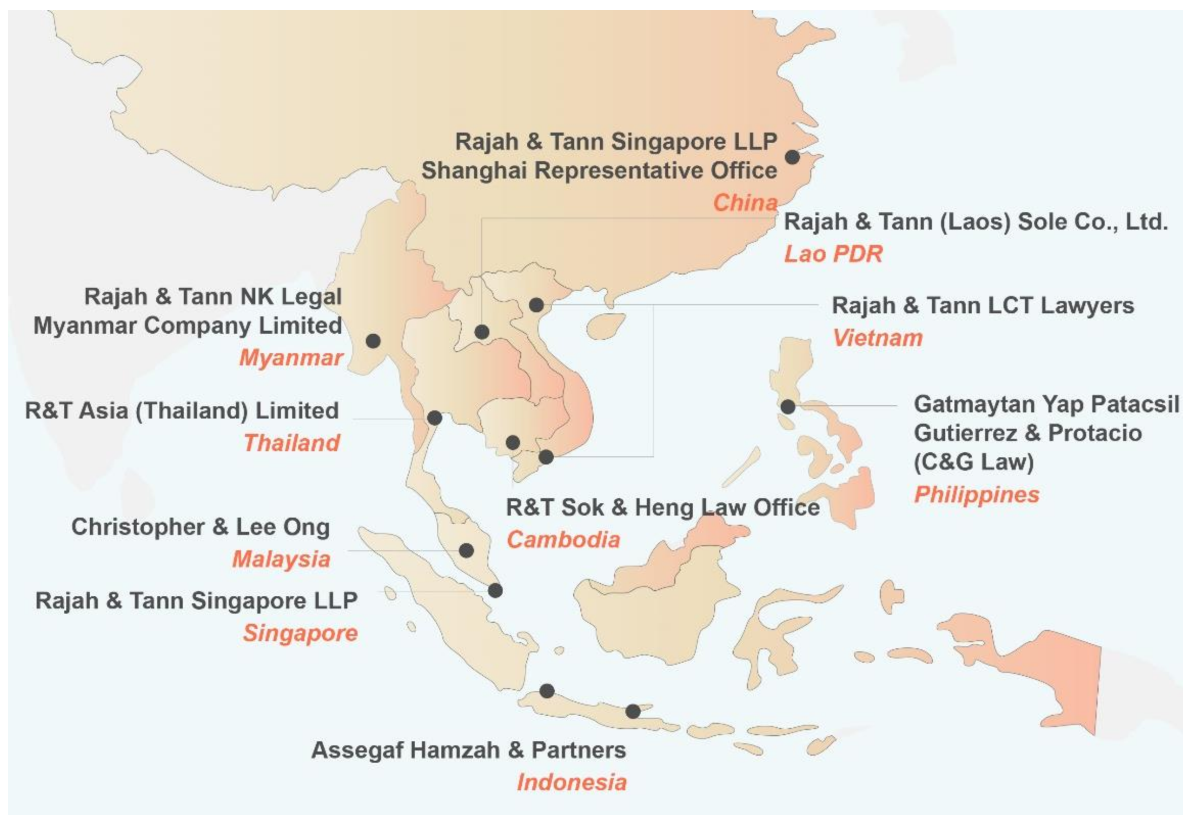
Regional Competition

COMPETITION BITES 2019 - Issue 2



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Introduction

Welcome to our Issue 2 of Competition Bites, providing you with updates of key developments primarily 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. This includes the setting-up of the National Competition Commission in Vietnam, a number of guidelines issued by the various competition regulators across the region, such as the long-awaited IP Guidelines in Malaysia and the first abuse of dominance case in the Philippines.

Focus for this issue – Indonesia's long-awaited new regulation on case handling procedure. Significantly, this new regulation entirely supersedes the previous case handling procedure regulation. Whilst the new regulation affirms certain provisions found in the previous regulation, it introduces new provisions such as the recognition of behavioural remedies proposed by the reported party and allowing an early plea of guilt by a reported party. It also sets out new measures that the KPPU can take to ensure compliance with its final decision.

Our updates are necessarily bite-sized. Should you need any further details or wish to discuss, please do not hesitate to contact us directly.

Yours sincerely,

The Rajah & Tann Asia Competition & Antitrust and Trade Practice

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Feature Article:

Indonesia - New Regulation on Case Handling Procedure

By: Farid Fauzi Nasution and Anastasia Pritahayu R.D. (Assegaf Hamzah & Partners)

Amidst the long-awaited amendment to the Indonesian Competition Law ("**ICL**"), the Commission for the Supervision of Business Competition (*Komisi Pengawas Persaingan Usaha* or "**KPPU**") issued KPPU Regulation No. 1 of 2019 on Case Handling Procedure ("**New Regulation**") on 4 February 2019. This New Regulation supersedes the entire previous regulation on case handling procedure, i.e. KPPU Regulation No. 1 of 2010 on Case Handling Procedure ("**Previous Regulation**").

Both the New Regulation and Previous Regulation consist of a three-stage case handling procedure:

(1) pre-investigation;

(2) investigation; and

(3) examination, which consists of a two-stage hearing (i.e., preliminary examination and further examination).

The notable changes in the New Regulation are as follows:

1. **Introduction of behavioural remedy**

   Under the New Regulation, the reported party (i.e. person under investigation) can plead guilty at the beginning of the preliminary examination, which as highlighted above is the first of the two-stage hearing under the examination stage. At this stage, the reported party can propose that it changes its behaviour in order to stop the case ("**Behavioural Remedy**"). Once KPPU accepts the proposal for Behavioural Remedy, the reported party is then required to sign an integrity pact that contains their guilty plea and commitment to cease the act that allegedly violates the ICL. KPPU will then monitor the implementation of such integrity pact for a certain period.

2. **Recognition of indirect evidence**

   For the purpose of verifying an alleged anti-competitive practice, the ICL recognises five types of evidence:

   a. witness' testimony;

b. expert's statement;

c. circumstantial evidence;

d. letter or document (including electronic documents such as emails); and

e. reported party's testimony.

Whilst the ICL and the Previous Regulation are silent on the existence or validity of indirect evidence, the KPPU has long utilised economic and/or communication evidence as indirect evidence in proving an alleged violation of the ICL. Such communication evidence may include data and/or document which shows the exchange of information between parties that potentially violates competition laws. Indeed, given the recent shift in judicial support of accepting indirect evidence, the New Regulation now recognises economic and/or communication evidence as part of circumstantial evidence. Based on the definition of communication evidence in the New Regulation, text and instant messages will be caught as well. Undertakings are therefore advised to be cautious when communicating potentially sensitive information about their businesses, be it through emails or less formal means such as text messaging.

3. Affirmation of a minimum of two pieces of evidence as a requirement to confirm an alleged violation

The Previous Regulation stipulated that an alleged violation can be confirmed if it is proven by "sufficient evidence", but fails to provide further explanation on the criteria of such "sufficient evidence". This has caused uncertainty with regard to the standard of proof in competition cases and resulted in arbitrary decisions by the KPPU. To address this issue, the New Regulation now requires the KPPU to provide at least two pieces of evidence in order to justify an alleged violation brought by the investigators.

4. The mechanism for termination and recommencement of an investigation

Both the New Regulation and Previous Regulation stipulate that the KPPU can terminate an investigation process if the alleged violation has not been legally proven. However, under the Previous Regulation, it is not possible for the reported party to know of such termination. To address this issue, the New Regulation requires the KPPU to notify the termination to the reported party within 14 business days from date of registration of the case in the List of Terminated Investigation (*Daftar Penghentian Penyelidikan*). Any terminated investigation can be recommenced by the KPPU if they find sufficient new evidence. However, there is no stipulation in the New Regulation requiring KPPU to notify the recommencement to the reported party.

5. Measures to ensure compliance with a final and binding decision

To ensure compliance with a final and binding decision, both the Previous Regulation and the New Regulation allow the KPPU to request for an execution order from the district court. In addition, the New Regulation allows other measures to be taken by the KPPU, including:

a. legal actions such as:

(i) civil forfeiture, which allows the KPPU to commence legal action to request the seizure of assets through the court; and/or

(ii) collection through a third-party.

b. other measures such as:

(i) persuasive approach, where the KPPU can request a related party's compliance with the final decision;

(ii) written warning;

(iii) announcement through the media; and/or

(iv) inclusion into a blacklist of undertakings who do not comply with final and binding decisions.

Unfortunately, there are no further details regarding any of the above procedures.

6. Summon a foreign entity through the Indonesian Embassy

Whilst the Previous Regulation is silent on the procedure to summon parties residing outside of the Indonesian jurisdiction, the KPPU can deliver a summon to any party outside of Indonesia through the Indonesian Embassy in the relevant country under the New Regulation.

7. Incidental power of attorney

The New Regulation explicitly stipulates that a reported party can be accompanied by its in-house legal counsel at every examination stage. This serves as another option of legal assistance for a reported party in dealing with KPPU's examination, aside from legal assistance from an advocate. Legal assistance by an in-house legal counsel must be based on an incidental power of attorney, which is issued by the Chairman of KPPU based on request.

8. **Investigation in initiative cases**

Under the New Regulation, investigation on initiative cases (investigations that are not based on a report) can be commenced once the KPPU Commissioners have given their approval. In contrast, under the Previous Regulation, the commencement of an investigation only needs to be reported to the Commissioners.

9. ***In Absentia* proceedings and decision**

Under the New Regulation, it is possible for the KPPU to conduct *in absentia* proceedings, whereby the KPPU commences the preliminary examination without the presence of the reported party. Such proceedings can only be commenced if the reported party has failed to appear before the Commissioners Assembly twice even after they have been summoned properly.

Notwithstanding the above, the New Regulation still has not fully reflected the implementation of the due process of law principle as it raises the following issues:

1. **Absence of specific provision regarding the rights of the reported party**

The Previous Regulation clearly specifies the rights and obligations of the reported party during the investigation and hearing process at the KPPU. However, the New Regulation eliminates these provisions, and as a result, the reported party's rights have become unclear. This issue may potentially harm the reported party since their rights are no longer explicitly included and protected under the New Regulation.

2. **No specific timeline for examining case dossiers and evidence**

Under the Previous Regulation, the reported party had the chance to examine all evidence submitted during the hearing process in the examination stage before the submission of the conclusion to the Commissioners Assembly. Unfortunately, the New Regulation is silent on such matter.

In conclusion, the New Regulation has attempted to bring certainty on several aspects of the case handling procedure that was not stipulated or provided with sufficient clarity in the Previous Regulation. The introduction of the Behavioural Remedy is also expected to be an attractive approach for companies in dealing with a KPPU investigation. If it is properly implemented, companies may be encouraged to be more cooperative with the KPPU during investigations, and the KPPU itself can avoid lengthy and inefficient procedure in handling alleged violation of the ICL. However, it remains to be seen whether the issuance of the New Regulation will actually result in improved case handling procedure.

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Malaysia -
(1) MyCC Guidelines on Intellectual Property Rights and Competition Law

Almost one year after the Malaysia Competition Commission ("**MyCC**") issued its draft guidelines on intellectual property rights ("**Draft IP Guidelines**") and further to a public consultation thereon, the MyCC Guidelines on Intellectual Property Rights and Competition Law ("**IP Guidelines**") came into force on 6 April 2019.

The IP Guidelines provide guidance on MyCC's approach on competition issues under the Act relating to intellectual property ("**IP**"). IP falls within the purview of competition law as the definition of goods under the Competition Act covers both tangible and intangible property. The IP Guidelines must be read together with the Act and all the other MyCC guidelines.

For conduct involving IP, MyCC would normally define the relevant market based on the following:

- the final or intermediate products incorporating the IP – product market;
- the processes or technology incorporating the IP – technology market; and
- intangible knowledge or know-how that constitutes the IP – innovation or R&D market.

MyCC recognises the tension between IP owners being conferred exclusive rights, which is consistent with one of IP rights' aims of encouraging new and on-going innovation on one hand, but which could negatively affect competition in the market on the other hand (for example, if the right causes difficulties for rival enterprises to sell substitute products and technology or if the IP owners leverage on their dominant position and dictate unfair terms).

MyCC therefore clarified that it will consider IP licensing to be pro-competitive so long as the conduct of IP owners does not fall within the anti-competitive prohibitions imposed by the Act as follows:

- anti-competitive agreements between enterprises (Section 4 of the Act or Chapter 1 Prohibition); or
- abuse of dominance (Section 10 of the Act or Chapter 2 Prohibition).

The IP Guidelines provide various illustrations of when MyCC would consider certain horizontal and vertical agreements as anti-competitive in nature. For example, MyCC reiterates its strong stance against resale price maintenance ("**RPM**") which would occur when an IP owner fixes a minimum price at which the licensee of its IP right may sell IP-protected articles and this may extend to the level of distributors or retailers to ensure the IP owner will obtain a higher royalty income. MyCC does however

recognise that it would be pro-competitive for the licensor to prevent non-exclusive licensees from engaging in intra-brand price competition at the expense of providing customer support or advertising that may increase inter-brand competition and in the longer run, result in intensified price competition and customer satisfaction. Thus, an assessment will need to be conducted by the IP owner to determine whether an agreement containing a RPM clause infringes Chapter 1 of the Act.

Other illustrations in the IP Guidelines include territorial and field of use restrictions, exclusive licensing, exclusive dealing, tying and grant-backs.

As regards abuse of a dominant position, the IP Guidelines expressly recognise that if an enterprise is found to be dominant in the relevant market due to its IP, that in itself is not illegal unless the enterprise abuses its dominant position. The normal exercise of an IP right by a dominant enterprise will not constitute abuse. Abuse of dominance however occurs through exploitative conduct and/or exclusionary conduct.

Illustrations of possible abusive practices set out in the IP Guidelines include, amongst others, the following:

- limiting or controlling production, market outlets or market access – illustrations on non-competition clause and product hopping;
- refusal to licence IP; and
- tying and bundling – mandatory patent package.

Whilst overall, the IP Guidelines provide welcome guidance from MyCC on MyCC's approach on competition issues under the Act relating to IP, there are important points of concerns that remain. First, the Guidelines do not create a specific safe harbour in relation to IP-related agreements. Second, the definition of IP appears extremely wide and captures "confidential information" without any definition being provided. Finally, the IP Guidelines seemingly take an extremely strong stance against territorial restrictions and parallel imports. In particular, the IP Guidelines provide that an absolute territorial licence provided in order to enable parallel import to be controlled and prevented may be considered anti-competitive, thus placing the onus on the IP owner to establish that the territorial restriction was not granted for such a purpose. This requirement to prove a negative places undue burden on the licensors. IP owners should immediately review their existing agreements and behaviour to avoid an infringement of the Act.

An infringement of the Chapter 1 Prohibition or the Chapter 2 Prohibition could potentially be severe as it may result in the imposition by MyCC of a financial penalty of up to 10% of the enterprise's worldwide turnover over the period during which an infringement occurred.

A copy of the IP Guidelines can be found here.

(2) MyCC's Bid Rigging Proposed Decision

MyCC (who has been focused on bid-rigging since its inception) finally issued its first proposed decision on bid-rigging, one of the deemed significantly anti-competitive horizontal agreements listed in Section 4(2) of the Act. A proposed decision was issued in March this year by MyCC against eight enterprises for their involvement in bid-rigging of Request for Quotations ("**RFQs**") and tenders valued at RM 1.92 million (approximately USD 458,900) submitted to Akademi Seni Budaya dan Warisan Kebangsaan ("**ASWARA**"), a public higher learning institution in the field of performance arts in Malaysia. The eight enterprises were alleged to have been colluding with each other by sharing each other's RFQs and tender proposal information, manipulating prices and preparing documents for one another. The winner of the RFQs and tender were alleged to have also shared their profits with the losing bidders. For their involvement in bid-rigging, MyCC imposed a total penalty of RM 1.94 million (approximately USD 463,700) on the enterprises.

Philippines -

(1) PCC Looks into Power Plant Shutdowns for Alleged Collusion

On 22 April 2019, the Philippine Competition Commission ("**PCC**") announced that it has launched investigations into alleged collusion or abuse of dominance in relation to a streak of power plant interruptions in Luzon, which may have led to the price hikes in the retail electricity market.

The PCC received public complaints alleging that several power plants have caused scheduled and forced interruptions in Luzon. These interruptions have led to a decrease in power reserves and a reduction in availability of electrical power, causing the Luzon grid to be placed on red and yellow alerts. Following these complaints, the PCC will determine whether these interruptions were intentionally created to hike up electricity prices or were legitimate and unintended breakdowns that impacted supply conditions.

Under the Philippine Competition Act ("**PCA**"), businesses are prohibited from engaging in anti-competitive behaviour. Anti-competitive or collusive behaviour is punishable under Philippines competition law with fines of up to PHP 250 million (approximately USD 4.76 million) and imprisonment of up to seven years.

(2) PCC Files First Abuse of Dominance Charges

On 27 March 2019, the PCC filed its first Statement of Objections ("**SO**") for abuse of dominance under Section 15 of the PCA. Under the PCC's rules of procedure, an SO is a formal administrative complaint filed by the PCC's Competition Enforcement Office after the termination of an investigation. The SO was filed 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 from the property. The housing developer also blocked other ISPs from installing fixed-line internet on units and from marketing their services to the property's interested residents. The residents of the housing development alleged that the ISP they were consequently forced to use was slow, unreliable, and overpriced in relation to other ISPs.

In its press release on the SO, the Director of the Competition Enforcement Office said the SO was "*a fair warning to businesses that resort to exclusive partnerships to corner profit and hinder the entry of other competitors in exercise of its market power. This act of abuse of dominance limits the choices made available to residents and is a violation of the competition law*".

The press release does not indicate the specific type(s) of abuses of dominance under the PCA's Section 15 allegedly committed by the housing developer. However, the 26 March 2019 notice of the conduct of a full administrative investigation in relation to fixed-line internet service provision in certain multi-dwelling units appears to indicate the following such abuses:

- Section 15(b): Imposing barriers to entry or committing acts that prevent competitors from growing within the market in an anti-competitive manner except those that develop in the market as a result of or arising from a superior product or process, business acumen, or legal rights or laws;
- Section 15(c): Making a transaction subject to acceptance by the other parties of other obligations which, by their nature or according to commercial usage, have no connection with the transaction;
- Section 15(e): Imposing restrictions on the lease or contract for sale or trade of goods or services concerning where, to whom, or in what forms goods or services may be sold or traded, such as fixing prices, giving preferential discounts or rebate upon such price, or imposing conditions not to deal with competing entities, where the object or effect of the restrictions is to prevent, restrict or lessen competition substantially: *Provided,* That nothing contained in the PCA shall prohibit or render unlawful:
    - Permissible franchising, licensing, exclusive merchandising or exclusive distributorship agreements such as those which give each party the right to unilaterally terminate the agreement; or
    - Agreements protecting intellectual property rights, confidential information, or trade secrets;
- Section 15(i): Limiting production, markets or technical development to the prejudice of consumers, provided that limitations that develop in the market as a result of or due to a superior product or process, business acumen or legal rights or laws shall not be a violation of the PCA.

In addition, the notice indicates that the PCA's general prohibition on anti-competitive agreements under Section 14(c), i.e., "[a]*greements … which have the object or effect of substantially preventing, restricting or lessening competition shall also be prohibited*," was also violated by the housing developer (and presumably its chosen ISP).

This case is significant as it marks the first abuse of dominance case filed before the PCC in violation of Section 15 of the PCA, which prohibits abuses of dominant position. It also shows that the PCC is now taking its enforcement against potential abuses of dominance more seriously, and will look into complaints and allegations received from the public.

Under the PCA, an entity found to have abused its dominance may be liable to a fine of up to PHP 100 million (approximately USD 1.9 million).

(3) PCC Issues Pre-Merger Guidance on Exchanges of Information

On 11 April 2019, the PCC issued its "Guidance on Pre-Merger Exchanges of Information", which indicates that the pre-merger exchange of confidential business information may constitute "gun jumping", i.e., the premature consummation of a notifiable transaction prior to PCC clearance, or an anti-competitive agreement, both of which are prohibited under the PCA. Thus, to prevent inappropriate dissemination of confidential business information and ensure that competition is protected during the PCC review process, the PCC prescribed certain measures, which include:

- The notifying parties are strongly discouraged from consulting or employing the same counsel regarding a transaction.
- Information necessary for due diligence must be narrowly tailored and reasonably related to a specific due diligence or pre-merger integration planning issue.
- If confidential business information must be exchanged for due diligence and pre-merger integration planning, parties are advised to employ third-party consultants that limit the dissemination and use of that information within the parties' businesses. The group of individuals ("clean team") who shall assemble, review, and analyse sensitive and other confidential data under certain protocols and prior to regulatory approval or consummation of the deal should not include any personnel responsible for competitive planning, pricing or strategy.

For more information on the guidance, please click here.

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Singapore -
(1) Clearance of Mergers

Our previous update highlighted that 2018 was a very active year for merger enforcement in Singapore. Merger enforcement remains similarly active in 2019, with the Competition and Consumer Commission of Singapore ("**CCCS**") reviewing and clearing two notified mergers in the last three months:

- On 8 February 2019, the CCCS cleared the proposed acquisition by Gebr. Knauf KG of USG Corporation, concluding that the proposed transaction, if carried into effect, will not lead to a substantial lessening of competition in the markets for supply of gypsum boards and modular suspended ceilings in Singapore. In arriving at its decision, the CCCS looked at the competitive constraints posed by other local suppliers, as well as the potential for overseas suppliers to supply to Singapore.

- On 22 February 2019, the CCCS cleared the proposed acquisition by DKSH Holding (S) Pte. Ltd. ("**DKSH**") of Auric Pacific Marketing Pte. Ltd. ("**APM**") and Centurion Marketing Pte. Ltd. ("**CM**"), concluding that the proposed transaction, if carried into effect, will not lead to a substantial lessening of competition in the market for the provision of distribution services for packaged food and beverage products in Singapore. Notably, the CCCS defined the market relatively widely as the market for the provision of distribution services for packaged food and beverage products in Singapore and did not segment the market further by the different types of food and beverage products.

(2) CCCS Joins New Framework on Procedural Fairness in Antitrust Enforcement

On 16 May 2019, the CCCS announced that it has joined the Framework on Competition Agency Procedures ("**CAP**") as a founding member. The CAP is a multilateral framework led by the International Competition Network ("**ICN**") and allows competition authorities worldwide to cooperate on the fundamental principles of procedural fairness and transparency. The CAP will facilitate collaboration between participating agencies as they engage in dialogues to forge a better understanding of each other's processes.

This announcement came soon after the CCCS reiterated its commitment to due process in relation to its infringement decision in the fresh chicken distributors cartel case. In response to the public's query on why the case took a few years to conclude, the CCCS cited the complexity of the case as well as the new evidence that surfaced during the course of investigations. Emphasising the importance of due process in ensuring the robustness and credibility of competition regime, the CCCS said that parties under investigations must be given enough time to consider the evidence and submit their

representations to the competition authority. This is in line with the CAP's principle of giving parties subject to a proceeding the chance to present, respond to and challenge evidence against them.

With regard to the investigative process, the powers that the CCCS has under the Singapore Competition Act (Cap. 50B) ("**Act**") are fairly wide. Section 63 of the Act was recently amended to give the CCCS the power to conduct general interviews during inspections and searches, without having to first serve a written notice on each individual to be interviewed. This presents a risk that the investigating officers may go beyond the subject matter or scope of the investigation (perhaps unintentionally) when conducting the general interview, and that the occupants of the premise may not be sufficiently informed and equipped to answer such general interview questions or raise concerns where the scope of questioning goes beyond the subject of the investigation. Whilst the intent of the amendments may not be to expand the CCCS' powers of investigation, this is an area that needs to be properly managed in practice to ensure procedural fairness.

Thailand - OTCC Drafting New Fair Trade Practice Guidelines and Clearing Backlog of Cases

Thailand's Office of the Trade Competition Commission ("**OTCC**") is in the process of drafting a new trade practice guideline applicable to wholesale/retail business operators, manufacturers and distributors, after receiving many complaints relating to unfair trade practices, namely the "Notification of the Trade Competition Commission Re: Guideline for Consideration of Fair Trade Practices between Wholesale/Retail Business Operators and Manufacturers or Distributors" ("**Draft Notification**"). Most of its provisions are similar to those of the previous OTCC regulation issued under the Trade Competition Act B.E. 2542 (1999) ("**1999 Act**").

By virtue of Section 57 of the Trade Competition Act B.E. 2560 (2017) ("**2017 Act**"), the Draft Notification sets out the criteria for determining trade practices of wholesale/retail business operators which could constitute conduct unfairly resulting in damage to other business operators, specifically to manufacturers and distributors.

The Draft Notification is intended to apply to wholesalers or retailers of daily-use consumer goods having a modern distribution system, regardless of whether they have a branch or operate as a franchise, and using modern technology in management processes to accommodate customers, e.g. hypermarket, cash and carry, supermarket, specialty store, department store and convenience store.

It is explicitly prescribed that trade practices between wholesale/retail business operators and manufacturers or distributors shall be based on the principle of free and fair trade practices, which shall not be coercive, discriminatory or obstructive. The trade practices must also have clearly specified criteria, a written agreement in advance, and must be an ordinary form of business conduct which is justifiable.

According to the Draft Notification, the trade practices of wholesale/retail business operators which may be considered as conduct unfairly resulting in damage to manufacturers or distributors are as follows:

(a) unfair price fixing by fixing or lowering the purchase price of the goods purchased from the manufacturer or distributor below the ordinary purchase price;

(b) unfair demand for unnecessary or excessive economic benefits from the manufacturer or distributor, e.g. entrance fee/listing fee, additional fee or discount for special occasion;

(c) unfair return of goods purchased from the manufacturer or distributor without justification, a mutual agreement in advance or the manufacturer's or distributor's consent;

(d) unfair use of consignment agreement;

(e) unfair coercion of the manufacturer or distributor to purchase goods or pay service fee(s);

(f) unfair assignment of duties to the manufacturer's or distributor's personnel without the manufacturer's or distributor's consent or a mutual agreement in advance;

(g) unfair refusal to accept the goods that are purchased or manufactured specifically for the wholesale/retail business operator, e.g. private-brand goods or house-brand goods; and

(h) other unfair trade practices, such as:

    (i) the wholesale/retail business operator's delay of price payment, reduction of purchase order, cessation or refusal to do business with the manufacturer or distributor as a result of the manufacturer's or distributor's refusal to agree with the condition fixed by the wholesale/retail business operator or the manufacturer's or distributor's submission or preparation of a complaint relating to the behaviour of the wholesale/retail business operator;

    (ii) delisting of goods from its shelves without justified reason or contrary to the prior agreement;

    (iii) use of trading partner's information, trade secrets or technology to manufacture wholesale/retail business operator's house-brand goods for sale in competition with ordinary brand goods; and

    (iv) other conduct which is in the manner of an unfair trade practice.

The Draft Notification is expected to become effective in June 2019.

Apart from the Draft Notification, the OTCC is preparing to draft another guideline for franchise businesses as the number of such business operators has increased and there is no specific regulation governing this area.

In the meantime, the OTCC has committed to deliver decisions on long-pending cases, some of which were filed prior to the enactment of the 2017 Act. According to the Trade Competition Commissioner, where a case filed under the 1999 Act results in a guilty verdict, the penalties under both the 1999 Act and 2017 Act will be compared and the less severe penalty shall be imposed.

Vietnam

Vietnam's Competition Law 2018 will officially come into force on 1 July 2019 and is said to bring national regulations more in line with international standards. To implement the new law, the Ministry of Industry and Trade 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 National Competition Commission, and (iii) draft decree on the handling of Competition Law violations. It is expected that all three draft decrees will be finalised and issued by the Government before 1 July 2019. The notable contents of the draft decree guiding the implementation of the law has been elaborated in the last issue of Competition Bites 2019 – Issue 1. Hence, this issue will focus on the other drafts, one on the establishment of the Vietnam National Competition Commission and the other on the handling of violations.

(1) Establishment of the National Competition Commission

Under the previous law, there was a two-tiered system to investigate and enforce Competition Law. The first tier was responsible for investigating restraint of competition cases (among other duties), and the second tier will adjudicate if there is sufficient evidence to conclude a violation and impose fines. To simplify the system and for faster processing of cases, the two-tiered system is combined under the new Competition Law into one state agency – the Vietnam National Competition Commission ("**NCC**"). The NCC is placed under Ministry of Industry and Trade, with the number of members not exceeding fifteen. The NCC members are officials of the Ministry of Industry and Trade, other relevant ministries and experts.

According to Article 2.5 of the draft decree on establishment of the NCC, the duties of NCC primarily include, to:

(a) investigate and adjudicate cases relating to restraint of competition (i.e. anti-competitive agreements, abuse of dominance, merger control), unfair competition practice and economic concentration;

(b) handle complaints against settlement decisions;

(c) consider granting exemptions to prohibited anti-competitive agreements;

(d) review economic concentrations; and

(e) request competent agencies to ensure the application of preventive measures and administrative fines when investigating and handling competition cases.

The NCC is tasked to fulfil all these duties regarding competition in addition to overseeing multi-level marketing activities and consumer protection.

(2) Draft Decree on Handling of Competition Violations

This draft decree provides details on the fines and corrective measures applicable to competition violations. It also attempts to provide some guidelines to the controversial provision of the Competition Law 2018, that acts in restraint of competition law shall be subject to the maximum fine of 10% of the violating business' turnover in the relevant market, but in any case lower than the minimum fine imposed by the Penal Code with respect to certain competition violations. The current minimum monetary fines for certain competition violations under the Penal Code is quite low (i.e., VND 200 million (approximately USD 9,000) for individuals and VND 1 billion (approximately USD 45,000) for companies). According to the draft decree, this cap with reference to criminal fine will only be applicable to limited types of anti-competitive agreements addressed by Article 217 of the Penal Code, such as price fixing, market allocation and output restriction where combined market share of parties are 30% or more, boycotting and agreement to exclude a certain enterprise from the market. These types of violations, if causing loss to other parties or leading to illegal gains up to certain levels, would likely be penalised under the Penal Code with monetary fines for companies and monetary fine plus jail term for involved individuals. The other types of competition violations will not be subject to this special cap. The fines are calculated with reference to the business' previous fiscal year financial reports.

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