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COMPETITION BITES 2019 - Issue 3
Introduction

Welcome to our 3rd issue of Competition Bites, providing you with updates of key developments across South East Asia!

In this quarterly competition law update, we feature short snippets of interesting competition law developments authored by our colleagues across our regional competition law practice. In this issue, snippets include significant changes to the procedure for appeal against KPPU decisions in Indonesia, the issuance of rules on expedited merger review by the PCC in the Philippines, as well as the introduction of new notifications by the Thailand Trade Competition Commission. These represent major procedural and administrative changes in relation to competition enforcement across the region, which businesses must pay close attention to.

Focus for this issue – The Malaysia Competition Commission published the final report of its market review on the food sector in Malaysia. The market review covers five food sub-sectors which, amongst others, were determined to be susceptible to competition concerns. Our update summarises the key takeaways for each sub-sector, as well as the Commission’s recommendations to further promote competition in these sectors.

Importantly, we are pleased to welcome HMBC Rikrik Rizkiyana back in our Indonesian office Assegaf Hamzah & Partners after fulfilling a year-long special appointment for the Jakarta provincial government where he served as chief of the special team mandated to synchronise the Jakarta administration’s laws and regulations. In addition, the Rajah & Tann Asia Competition & Antitrust and Trade Practice successfully hosted its 7th Regional Competition Conference on competition law trends and the digital economy in Jakarta on 30 July 2019, where partners of our various regional offices (together with our invited guest speakers) shared important updates on competition law enforcement and merger control in our respective countries, as well as our perspectives on the intersection between competition law and data-policies and the digital industry.

Do touch base with us if you would like any further details or wish to discuss any of the news highlighted in this edition.

Yours sincerely,

The Rajah & Tann Asia Competition & Antitrust and Trade Practice
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Feature Article:
Malaysia - MyCC Market Review Report on Food Sector in Malaysia

By: Yon See Ting, Jane Guan and Mithrra Kuladeva

Pursuant to the power of the Malaysia Competition Commission (“MyCC”) under Section 11(1) of the Competition Act 2010 to conduct a review into any market in order to determine whether any feature or combination of features of the market prevents, restricts or distorts competition in the market, MyCC conducted a market review on the food industry in Malaysia to address the broader concern of the general public, namely, whether the rising food cost in Malaysia was caused by any anti-competitive conduct within the food sector. There had been concerns related to inconsistency of food supply, increasing price trends and high cost of food in Malaysia.

MyCC selected five food sub-sectors for its market review, namely (i) beef; (ii) fisheries, more specifically, the Indian mackerel (ikan kembung); vegetables, more specifically, (iii) mustard leaf (sawi) and (iv) round cabbage (kubis bulat); and (v) infant milk powder. These food items were selected by MyCC as MyCC determined that that these foods were consumed by many Malaysians and in some instances were also used as benchmark food items to gauge the cost of food items in that category. Further, based on MyCC’s preliminary review, these selected food items were determined to be susceptible to competition concerns.

Following a public consultation on the draft Report, MyCC launched on 6 August 2019 the final Report setting out its findings and recommendations on these selected food sub-sectors.

Overview of the Report

The objective of the market review was for MyCC to better understand the food industry in Malaysia. The market review comprised an overview of the applicable laws, regulations and governmental policies in relation to import, export, upstream level or manufacturing, distribution and retail level; reviewed the market structure and supply chain; identified the key governmental agencies, industry players and prices across the supply chain as well as pricing trends; identified competition levels including market shares, market concentration and market dominance and impact; and identified competition concerns such as anti-competitive conduct and whether any existing policy or law impeded competition on each selected food item.

Further, the review included an analysis of the extent of market distortion and whether government intervention is necessary to curb anti-competitive conduct. The Report ended with a set of recommendations.
Key takeaways for each selected sub-sector:

**Beef**

Malaysia is heavily reliant on live cattle imported from Australia and Thailand, beef imported from Australia and buffalo meat sourced from India. There has been significant price increase over the years for imported cattle, local beef and imported beef. Some key factors which may have led to this situation were low domestic production, high dependence on imports, high financial barrier to entry (as huge capital is needed for importation and logistics), dominance of importers and limited number of exporters to Malaysia (due, among others, to the need to meet halal requirements).

MyCC also found key importers establishing long term agreements with exporters and enjoying preferential treatment (e.g. in terms of pricing) or having restrictions imposed on new/emerging importers (large minimum purchasing volume) or tying and bundling (less favourable beef cuts before a distributor or retailer may purchase the parts required).

**Fish**

Malaysians are, on a per capita basis, the fourth highest fish consuming country in the world, consuming up to 57kg per capita. The self-sufficiency ratio (“SSR”) of Indian Mackerel has over the years been constantly low, dropping to a low of only 37% in 2017. Thus, there is heavy reliance on imports to meet the local demand. More than half of the fish supply in Malaysia is distributed through the Wholesale Market of Kuala Lumpur (“PBKL”) resulting in high bargaining power of the wholesalers who are able to determine the market supply/volume and influence prices due to price information asymmetry along the supply chain. The behaviour within the wholesale market where the players benchmarked the prices against one another, suppresses price competition as players share sensitive market information. Further, the upstream supply chain (i.e. fishermen with low bargaining power) is also reliant ultimately on wholesalers to purchase their excess supply to recover their cost of capturing the fishes. Multiple layers of intermediaries in the fisheries supply chain drive up the prices as the price of fish can increase up to six times by the time it reaches the market. MyCC highlighted that supply may also be intentionally withheld by creating more frozen fish during the period of excess supply and releasing the same in the market during the low supply season thereby manipulating the price. Modern retailers such as hypermarkets and supermarkets who engage with suppliers are able to bargain for rebates (between 2% to 10% of yearly revenue) resulting in suppliers marking up the prices to account for such rebates. Online distribution channels for seafood products are however becoming more prevalent and are disrupting the industry.

**Vegetables**

Mustard leaf and round cabbage were selected by MyCC due to their popularity and the existing competition issues identified in the vegetables market. While Malaysia depends on imports for round cabbage (China 90% and Indonesia 10%), it generally produces sufficient mustard leaf for its own
consumption. Farmers have low bargaining power and depend on middlemen due to the financial support provided by the latter. The distribution chain is primarily dominated by wholesalers and, similar to fish products, most of the supply are distributed through key distribution hubs in the central region such as PBKL. Local markets in other States may also refer to PBKL’s prices when setting their selling prices. The close connection between market players and frequent interaction on prices may lead to concerted practices.

Barriers to entry for importers of round cabbage are moderate due to the need for strong financials to have cold rooms/storage and logistic facilities as well as existing track record to apply for and renew the approved permit ("AP") required to import the round cabbage. The size of the import quota approved for the importers is determined and fixed annually but there is a lack of clarity on the approval process for the APs and there have been cases of unethical practices of AP holders selling or renting their quotas (in part due to the need for AP holders to exhaust 90% of their approved quota within three months). The quotas are sold or rented, among others, to foreign companies who import directly from their own farms in the country of origin to obtain supplies at cheaper cost to gain market share and who engage in mergers and acquisitions ("M&As") and joint ventures ("JVs") with local players to gain a foothold in Malaysia. These add competitive pressure to the local players. Similar to the fish sector, modern retailers request rebates from suppliers resulting in suppliers marking up the prices to account for such rebates.

**Infant formula**

Infant formula in Malaysia is generally categorised into four groups. MyCC’s selected sub-sector is that of the infant formula (Stage 1) formula, targeted at infants between zero to 12 months old. As there is a high barrier to entry into this market due to high capital investment and stringent regulatory requirements, this market is dominated by established players with significant resources - typically, MNCs. The brands supplied by manufacturers are loosely classified as mainstream brands or premium brands based on pricing, which is dependent on the formulation. This market is highly dependent on imports as even products manufactured locally are highly reliant on imports of raw materials, especially dairy ingredients, due to insufficient domestic supply of milk and lack of specialised manufacturing plants. The price of infant formula has been increasing consistently over the years, ranging between 15% to 20%. However, when benchmarked against selected countries, prices in Malaysia are shown to still be cheaper.

Although manufacturers determine the “Recommended Retail Price” ("RRP"), this is merely a guide and most retailers set the prices below RRP. MyCC did not find any significant indication of anti-competition concern or conduct within the infant formula sector in Malaysia but noted shortcomings such as the majority of the brands being premium brands, the reliance on imports (which causes price volatility when the Ringgit fluctuates), as well as the domination by a few MNCs which gives them some power to influence prices of infant formula in the market.

**MyCC’s recommendations**

MyCC’s overarching recommendations include promoting investment and encouraging innovation within the food sector (including infrastructure development and adoption of technology), strengthening the
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legal system and regulatory policy to reduce information asymmetry, enhancing market transparency and improving information access, encouraging fair trading practices through consumer and business education and streamlining and harmonising existing government policies.

For the beef sector, MyCC recommended the Government re-strategise how to ramp up domestic beef production as well as focus on reducing the cost of doing business in the domestic market and explore additional countries for the supply of imported beef.

For the fish market, consumer education of various substitutes other than fresh mackerel fish was recommended, alongside developing an inclusive e-commerce policy for fish distribution.

For the vegetables market, monitoring of the AP post-grant was a key recommendation, together with establishing a new wholesale market(s) to tackle the PBKL issue while upgrading and offering better and more modern facilities.

For the infant formula sector, MyCC supports the Ministry of Health’s recommendation for exclusive breastfeeding for infants during their first six months. MyCC recommended that trained healthcare professionals should take charge to ensure consumers are well-informed that all infant formula in the market, including the mainstream brands, meet the minimum prescribed nutritional requirements.

MyCC’s review comes on the back of several food-related competition investigations and enforcement action taken in Southeast Asian nations in recent years. It is hoped that the Malaysian Government will take note of and implement the recommendations in the Report as these should have an impact on reducing the cost of food in Malaysia.
Indonesia - Drastic Changes to the Procedure for Appeal Against KPPU Decisions

On 9 August 2019, the Supreme Court issued the Supreme Court Regulation No. 3 of 2019 ("Regulation") on Procedure for Appeal against Decisions of the Indonesian Competition Commission ("KPPU"). This new Regulation provides several drastic changes that can limit business actors in presenting their appeal against KPPU decisions. Such changes are effectively in force since the date of the Regulation’s promulgation, being 20 August 2019.

Below are the key changes under the Regulation:

1. **Electronic filing**

   Under the Regulation, an appeal against a KPPU decision can now be submitted online. This mechanism is in line with the new Supreme Court regulation on electronic litigation.

2. **Deadline to file an appeal**

   Under the previous regulation, an appeal against a KPPU decision could be filed to a district court within 14 business days as of receipt of notification of the KPPU decision or as of the date of announcement of the KPPU decision through the KPPU’s website. Such deadline is applicable regardless of whether the appellant attended the hearing decision or not.

   Now, an appellant has 14 business days to file an appeal to a district court, and the 14-day period will be calculated as of:

   (i) the date of the hearing decision, if attended by the appellant; or

   (ii) the date of the notification of the KPPU decision if the appellant did not attend the hearing.

3. **Administrative requirements to file an appeal**

   The Regulation explicitly requires an appellant to submit the following documents to the district court in filing an appeal:

   (i) a power of attorney;

   (ii) a request for appeal; and

   (iii) a copy of the KPPU decision.
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If these documents are not provided, the district court will return the filing to the appellant. For comparison, those requirements were not explicitly stipulated under the previous regulation but required by the district court.

4. **The period for consolidation of appeals**

According to the Indonesian Competition Law, an appeal to the district court must be filed to the district court whose jurisdiction covers the domicile of the appellant. This procedure may result in multiple appeal filings against one KPPU decision to different district courts if there is more than one appellant.

In the previous regulation, the KPPU would submit a written request to the Supreme Court to consolidate the appeals and appoint one district court to examine the appeal. The Supreme Court would have to conclude on such consolidation and appoint the district court within 14 business days after receiving the KPPU’s written request. This deadline has now been shortened under the new Regulation, which provides that the Supreme Court must appoint the district court within seven working days after receiving the KPPU’s written request.

5. **Additional examination**

Under the previous regulation, the panel of judges, which are the adjudicating judges in the district court, can instruct the KPPU to hold an additional examination if deemed necessary. In practice, the appellant can also propose such additional examination to the panel of judges.

The new Regulation, however, is silent on this. This can mean that additional examinations will no longer be allowed under the new Regulation. It remains to be seen how this provision will be applied in district courts.

6. **Legal Measure against Supreme Court decisions**

Article 15 of the new Regulation stipulates that both the appellant and the KPPU can only file an appeal to the Supreme Court as the last legal measure against a district court’s decision. This is in contrast to the previous regulation, which was silent on this issue. In practice, the Supreme Court accepts civil reviews as an extraordinary legal measure applicable to be submitted against Supreme Court decisions.

In general, there are two types of legal measures in the Indonesian legal system, namely: (i) Ordinary Legal Measure; and (ii) Extraordinary Legal Measure. An Ordinary Legal Measure can be taken against a non-legally binding decision. In the context of competition law, Ordinary Legal Measures include: (i) the proceeding in the district court, in which the district court examines the appeal against the KPPU decision; and (ii) the proceeding in the Supreme Court, in which the Supreme Court examines the appeal against a district court's appeal decision. Further, an
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Extraordinary Legal Measure is the only applicable legal measure to be taken against a legally binding decision. This includes the civil review process in which the Supreme Court examines the Supreme Court’s appeal decision.

It is worth noting that the legal basis for civil review as an extraordinary legal measure is provided under separate laws regarding the Supreme Court and judicial power. Therefore, even with the affirmation that an appeal to the Supreme Court is the last legal measure against a district court’s decision, it is still unclear whether civil reviews will still be applicable under the new Regulation.

In conclusion, it remains to be seen how the Regulation would apply in practice, especially bearing in mind the drastic changes implemented by some of the provisions. To provide legal assurance, the previous regulation remains applicable for any ongoing appeal to the district court until such appeal has obtained a final and binding decision.

Philippines -
(1) PCC Issues Rules on Expedited Merger Review

In May 2019, the Philippine Competition Commission (“PCC”) issued its Rules on Expedited Merger Review, which reduces to 15 days (counted from the PCC’s acceptance of the relevant Notification Forms) the PCC’s period to review specific types of mergers set out in the rules. That 15-day period is a significant reduction from the usual Phase I review process, which includes 15 days for the PCC to review the completeness of the submitted Notification Forms and the 30-day Phase I review period proper. The PCC indicated that the expedited review of non-problematic mergers will allow a more efficient use of its resources.

The specific types of mergers which may qualify for an expedited review are:

- There is no actual or potential horizontal or vertical (including complementary) relationship in the Philippines between the acquiring entity, including its Notifying Group, and the acquired entity and the entities it controls.

- The merger is a global transaction where the acquiring and acquired entities identified in the definitive agreement are foreign entities (“foreign parents”), and their subsidiaries in the Philippines merely act as manufacturers or assemblers of products with at least 95% of such products exported to the foreign parents, subsidiaries, affiliates or third parties located outside the Philippines; provided that the remaining 5% product sales in a market in the Philippines is minimal in relation to the entirety of such Philippine product market.

- The candidate relevant geographic market of the merger is global and the acquiring and acquired entities have negligible or limited presence in the Philippines.
Joint ventures, whether incorporated or not, formed purely for the construction and development of a residential and/or commercial real estate development project.

(2) Exemption from Compulsory Notification of Solicited PPP Projects

JVs are considered mergers under the Philippine Competition Act’s (“PCA”) implementing rules and regulations issued by the PCC. JVs which meet the thresholds set by the PCC, including JVs formed to undertake Public-Private Partnership (“PPP”) projects mainly in accordance with the Philippines’ Build-Operate-and-Transfer Law, must be notified to the PCC and approved by the PCC prior to consummation.

However, pursuant apparently to a Memorandum of Understanding between the PCC and the PPP Center (also a government body), in July 2019, the PCC issued its Memorandum Circular No. 19-001, which sets out the process by which a government agency undertaking a solicited PPP project may seek exemption from compulsory notification to the PCC on behalf of prospective bidders of the project. The relevant agency must file an application for a Certificate of Project Exemption with the PCC. The PCC will review the solicited project in terms of (i) the nature and the scope of the project; (ii) the bidding design and process; and (iii) competition concerns that may arise from the nature and/or composition of prospective bidders and the winning project proponent. If necessary, the PCC shall render advisory opinions and require undertakings.

(3) PCC Seeks Public Comments on Proposed Settlement of First Abuse of Dominance Case

In our previous Competition Bites issue, we updated on the Statement of Objections (“SO”) filed by the PCC for abuse of dominance against a mass housing developer which entered into an exclusive partnership with an internet service provider (“ISP”) for its multi-dwelling property in Manila, and prevented the entry and access of other providers to the occupiers of the property.

On 5 August 2019, the PCC sought comments from the public on the proposed settlement of the case jointly sought by the Competition Enforcement Office (“CEO”) and the condominium developer. Among other matters, under the proposed settlement:

- The respondents warrant that the subject conduct has already ceased, or to the extent not ceased, that it will cease within one month from the approval of the joint motion for settlement;
- The respondents shall allow their residents, tenants or customers who are in a lock-in period to opt-out of their subscription contracts at no cost and without penalty in any form, and shall not discriminate against such residents, tenants or customers that shifted to other ISPs; and
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- As part of the settlement and pursuant to Section 29(a) of the PCA and in accordance with Sections 6.1, 6.2, 6.3 and 6.4, Article I, Rule VI of the PCC’s rule of procedure, the respondents are liable to pay an administrative fine for contravening Section 15(i) of the PCA and for the infringement period. The Basic Fine will be based on an assessed gravity of 30% of the Relevant Turnover of the respondents.

The call for comments closed on 20 August 2019.

Under its rules of procedure, the PCC has full discretion to approve the joint motion for settlement. The settlement must contain, among others, such terms and conditions that the PCC finds appropriate or necessary for the effective enforcement of the PCA, its implementing rules and regulations, and other competition laws. An order approving a settlement shall be final and immediately executory.

If, on the other hand, the PCC denies the joint motion, the PCC may nevertheless appoint a mediator or provide for such other means to facilitate further discussions between the CEO and the respondent, and may indicate the terms and conditions that it requires for the approval of a settlement; provided that the settlement discussions shall be concluded within a period of not more than 60 days from their initiation. If the CEO and the respondent agree on the terms of the settlement in compliance with the PCC’s requirements, if any, they shall file another joint motion within the 60-day period, stating the terms of the settlement they agreed upon. Otherwise, the settlement proceedings shall be considered terminated. The PCC’s denial of the joint motion for settlement shall not be construed as a prejudgment on the matters subject thereof.

Singapore -
(1) CCCS Research Paper on Quantitative Tools to Assess Closeness of Rivalry between Firms

On 2 September 2019, the Competition and Consumer Commission of Singapore (“CCCS”) issued a research paper to explore two price-based quantitative tools which can be used to assess the extent of the closeness of rivalry between firms in price competition, namely: (i) price co-movement analysis; and (ii) the diversion ratio analysis.

The first tool is the price co-movement analysis, which is based on the intuition that prices of products which are good substitutes should not diverge beyond a certain magnitude to avoid scope for arbitrage. In this regard, the relative price movements of two products can be measured to give an indication of the closeness of rivalry between them – similarities in price levels or co-movements in prices can indicate that the two products are close substitutes. A price correlation test can be used to test the strength of co-movement of two price series and whether the price of two products move in tandem. Alternatively, a stationarity test can be used to examine whether the relative price ratio of two products tend to return
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to a stable value over time – where it does, it can be concluded that the prices of the two products do not diverge in the long run.

The second tool is the diversion ratio analysis, which measures the proportion of lost sales that is diverted to the substitute product when the price of the focal product is raised – the higher the diversion ratio, the closer the substitute product is to the focal product. As an illustration, in the case where the quantity of Product A sold decreases by 100 in the event of a price increase, and the quantity of Products B and C sold increases by 20 and 80 respectively, the diversion ratio from Product A to Product B is 0.2 while the diversion ratio from Product A to Product C is 0.8 – this indicates that Product C is a closer substitute to Product A than Product B is. Diversion ratios can be applied in price pressure tests (such as the Gross Upward Pricing Pressure Index, the Upward Pricing Pressure and the Illustrative Price Rise) to estimate the change in incentives of the merged entity to raise its prices independently post-merger.

For each of these tools, the CCCS noted that there are limitations and their results must be interpreted with care. For example, the CCCS highlighted that the price correlation test can suffer from spurious correlation whereby the price series of two products are closely correlated not because they are strong substitutes, but possibly due to common influences (e.g. common costs) or because the price series contains a time trend. Furthermore, there is no benchmark figure to compare against to determine whether a correlation coefficient is sufficiently high to suggest that the two products being tested are close substitutes. On diversion ratios, the CCCS noted that estimating diversion ratios requires sufficient and accurate price and volume data, which may not be easily available. Where consumer surveys are used to obtain the inputs to calculate the diversion ratio, the results may be affected by the way questions in the survey are phrased and sequenced; what consumers say they will do may also differ from what consumers actually do. Nevertheless, the CCCS noted that the price co-movement analysis and the diversion ratio analysis can still serve as useful quantitative tools, so long as the limitations are understood.

The CCCS noted that these two tools may be applied as an aid in market definition, as well as to provide insights into the direct competitive constraints that each merger party imposes on the other so as to better assess the potential competitive effects of a merger. For example, if the diversion ratio between the two merging parties’ products is significantly higher than the diversion ratios to their competitors’ products, this would imply that the merging parties are each other’s closest competitors and that the competitors may not be able to act as an effective competitive constraint to the merged entity post-merger. The CCCS added that these tools have been considered in recent merger cases, such as the proposed acquisition by Wilhelmsen Maritime Services of Drew Marine Technical Solutions, as well as the unnotified merger between Grab and Uber.

The issuance of the research paper indicates that the CCCS may increase the use of quantitative methods in its competition assessment. Merger parties, in particular, will therefore need to consider how these tools may be used in their merger notifications to the authority, and be prepared that the CCCS may come back to request for the necessary information that will allow them to perform such quantitative
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assessment in their evaluation of the merger. Outside of a merger assessment, the CCCS may also use these tools more generally for market definition purposes.

(2) CCCS Closes Investigation Against Charcoal Thai 1 and Other Consumer Protection Activities by the CCCS

On 16 August 2019, the CCCS announced that it has closed its investigation against Charcoal Thai 1 Restaurant ("Charcoal Thai 1"). By way of background, the CCCS observed that Charcoal Thai 1 failed to specify an end date to the discount period stated on its promotional materials. Moreover, the discounts were found to have been available for at least two years since 2016, even though the promotional materials stated that the discounts were only offered for a “limited period only” or would be “Ending Soon! 50 Discount”. Consequently, the CCCS launched an investigation in 2018 against Charcoal Thai 1 and found that it had breached the Consumer Protection (Fair Trading) Act ("CPFTA") for representing that its meals were available at a discount for a limited time period despite being aware that the discount would be still available for a substantially longer period of time. To address the CCCS’ concerns, Charcoal Thai 1 has undertaken to put an end to its unfair trade practice and to refrain from engaging in future unfair trade practices, which include offering discounts without expressly identifying the end date.

Such unfair trade practice (i.e. misrepresentation of the duration of a sale) is one of those identified in the CCCS Draft Guidelines on Price Transparency ("Draft Guidelines") issued on 30 September 2019. The Draft Guidelines aim at providing guidance to businesses on the way they display and advertise their products and services. The Draft Guidelines also serve as a reference for consumers on what they should be aware of when purchasing products or services under promotion. Businesses and interested parties are invited to share their comments with the CCCS during the public consultation which is open until 21 October 2019.

On 30 September 2019, the CCCS has also issued its awaited study on the Online Travel Booking Sector ("Study"), the first market study launched by the CCCS after it took on its function as the consumer protection watchdog. The Study has identified various practices such as strikethrough pricing or pressure selling using false or misleading claims which are further addressed into the Draft Guidelines. From the competition perspective, the CCCS has reviewed a number of practices in the online travel booking sector, such as price and non-price parity clauses; search rankings and ownership; tying and bundling and pricing algorithms. The conclusion by the CCCS is that it did not find evidence that would suggest a violation of the Competition Act and the need for CCCS intervention. The CCCS, however, indicated that it will continue to monitor market developments in the online travel booking industry in Singapore and will not hesitate to take action if deemed necessary to ensure a fair and competitive environment.

In addition to the online travel sector, the CCCS has made known that it is currently monitoring the beauty industry closely, given that the beauty industry has consistently been one of the industries with the most consumer complaints and had in fact the greatest number of consumer complaints in 2018.
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Other industries that the CCCS is currently keeping a close eye on include e-commerce and food and beverage.

The above developments clearly indicate that the CCCS has been active on the consumer protection front ever since it took over the consumer protection function from then-SPRING Singapore on 1 April 2018. Indeed, the CCCS is well-placed to carry out its dual role of ensuring both consumer and competition protection, given their shared goal of enhancing consumer welfare. As such, businesses should therefore be mindful of this new regulatory environment and are advised to review current business practices. Should any practices be identified as being in breach of the CPFTA, necessary steps should be taken to rectify such practices so as to ensure compliance.

Thailand -
(1) Trade Competition Commission’s Newly Drafted Guideline on Franchising Business and Other Recent Enactments

Notification Re: Wholesale/Retail Business

Thailand’s Trade Competition Commission (“Commission”) continues to publish new guidelines and regulations. One of the guidelines recently issued by the Commission is the Notification of the Trade Competition Commission Re: Guidelines for Determining Unfair Trade Practices between Wholesale/Retail Business Operators and Manufacturers or Distributors B.E. 2562 (2019) (“Notification Re: Wholesale/Retail Business”), which we highlighted in the previous Competition Bites issue. The Notification Re: Wholesale/Retail Business was published on 19 July 2019 and remains mostly unchanged from the draft outlined in our previous Competition Bites issue, as most of the provisions of the draft derived from a regulation issued under the Trade Competition Act B.E. 2542 (1999).

Notification Re: Settlement Fine

The Notification of the Trade Competition Commission Re: Criteria, Procedures and Conditions for Imposing the Settlement Fine B.E. 2562 (2019) (“2019 Notification Re: Settlement Fine”) was published on 23 July 2019 to repeal and replace the Notification of the Trade Competition Commission Re: Criteria, Procedures and Conditions for Imposing the Settlement Fine B.E. 2561 (2018). The 2019 Notification Re: Settlement Fine prescribes that the competent officials may not enter into a settlement where it appears that the offender has repeatedly committed such offense (i.e. more than three times) or such commission of offense has effectively affected free and fair competition.

New Regulations

On 7 May 2019, the Commission issued the Regulation of the Trade Competition Commission on the Acceptance of Complaints and the Investigation of Facts B.E. 2562 (2019) and, subsequently on 6 June
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2019, issued the Regulation of the Trade Competition Commission on Criteria, Procedures, Conditions and Period of the Issuance of the Order to Business Operator to Suspend, Cease or Rectify its Action according to Section 60 B.E. 2562 (2019).

**Draft Notification Re: Franchising Business**

The Office of the Trade Competition Commission (“OTCC”) has published a draft Notification of the Trade Competition Commission Re: Guideline for Consideration of Unfair Trade Practices in Franchising Business B.E. … (“Draft Notification Re: Franchising Business”) on its website for public consultation. The Draft Notification Re: Franchising Business provides definitions of “Franchise”, “Franchisor”, and “Franchisee”, the obligations of the Franchisor, and also the criteria for consideration of trade practices which may cause damage to the franchisees.

Under the Draft Notification Re: Franchising Business, the criteria for consideration of the franchisor’s trade practices which may cause damage to the franchisee are as follows:

- Fixing conditions which restrict the rights of the franchisee without justifiable reason, such as requiring the franchisee to purchase goods or services unrelated to the operation of the franchising business;

- Fixing additional conditions for the franchisee to implement after execution of the franchise agreement, such as requiring the franchisee to purchase other goods or services or to carry out conduct beyond what is specified in the franchise agreement;

- Restricting the franchisee from purchasing goods or services from other suppliers and requiring the franchisee to purchase those goods or services from the franchisor or a supplier specified by the franchisor without justifiable reason;

- Restricting the franchisee from discounting perishable goods or goods close to expiration without justifiable reason;

- Fixing different conditions between multiple franchisees without justifiable reason which constitutes trade discrimination; and

- Fixing any unreasonable conditions for purpose(s) other than to maintain the reputation, quality and standard of the franchisor pursuant to the franchise agreement.

The Draft Notification Re: Franchising Business was open for public consultation between 19 August to 20 September 2019, and is expected to become effective in around October or November 2019.
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(2) First Settlement under 2017 Act: M-150 pays THB 12 Million Fine to Settle the Unfair Trade Practice Case

On 1 August 2019, M-150 Company Limited ("M-150"), an energy drink manufacturer and distributor, and its director paid a THB 12 million settlement fine as imposed by the Commission due to the unfair interference with others’ business operation. The incident occurred between October 2011 to July 2012 and was brought to the Commission during the enforcement of the 1999 Act.

Distributors of M-150’s energy drinks filed complaints with the Commission alleging that M-150 unfairly fixed conditions in the purchase or sale of energy drinks. The distributors alleged that if they carried competitors’ energy drinks, M-150 would refuse to deliver its energy drinks for sale.

The investigative sub-committee appointed by the Commission ("Sub-Committee") concluded the following:

- M-150, at that time, was a market dominant business operator having a market share of more than 50% and having sales revenue more than THB 1 billion;
- M-150 unfairly fixed conditions for other business operators to limit service, production, purchase or distribution of goods, or to restrict the opportunity to purchase, sell, receive or provide service, which was prohibited under Section 25 (2) of the 1999 Act;
- M-150 unfairly interfered with the business of other business operators without justifiable reason, which was prohibited under Section 25 (4) of the 1999 Act; and
- M-150 engaged in conduct that is not free and fair competition which destroys, damages, obstructs or restricts business of other business operators, which was prohibited under Section 29 of the 1999 Act.

Based on the findings of the Sub-Committee, the Commission ordered the filing of charges against M-150 and its director. However, M-150 submitted a request to settle the case under Section 79 of the 2017 Act, and M-150 and its director pleaded guilty.

This case serves as a landmark case for the Commission as it marks the first time the settlement power under 2017 Act has been exercised by the Commission to settle cases under its authority.
Vietnam – Draft Decrees on Vietnam Competition Law 2018 Yet to be Finalised

Vietnam Competition Law 2018 has officially come into force on 1 July 2019. To implement the new Law, the Ministry of Industry and Trade (“MOIT”) has released three draft decrees for public comments: (i) draft decree guiding the implementation of Competition Law, (ii) draft decree on the establishment of the Vietnam Competition Commission, and (iii) draft decree on the handling of Competition Law violations. It was expected that all three draft decrees would be finalised and issued by the Government before 1 July 2019.

The notable contents of the draft decrees guiding the implementation of the law have been elaborated in our previous Competition Bites issue.

However, as of this month, none of the above implementing decrees have been approved and issued by the Government. This delay in issuing the implementing decrees has, in practical terms, suspended the implementation of the new Competition Law.

On 5 August 2019, Vietnam Competition and Consumer Protection Agency (“VCCA”) published an announcement on its website stating that the MOIT is still working on the draft decree guiding the organisation and competence of the National Competition Commission. Under the announcement, from 1 July 2019, the enforcement of the Competition Law has been suspended pending the issuance of such decree. The VCCA continues to administer the enforcement of the laws and regulations in relation to consumer protection and multi-level sales.

There has been no official guidance from the Government or the MOIT regarding the implications for business as well as the handling of competition matters, including mergers and other issues, arising in the interim period when the implementing decrees have not been issued.
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