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REGIONAL COMPETITION REPORT 2020

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Overview

Dear Friends,

2020 has been an interesting year to say the least, with the COVID-19 outbreak changing the way we live, learn, work and play. One notable result has been the hastening of the shift towards e-commerce and platforms, a trend that many of the competition regulators in the region have picked up on and responded to, either by conducting market studies, issuing guidelines or conducting investigations in this area.

Competition enforcement and activity by the competition regulators in the region also remained high in the other traditional areas, such as merger review, cartel enforcement and investigations. We highlight several interesting cases, such as the Statement of Concerns issued by the Philippines regulator against a merger in the cement industry, with the parties eventually aborting the transaction; as well as the Thailand regulator's conditional approval of the acquisition of the local retail business of Tesco by the Charoen Pokphand Group, two dominant players in the retail and modern trade market. We also discuss the decision of the Singapore Competition Appeal Board in relation to the appeal lodged by chicken distributors for anti-competitive agreements, as well as the warning by the Malaysian regulators against exclusivity arrangements between telecommunication service providers and building developers/managers. Competition regulators have also issued various updates to their frameworks and policies, including the Indonesia regulator's introduction of implementing guidelines for merger review, as well as the Vietnam regulator's issuance of the much-awaited decree on merger notification thresholds.

What is clear is that many of your businesses would be impacted by these competition developments, and it is critical for businesses to keep abreast of these legislative and enforcement updates. Hence, we thought that a wrap of the Year in a 2020 Report touching on the countries that we have market leading presence in, i.e. across Southeast Asia, would lend a personal touch to better understanding the climate in each of the countries. We hope that our 2020 Report here is helpful to you, and we would be happy to discuss any of these updates in greater detail with you.

In 2020, we are pleased to say that various teams across our Regional Competition & Antitrust and Trade Practice have once again been recognised as stand-out market leaders in the work that we do, including most recently by Chambers Asia Pacific, which notes that we provide "*valuable advice on international law"* whilst also "*being well read in local practices."* We were also awarded the Behavioural Matter of the Year (Asia-Pacific, Middle East and Africa) by Global Competition Review Awards 2020, which is a huge win, given the impressive case load handled by other contending firms. This win also reflects the effectiveness with which Rajah & Tann Asia's Competition practice works across the region. These recognitions are only possible through the collaborations that we have with you as clients, working intimately together. As we do, we always seek to understand your business so as to provide you with the most legally apt, business centric response. To our colleagues-in-law(firms) across the world who readily engage and partner with us to assist your clients in this part of the world, we also owe much to. Thank you and we look forward to our continued relationships.

We look forward to interacting further with you in the coming year – please refer to the back of our report for some of our upcoming events and seminars.

Happy New Year!

The Rajah & Tann Competition & Antitrust and Trade Practice
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Our Achievements:
Practice Accolades

Rajah & Tann Asia has been named as a leading Competition Practice across several different jurisdictions across South East Asia by all of the major legal ranking journals, including but not limited to:

Global Competition Review 100 (GCR100) 2020	Chambers Asia Pacific 2021	The Legal 500 Asia Pacific 2020
 Assegaf Hamzah & Partners: **Elite** (since 2012) Rajah & Tann Singapore: **Elite** (since 2014) Christopher & Lee Ong: **Recommended**	 Assegaf Hamzah & Partners: **Band 1** Rajah & Tann Singapore: **Band 1** Christopher & Lee Ong: **Spotlight**	 Assegaf Hamzah & Partners: **Tier 1** Christopher & Lee Ong: **Tier 1** Rajah & Tann Singapore: **Tier 1** C&G Law: **Tier 2**
asialaw Profiles 2021	**In-house Community Firm of the Year 2019**	**ALB Indonesia Law Awards 2020**
 Assegaf Hamzah & Partners: **Outstanding** Rajah & Tann Singapore: **Outstanding** Christopher & Lee Ong: **Highly Recommended** C&G Law: **Recommended**	 Assegaf Hamzah & Partners: **Winner** Christopher & Lee Ong: **Winner** Rajah & Tann Singapore: **Winner**	 Assegaf Hamzah & Partners: **Winner** (Competition and Antitrust)

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Our Achievements: Individual Accolades

The members of our Rajah & Tann Asia Competition & Antitrust and Trade team have also been individually recognised in various legal ranking journals, including but not limited to:

Chambers Asia Pacific 2021 – Competition / Antitrust

Indonesia:
Rikrik Rizkiyana (Band 1)
Farid Nasution (Band 2)
Asep Ridwan (Band 2)

Singapore:
Kala Anandarajah (Band 1)
Dominique Lombardi (Band 2)

Malaysia:
Yon See Ting (Band 2)

Philippines:

Norma Margarita B Patacsil (Band 3 for Corporate/M&A including Competition)

Who's Who Legal - Thought Leaders: 2020 - Competition

Singapore:
Kala Anandarajah

Who's Who Legal – Global Leaders: 2020

Competition
Singapore:
Kala Anandarajah
Dominique Lombardi

Trade & Customs
Singapore:
Kala Anandarajah

Thailand
Melisa Uremovic
Supawat Srirungruang

Trade & Customs - Economists & Anti-Dumping Consultants
Singapore:
Kala Anandarajah
Tanya Tang

Best Lawyers in Singapore 2021 Awards - Competition/ Antitrust

Singapore:
Kala Anandarajah
Dominique Lombardi

The Legal 500 Asia Pacific 2020 - Antitrust and Competition

Singapore:
Kala Anandarajah

asialaw Profiles 2021 - Competition / Antitrust

Singapore:
Kala Anandarajah (Elite Practitioner)

Indonesia:
Rikrik Rizkiyana (Notable Practitioner)

Malaysia:
Yon See Ting (Distinguished Practitioner)

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MERGERS

Despite the administrative challenges brought about by the COVID-19 pandemic, merger review remained active across the region, with regulators scrutinising and raising competition concerns with some transactions. In addition to the active merger review, several jurisdictions saw changes in their merger notification thresholds and framework for merger review.

SAMPLE OF TRANSACTIONS REVIEWED

The Competition and Consumer Commission of Singapore ("**CCCS**") notably moved two mergers into an in-depth Phase 2 review in the course of the year, despite COVID-19. This shows that despite its voluntary merger notification regime, the regulator does not take a lenient approach towards merger assessment and will not hesitate to undertake an in-depth review or require commitments where it has competition concerns. Indeed, the Singapore regulator has been wielding its teeth more strongly and pushing its reach widely. Businesses must not ignore competition and merger control concerns even as they continue to do deals.

RTA's Singapore Team was involved in these mergers acting for third parties.

We share more information on the two Phase 2 cases we highlight here:

(a) The first involved the acquisition by shipbuilder Korea Shipbuilding & Offshore Engineering Co., Ltd. ("**KSOE**") of its competitor Daewoo Shipbuilding & Marine Engineering Co., Ltd., ("**DSME**"). The CCCS moved the review into a Phase 2 review at the start of the year given concerns that it could substantially lessen competition in the supply of certain sophisticated commercial vessels such as LNG carriers, taking into account the size of the parties and possible barriers to entry and expansion. However, the CCCS subsequently cleared the transaction as market feedback and the CCCS's quantitative assessment on the closeness of rivalry convinced the CCCS that there would be viable alternative suppliers in the relevant markets post-transaction. The CCCS also concluded that coordinated effects were unlikely despite the high market concentrations post-merger, due to limited price transparency arising from the private

negotiations between shipbuilders and their customers, as well as the perceived differences in quality and experience of shipbuilders which would make price coordination difficult.

(b) The second involved the proposed acquisition by London Stock Exchange Group plc ("**LSEG**") of sole control over Refinitiv Holdings Limited ("**Refinitiv**"). In Singapore, the parties overlap in the supply of fixed income index licensing services (excluding hybrids) and have non-horizontal links in six categories of products. Market feedback received indicated concerns that the merged entity may cease to supply Refinitiv's WM/Reuters foreign exchange benchmarks at Fair, Reasonable and Non-Discriminatory terms to rival providers in the market for the global supply of index licensing and derivatives clearing services to customers globally (including Singapore).The CCCS has yet to issue its decision. The European Commission ("**EC**") is also still assessing the deal, where LSEG has provided concessions to address competition concerns, including offering to sell Borsa Italiana to Euronext NV and two Italian banks.

RTA's Philippines Team acted for and assisted LafargeHolcim Ltd.

The Philippine Competition Commission ("**PCC**") issued a Statement of Concerns ("**SOC**") in January 2020 in relation to the proposed acquisition by First Stronghold Cement Industries, Inc., an affiliate of San Miguel Corporation, of shares in Holcim Philippines, Inc. ("**HPI**"). HPI is a major Philippine cement manufacturer and an affiliate of the leading global cement company LafargeHolcim Ltd. The SOC flagged competition concerns such as monopoly in Northwest Luzon, and increased market power and potential collusion among inter-related cement companies controlled by the acquirer in the Northeast Luzon, Central Luzon, and Greater Metro Manila areas. In May 2020, the PCC announced that the parties had aborted the transaction and formally withdrew their merger notification. ***RTA's Philippines Team acted for and assisted LafargeHolcim Ltd.***

As another indication that the PCC takes merger notification seriously, the PCC issued a decision imposing a PHP154,944.51 (approximately USD3,000) fine on City Savings Bank, Inc. and Banko Kabayan, Inc. for submitting their merger notification forms 257 days late. Under the PCC's Rules on Merger Procedure, the parties must notify the PCC of their transaction which meets the relevant compulsory merger notification thresholds within 30 days from the execution of their definitive agreements.

RTA's Philippines Team acted for and assisted PCPPI with the PCC merger notification and approval process for the transaction with Lotte Chilsung Beverage Co. Ltd.

Apart from the toughness exhibited by the PCC, they are active in reviewing and clearing mergers, including the acquisition by UC Malampaya Philippines Pte. Ltd. of shares in Chevron Malampaya LLC; the acquisitions by AC Energy Philippines, Inc. of shares in Negros Island Solar Power Inc. and in Philippine Wind Holdings Corp.; the acquisition by Trident Water Company Holdings Inc. of a 51% voting interest in Manila Water Company Inc.; the acquisition by Aéroports de Paris SA of a 24.01% stake in GMR Airports Limited; and the acquisition by Lotte Chilsung Beverage Co. Ltd. of shares in Pepsi-Cola Products Philippines, Inc. ("**PCPPI**") through a tender offer. ***RTA's Philippines Team acted for and assisted PCPPI with the PCC merger notification and approval process for the transaction with Lotte Chilsung Beverage Co. Ltd.***

In November 2020 the Office of the Trade Competition Commission in Thailand ("**OTCC**") granted conditional approval to the acquisition of the local retail business of Tesco by the Charoen Pokphand (CP) Group. Conditions imposed included the requirement for merging parties to promote products of and improve trade terms with mid-size and small suppliers; a ban on CP entering any other modern trade retail mergers for three years (excluding e-commerce); and prohibitions on the exchange of certain trade data between the two merging parties. Whilst recognising that the merger would provide the merging parties, who already are dominant players in the retail and wholesale modern trade market for consumer products, with additional market power, the OTCC assessed that the merger would not result in a monopoly and was supported by a justifiable business rationale. The OTCC also noted that any material reduction of competition would not create severe damage to the economy or the interest of consumers. The review of this merger is viewed by many as the first major test for the Trade Competition Act which was passed in 2017.

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The OTCC's decision in this case suggests that large dominant companies may be allowed to undertake a merger if they can convince the regulator that their merger will not result in a monopoly or cause severe damage to the economy/consumer interests and has a justifiable business rationale. It remains to be seen how the OTCC will monitor the implementation of the conditions.

REGULATORY CHANGES INTRODUCED IN MERGER CONTROL

In Indonesia, the Indonesia Competition Commission ("**KPPU**") introduced implementing guidelines for merger review covering mergers, consolidations and shares/asset-based transactions, which came into force on 6 October 2020. One key breakthrough under the new guideline is the formal introduction of the simplified merger notification procedure under which the KPPU will complete its simplified assessment for eligible businesses within 14 business days, which is expected to occur after the 60 business days clarification and research phase – this is a significantly shorter timeframe than the maximum 150 business days' review under the traditional merger notification process. The guidelines also seek to clarify the criteria under which an asset acquisition will be exempted from the mandatory post-acquisition notification to the KPPU, further to the issuance of new regulations in 2019 which expanded the scope of the KPPU's authority to assess acquisitions of assets. The guidelines also provide important clarifications regarding the merger review framework, such as the notifiability of foreign mergers that have an impact to the Indonesian market, which will be satisfied if a party to the transaction has business activities in Indonesia and the other party has a sister company that conducts business activities in and/or sales into Indonesia. These are important developments that businesses with operations in Indonesia must keep up-to-date on, given Indonesia's active merger enforcement regime and the high fines that have been imposed by the KPPU in the past for late merger notification.

Shortly after in November 2020, the KPPU also issued a new regulation on the Relaxation of Legal Enforcement of Monopoly Practices and Unfair Business Competition and Monitoring of Partnership Implementation to Support the National Economic Recovery, which amongst others, extends the deadline for businesses to submit their mandatory post-clarification notification to the KPPU from the current 30 business days to 60 business days.

These are important developments that businesses with operations in Indonesia must be alert to, given Indonesia's active merger enforcement regime and the high fines that have been imposed by the KPPU in recent times for late merger notification. There are discussions regarding the possibility of a mandatory pre-merger notification regime in addition to the current post-merger notification, but this has not been introduced as yet.

In the Philippines, the PCC had in the beginning of the year adjusted the compulsory merger notification thresholds from PHP 5.6 billion (approximately USD 110.1 million) to PHP 6.0 billion (approximately USD 118 million) for the size of person test, and from PHP 2.2 billion (approximately USD 43.3 million) to PHP 2.4 billion (approximately USD 47.2 million) for the size of transaction test. The merger notification thresholds in the Philippines are automatically adjusted every year based on the nominal gross domestic product growth of the previous year, with the aim of ensuring the thresholds maintain their real value over time and relative to the size of the economy. The adjusted thresholds for compulsory notification are based on the nominal GDP growth in 2019 at 6.8% and apply to mergers and acquisitions executed on or after 1 March 2020.

However, pursuant to the law called the Bayanihan to Recover As One Act ("**Bayanihan 2**"; Republic Act No. 11494) passed by the Philippine Congress as part of the government response to the COVID-19 pandemic, the PCC was compelled to adjust the mergers and acquisitions review thresholds again in 2020. The law exempts from compulsory notification those mergers and acquisitions with a transaction value of less than PHP 50 billion (approximately USD 1.04 billion) which are entered into within two years from the effectivity of Bayanihan 2 in September 2020. Bayanihan 2 also suspends PCC's exercise of *motu proprio* review of these mergers and acquisitions for a period of one year. The PCC subsequently issued rules on how these changes would be implemented. Under these rules, the following mergers and acquisitions are still subject to compulsory notification: (a) transaction value is at least PHP 50 billion; or (b) entered into before the effectivity of Bayanihan 2 and exceed the applicable thresholds when the definitive agreement was signed. Businesses who may be impacted by this rule should carefully review whether they indeed qualify for the exemption from notification – as noted above, the PCC has recently imposed fines for late merger notification and was not sympathetic to the party's arguments that the notification requirements did not apply to it.

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In June 2020, the PCC also streamlined procedures for the review of unsolicited Public-Private-Partnership ("**PPP**") projects. These new rules complement PCC's exemption rules for solicited PPP projects issued in July last year, and were enabled by the Memorandum of Agreement between the PCC and PPP Center.

In Vietnam, the much-awaited decree setting out the merger notification thresholds under the new merger regime stipulated in Vietnam Competition Law 2018, Decree No.35/2020/ND-CP, was issued on 24 March 2020 and took effect from 15 May 2020. The decree sets out the applicable merger notification thresholds moving forward, distinguishing between four categories of businesses, i.e. credit institutions, insurance companies, securities companies and all other businesses.

A summary of the merger notification thresholds for all businesses (excluding insurance, securities and credit institutions) are as follows:

(a) Domestic assets: The total assets of a participating company or the group of affiliate companies of which such company is a member on Vietnam market were at least VND 3,000 billion (approximately USD 130 million) in the preceding fiscal year to the year of the proposed transaction; or

(b) Domestic sales or purchasing turnover: The total sales turnover or purchase turnover of a participating company or the group of affiliate companies of which such company is a member on Vietnam market was at least VND 3,000 billion (approximately USD 130 million) in the preceding fiscal year to the year of the proposed transaction; or

(c) Transaction value (only applied to onshore transactions): The transaction value of the intended merger is at least VND 1,000 billion (approximately USD 43 million); or

(d) Combined relevant market share: The combined relevant market share of the participating companies was at least 20% in the relevant market in the preceding fiscal year to the year of the proposed transaction.

Note that the thresholds above are disjunctive, i.e. notification is compulsory as soon as any one of the thresholds is crossed. Separate thresholds apply for mergers involving insurance, securities and credit institutions.

Since then, the Vietnam Competition and Consumer Authority ("**VCCA**") has assessed and issued numerous merger clearances under the enforcement of the new decree.

In Singapore, the CCCS had proposed several changes to its merger guidelines as part of its overall review of its suite of competition guidelines, which it had issued for public consultation in September. Following the close of the public consultation on 8 October 2020, the CCCS will review the comments received and provide its response. In general, the amendments to guidelines on the substantive assessment of mergers are intended to take into account the findings from the CCCS's E-commerce Study (which we discuss under the section on Market Studies below) and provide clarity on how the CCCS will assess mergers involving the e-commerce and innovation markets. The guidelines on merger procedures are intended to provide procedural clarity and timelines for the assessment for commitments.

Interestingly, in Thailand, on 22 September 2020, the Office of the National Broadcasting and Telecommunications Commission ("**NBTC**") and the OTCC signed a memorandum of understanding ("**MOU**") on creating guidelines to ensure fair trade in the telecommunications, broadcasting and digital services sectors. The MOU is reportedly targeted at mergers and acquisitions in the telecommunications and broadcasting sectors and propelled by concerns due to rapid growth in digital platforms.

The introduction of a merger control regime in Malaysia has been delayed due to COVID-19, and the Malaysia Competition Commission ("**MyCC**") is now aiming at introducing merger control in the middle of 2021 instead of 2020. Whether the merger control regime will be of a voluntary or mandatory nature or a mix of both is still under discussion. Once the merger control regime is established, e-commerce, which is a priority sector for MyCC's cartel review for 2018 to 2020, could similarly be a focus sector for MyCC's merger review.

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CARTELS & OTHER ANTI-COMPETITIVE AGREEMENTS

*2020 saw the issuance by a number of competition regulations across the world of guidance to businesses on how they would apply competition laws to agreements amongst competitors in response to the COVID-19 pandemic. Some ASEAN Competition Regulators likewise did so, taking the lead from the ASEAN Experts Group on Competition ("**AEGC**"), which comprises senior representatives from the multiple ASEAN competition regulators, which issued a joint statement "in response to the Coronavirus (COVID-19) pandemic". The joint statement nevertheless reiterated that competition enforcers in ASEAN "will not hesitate to take action against any business taking advantage of the current pandemic crisis by engaging in exploitative conduct that amounts to an abuse of their dominant position".*

Following this statement, Singapore in July 2020 and Indonesia, first informally in March 2020 and more recently in November 2020 through the issuance of Regulation No. 3 of 2020 on the Relaxation of Legal Enforcement of Monopoly Practices and Unfair Business Competition and Monitoring of Partnership Implementation to Support the National Economic Recovery, issued specific guidance.

Yet, the focus for all countries remained the need to apply the Net Economic Benefit ("**NEB**"), i.e. the harm to competition resulting from the agreement is outweighed by the benefits to the community, which include assisting in tackling the health and economic issues caused by the COVID-19 pandemic. In short, even if certain regulators did not issue any specific guidance, the essence of the NEB would have guided and ensured that businesses would have been allowed fair leeway to undertake collaborations.

All said, enforcement has remained rife, as illustrated by a number of high-profile and/or novel cases dealt with in the course of 2020 across the various countries, all of which we review below.

CARTELS AND OTHER HORIZONTAL ANTI-COMPETITIVE AGREEMENTS

The main impact of COVID-19 on decisions issued by the competition authorities in the region was the taking into account of the financial difficulties faced by the infringing parties in the level of the fines imposed on them or the decision to not impose a fine at all given the financial impact of the COVID-19 pandemic on their revenue, as reflected by a decision from Indonesia and from Malaysia, each of which is discussed here.

To illustrate, the KPPU in Indonesia chose not to impose a financial penalty on seven Indonesian airlines, namely PT Garuda Indonesia (Persero), Tbk., PT Citilink Indonesia, PT Sriwijaya Air, PT NAM Air, and Lion Air Group, consisting of PT Batik Air, PT Lion Mentari, and PT Wings Abadi for price fixing in the Scheduled Commercial Air Transportation Services for Domestic Economy Class Passengers. Taking into account the COVID-19 pandemic and the fact that, even before the COVID-19 pandemic hit, several airlines had already been struggling, the KPPU issued against the airlines a direction to report to the KPPU any decision potentially affecting competition and the ticket price paid by the consumer for a period of two years. The Lion Air Group has filed an appeal against the decision and the district court has accepted the appeal. The Central Jakarta District Court found that there was no evidence that the Indonesian airlines had determined their tariffs based on concerted action or meeting of mind between the airlines. The court also found that the tariffs were not excessive because they were still within the range stipulated by the government.

> *The main impact of COVID-19 on decisions… taking into account of the financial difficulties faced by the infringing parties in the level of the fines imposed*

In Malaysia, the MyCC applied a discount of 25% on the fines imposed on 22 insurance companies for price-fixing, taking into account the financial situation of the parties due to the COVID-19 pandemic. Still, the total amount of the fines, MYR 130.24 million (approximately USD 32.1 million), is the highest ever imposed by the MyCC to date. This is not, however, the most important feature of this long-awaited final decision ("**Decision**") which came more than three years after the proposed infringement decision was issued in February 2017. The case involves

> *RTA's Malaysia Team was involved in this matter both at MyCC stage and in the pending appeal to the Competition Appeal Tribunal.*

the General Insurance Association of Malaysia ("**PIAM**") and 22 insurers (collectively the "**Parties**") which were all found to have participated in an agreement to fix the trade discounts on parts prices and hourly labour rates for motor vehicle repairs by workshops under the PIAM Approved Repairers Scheme ("**PARS**"). What is unique to the Decision is that it was issued despite Malaysia's financial regulator, Bank Negara Malaysia ("**BNM**"), having indicated that the agreement was the direct result of a directive by BNM. Under the Malaysia Competition Act, the prohibition of anti-competitive agreements does not apply to "an agreement or conduct to the extent to which it is engaged in order to comply with a legislative requirement". According to the MyCC however, and despite the contrary views expressed by BNM and the Parties, there was no directive akin to a "legislative requirement" issued by BNM. As such, the agreement was not excluded from the Competition Act. All other arguments made by the Parties, whether on procedural grounds or on substance or on NEB, have been rejected by the MyCC. Appeals have been lodged against the Decision. The outcome will likely shape the way regulators in Malaysia will interact with trade associations and how directives to such trade associations or businesses will be conveyed in the future. ***RTA's Malaysia firm was involved in this matter both at MyCC stage and in the pending appeal to the Competition Appeal Tribunal***.

> *RTA's Singapore Team was involved in this matter and we are proud to say that our client had his penalty reduced by close to 70%.*

Separately, an important decision which will have an impact on how competition law is enforced is the decision issued in December 2020 in Singapore by the Competition Appeal Board ("**CAB**") in relation to the appeal lodged by five fresh chicken distributors/distributors' groups against the 2018 CCCS decision which found that the parties had entered into a price-fixing agreement and a non-aggression pact ("**NAP**") for a period of close to seven years. Whilst the CAB affirmed the CCCS decision that the Parties had participated in a price-fixing arrangement over the period,

> *"Parliament legislated for very broad powers for the CCCS and the Competition Appeal Board that focused on the substance of infringements and somewhat less on the procedural elements as for example waiving the applicability of the Evidence Act and the law of evidence".*

the CAB agreed with the Parties that the CCCS had not established to the requisite legal standard that all the parties had participated in the NAP. In particular, the CAB noted that "if CCCS's case is that the NAP and Price Discussions are distinct infringements, they should not approach the evidence in a general broad-brush manner to treat relevant evidence as pointing to participation in a general collective "*Anti-Competitive* Discussions" constituting both NAP and Price Discussions", adding that evidence indicating participation in one agreement "cannot simply be taken to also indicate participation" in the other.

The CAB further disagreed with the CCCS's calculations of the financial penalties imposed. In addition to confirming that the relevant turnover for the purpose of calculating the penalties had to be the turnover in the financial year preceding the end of the infringement(s) – as opposed to the year preceding the issuance of the infringement decision - the CAB found that the CCCS was incorrect to assert that minor and passive participation is not a mitigating factor. As a result, the overall penalty imposed on the appellants was reduced by an average of 40%. Whilst there are a number of critical points that arise from the CAB's decision on process and procedure, which weigh in favour of businesses, it is worth noting that the CAB decision ends on the following remarks: "Parliament legislated for very broad powers for the CCCS and the Competition Appeal Board that focused on the substance of infringements and somewhat less on the procedural elements as for example waiving the applicability of the Evidence Act and the law of evidence". ***RTA's Singapore firm was involved in this matter and we are proud to say that our client had his penalty reduced by close to 70%.***

Aside from the cases discussed above, enforcement has continued as usual, with a slew of smaller price-fixing and bid-rigging cases involving a number of industries such as warehousing operators and providers of various types of maintenance services. The recent infringement decision in Singapore against contractors for bid-rigging in tenders for maintenance services of swimming pools and water features must be highlighted as the first one where parties received a discount as leniency applicants and additionally for their participation in the CCCS's Fast Track Procedure. Under the Fast Track Procedure, parties who admit liability for their infringement of the Competition Act and successfully conclude a Fast Track Agreement with CCCS are eligible for a fixed 10% reduction in the amount of financial penalty. This comes on top of the reduction obtained pursuant to leniency. This is the first time CCCS applied both discounts cumulatively since the Fast Track Procedure was formalised.

OTHER NON-HORIZONTAL AGREEMENTS

2020 started with news of the first known Statement of Objections ("**SO**") in the Philippines based on alleged anti-competitive agreements under Section 14(c) of the Philippine Competition Act ("**PCA**"), which extends to agreements which are not ***per se*** prohibited such as vertical agreements. On 27 December 2019, the PCC filed an SO alleging that the Home Development Mutual Fund ("**HDMF**" or "**Pag-IBIG**") Mortgage Redemption Insurance ("**MRI**") pool, which is composed of Beneficial Life Insurance Company, Inc., Country Bankers Life Insurance Corporation, First Life Financial Co., Inc., Fortune Life Insurance Company, Inc., Manila Bankers Life Insurance Corporation, Philippines International Life Insurance Co., Inc., The Manufacturers Life Insurance Company (Phils), Inc., and United Life Assurance Corporation, and National Home Mortgage Finance Corporation ("**NHMFC**") entered into exclusive agreements allowing the insurance companies part of the pool to exclusively and indefinitely provide MRI to borrowers whose loans had been assumed by the NHMFC as a secondary mortgagor. The agreements, spanning more than 40 years, were claimed to have deprived the NHMFC and borrowers of choosing MRI coverage from other providers who may offer better terms and conditions at lower premium rates. It appears that the NHMFC was part of the investigation for being part of the vertical agreement. The PCC noted that the agreements have resulted in poor service, unfavourable premium rates, and lack of options to the detriment of thousands of account-holders, including low-cost and socialised housing borrowers. According to the PCC's 4 February 2020 press release, the investigation on this matter was initiated when the NHMFC approached the PCC, seeking a review of its agreements with the respondent insurance companies. The NHMFC indicated that it attempted to terminate the agreements with the respondent insurance companies but faced legal obstacles. As this is the PCC's first known SO under

Section 14(c) of the PCA, its resolution is eagerly awaited and will be closely studied. Under the PCA, entities found to have entered into anti-competitive agreements could face an administrative fine of up to PHP100 million (approximately USD1.97 million).

Exclusivity agreements were also picked up by the sectoral competition regulator, the Malaysian Communications and Multimedia Commission ("**MCMC**") and the MyCC. The regulators took issue with exclusivity arrangements between telecommunications service providers and property developers or building management companies in high-rise buildings. In a joint announcement, the two regulators in Malaysia issued a stern warning to "all telecommunications service providers, property developers and building management companies that have entered into exclusive arrangements to take immediate remedial measures, failing which, appropriate action will be taken under the provisions of the Communications and Multimedia Act 1998 and/or the Competition Act 2010 respectively ".

The issue of self-preferencing which is being looked at in the EU and has been highlighted in the CCCS's E-commerce Study, which we discuss under the section on Market Studies below is a development that will keep regulators busy in the region.

An interesting case, which seems to draw on the concept of self-preferencing and yet is not expressly recognised as yet under the laws of Indonesia is the case where the KPPU imposed an unprecedented fine of IDR 30 billion (approximately USD 2.12 million) on PT Solusi Transportasi Indonesia ("**STI**") – Grab's Indonesian entity – and of IDR 19 billion (approximately USD 1.35 million) on PT Teknologi Pengangkutan Indonesia ("**TPI**"), a car rental company affiliated to Grab. The KPPU took the view that STI and its affiliate, TPI, together had caused unfair competition by giving priorities to TPI-related drivers, to the detriment of drivers using other car rental companies. The case is one of the rare instances where the KPPU applied Article 14 of the Anti-Monopoly Law, which prohibits vertical integration that results in anti-competitiveness. In a time where regulators across the globe look at "self-preferencing" as a potential breach of competition laws, the decision by the KPPU is a signal that Indonesia may embark on the same journey as well and use Article 14 of the Anti-Monopoly Law for that purpose.

Whilst this decision is the first time that the KPPU imposed a fine exceeding IDR 25 billion (approximately USD 1.77 million) on one company, there have been substantial regulatory changes introduced by the Indonesia Omnibus Law, to inter alia allow for limitless financial penalties similar to other jurisdictions to be imposed for competition law violations, for infringement to Indonesia Competition Law. As this is done, the IDR 25 billion cap will be removed. It is also worth noting that the Omnibus Law has removed criminal sanctions for violation of the substantive provisions of the Competition Law. Criminal sanctions will now only apply in case of obstruction to KPPU examination or investigation.

UNILATERAL CONDUCT

Unilateral conduct involves conduct by a firm with market power or dominance, which leverages that position in the market to adversely affect competition. Common examples of unilateral conduct include predatory pricing, price discrimination, exclusivity provisions that foreclose a market, and an arbitrary refusal to supply.

SAMPLES OF CASES REVIEWED

One notable feature of the unilateral conduct cases across the region this year has been the focus on e-commerce and platform markets. This is not surprising, given the rise of e-commerce and platform markets and the presence of several strong players in that sector, together with certain characteristics of the market such as network effects, which increases the potential for conduct such as exclusivity and discrimination to have an adverse competition effect.

In Singapore, the CCCS conducted an investigation into the online food delivery and virtual kitchen sectors in Singapore, focusing on concerns involving the refusal by online food delivery providers in Singapore to supply to competing virtual kitchens, such as Smart City Kitchens ("**SCK**"), which compete to provide virtual kitchens to various F&B operators. Following the commencement of the CCCS's investigation, online food delivery providers, GrabFood and Deliveroo started supplying to F&B operators in SCK's virtual kitchens, which already had access to Foodpanda's online food delivery service. Given this change, the CCCS closed the investigation but made its interest in online platforms known. It follows that businesses operating other forms of online platforms need to be alert to their practices.

> *RTA's Singapore Team was involved in this CCCS investigation.*

The High Court of Malaysia dismissed a judicial review application filed by the ride-hailing company and its related entities Grab Inc, Grab Car Sdn Bhd and MyTeksi Sdn Bhd (collectively "**Grab**") against the MyCC's 2019 proposed decision that Grab had abused its dominance by imposing certain restrictive clauses on its drivers that prevented the drivers from promoting and providing advertising services for Grab's competitors in the e-hailing and transit media advertising market. The MyCC had proposed to impose a financial penalty of

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RM86.7million (approximately USD19.9 million), together with a daily penalty of RM15,000 (approximately USD 3,400) commencing from the date of the proposed decision and for so long as Grab failed to take remedial actions as directed by the MyCC. Pre-empting MyCC's final decision, instead of writing representation to the MyCC, the parties took the matter to the High Court, which rightly dismissed the application for judicial review. The High Court decision has thus made clear that a proposed decision is not considered a final decision amenable to judicial review.

> *The (Malaysian) High Court decision has thus made clear that a proposed decision is not considered a final decision amenable to judicial review.*

The KPPU's decision against PT Solusi Transportasi Indonesia ("**STI**") and PT Teknologi Pengangkutan Indonesia ("**TPI**") (discussed under "Other Non-Horizontal Agreements" above) in Indonesia did not only involve price fixing but also unilateral conduct. The KPPU took the view that STI and TPI had also engaged in discriminatory practices against individual partners as compared to the TPI partners, such as the granting of priority orders, suspension periods, and other facilities. Such practice was found to have resulted in the occurrence of a monopolistic practice and unfair business competition for non TPI partners and individual partners.

REGULATORY DEVELOPMENTS

The regional regulators have issued updates to guidelines on unilateral conduct with respect to e-commerce and platforms markets.

In Thailand, the **OTCC** issued the Notification Guideline for Consideration of Unfair Business Practices between Online Food Delivery Service Providers and Restaurant Business Operators ("**Notification on Food Delivery**") after putting a draft of such notification up for public consultation in August 2020. The Notification on Food Delivery came into effect on 23 December 2020. The OTCC has been pursuing more active enforcement against online food delivery service providers after it received complaints of overcharging and increased commissions during the COVID-19 lockdown. Examples of potentially unfair trade practices include fixing of commercial conditions which restrict or obstruct business operation of other business operators unfairly (e.g. requiring exclusive dealing or forbidding restaurants from making sales via other online food delivery service providers unfairly, whereby restaurants which fail to comply are penalised by commercial sanctions, such as increased rates of income sharing charges, denying or suspending discounts on income sharing charges and charging other economic benefit at an excessively high rate) or using marketing dominance or superior bargaining power unfairly (e.g. imposing a rate parity clause, such as requiring the restaurant to sell the same type of food at the same price for every channel of sale without justifiable reason; or refusing to deal with or boycotting restaurants who refuse to comply with conditions or requests of the online food delivery service provider or restaurants who file a complaint or prepare to file a complaint regarding trade practices of the online food delivery service provider to a government authority).

The CCCS in Singapore, has proposed several changes to its Guidelines on the Section 47 Prohibition against abuse of dominance, which it had issued for public consultation in September 2020, as part of its overall review of its suite of competition guidelines. In relation to the assessment of dominance, the CCCS clarified that it will consider factors such as the strength of network effects, economies of scope, consumption synergies and control or ownership of key inputs, including data. One key change is the introduction of the concept of self-preferencing as a potential abuse of dominance. Self-preferencing occurs when a vertically integrated dominant undertaking gives preferential treatment to its own downstream products over competing sellers which utilise the dominant undertaking's upstream products (e.g., an e-commerce platform who may give better placement of its own products as compared to other sellers). Another change is the express recognition that the CCCS may consider other indicators for market share analysis, such as the number of active users, number of transactions and gross merchandise value, as the traditional sales-related indicators of market share may not be appropriate in certain markets, such as for multi-sided digital platforms which do not charge positive prices to one or more sides.

In Vietnam, Decree No.35/2020/ND-CP (discussed under "Mergers" above) provides guidance on how the significant market power of an enterprise will be determined in establishing whether an enterprise holds a market-dominant position. The decree noted that an assessment of dominance would consider, amongst others, the correlation of market shares among enterprises in the relevant market, barriers for entry and

any advantages held by the enterprise such as the right to hold and access infrastructure.

Thailand also issued a new Notification on Market Dominance which came into effect on 26 September 2020, repealing the 2018 Notification on this issue. The test of market dominance under this Notification is as follows:

(1) a business operator in any market with a market share of 50% or more and with sales volume of THB1 billion (approximately USD32 million) or more in the preceding year; or

(2) the first three business operators in any market with a combined market share of 75% in the preceding year.

The provision in (2) does not apply to any business operator (amongst the three) having *less than THB1 billion sales* or less than 10% market share in the preceding year.

MARKET STUDIES

Market studies are a key tool undertaken by competition regulators to get a pulse on specific industries. In recent years, a number of such studies were undertaken, with some conclusions released in 2020. Two such studies include the CCCS report on its findings on E-Commerce Platforms and the impact on both competition and consumer protection, and the MyCC's final report on the wholesale and retail trade of various basic and indispensable products such as processed food and beverages or personal care & toiletries. The findings of these two studies highlight common features which exists in various other countries in the region. As ASEAN competition regulators share experience and exchange information, businesses active in these sectors on either a national or regional basis should be aware of what appear as priority areas of enforcement for the year to come.

Singapore CCCS's E-commerce Study

Released on 10 September 2020, the E-commerce Study was driven by the CCCS's observations of a significant increase in e-commerce activities in Singapore in the past few years and the rise of regional "super apps" which compete across different market segments. Thus, the CCCS had conducted the study with the objective of learning more about the potential competition and consumer protection issues which could arise from the growing prevalence of e-commerce platforms that operate at least one multi-sided platform, facilitate e-commerce as their primary activity and operate in more than one market segment in Singapore.

The study identified the following key features of competition involving e-commerce platforms:

(a) Tendency for multi-sided platforms to leverage on existing user base: The CCCS observed that many e-commerce platforms active in the Southeast Asia region start off in a single market segment before expanding into other market segments. Compared to other competitors entering into the subsequent market segments, e-commerce platforms who can leverage on existing user base will face lower entry

costs and achieve better economies of scale. Operating across multiple market segments also allows e-commerce platforms to exploit consumption synergies in the form of cost or time savings enjoyed by consumers who buy distinct products from one supplier rather than from different suppliers. Where such consumption synergies are significant, this could represent greater barriers to entry for potential entrants of the individual market segments.

(b) Significance of externalities such as indirect network effects and its impact on market definition: The CCCS had also found that a key entry cost for e-commerce platforms is the cost associated with amassing a critical number of users to allow the platform to generate and exploit externalities such as indirect network effects, which are characteristic of multi-sided platforms. Such indirect network effects could affect the price structure and strategies of e-commerce platforms – many e-commerce platform operators may choose to not charge a positive price on the side of the platform which generates stronger externalities while charging the other side(s) of the platform, so that they can build the initial consumer base required on the free side of the platform. Hence, although each side of the multi-sided e-commerce platform provides a different product or service to a different group of users, there are clearly interdependencies in the demand between the various groups. Multi-sided e-commerce platforms could compete with not just other multi-sided platforms that supply the same service(s), but also multi-sided platforms that only have one "coincident" side, and/or single-sided platforms.

(c) Use of artificial intelligence ("**AI**") and algorithms and their impact on anti-competitive agreements or concerted practices: An increased use of AI or algorithms to make pricing decisions could increase the likelihood of collusion between sellers, including e-commerce platforms. For instance, the CCCS noted that where a third party such as a software company deploys the same algorithm or a coordinated algorithm amongst competitors, this can amount to prohibited concerted practice even if there is no communication between the competitors, if the competitors do not publicly distance themselves despite being aware of such conduct.

Overall, the CCCS concluded that there are currently no major competition concerns involving e-commerce platforms, and the existing competition regime is sufficiently robust and flexible to deal with competition concerns that may be posed by digital platforms. The CCCS noted that:

- Price competition continues to be highly relevant in the e-commerce sector as a significant number of customers practise multi-homing across different platforms. Multi-homing refers to the practice by suppliers or consumers of using more than one platform simultaneously to buy or sell;

- The absence or lack of data is not currently an insurmountable barrier to entry or a severe limitation on the ability of e-commerce platform operators to compete effectively, as industry players have indicated that they are generally able to collect their own data through various user touchpoints on their platforms, or through third-party market research capabilities; and

- Data protection is not currently a key parameter of competition amongst e-commerce platforms, as survey results from consumers using e-commerce platforms indicate a lack of habitual reading of privacy policies and ambivalent attitude towards data protection breaches.

Nevertheless, the CCCS recognised the need to provide businesses with clearer guidance on how the Singapore Competition Act will be applied to digital platforms, especially in the longer term. The E-commerce Study has thus culminated in, amongst others, proposed amendments to the various CCCS competition guidelines, which the CCCS had issued for public consultation.

The E-commerce Study has provided valuable insights on the specific concerns the CCCS looks out for when assessing competition issues involving digital markets or platforms. These concerns are also relevant to the competition regulators in ASEAN where most of the players and practices reviewed in the E-commerce Study are present. To a large extent, clarifications relating to network effects and consumption synergies, amongst others, are also relevant to brick-and-mortar businesses.

Malaysia MyCC Report on Service Sector in Malaysia (Wholesale and Retail)

Following a public consultation, the MyCC issued on 19 August 2020 its Market Review Final Report on Service Sector in Malaysia (Wholesale and Retail) ("**Report**"). The MyCC conducted a market review on the wholesale

and retail trade ("**WRT**") sector of selected products, namely, processed food and beverages, personal care & toiletries, household cleaning products and clothing ("**Selected Products**") as this sector is crucial to the country's economy and growth. The Report highlighted that there has been a shift in Malaysian consumers' purchasing habits as more people have been using digital and e-commerce channels during the COVID-19 pandemic outbreak period. On the industry front, new players have emerged, adopting digital platforms to cater to the needs of the consumers. These growing trends of e-commerce, adoption of new technologies and consumer behaviour have all contributed to the current landscape of the WRT industry in Malaysia.

The Report identified competition concerns in the WRT sector arising from the following eight theories of harm that were observed in Malaysia:

(a) Downstream buyer power of large supermarkets – suppliers may be subject to onerous conditions (e.g. back margins) or forced to sell at lower prices to large supermarkets, resulting in suppliers having to recoup through increased prices charged to smaller supermarkets such as convenience stores or traditional retailers.

(b) Price flexing – large retailers that operate in multiple locations might differentiate prices between locations and such practice may distort competition in the market and/or deter new market entrants as smaller players may lack the ability to cross-subsidise low prices in one store by charging higher prices in another.

(c) Loss leader – dominant firms lower their prices and deliberately incur losses or forego profits in the short term, which curtails entry of potential competitors and sometimes even drives out existing competitors. Consumers may benefit in the short term, but they may lose out in the longer term as once these competitors are driven out of business, the dominant firms can raise prices above the original level.

(d) Suppliers' market power – producers or suppliers with market power may charge exploitative prices or use their powers to engage in practices like exclusive dealing, tied selling or requiring outlets to sell new products or guarantee favourable shelf space, controlling the prices of products sold by retailers to end consumers, or requiring a certain percentage of their products to be displayed and sold by the retailers.

(e) Supply chain collusion – competitors may agree not to compete on prices they charge or quantities they supply to the market or agree on sharing a relevant market. Such collusion (tacit or otherwise) could result in higher prices than under open competition, or discourage industry players from innovating, or allow the continued survival of inefficient firms that would otherwise have exited the relevant market.

(f) Exclusive distribution – a large distributor may be able to extract exclusive supply rights from a supplier or producer for a particular territory or region, or a supplier may require that only one distributor can hold the rights to resell its products. Such practices may result in market foreclosures.

(g) Price fixing (resale price maintenance) – producers or manufacturers may prohibit resellers or distributors from independently pricing a given product, thus restricting competition in that product segment.

(h) Bundling – producers or manufacturers may offer multiple products bundled together, inducing customers to take the whole bundle or more than one product, thereby resulting in market foreclosure as a producer or manufacturer in a dominant position in one product market can leverage that into other markets and threaten its competitors in these markets.

Based on the findings, the MyCC recommended, amongst others, the need to conduct further in-depth studies on the following markets/areas to enable it to intervene as necessary:

(a) Identified product markets with high market concentration such as (i) wholesale of dairy products; (ii) wholesale of biscuits, cakes, breads and other bakery products; (iii) wholesale of confectionery; and (iv) retail sale of dairy products and eggs in specialised stores;

(b) Identified areas of possible competition concern which have the highest impact to the industry (and subsequently consumers) such as (i) suppliers having market power (especially large MNCs); (ii) collusion by firms; (iii) exclusive distribution (which

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reduces the ability to source better competitive terms) and (iv) price-fixing.

Businesses in the WRT sector (in particular, those with significant market share) should therefore be vigilant and conduct internal review or audits to ensure compliance with the relevant competition law in the region.

Whilst the report focuses on Malaysia, it is worth noting that the consumers' purchasing habits as well as the trends and concerns identified in the report are very similar in countries in the region. They should, therefore, be taken into consideration when reviewing activities or deals in the region, in order to anticipate the issues that could be raised by more than one competition regulator.

Other Developments

In addition to the two market studies highlighted above, the PCC in the Philippines had in 2020 published five Issues Papers covering various industries, including the pharmaceutical industry, sugar industry and the Philippine Digital Commerce Market. The PCC Issues Papers aim to examine the structure, conduct and performance of select industries to better inform and guide the PCC's advocacy and enforcement initiatives.

In relation to the Philippine Digital Commerce Market, for example, the Issues Paper noted that the Philippine e-commerce sector is dominated by a few large international pure online retailers, although SMEs and giant corporations alike are shifting to e-commerce to broaden their Filipino consumer base despite the Philippines' "mall culture". The report noted that potential anti-competitive issues in the sale of consumer goods online include: (1) price limitations for online retail prices particularly for multichannel establishments; (2) exclusive selling in particular marketplaces; and (3) possible restrictions to sell cross-border or geo-blocking. Possible anti-competitive issues for digital content include: (1) restricting the validity of licences for content based on cross-border regulation; (2) long duration of contractual relations; and (3) long copyright licences that may limit the entry of new or smaller players. The report identified the following competition and regulatory issues for further study: (1) regulation of last mile for courier services; (2) industry classification and applicable laws; (3) foreign ownership restrictions in the the e-commerce value chain; (4) cross-ownership and vertical relationships between firms engaged in retail, e-commerce, telecommunications and fintech; (5) telcos and over-the-top (OTT) applications.

On a related note, the PCC also published several Policy Notes as a follow-up to the Issues Papers which contain additional analysis and recommendations for policymaking.

UPCOMING EVENTS

Date	*Event Details*
12 Jan	**Competition Law in a COVID-19 Year Across South East Asia**
19 Jan	**Consumer Protection – Real Enforcement in Singapore**
27 Jan	**Regulatory Issues Governing E-commerce: Navigating Doing Business On-line**
2 Feb	**Corporates Doing Business Across Borders: FTAs, Export Control, Sanctions and more – Navigating Trade Issues with Ease**
TBC Feb	**Merger Control Issues in the UK, ASEAN and Australia**
10 Mar	**Regional Competition Law Update – Key Issues in Cartels, Abuse and Mergers**

Apart from the upcoming events, our Regional Competition Conference will make a come back in 2021 in the middle of the year. We will keep you updated.

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