to seek higher penalties than what was awarded. These penalties include:

- The AUD17.1 million penalty imposed on Cement Australia which the ACCC argues is 'manifestly inadequate' and not of appropriate deterrent value – the ACCC had sought penalties of more than AUD90 million. We are still awaiting this judgment.
- The AUD1.7 million penalty imposed on Nurofen for making misleading representations about the suitability of particular pain relief products for various pain conditions – the ACCC had sought penalties of AUD6 million. The ACCC was successful in this appeal and awarded AUD6 million in penalties.
- Reflecting on the ACCC's court enforcement activities in 2016, businesses should expect the ACCC to continue to test boundaries, seek higher penalties if these are not awarded at the first instance, and to pursue its case through to the highest court in Australia.

Industries that featured regularly in 2016 included banking and agriculture

Innovation and accountability in the banking sector

Banks featured regularly on the Australian competition and regulatory landscape in 2016 which has led to calls for closer scrutiny of the banking industry to ensure sufficient competition and increased accountability. This included a recommendation, which came out of a banking inquiry, that a banking tribunal be established by mid-2017 and banks be required to open access to customers' data by 2018.

Some of the key competition issues in the banking industry that arose in 2016 were:

- *Calls for an open data regime* – One of the main recommendations that came out of the Banking Inquiry was that banks "be required to develop a binding framework to facilitate the sharing of data making use of application programming interfaces (**APIs**)". This follows moves by the UK regulator, the Competition and Markets Authority, to force lenders to open their data and systems up to third parties to boost competition, especially from non-banks. Regulators in Germany, Singapore and the United States, where open data APIs are not mandated, are also pushing the banks to create more open standards. If open data APIs are adopted in Australia, banks will be forced to give up proprietary information - their customers' transaction histories - to other banks and fintechs. Another recommendation of the inquiry is that the ACCC establish a team to make recommendations to the Treasurer on how "to improve competition in the banking sector". We expect the banking industry will continue to feature in 2017.
- *Digital wallets* – Australian banks want access to Apple iPhone's tap-and-pay technology to allow them to offer their own integrated digital wallets to iPhone customers in competition with Apple's digital wallet (ie without using Apple Pay). The banks sought authorisation from the ACCC to collectively bargain with and boycott Apple on Apple Pay. In November 2016, the ACCC issued a draft determination proposing to deny authorisation. The ACCC is concerned that granting authorisation would reduce competition between the banks in the supply of mobile payment services for iPhones and distort competition between mobile operating systems. A final determination is due next year. Until recently ANZ was the only bank to have reached an agreement with Apple to enable its American Express card holders to use Apple Pay. In November 2016, Cuscal Ltd reached agreement with Apple, on behalf of 31 issuers, to offer Apple Pay.
- *Rate-fixing* – Australia was not immune from the swathe of price-fixing and manipulation allegations that have swept the banking industry globally. The ACCC brought proceedings in the Federal Court against ANZ and Macquarie Bank for attempted rate-fixing. The banks admitted that some of their traders used the Bloomberg and Reuters chat rooms to try and control the benchmark rate for the Malaysian ringgit. The court imposed penalties of AUD9 million and AUD6 million respectively.

- *Start-up acquisitions* – In late October 2016, Rod Sims, Chairman of the ACCC, queried whether Australia needs new laws to allow the ACCC to look at a company buying up a string of start-ups as opposed to only being empowered to consider all acquisitions individually. Using the example of fintech start-ups to disrupt banks, he argued that it was eminently logical that a larger player buying a currently "miniscule but innovative" player could have a case to argue regarding competition concerns.

Competition in Australia's agricultural supply chains

The ACCC received specific funding in 2016 to establish an Agriculture Enforcement and Engagement Unit. The unit's purpose is to examine competition and unfair trading issues in agricultural supply chains.

In keeping with its agricultural enforcement priorities for 2016, the ACCC:

- conducted a market study into the cattle and beef industry (not yet completed);
- commenced an inquiry into the competitiveness of prices, trading practices and the supply chain in the Australian dairy industry (final report due in November 2017);
- worked with participants in the horticulture and viticulture industries to educate them and to also understand particular competition and fair trading issues faced by these industries.

What's next for Australia in 2017?

Implementing recommendations from the Harper Review

The final report of the Harper Review (published in March 2015) proposed various changes to the *Competition and Consumer Act 2010* (**CCA**), including the controversial introduction of an effects test into the misuse of market power provision.

After rounds of extensive consultations over the course of 2016, a Bill amending the misuse of market power test to include an effects test was introduced on 1 December 2016 – this law will prohibit a company from engaging in conduct with the purpose, effect or likely effect of substantially lessening competition in market in which it directly or indirectly participates. With the strengthening of the general misuse of market power prohibition this Bill proposes to remove the telco-specific laws. The telco-specific laws were always intended to be transitional and the enforcement mechanisms under these specific sections have rarely been used in the last decade.

The remaining proposed amendments to the CCA have been set out in an Exposure Draft Bill which is expected to be introduced into Parliament in early 2017. This draft proposes a number of changes including:

- Amending the definition of competition so that it incorporates imports and potential imports;
- Broadening the exceptions for joint ventures and vertical trading restrictions;
- Repealing the price-signalling prohibitions that currently only apply to the banking sector;
- Introducing a 'concerted practices' prohibition;
- Removing the per se prohibition that applies to third line forcing so that it is only unlawful if it has the purpose, effect or likely effect of substantially lessening competition; and
- Extending the notification process to resale price maintenance.

Australian Consumer Law Review

An in-depth review of the Australian Consumer Law kicked off in March 2016 and a final report is expected by March 2017. At this stage it is unclear as to what changes to the Australian Consumer Law may be recommended.

Intellectual Property Review

The Productivity Commission's final report which was made public in December 2016 recommended that commercial transactions involving IP rights be subject to competition law, which if taken up, will mean a repeal of the current exemptions under the *Competition and Consumer Act 2010*. The report also recommended that the restrictions on parallel imports be removed by the end of 2017.

Unfair contracts regime now applies to business-to-business dealings

The unfair contracts regime now applies to B2B dealings where one of the businesses employs less than 20 people and the contract is worth up to $300k in a single year or $1 million if the contract runs for more than a year.

Businesses that use standard form contracts for dealings with other businesses that vary, renew or enter into a new contract from 12 November 2016 will be subject to the new laws. The ACCC is now enforcing these new laws and has already worked with a range of businesses to amend their standard form contracts to comply with the new law.

China

China maintains strong enforcement presence in 2016

Following on from a record setting year in 2015, China's competition enforcement authorities have been more active in 2016 than ever before. Marked by increased antitrust investigations and the release of further interpretive guidelines, China's competition regime continues to develop as its position as the dominant player in the Asia Pacific region strengthens.

In early 2016, the Price Supervision and Anti-monopoly Bureau of China's National Development and Reform Commission (**NDRC**) outlined key antitrust enforcement priorities for 2016. These included a focus on pharmaceuticals, medical devices, auto parts, as well as industrial materials in 2016. In service-related areas, the NDRC indicated it would pay close attention to shipping, telecoms and finance.

The NDRC released its enforcement priorities to promote greater transparency in the interpretation and application of the nation's Anti-Monopoly Law (**AML**). To further assist in this process, a number of draft legislative guidelines were implemented in the first quarter of 2016. For example, the Draft IP Guidelines, the Guidelines on Anti-Monopoly in the Automobile Industry, the Guidelines for Leniency Application in Cases concerning Horizontal Monopoly Agreements, the Guidelines on Commitment and the Guidelines on the Exemption Procedures for Anti-Monopoly Agreements have all been implemented. These are the six draft guidelines issued by the NDRC so far and are expected to be promulgated by the Anti-Monopoly Commission of the Chinese State Council (**AMC**) once they are finalised.

On the enforcement front, the Chinese competition enforcement authorities concluded a number of large investigations in 2016. For example:

- China's State Administration for Industry and Commerce (**SAIC**) concluded its investigation into the activities of Tetra Pak in the food packaging industry which commenced in January 2012, fining Tetra Pak 668 million yuan for abusing its dominant market position.
- NDRC fined US medical device manufacturer Medtronic 118.5 million yuan for breaching resale price maintenance (**RPM**) provisions.
- China's Ministry of Commerce (**MOFCOM**) approved of Anheuser-Busch InBev's acquisition of SABMiller.

These developments mark significant strides in the development of China's competition regime, indicating a greater move towards transparency and uniformity with other jurisdictions in the Asia Pacific region and beyond.

Investigations and decisions

Tetra Pak

SAIC published its long awaited decision ending its five year investigation against global packaging giant Tetra Pak on 16 November 2016. The case concerned aseptic carton packaging of liquid food products. In its decision, SAIC identified three relevant product markets, concluding that Tetra Pak had a dominant position in each. SAIC cited Tetra Pak's high market share and its ability to influence the markets in which it was engaged as among a variety of other factors in its decision.

SAIC found that Tetra Pak engaged in:

- tying-in practice by requiring customers to purchase / use Tetra Pak packaging materials together with packaging equipment or technical services provided by Tetra Pak;
- limiting trade counterparts by restraining raw material suppliers from conducting business with those in competition with Tetra Pak; and
- imposing a loyalty rebate policy for its packaging materials that unlawfully extended Tetra Pak's market power into areas that competitors were not able to compete.

The findings against the loyalty rebate scheme are of particular significance because the AML does not expressly state this type of conduct as a form of abusive conduct. This decision marks the first penalty against a rebate scheme in China's competition history.

In its assessment, SAIC took a qualitative approach and conducted economic modelling in analysing Tetra Pak's loyalty rebate scheme. It found that the loyalty rebate policy would foreclose competitors in the short term and would make it impossible for competitors to compete on the same or similar cost basis in the long term. In this case, the loyalty rebate scheme was held to fall under the definition of the "other types of abusive conducts" under the AML's catch-all provision in Article 17.

SAIC fined Tetra Pak 668 million yuan, one of SAIC's highest antitrust fines to date.

Medtronic

The NDRC fined US medical device manufacturer Medtronic 118.5 million yuan for RPM in December 2016. The NDRC found that Medtronic had entered into illegal agreements with distributors and local partners regarding the sale of cardiovascular and diabetes related medical devices. The conduct was said to have affected resale prices to hospitals and involved the implementation of territorial restrictions and other conduct designed to strengthen restraints in trade.

This decision should bring greater transparency to China's high-value and implantable medical device markets which the NDRC considers currently lacks full and open competition. This decision ultimately reinforces the recent trend in China's competition regime to target RPM, particularly in the healthcare sphere.

Anheuser-Busch InBev acquisition

In recent years, China's merger control system has made significant inroads in aligning itself with the approach taken by other jurisdictions in the Asia Pacific region. Despite this, staffing shortfalls and the particularities of the country's antitrust law have been noted to create obstacles to true convergence. These issues are most obvious where MOFCOM has blocked or prevented mergers that have been approved in every other jurisdiction in which the merger was filed.

In recent years MOFCOM has worked to improve its merger control practices and has added a fast-track clearance process for uncomplicated deals. Further, MOFCOM has converted its pre-merger negotiation division into another team of case reviewers. These gradual changes are allowing for the review of mergers at a greater speed, evidenced by MOFCOM's approval of Anheuser-Busch InBev's (**AB InBev**) acquisition of SABMiller in July 2016, subject to selling SABMiller's stake in a local beer maker.

AB InBev operates in China's beer market and is one of the key players in the industry. MOFCOM originally concluded that the deal would reduce competition in the market, heighten entry barriers and harm the interests of downstream distributors due to the latter's lack of bargaining power, and therefore rejected the proposal.

To achieve MOFCOM's conditional approval, AB InBev agreed to sell SABMiller's stake in China Resources Snow Breweries. MOFCOM agreed that the sale of SABMiller's stake would relieve the merger of any anti-competitive consequences.

What's next for China in 2017?

Overview

China has undergone tremendous developments in its competition law and enforcement practices since the AML entered into force in August 2008. Enforcement, transparency, and the body of published secondary implementing rules and regulations have continued to grow in 2016. This is leading to more predictability in Anti-Monopoly Law enforcement in the Asia Pacific Region.

Inevitably, these developments will continue in 2017 as China seeks to balance its AML enforcement between its national industrial interests and the desire to attract direct foreign investment and be an attractive trade partner.

Cooperative Focus

China's enforcement agencies have entered into a variety of Memorandums of Understanding with counterparts in several jurisdictions, including Australia, Canada, the US and the UK. It signals a desire for China to approach competition issues from an international perspective, which is becoming increasingly important in today's global society.

According to the NDRC, China intends to further expand and deepen the international cooperation between nations in 2017, and to improve the effects of cooperation. Such developments follow the conclusion of the 2015 record setting Qualcomm investigation which saw the NDRC and the Korea Fair Trade Commission (KFTC) share resources and data.

China's enforcement bodies are interested in further developing relationships with other jurisdictions, particularly those in the Asia Pacific, enabling it to stamp out and deter businesses from engaging in anti-competitive conduct more effectively. We expect to see multijurisdictional antitrust investigations in 2017, where heavy penalties can be expected for those who breach the AML as well as in other countries where similar conduct occurs.

Enforcement Priorities

The NDRC is increasingly publishing its enforcement priorities at the beginning of each year. We expect that 2017 will be no different with an enforcement priorities announcement due in the first quarter of the year.

In line with recent publications and announcements, it can be expected that China's enforcement bodies will continue to focus on the automobile, auto parts and pharmaceutical industries. It has also been made clear that China will crack down on the production and sale of counterfeit products.

In the meantime, the NDRC intends to widen case sources and encourage more whistle-blowers to report any information pointing to a potential AML violation. To facilitate this, the NDRC has said that they will improve China's reporting systems.

Five Year Plan

China's 13th Five-Year Plan was released in December 2016 and sets forth China's strategic intentions and defines its major objectives, tasks and measures for economic and social development for the coming years.

Of particular significance, China's Five-Year Plan sets out the objective of abolishing all regulations and practices that impede the promotion of a unified market and fair competition. Over this period, China's competition enforcement bodies are tasked with refining policies to promote competition, improve market competition regulations, and implement a review system for fair competition. To achieve this we expect a number of changes to the AML will occur in 2017.

Hong Kong

The Competition Ordinance: one year on

2016 marks the first full year since Hong Kong's Competition Ordinance (Cap.619) (**Ordinance**) came into force. It has been an important year for the development of competition law in Hong Kong.

The Hong Kong Competition Commission (**HKCC**) has undertaken a wide range of activities ranging from formal industry and sector investigations to law enforcement actions, the handling of block exemption applications and conducting market studies. The HKCC has also released a number of publications and completed public campaigns and advocacy work throughout the year. The HKCC is yet to bring an action before the Competition Tribunal but has foreshadowed that it expects to announce its first case in early 2017. It has opened 13 in-depth investigations.

There is also a notable case before the High Court that has raised issues of competition law (among other matters). This case will play an important role in shaping legal developments in this area in relation to standalone private enforcement actions as individuals do not currently have a right to bring actions for breaches of the Ordinance, only the HKCC does. The Ordinance only provides for a statutory follow-on cause of action once the HKCC has successfully brought a claim before the Competition Tribunal and all rights of appeal have been exhausted.

The HKCC in action

HKCC's enforcement efforts in a nutshell

Prior to the full commencement of the Ordinance, the HKCC undertook a comprehensive review of the published practices of more than 350 trade and professional associations. The HKCC identified and engaged with over 20 of these associations whose published practices and / or aspects of their codes of conduct were considered to be at high risk of contravening the Ordinance.

The HKCC has reported that, as a result of the HKCC's engagement efforts, most of the associations which it contacted have taken steps to comply with the Ordinance. These steps have included removing price restrictions, recommended fees or fee scales, removing recommended agent commissions, removing daily reference prices (for gold and other jewellery) and revising codes of practice for their members.

Following on from this review the HKCC has also strongly urged two professional associations, the Hong Kong Institute of Architects (**HKIA**) and the Hong Kong Institute of Planners (**HKIP**), to rectify potentially anticompetitive practices which it considers raise serious competition law risks for their members. These associations are exempt statutory bodies under the Ordinance but their members are not exempt. Both associations publish codes of conduct on their websites, which restrict their members' freedom to set their own fees and take on clients. These codes ultimately prevent price competition among architects or among planners in Hong Kong. The HKCC announced that it will refer the two associations to the Competition Policy Advisory Group (**COMPAG**) if there is no clear indication that genuine action to respond to the KHCC's concerns is underway by January 2017. The HKIA has stated it will be taking steps to fully comply with the law.

Dawn raids

In or around August 2016 the HKCC conducted its first dawn raid which targeted the technology sector for suspected bid rigging activities. Nutanix (a US-listed software company) was one of the companies investigated. By late October 2016, the agency announced it had conducted six dawn raids. We are yet to see whether these raids will give the HKCC the information it needs to bring its first action in the Competition Tribunal.

Further dawn raids may take place in 2017, although it remains to be seen whether or not the HKCC will publicise it during or after the crackdown as its overseas counterparts would do.

Market studies and public campaigns

Bid-rigging has been a matter of grave public concern, particularly in the local residential building renovation and maintenance market, following a high profile Court case which received wide media coverage. This caused homeowners to pay more for repair works on their residential buildings, and to put up with poor quality or delayed work.

The HKCC undertook a study into certain aspects of the market regarding bid-rigging, releasing its findings in May 2016. The result of the study is consistent with the widespread concern that bid-manipulation practices were prevalent in the local residential building renovation and maintenance market. The HKCC called upon market participants

to bid for projects on a competitive basis and to refrain from engaging in bid-rigging.

The HKCC launched the "Fighting Bid-rigging Cartels" campaign to promote public awareness of the subject and to educate the public and market participants regarding the prohibitions on bid-rigging.

Separately, the HKCC has been undertaking a study into the auto fuel market, and is expected to release its results in due course. However, the HKCC has not disclosed any details of this market study to date.

Block exemption applications

In response to an application for a block exemption order by the Hong Kong Liner Shipping Association (**HKLSA**), the HKCC published a proposed block exemption order in respect of certain liner shipping agreements. The application concerns exemptions covering both vessel sharing agreements and voluntary discussion agreements.

The HKCC's proposed block exemption order reflects a proposed tight regulatory approach as it would only apply to a category of liner shipping agreements where the combined market shares do not exceed 40 per cent.

The HKCC is conducting public consultation on the subject and has invited interested parties to submit representations by 14 December 2016.

First lawsuit to involve competition arguments based on the Ordinance

There is no right to private standalone enforcement action in Hong Kong as the law limits private lawsuits to follow-on actions. This means that individuals and companies need to wait for the HKCC to successfully take action in the Competition Tribunal and for all rights of appeal to be exhausted before being able to seek damages.

Nevertheless, there is a case before the High Court that is set for hearing in February 2017 which, in part, raises competition law issues. This case, which concerns a general tort claim, is likely to become precedent for private standalone actions if the Ordinance is discussed and taken into account in the judge's decision.

The case involves Loyal Profit International Development (**LPID**), a travel agency, which commenced a civil action against the Travel Industry Council of Hong Kong. LPID claims that one of the Council's directives relating to an exclusionary list of shops to which the travel agencies can bring tourists is anticompetitive and in breach of the Ordinance.

2016 in summary

2016 has been a year of developments in the competition law arena as the regulator has started to enforce the law in earnest and businesses, stakeholders and the general public are adapting to the new way of life with the Ordinance now in force.

The first year of the Ordinance has shown that the HKCC has, in addition to its educational role, taken active steps on investigations and enforcement. Businesses should stay alert to news and updates in this area, in particular the various publications and press releases of the HKCC and the latest Court decisions. Active compliance steps should also be taken, including internal checks and implementation of appropriate policies, to ensure full compliance with the Ordinance.

What's next for Hong Kong in 2017

The HKCC is set to lose two more key executives in 2017 which will result in a wholesale reshuffle of top executives since the agency's inception. This follows a swathe of departures in 2016.

Rose Webb (CEO, formally Senior Executive Director) and Timothy Lear (Executive Director of Operations) will not be renewing their contracts in 2017 for family reasons. Stanley Wong (Rose Webb's predecessor) stood down in March 2016 for health reasons and sadly passed away soon after. The agency has also lost two chief economists in quick succession. On top of this, the HKCC has also experienced sustained losses of mid-level officials across all three branches of its executive arm.

The change in top executives combined with the loss of mid-level officials presents challenges for the 10 in-depth investigations it is said to be running. It also questions the continuity of enforcement and knowledge within the agency.

The HKCC needs to show some record of success soon and 2017 is highly likely to be the year it will bring its first case to the Competition Tribunal. It has a few cartel cases it is investigating to choose from, one which reportedly concerns bid-rigging. Since private parties have to rely on a decision from the Competition Tribunal before they can seek damages, there is pressure on the HKCC to bring

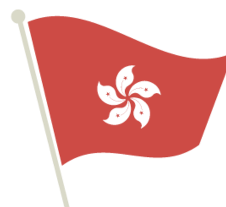
such cases where private parties are harmed by breaches of the Ordinance.

On this issue, we anticipate there will be debate at the Legislative Council in 2017 to include a right in the Ordinance for private standalone action following a request from one of Hong Kong's biggest political parties. Interestingly, the High Court has not rejected a case which raises competition law issues (among others) considering there is currently no right to private standalone action. This case has been set down for hearing in February 2017 and will become a precedent for how private standalone actions for transgressions of the Competition Ordinance are understood in Hong Kong.

Despite the internal challenges the HKCC is facing, it has indicated that it will be bringing its first action before the Competition Tribunal in early 2017 and that it expects to bring two to three cases a year, which is the most its funding will allow at this stage. The HKCC will be facing financial deficits at the end of this and the next financial year, based on litigation estimates, but states it has the government's support and surpluses from previous years to support its pursuit of these priority cases.

In 2017 we expect the HKCC will take steps to get its house in order following the loss of key personnel and to continue to build on its enforcement efforts, culminating in it bringing a couple of cases before the Tribunal in 2017.

We may also see increased cooperation with other law enforcement agencies and overseas regulators as the HKCC recently added another partner to its list having signed a MoU with the Canadian Competition Bureau in December 2016.



Malaysia

The course taken by the Malaysian Competition Commission in 2016

Landmark decision by Competition Appeal Tribunal

The first decision by the Malaysian Competition Appeal Tribunal (**CAT**) since its inception more than four years ago caught the media and public's attention. The verdict overturned the Malaysian Competition Commission (**MyCC**) ruling that AirAsia and Malaysia Airlines (**MAS**) had colluded to share the market.

The case involves the country's two major carriers, MAS and AirAsia, who entered into a Collaboration Agreement together with AirAsia X Bhd as part of a short-lived share swap deal involving their major shareholders, Khazanah Nasional Bhd and Tune Air in 2011. The share swap was unwound in 2012.

On 31 March 2014, the MyCC ruled that MAS and AirAsia's Collaboration Agreement had violated the prohibition against market-sharing agreement under section 4(2)(b) of the Malaysian Competition Act 2010 (**Competition Act**) and imposed financial penalties of MYR10 million each. On 4 February 2016, the five members of the CAT, unanimously decided that the MyCC misinterpreted the Collaboration Agreement and failed to show there was a market sharing object.

This landmark decision of the CAT has provided some much sought after clarity on the interpretation of section 4(2) of the Competition Act. The CAT's decision will force the competition authority to address the cardinal issue whether there is an object to share market before attempting to rely on section 4(2)'s deeming provision. In other words, MyCC must establish an agreement restricts competition by object before it invokes the deeming provision.

MyCC has filed a judicial review application to the High Court against the CAT's decision. The judicial review application is pending disposal by the High Court.

Final decision against 4 container depot operators and an IT service provider who engaged in price-fixing and concerted practices

The MyCC issued a final decision against four container depot operators and an information technology service provider (Containerchain (Malaysia) Sdn Bhd) in the shipping and logistic industry for engaging in price fixing and concerted practices. The MyCC imposed financial penalties against those companies for a total of RM645,774.

Containerchain Malaysia has also given an undertaking to MyCC that it will, *inter alia*, reconfigure its system in order to ensure that it will not be used for any anti-competitive conduct and so that a container depot operator will be responsible to publish its own depot gate charges without the involvement of Containerchain Malaysia's personnel and the Containerchain system no longer administers the rebates (if any) from a CDO to a haulier for early payment.

Final decision against a provider of E-Government services for abusing its dominant position

MyCC issued a final decision against My E.G. Services Bhd (**MyEG**) for abusing its dominant position in the provision and management of online Foreign Workers Permit Renewal applications. It was found to have applied different conditions to equivalent transactions with other trading parties which harmed competition. MyCC imposed a financial penalty of RM307,200. MyCC also imposed an additional penalty of RM15,000 for each day MyEG did not comply with remedial actions which required MyEG to take positive action to ensure an efficient gateway for all insurance companies to sell the mandatory insurances. MyEG has filed an appeal to the Competition Appeal Tribunal against the MyCCs' decision. The appeal is pending disposal by the Competition Appeal Tribunal.

MyCC cleared Megasteel from abuse of dominance complaint

In 2012, MyCC initiated an investigation against Megasteel pursuant to a complaint lodged by its competitor. The complainant alleged Megasteel, an integrated steel producer operating in both upstream (HRC or hot rolled coils) and downstream (CRC or cold rolled coils) value chain, is selling the HRC at a higher price to the complainant. The complainant is a downstream CRC re-roller and a competitor to Megasteel's CRC arm.

Upon investigation, the MyCC issued a proposed infringement decision in October 2013 concluding in essence that Megasteel is a dominant enterprise in the HRC market and it has abused its dominant

position by charging a higher price for its HRC and imposing a low price for its CRC, the combination of which amounts to a margin squeeze. Such practice results in the inability of the CRC producer from making a reasonable margin or profit when they produce CRC from the HRC. MyCC then proposed to impose a financial penalty of RM4.5mil on Megasteel for infringing section 10(1) of the CA 2010.

After issuing the proposed infringement decision more than 2 years ago, the MyCC finally agreed to a non-infringement decision after carrying out careful reassessment of the case with more detailed information obtained through Megasteel's representation as well as further analysis by MyCC. In its final decision notice, MyCC determined that Megasteel has not infringed the abuse of dominant position prohibition under section 10 of the Competition Act.

Major investigations in the pipeline

The MyCC did not issue any infringement decisions in 2016 but a number of investigations are reported to be in the pipeline:

- The MyCC is in the midst of investigating seven local pharmaceutical firms for alleged anti-competitive agreements and abuse of dominant positions in the sector. The investigation is being conducted alongside the Health Ministry. The MyCC has found among others that some medical wholesalers had been charging different prices for the same medicines and that local and foreign pharmaceutical firms have attempted to monopolise medicine supplies.
- The MyCC is investigating a number of general insurance companies, including its association, for alleged anti-competitive agreements in relation to the automobile repair industry in Malaysia. The investigation involves commercial activities between workshops and general insurers in Malaysia particularly on trade discounts on part prices for certain vehicle makes as well as the labour rate paid to the workshops.

Malaysia is taking a staged approach to introducing competition laws, including merger control

Malaysia introduced a general competition law in 2011 but did not introduce a general merger control regime at this time. Since the new competition laws came into force, Malaysia has introduced competition laws specific to the aviation industry in 2016 and is set to strengthen the competition law regime in the gas industry in 2017.

Malaysia now has aviation-specific competition laws, including merger control

Malaysian Aviation Commission Act 2015 (**Aviation Act**) came into force on 1 March 2016. Malaysian Aviation Commission (**MAVCOM**) was also formally established on that same day.

The Aviation Act introduced aviation-specific competition laws that mirror those in the Competition Act but also introduced a merger regime specific to the aviation industry.

The voluntary merger regime prohibits mergers between enterprises which result, or is expected to result, in a substantial lessening of competition in any aviation service market. There are provisions for voluntary notification of an anticipated merger or a merger which has taken place together with an application for a decision by the Commission as to whether the anticipated merger or a merger which has taken place may be a prohibited merger. For this purpose, the following are considered as a 'merger' under the Malaysian Aviation Commission Act 2015:

- two or more previously-independent enterprises merge into one;
- one or more individuals or enterprises acquire control of another enterprise;
- an enterprise acquires assets of another enterprise which results in the former enterprise replacing the latter in the business; or
- a joint venture created to perform, on a lasting basis, all the functions of an autonomous economic entity.

A party to an anticipated merger may notify the Commission of the anticipated merger and apply to it for a decision. Guidelines for anticipated mergers have not yet been published.

Malaysia set to strengthen competition laws in the gas industry

The Parliament of Malaysia has enacted the Gas Supply (Amendment) Act 2016 to amend the Gas Supply Act 1993 for the implementation of third-party access (**TPA**) regime in an effort to enhance competition in the national gas supply industry.

Part VIA largely mirrors the Competition Act in terms of the prohibitions against anti-competitive

agreements, abuse of dominant position, the criteria to determine relief of liability for anti-competitive agreements, the provision granting individual and block exemptions, the leniency regime and the rights for a private action. The Energy Commission, similar to MyCC, may impose a financial penalty of up to ten percent of the enterprise's worldwide turnover over the infringement period.

The Amendment Act also established a Gas Competition Appeal Tribunal to regulate competition practices in the natural gas supply industry.

The Amendment Act is expected to come into force by stages next year.

What's next for Malaysia in 2017?

The MyCC has resolved to be more active in its fight against price-fixing so we may see some more cartel cases in 2017 as a result of these efforts.

In mid-2016, the MyCC sought public feedback on its proposal to make 14 amendments to the Competition Act and Competition Commission Act 2010. These proposed changes include empowering the MyCC to impose fees and charges for exemption applications, empowering the Competition Tribunal to determine who should pay for costs (and to what extent), adding a provision on registering the MyCC's decision as a judgment of the High Court so that it can be enforced as such. Public consultation closed on 31 July 2016 so we should expect to see what changes the MyCC will be seeking to make in 2017.

In 2017 we are also likely to see increased coordination between the MyCC and other national regulators that manage competition law issues, such as the Malaysia Aviation Commission (**MAVCOM**) and Energy Commission (**EC**). Both the MAVCOM and EC are developing competition guidelines for their respective industries which are expected to be published in 2017.

Philippines

Philippines' story only just unfolding

After an eventful maiden year marked by an ongoing legal battle concerning the country's highly concentrated telecommunications sector, the Philippine Competition Commission's (**PCC**) Chairman Arsenio Balisacan says the operation of the Philippines' competition regime is only just unfolding. It follows that the Philippines will continue to develop the scope and operation of the Philippine Competition Act (**Act**) as the two year period of grace draws nearer to close.

The PCC was officially established on 1 February 2016. The PCC is a single independent quasi-judicial enforcement body tasked with enforcing the Philippines' competition laws. To assist in this task, the PCC has handed down a number of supporting notes, decisions and circulars in 2016, aimed at supporting and guiding the regulator in the interpretation and application of the Act.

The PCC has also made significant inroads regarding the method of approval for various mergers and acquisitions. While the Act provides a grace period of two years from the provisions against anti-competitive agreements and abuse of dominance, the PCC has made a number of judgments concerning the merger provisions of the Act in 2016. In particular, the PCC is currently involved in a dispute with telecommunication giants PLDT and Globe Telecom, regarding their joint acquisition of Vega Telecom. In the latest development between the parties, the appellate court is considering the submitted arguments by all involved.

This investigation comes following the Government's crackdown on the telecommunication industry and has lead the Philippine National Telecommunications Commission (NTC) to consider auctioning unused and unassigned frequencies next year to open an industry currently dominated by PLDT and Globe Telecom.

These events mark significant developments in the country's first comprehensive antitrust regime, and signal a move towards greater uniformity with the approach taken by other nations in the Asia Pacific region.

Important developments

M&A Guidance and Interpretation

In February the PCC issued two circulars setting out merger control procedures under the Act. The first circular is of general application while the second relates specifically to merger and acquisition transactions involving companies listed on the Philippine Stock Exchange. Pursuant to the issued circulars, any transactions executed or implemented which meet the requisite threshold (i.e. merger or acquisition valued at more than one billion pesos) are required to be notified by way of a letter to the Commission.

The PCC also issued the implementing rules and regulations (**IRR**) of the Act on 3 June 2016. The IRR provides clarification on a number of key threshold provisions and mandatory reporting requirements concerning mergers. In addition, the PCC adopted clarification notes on two topics regarding the Act's merger control regime. Combined, the IRR and the clarification notes are intended to assist in the interpretation and application of the merger provisions of the Act.

In accordance with the latest developments, section 20 of the Act prohibits merger or acquisition agreements that substantially prevent, restrict or lessen competition in a relevant market. The Act gives the PCC power to review mergers or acquisitions having a direct, substantial and reasonably foreseeable effect on trade, industry, or commerce in the Philippines based on factors deemed relevant by the PCC.

For agreements exceeding one billion pesos, companies wishing to undertake M&A transactions must now complete a notification form, requiring disclosures on the group entities participating in the transaction, as well as details of the transaction itself. The acquirer must also now include a brief description of the transaction, which the PCC will publish upon adoption of its decision at the end of the first phase of its review. It has also been clarified that internal group restructurings that do not lead to a change of control do not require notification under the Act.

In terms of the competitive analysis undertaken by the PCC, the IRR and clarification notes stipulate that vertical relationships must now be considered in addition to horizontal overlaps among the transacting parties. Further, in determining whether a particular transaction would have market

implications contrary to the provisions of the Act, the PCC may consider the structure of the relevant markets concerned, the market position of the entities concerned, the actual or potential competition from entities within or outside of the relevant market, the alternatives available to suppliers and users, and any barriers to entry.

Reviews by the PCC will also be conducted having regard to potential unilateral effects, coordinated effects and the existence of competitive constraints in the market.

These developments are largely reflective of what would be undertaken in other Asia Pacific jurisdictions and signifies the Philippines' move towards greater uniformity in the region.

Mergers and the Vega Telecom Acquisition

On 22 August, the PCC approved its first acquisition transaction under section 20 of the Act. The approval saw Sanofi of the Consumer Health Care business acquire Boeheringer Ingelheim International, where the PCC noted that the acquisition would not result in a substantial lessening of competition in the relevant market. In total, the PCC has approved of eight acquisitions in 2016 out of a possible nine.

Of particular concern to the PCC was the proposed joint acquisition of Vega Telecom by PLDT and Globe Telecom. On 25 August, the PCC issued a Preliminary Statement of Concerns calling for a review of the acquisition, noting that the transaction may be expected to substantially prevent, restrict or lessen competition within a market in the Philippines for goods or services.

According to the Philippine Act, if a merger is consummated in the absence of a valid notification to the PCC, the parties involved are liable to pay fines of up to five percent of the value of the transaction.

The matter is currently proceeding through the courts, and the PCC has been temporarily halted from reviewing the acquisition until the arguments of all parties are heard by the Court of Appeals. The case concerns the legality of the PCC's review of joint acquisition. PLDT and Globe Telecom argue that the joint acquisition is 'deemed approved' under the PCC's transitory guidelines as long as it is consummated before the implementing rules and regulations are effective. The acquisition was signed four days before the implementing rules and regulations came into effect. On this basis PLDT and Globe Telecom argue the PCC has no further right of review. The PCC argues that the transitory provisions do not affect its authority to review the acquisition especially where national interest and public policy require it.

What's next for the Philippines in 2017?

End of grace period

Given that the two year period of grace will end by August 2017, the PCC is preparing to enforce the Act's administrative, civil and criminal penalties on anti-competitive business structures, conduct or practices. While a number of major inroads were made over the course of the year, particularly in regards to the application of the merger provisions, we expect further guidelines, decisions and regulations to be released by the PCC leading up to the end of the grace period. There is no doubt that more clarification and supplementary documentation concerning anti-competitive agreements and abuse of dominance will be made available in the first half of 2017 as the PCC readies itself to enforce the provisions of the Act.

Prioritisation and expansion

While the PCC continues to battle PLDT and Globe Telecom over its joint acquisition of Vega Telecom in court, the regulator has prioritised four other areas for investigation in 2017. The PCC has highlighted international shipping lines, the power sector, the cement sector and the agricultural sector as all requiring policy research and investigation. These sectors are said to have been identified by the PCC after receiving numerous complaints and letters pointing to questionable practices.

To achieve these objectives, the PCC plans to significantly increase its current staff (from 80 to 200) but acknowledges the difficult task of new recruits building up expertise on the Philippine competition law. Given the relatively short lifespan of the Act, coupled with an admitted absence of law and economics programs specific to the Philippines, the PCC is aware of the challenges ahead.

In wake of this, the PCC has scheduled two years' worth of in-country training from international experts. It is also seconding its staff to regulators in more experienced jurisdictions for training, as well as receiving institutional support from foreign counterparts and development partners such as the Asian Development Bank and World Bank.

Collective focus

The regulator has made it clear that competition laws are a shared concern and cut across issues that involve different sectors, different aspects of government and in some circumstances, different nations. The PCC hopes to continue to develop relationships with other regulators and government agencies to avoid conflicts and ensure cooperation in 2017 and beyond. This is likely to be reflected in the draft Philippine Development Plan 2017-2022 set to be released next month, from which the Philippines' National Economic and Development Authority (NEDA) is set to draft a national competition policy in conjunction with the PCC.

Companies conducting business in or affecting the Philippines should closely monitor advisory opinions, decisions and guidelines issued by the PCC and NEDA, as they become available, to ensure continuing compliance with the law.

Singapore

The Competition Commission of Singapore completes review and revises Guidelines

The Competition Commission (**CCS**) first issued its Guidelines in 2007, outlining how CCS would interpret, administer and enforce the provisions under the Competition Act.

Following public consultations in 2015 and 2016, the Guidelines have been revised to reflect the changing landscape and international best practices.

Some of the key highlights:-

Guidelines on Substantive Assessment of Mergers 2016

These newly revised guidelines:

- clarify when acquisition of minority shareholdings result in a reviewable merger;
- clarify that transactions by venture capitalists and private equity investors may raise competition concerns. Such transactions may result in coordination or conduct among firms in their portfolios in the same market in which they have stakes and are able to influence their commercial behaviour; and
- highlight indicative duration for non-compete clauses (based on previous merger cases) to be between two to five years.

Guidelines on Section 34 Prohibition 2016 (Anti-competitive conduct and agreements)

These guidelines caution that a horizontal concerted practice and possible infringement is likely to be found in agreements of a hub-and-spoke nature, even though the individual distribution agreements would otherwise be generally considered vertical agreements which may be exempt.

Guidelines on Section 47 Prohibition 2016 (Abuse of Dominance)

These guidelines indicate that a finding of dominance can be established at a market share below the indicative threshold of 60%.

Guidelines on Appropriate Amount of Penalty 2016

These guidelines state that the calculation of financial penalty based on an undertaking's relevant turnover will be the turnover for the financial year preceding the date when an undertaking's participation in an infringement ends.

Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016

Under these guidelines, if the CCS:

- has not commenced an investigation into the cartel, an undertaking is entitled to total immunity from financial penalties; or
- has commenced an investigation into the cartel, an undertaking does not qualify for total immunity but may still qualify for a reduction of up to 100% of the financial penalty.

Subsequent leniency applicants that cooperate and provide evidence of cartel activity may be entitled up to a 50% reduction of the financial penalty.

CCS continues to be the primary competition agency in Singapore but does not administer general consumer protection laws

While CCS is the statutory body tasked with administering the Competition Act, competition matters for certain sectors (such as electricity and gas, regulated telecommunication services, supply of piped potable water, and public transport to name a few) remain under the purview of their respective sectoral regulators. CCS will provide competition advice to such sectoral regulators and other public sector agencies to aid in investigations, enforcement and development of policies.

CCS continues to actively engage and cooperate with regional and international competition bodies, such as the International Competition Network, ASEAN Experts Group on Competition, and the APEC Competition Policy and Law Group.

In 2016, the Consumer Protection (Fair Trading) Act (CPFTA) was amended to name SPRING Singapore as the administering agency for the CPFTA. This is a clear demarcation of the roles of the competition authorities (CCS and the sectoral regulators) and the consumer protection agency (SPRING Singapore).

Notable Cases and Developments

The CCS reviewed a number of mergers and imposed fines for breaches of the Competition Act. It investigated the online food delivery industry,

conducted a market study on retail petrol and published a Special Report on Government Advocacy and Disruptive Innovations.

These notable cases and developments include CCC's:

- Revised Strategic Alliance between Cebu Pacific and TigerAir Cleared (September 2015) – revisions were made to address competition concerns raised by CCS;
- Clearance of proposed mergers and acquisitions:
  - Acquisition of Dupont's neoprene business by Denka and Mitsui (*May 2015*);
  - Acquisition of Sandisk Corporation by Western Digital (*January 2016*);
  - Merger of airfield light suppliers ADB BVBA and Safegate International AB after commitments are accepted (*March 2016*);
  - Financial penalties totalling more than S$900,000 imposed on 10 Financial Advisors for collectively pressurising a competitor to withdraw an offer (*March 2016*);
- Interim Findings from Retail Petrol Study (February 2016) – no interim evidence to suggest collusion of petrol pricing, high degree of pass-through of Mean of Platts Singapore price to consumers.
- Special Report on Government Advocacy and Disruptive Innovations (in conjunction with the International Competition Network Annual Conference):
  - Governmental and legislative entities at times do not regularly consider or assess the impact of their proposed policies on market competition;
  - Disruptive innovation is an area that is susceptible to defensive behaviour and aggressive lobbying by incumbents, resulting in increased pressure for prompt governmental or legislative intervention;
  - Due to the nature of the industry, there is a lack of data and extensive study on disruptive innovations.
- Investigation of Online Food Delivery Industry (August 2016) – CCS finds the industry to be currently vibrant and competitive but cautions that exclusive agreements risk infringing competition law.

What's next for Singapore in 2017?

CCS continues to monitor and investigate larger and more complex cases, while paying greater attention to start-ups and disruptive innovations with volatile market shares and fluid market definitions.

Recent reports and releases by CCS indicate regulatory concerns and interest in developments and challenges in the economy. Greater scrutiny is expected for developments in the digital and disruptive innovation spheres. M&A activity is expected to remain robust in 2017, and a steady flow of merger reviews are in the pipeline.

Bird & Bird in Asia Pacific

Our network in the Asia Pacific region comprises offices located in key business centres in Beijing, Hong Kong, Shanghai, Singapore, and Sydney. Our team of nearly 200 highly qualified and multi-lingual lawyers and legal professionals combines exceptional expertise with deep industry knowledge and refreshingly creative thinking to help clients achieve their commercial goals.

"They are very detailed and strong in considering the precautions which need to be taken across a wide range of potential issues. They are easy to work with and good at meeting deadlines."

"We feel they are undoubtedly a Band one firm."

Chambers & Partners Asia-Pacific

In addition to our regional network, we have expanded our geographical footprint in the region through a series of strategic and dynamic Co-operations Agreements which include Tay & Partners in Malaysia, K&K Advocates and Nurjadin Sumono Mulyadi & Partners in Indonesia, and Hwang Mok Park in Korea.

Our five regional offices and formal Co-operation Agreements, as well as strong links and extensive experience across the key technology rich, knowledge driven economies makes us particularly well placed to support our clients throughout the Asia Pacific and ASEAN nations.

We also have dedicated Steering Groups and have developed strong relationships with some of the most respected local law firms in jurisdictions where we do significant work for clients including Brunei, Cambodia, India, Indonesia, Japan, Korea, Laos, Macau, Malaysia, Myanmar, New Zealand, the Philippines, Taiwan, Thailand, Vietnam, and elsewhere in Asia Pacific

Explaining our Co-operation Agreements

We have established formal Co-operation Agreements (Co-ops) designed to help support our clients operating in countries where we don't have an office.

What is a Co-op?

From a client's perspective, Co-op firms are independent firms who are as close to a Bird & Bird office as we can get without integration. They are not part of Bird & Bird, but they are culturally close to Bird & Bird. They understand and embrace our sector approach, and they have been working with us for a long time in providing seamless and joined-up service.

A Co-op is an agreement that allows us to offer comprehensive legal services for multinational corporations operating in these markets.

A Co-op firm can be an excellent solution if you don't have a pre-existing law firm relationship: we have worked with the firm and trust them; they understand our approach and our passion for excellence in client services as well as our sector focused approach.

What are the benefits for clients?

- Co-ops allow us to offer comprehensive legal services for multinational corporations operating in the relevant jurisdiction.
- We work with each of our Co-op firms, with the intention that their client service levels and values align with our own, and to foster a commitment to provide our clients with first-rate advice.
- Co-op firms often share our sector focus, meaning they understand our approach and our passion for understanding our clients' businesses and sector challenges.

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