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CLIENTUPDATE

Competition Highlights – ASEAN & Beyond

Introduction

Dear All,

Welcome to Assegaf Hamzah's "*Competition Highlights – ASEAN & Beyond*", which will be issued regularly and is prepared in conjunction with our Singapore sister firm, Rajah & Tann LLP. Within the update, you will find quick notes on a number of important competition related legal and economic developments in ASEAN as well as key jurisdictions such as the European Union, Australia, India and People's Republic of China.

With the 2015 deadline for implementation of the ASEAN Economic Community fast approaching, significant changes are taking place not only in Indonesia, but also in other ASEAN member nations, both with and without a competition regime already in place.

For member nations already with a competition regime in place, we have provided a brief snapshot of what the competition regulator in that particular jurisdiction has been focusing on in the recent months as well as key developments that arose from those recent decisions. For those yet to have a competition regime in place, we have given a status update on the efforts made by those nations in their attempt to implement competition laws in their country. We hope to continue to provide you updates on each of the ten countries on a regular basis.

We hope that you will enjoy this issue and trust that you will find it informative. In addition, any valuable comments and suggestions that you may have to help us improve this publication would be very much appreciated. Feel free to contact the lawyers in your jurisdiction as outlined in the last page for clarifications.

Kind regards,

Competition & Antitrust Team

Indonesia

Surge In Staple Food Prices Leads To Investigation By The KPPU

The recent surge in prices of staple foods in Indonesia has led the Indonesia Competition Commission ('KPPU') to suspect that anti-competitive practices were taking place. Subsequently on 24 July 2013, the KPPU's investigators named 22 parties who were allegedly involved in operating a garlic cartel and on 16 August 2013, the KPPU announced that it had found indications of coordinated speculation in the distribution of imported beef. The KPPU has yet to conclude either investigation and we await further updates on this issue.

Removal Of Taxi Monopoly At Bali Airport

On 8 July 2013, the KPPU recommended the elimination of a taxi service monopoly at the Ngurah Rai International Airport in Bali. Previously, the KPPU had given the management of the airport an extension of time while the airport underwent an expansion project. After the construction work was completed, the KPPU required that the taxi monopoly be eliminated immediately. This case highlights that regulators may take into account commercial realities when enforcing competition law, which is a useful point for all businesses to take note of.

New Requirements for Merger Notifications

Indonesian competition law applies a mandatory post-merger notification system to M&A transactions. On 5 April 2013, the KPPU introduced Directive No. 2/2013, which amends the requirements for such notifications as set out in KPPU Directive No. 13/2010. Previously, only limited information had to be provided in the notification, such as information on the legal aspects, assets and turnover, and affiliated companies. Directive No. 2/2013 introduces two additional requirements, namely, the submission of (1) a business plan for the next three years, including information on the industry outlook; and (2) information on the market structure of the industry, including the market share of the merging entities and their competitors. These changes present new challenges to prospective mergers and acquisitions as it will have to be ensured that the due diligence process takes into account the new requirements.

KPPU Signs MoU With Attorney General's Office

On 22 July 2013, the KPPU and the Attorney General's Office signed a Memorandum of Understanding ('MoU') on cooperation and coordination in the enforcement of the Competition Act, including in respect of cartels. The KPPU, as mandated by the Competition Act, is the body responsible for investigating allegations or prima facie indications of violations of the Competition Act and has the authority to impose administrative sanctions on those who break it. Meanwhile, the Attorney General's Office is the body responsible for prosecuting those suspected of having committed offenses. In essence, the scope of the MoU covers the enforcement of final and conclusive KPPU decisions, the collecting of information and data, and the conducting of studies and research. Previously in 2011, the KPPU signed a similar MoU with the National Police. The MoUs are necessary as the KPPU needs the cooperation of the National Police and Attorney General's Office to expedite the enforcement of the Competition Act, particularly in relation to offenses established by the legislation.

Singapore

Coca-Cola Gives Undertakings To Amend Business Practice

In January 2013, the Competition Commission of Singapore ('CCS') announced that it would cease its investigations into Coca-Cola Singapore Beverages Pte Ltd's ('CCSB') supply agreements with its on-site retailers. The CCS launched the investigation in March 2012 following complaints that CCSB's supply agreements with its on-site retailers had incorporated restrictive provisions, including exclusivity conditions and conditional rebates. According to the announcement, CCSB has since voluntarily amended its supply agreements to remove potentially anti-competitive provisions. In light of this, the CCS declared that it will cease its investigations into CCSB but will continue to closely monitor the situation in the local soft drinks market.

This matter, in which Rajah & Tann acted for CCSB, was also the winner of the "*GCR Awards 2013: Behavioural Matter of the Year – Asia-Pacific, Middle East & Africa*" category, at the Global Competition Review ('GCR') Awards 2013 held in Washington, DC. In securing the

award, the team beat several other matters and deals from across the Middle East, Africa and Asia.

Modelling Agencies Fail On Most Grounds Of Appeal

On 22 April 2013, the Competition Appeals Board ('CAB') issued its decision on appeals from the CCS made by several modelling agencies. The appeals were primarily against the quantum of financial penalty imposed on them by the CCS in 2011 for fixing the prices and rates of modelling services in Singapore. Although the CAB dismissed most of the grounds of appeal submitted by the modelling agencies, it is worth noting that amongst them, one of the grounds of appeal that was successful related to whether the fact that directors or members of senior management were involved should be taken as an aggravating factor.

On this point, the CAB felt that mere involvement of such personnel should not be systematically taken as an aggravating factor. This departed from the CCS' view, which was that involvement of directors or senior management, without more, would be sufficient to qualify as a general aggravating factor. This is a welcome clarification by the CAB over the previous position taken by the CCS that this aggravating factor was applicable each time a director or senior manager was involved, even when there was no active participation.

Motor Vehicle Traders Fined For Bid-Rigging At Public Auctions

On 28 March 2013, the CCS fined 12 motor vehicle traders a total of S$179,071.00 for bid-rigging at motor vehicle auctions which were open to the public and held by various government agencies to dispose of decommissioned motor vehicles. The CCS noted that the colluding parties had entered into an agreement to refrain from bidding against each other at such auctions. Instead, a sole bidder, typically the same party, would bid for the vehicles. Subsequently, the colluding parties would conduct their own 'private' auctions for the vehicles that were won. The difference between the bid price of the vehicles at the public auctions and the 'private' auctions would then be shared amongst the colluding parties at the 'private' auctions.

In its decision, the CCS emphasised that one of the main purposes of auction sales is to obtain a fair and competitive financial return for the owner of the auctioned property. Thus collusion between bidders artificially suppresses the value of the property. CCS considers such bid-suppression, which has as its object the restriction of competition, to be a serious infringement of the Section 34 prohibition of the Act.

Malaysia

Cracking Down On Bid-Rigging Practices

The Malaysia Competition Commission ('MyCC'), where the Competition Act is now 18 months old, indicated in January 2013 that it will make enforcement of bid rigging cases a priority for 2013. As part of this effort, the MyCC jointly hosted a three day get-together with the Organisation for Economic Co-operation and Development and Korea Policy Centre in June 2013. During the workshop, MyCC Chairman Tan Sri Dato' Seri Siti Norma Yaakob emphasised the seriousness of bid rigging cases by alluding to the fact that, in bid rigging cases, the victims are the customers, and that the effect of such conduct may be particularly serious when the provision of essential goods and services that affect the lives and well-being of citizens is involved.

Another notable event in June 2013 is that the MyCC was directed to probe the attempt by Pan Malaysia Bus Operators Association to manipulate the prices in the market for express bus tickets by limiting ticket production for the Aidilfitri festive season. No new

updates have been released on this matter as of yet, and we await further developments on this issue.

Separately, the MyCC also announced on 3 August 2013 that it has finalised the results of its study on the fixing of prices and fee scales by associations and professional bodies. The objective of the study was to find out if the price and fee charging practices of professional bodies or associations were consistent with the Competition Act 2010. The MyCC indicated that the results of the study will be uploaded to its website in due course. A possible consequence of the study could be investigations into cartel type activities in the near future.

Vietnam

State Is Better Placed To Oversee Anti-Competitive Behaviour In Pharmaceutical Market

On 12 June 2013, the Vietnam Competition Authority ('VCA') held a 'Competition Advocacy Seminar for the Pharmaceutical Sector' in Hanoi in collaboration with the Japan International Cooperation Agency ('JICA'). During the seminar, Nguyen Phuong Nam, deputy director general of the VCA, said that there were signs of anti-competitive behaviour emerging in Vietnam's pharmaceutical market. Mr. Nam added that the signs emerged from the close relationship between foreign drug producers and local importers and distributors. However, because the industry is subject to regulation by the state, the VCA proposed that instead of opening an investigation, other state management bodies should take responsibility by tightening control over this issue and managing the various links between the foreign producers and the local importers and distributors.

Petition Filed By Private Corporation On Abuse Of Dominance In Hydropower Market

Separately in August 2013, a private hydropower corporation has filed a petition against the Electric Power Trading Company ('EPTC') of abusing its position as the only buyer of power in the market. In its petition, the private corporation accused the EPTC of violating competition law in Vietnam as the EPTC only buys power from companies under the Vietnam Electricity Group ('EVN'). EPTC allegedly turns down the offers from private firms. VCA has given the parties one month to respond and it will be interesting to see if the VCA decides to open official investigations into this matter.

It is clear from the above that the competition law landscape is developing very quickly in Vietnam, with even private entities also taking up an active role in enforcing competition law.

Thailand

New Merger Criterion

Under Section 26 of the Trade Competition Act 1999 ('TCA'), merger of businesses that may result in monopoly or unfair competition are prohibited, unless permission is obtained from Thailand's Trade Competition Commission ('TCC') based on criteria prescribed by the TCC. To-date however, mergers in Thailand may still be implemented as Section 26 remains unenforceable because the TCC has yet to implement any criteria relating to merger notification thresholds as well as the procedure by which the TCC examines a merger (in the form of TCC notifications).

Tackling the first issue towards enforcing merger regulations in Thailand, the TCC recently approved a set of criteria to be used as merger notification thresholds governing business mergers under Section 26 at its second meeting earlier in June this year. Under the new thresholds, notification to the TCC will be required for business mergers by businesses

which have: (i) at least 30 per cent market share before or after the merger and revenue in the previous year of at least Bt2 billion; and (ii) are acquiring shares with voting rights accounting for at least 25 percent of the total in the case of a publicly listed firm, and 50 percent for a limited company.

However, as the above criteria are not yet effective prior to their official publication in the Government Gazette, they are in no certain terms final and might be subject to further changes down the road.

Cambodia

Submission Of Draft Law On Competition Expected This Year

With the exception of essential business sectors (for example telecoms, banking and electricity), where their respective competition policies are administered by the relevant government authority in-charge, Cambodia has yet to have in place a formal competition law or corresponding regulatory authority. While existing provisions relating to competition can be found in Articles 22 and 23 of the Law on Marks, Trade Names and Acts of Unfair Competition, they are often criticised as lacking in practical applicability due to their broad and ambiguous nature.

However, the landscape for competition law in Cambodia is poised to change with Cambodia's draft law on competition being expected to be submitted to the Council of Ministers this year following the completion of its public consultation in July 2012. According to the draft competition law, a Cambodian competition commission and a directorate of the commission will be established, to promote competition and implement competition laws and regulations. We await further developments.

Business that have operations in Cambodia would do well to take note that they may soon have to review their compliance processes, to ensure that they are not in violation of Cambodia's competition law.

Myanmar

Bill On Competition Law Is Submitted At Myanmar Parliamentary Session

On 25 June 2013, a bill on competition law was submitted at the seventh regular session of Myanmar's parliament. This marks the first milestone in Myanmar's progress towards meeting the 2015 deadline to introduce a nation-wide competition law in accordance with its obligations under the ASEAN Economic Blueprint. While there may be at least several months before the bill is approved by parliament, it is nevertheless a welcome development in establishing competition jurisprudence in Myanmar, a country which does not have a generic competition law in place presently.

Business in Myanmar should take this opportunity to ensure that they are ready to review their processes as soon as the Myanmar parliament passes the bill, which may take place as early as a year or two.

Lao People's Democratic Republic

Consultation Workshop Concludes On Draft Domestic Trade Competition Law

Under the ASEAN Economic Community Blueprint ('AEC Blueprint'), Competition Policy and Law have been identified as a vital vehicle to forward the region's goal towards economic integration amongst the ASEAN member states. With the 2015 deadline for

implementation fast approaching, the Lao People's Democratic Republic ('Laos') remains one of five ASEAN member states with no generic competition law in place. However, it seems that the Laos is finally beginning to take action with regards to meeting the deadline as part of its obligations under the AEC Blueprint.

In February earlier this year, representatives of local authorities as well as the business community attended a consultation workshop held in Khammouane to discuss and brainstorm a draft law on domestic trade competition. The issues discussed included trade competition promotion in Laos, goods price management, service and competitive policy, consumer protection as well as market price forecasting. Despite being a step in the right direction, no written report on the outcome of the workshop was released. Thus, the exact progress that was made towards Laos meeting the deadline under the AEC Blueprint remains to be seen.

Laos appears to be very much still in the formative stages of developing a general competition law. This is an excellent opportunity for stakeholders such as the business community to participate in the various consultative processes opened by the government. This will not only enable the competition laws to better reflect economic realities, but also provide businesses with a keener understanding of how their operations may be affected when the competition law is enforced.

Shanghai, People's Republic Of China

Taking Action Against Resale Price Maintenance Practices

On 1 August 2013, the Shanghai High People's Court came to a decision in the first civil lawsuit involving resale price maintenance since the People's Republic Of China's ('China') Anti-Monopoly Law ('AML') came into effect in August 2008. One key point from the decision of the Shanghai High People's Court is that in order to hold that an RPM provision equates to a monopoly agreement, the court must find that the RPM provision has restricted or eliminated competition and the burden of proof for showing this will be on the plaintiff. This is the opposite from cartel cases, where the defendant bears the burden of showing that the agreement does not have any effect of eliminating or restricting competition.

Separately, China has also seen several key RPM enforcement actions in 2013 by the National Development and Reform Commission ('NDRC'), one of the key agencies in charge of enforcing the AML. In February 2013, the NDRC imposed collective fines of almost USD 80 million on famous Chinese liquor brands, Maotai and Wuliangye respectively, for requiring distributors to resell the products above a certain price. Subsequently, the NDRC announced on 7 August 2013, that it had imposed RPM-related fines of USD 109 million against these six milk powder companies, five of which are non-Chinese.

The above civil cases and administrative actions clearly show that RPM is currently under great scrutiny by enforcement authorities. Given the widespread practice of having RPM in distribution agreements and other contracts, businesses in China would do well to do a thorough review of their operations to ensure that they do not foul of competition law in China. Moreover, the fact that a civil lawsuit has been successful suggests that more cases could potentially follow in its wake, now that potential litigants have a precedent that they can rely on.

Other jurisdictions

Europe

Draft Directive Issued On Private Antitrust Litigation

Following eight years of internal and public consultations alongside unheeded encouragement to promote private enforcement of EU competition rules, as well as an aborted comprehensive legislative package on collective redress, the European Commission ('EC') has finally presented its first draft "*Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of Member States and of the European Union*".

Under the draft directive, key proposals include: EU-wide rules to ensure effective access to evidence a claimant needs to prove in order to pursue their claims as well as exceptions to shield disclosures made under leniency procedures to claimants in follow-on private damage actions; and the harmonisation of commonly found issues in private damages actions such as the binding effect of infringement decisions, limitation periods, and presumptions of passing-on and harm.

Accompanying the draft directive is a simultaneously issued non-binding recommendation by the EC dealing with collective redress. Through the recommendation, the EC expressed its preference for an opt-in system which reserved standing only to eligible representative bodies. In addition, no contingency fees or punitive damages are allowed or provided for. Notwithstanding this restrictive approach and its limitations, the recommendation may prove to be useful in complementing the draft directive and bolster private enforcement of EU competition rules by SMEs, improving their chances of being effectively compensated.

While the recommendation will be effective upon publication in the Official Journal, it is non-binding. The draft directive however, is now due to be discussed by the European Parliament and the Council of the EU. Once agreed, the directive will be adopted at a EU level, giving Member States two years to implement the Directive's provisions in their legal system.

Public Consultation On Improvements To Merger Regulation

On 20 June 2013, the EC launched a public consultation on suggested improvements to the European Merger Regulation ('Consultation'). Two main areas are discussed under the Consultation: minority shareholdings and case referrals between the European Commission and the Member States' Competition Authorities. Importantly, the EC also initiated a reflexion on whether the EU Merger Regime ('ECMR') should apply to the acquisition of non-controlling minority shareholdings, also referred to as structural links.

The Consultation highlights that significant harm to competition and consumers can result from structural links, notably:

(a) by reducing competitive pressure between competitors ('horizontal unilateral effects');

(b) by substantially facilitating coordination among competitors ('horizontal coordinated effects'), and

(c) in case of vertical structural links, by allowing companies to hamper competitors' access to inputs or customers ('vertical effects').

Under the current European competition rules, the acquisition of minority shareholdings can be reviewed under the ECMR if and when it leads to acquisition of control, i.e. in limited situations only. Further, whilst Articles 101 and 102 of the Treaty On The Functioning Of The European Union (which prohibit respectively anti-competitive agreements and abuse of dominance) may, in some instances, apply to structural links, these substantive provisions would only apply *a posteriori* rather than *ex-ante*. This is because it is recognized that 'the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct restricting competition'.

The Consultation, therefore, aims at providing the EC with the power 'to investigate and, if necessary, intervene against anti-competitive structural links'. In support of its proposal, the EC refers to Merger Regimes in other jurisdictions which allow for such reviews of acquisition of minority shareholdings.

Australia

The Australian Competition and Consumer Commission ('ACCC') recently released draft Merger Review Process Guidelines for public comment this July. With the last substantive revisions to the Guidelines occurring in 2006, an update was required to accurately reflect a number of changes in ACCC processes and approach to reviewing mergers in recent years.

Significantly, the Guidelines now contain information on ACCC's pre-assessment phase as well as informal clearance procedure, under which the ACCC may grant informal clearance of a transaction in the pre-assessment phase if certain requirements are met. The revision also sets out in detail how parties may approach the ACCC for a confidential review, where merger parties may approach the ACCC for a preliminary assessment of clearance risk of a proposed transaction prior to making a formal request for informal clearance, without the need for the matter to be made public.

The formalisation of the ACCC's approach in the revised Guidelines represent much welcomed clarifications on the informal process for merger parties. Despite Australia operating a voluntary merger clearance regime, the enhanced ability for parties to seek informal clearance or to receive early assistance in the identification of issues will no doubt translate to added comfort for merger parties, particularly where closing of transaction timetables is often reliant on the condition precedent of ACCC clearance.

India

On 16 August 2013, the Competition Commission of India ('CCI') released its order to fine Temasek Holdings ('Temasek'), the investment arm of the Singapore government, and two of Temasek's subsidiaries Rs 50 lakh (USD 79,000) for late filing of approval forms for an M&A deal as required under Indian securities law. Under CCI regulations, it is mandatory for any investment firm planning to buy a controlling share in an Indian company to notify the CCI 30 days in advance and submit the necessary filings with details about the proposed M&A deal. Temasek had only filed the notice after a delay of around 399 days, based on original advice from Temasek's Indian legal advisors that no filing was required. The CCI may impose a fine of up to one percent of the total combined assets of all companies involved in the M&A deal. In Temasek's case, the combined assets were well over Rs 31 lakh crore (USD 14.7 billion). In imposing the fine, the CCI stated that it took into account the fact that the proposed deal was between two foreign entities and that the deal was later terminated.

This case may be a sign that the CCI is intensifying its scrutiny of international transactions. Foreign entities currently in the midst of, or who seek to participate in, M&A deals in India should ensure that they have complied with all of the relevant rules and regulations.

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