Bird & Bird

A Year in Review

Competition Law in Asia Pacific: Highlights from 2018 and what's coming next in 2019

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Regional overview

As competition law regulators and regulatory frameworks continue to mature and develop across the Asia Pacific region, businesses must remain increasingly mindful of the developments in this space, and how they might impact upon their operations across the region, particularly those businesses operating across borders.

The regulators across the region, including the most recently established competition commissions in Hong Kong and the Philippines, are now growing in sophistication and moving forward at considerable pace, benefiting from an increased level of regional cooperation between their counterpart regulators. The strengthening of these institutions and the enforcement frameworks under which they operate will see matters of competition feature more regularly as key issues of concern for companies.

To give you a flavour of recent events that demonstrate the enhancement, and growing enforcement, of competition laws in the region:

- Australia brought 3 new criminal cartel prosecutions in 2018, and also secured the highest pecuniary penalty for a competition law breach in the country;
- China consolidated the functions of its three previous antitrust agencies into a single agency - the State Administration for Market Regulation (SAMR) - in order to streamline its approach to antitrust law enforcement;
- The Malaysia Competition Commission appointed a new Chairman and CEO as it continues to take action against companies engaging in anti-competitive conduct across a range of industries;
- The Philippine Competition Act and the Philippine Competition Commission (**PCC**) enjoyed its first full year of operation and the PCC continued to accelerate its enforcement and advocacy efforts throughout the country;
- Singapore introduced legislative reforms which will better equip the Competition and Consumer Commission of Singapore (formerly the Competition Commission of Singapore) with the tools it needs to more effectively enforce competition and consumer law in the country; and
- The Hong Kong Competition Commission brought its first direct enforcement action against a number of individuals in relation to alleged cartel conduct in the construction industry.

In this publication we take a look at some of the more significant competition law events in the region in 2018 and anticipate the likely course competition law and enforcement will take in a number of key jurisdictions during 2019.

Australia

2018 was an important year for the Australian competition landscape. The Australian Competition and Consumer Commission (**ACCC**) remained active in its enforcement activities, bringing 3 new criminal cartel prosecutions, as well as securing a record AUD$46 million penalty for cartel conduct involving wire harnesses used in the manufacture of motor vehicles. The ACCC also launched widely publicised merger investigations in the media and telecommunications sectors, and filed its first gun jumping case against a supplier of cord blood and tissue banking, Cryosite.

The year also saw legislative changes that will remove intellectual property exemptions from competition law, the release of the ACCC's preliminary report on the Digital Platforms Inquiry, and industry specific competition developments in the telecommunications, aviation, electricity and agribusiness sectors.

Criminal cartel prosecutions on the rise

Although Australia has had criminal cartel provisions since 2009, the ACCC had not sought any criminal sanctions for cartel conduct until 2016. Since then, it has significantly increased its criminal cartel investigative activity, bringing 3 more criminal cartel prosecutions this year.

The most significant criminal cartel prosecution to date was brought in June 2018, with charges laid against ANZ, Citigroup, Deutsche Bank and several of their senior executives. JP Morgan, who is also allegedly involved, is understood to have been granted immunity by the Commonwealth Director of Public Prosecutions (**CDPP**) in exchange for cooperation in the matter. The alleged conduct relates to the sale of 25.5 million unsold shares worth $789.2 million. These shares failed to find institutional buyers during a $2.5 billion capital raising by ANZ in 2015. The ACCC and CDPP allege that the senior executives from the three banks colluded on how the unsold shares would be sold into the market to minimise the impact on ANZ's share price, consistent with an output restriction cartel agreement. The case will likely be the first to fully consider the operation of the criminal cartel provisions and will therefore provide useful guidance on the interpretation of those provisions.

The ACCC also brought criminal cartel prosecutions against healthcare equipment supplier Country Care, and its managing director. The alleged cartel involves bid rigging behaviour (including cover pricing and agreements not to bid) in tender processes for healthcare equipment by NSW Health. A third criminal cartel prosecution was also brought against the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) and a Divisional Branch Secretary for allegedly attempting to induce suppliers of steel fixing and scaffolding services into a price fixing arrangement.

We can expect to see more criminal cartel prosecutions in 2019 with the ACCC stating that a further 5 matters have been referred to the CDPP, and that a portfolio of its criminal cartel investigations are at an advanced stage.

Australia's penalties for competition law breaches under the spotlight

In 2018, the ACCC secured the highest penalty for a competition law breach in Australia. At the same time, the OECD found that Australia's penalties for competition law breaches are significantly lower than those imposed in the EU, UK, Germany, Japan, South Korea and the USA. The ACCC has indicated that it intends to reconsider its approach to penalties, with the potential of adopting approaches that more closely resemble those of other OECD countries.

Yazaki cartel case yields a record penalty of $46 million

After appealing the original $9.5 million penalty imposed by the Federal Court, the ACCC secured a record $46 million penalty against Yazaki Corporation (**Yazaki**), a global manufacturer of wire harnesses for motor vehicles headquartered in Japan. The penalty follows from a finding that Yazaki and its competitor Sumitomo Electric Industries (**Sumitomo**) engaged in cartel conduct relating to the supply of wire harnesses to Toyota Motor Company and its related entities in Australia.

The Federal Court found that from the mid-1990s, Yazaki and Sumitomo entered into and gave effect to agreements on a mutual response to tender requests for automotive wire harnesses. This included the allocation of their respective products to various vehicle manufacturers, and agreements on the prices submitted by their local subsidiaries in response to tenders.

The increase in the penalty on appeal is a result of the Full Federal Court's differing approach on the calculation of the maximum penalty. In Australia, the maximum penalty per contravention is the greater of:

- $10 million,
- 3 times the value of the benefit received from the contravening conduct, or, where the benefit cannot be calculated,
- 10% of the company's annual turnover in the 12 months prior to when the conduct occurred.

The trial judge had originally found the maximum penalty to be $20 million on the basis of there being 2 contraventions (the making and giving effect to the cartel agreement), and that the relevant annual turnover was $65 million. However, the Full Federal Court found that there were in fact 3 separate contraventions in making the cartel agreement, and 2 contraventions in giving effect to it. Moreover, it found that the entire revenue of the Australian subsidiary should be included in the annual turnover figure (as opposed to only that which was earned through conducting business in Australia related to the cartel conduct), which increased the total annual turnover to $175 million. The maximum penalty for each contravention was therefore $17.5 million, increasing the overall maximum penalty to $87 million.

The case highlights the willingness of Australian courts to take a broader approach in calculating penalties, particularly in respect of the number of contraventions engaged in, and the calculation of a company's annual turnover. To date, the $46 million penalty is the highest since the Visy Recycling case in 2007 (in which a $36 million penalty was imposed).

OECD report finds Australian competition law penalties to be significantly lower than its counterparts

In March 2018, the OECD published its report on Pecuniary Penalties for Competition Law Infringements in Australia, finding that the average penalties imposed for breaches of competition laws in Australia is significantly lower than other OECD jurisdictions. In Australia, pecuniary penalties are determined by the Federal Court following an 'instinctive synthesis' of various factors. By comparison, in jurisdictions such as the US or EU, pecuniary penalties are set by reference to a detailed and publically available methodology that focuses on the relevant sales of the infringing company's product.

The ACCC has stated that competition law penalties have not been sufficiently high enough to deter breaches to date, particularly in cases involving large businesses or where conduct has occurred over a long period of time. The ACCC has indicated that it will rethink its approach to penalties for competition law and will consider the OECD's suggestion to develop penalty guidelines similar to the approach in other jurisdictions.

Significant enforcement activities involving mergers and acquisitions

Media and telecommunications mergers and acquisitions under scrutiny

Although the ACCC routinely reviews mergers and acquisitions for competition concerns, there are two in particular that have gained significant attention. The first of these was the proposed merger between two listed media entertainment companies, Nine Entertainment (**Nine**) and Fairfax Media (**Fairfax**). This transaction was not opposed by the ACCC. Nine's main business activities involve free-to-air-TV, digital publishing, on demand video services (including a 50% share in Netflix competitor, Stan), and TV content production and distribution. Fairfax on the other hand predominantly publishes metropolitan, agricultural, regional and community newspapers, as well as financial and consumer magazines, including the Sydney Morning Herald, The Age, and the Australian Financial Review. The ACCC conducted market inquiries in relation to the proposed merger, contacting hundreds of interested stakeholders, and considering more than 1000 submissions made in relation to the proposed merger. Whilst the ACCC concluded that there is likely to be some lessening of competition, it found that this would not be substantial. In particular, it considered online news to provide a degree of competitive constraint on traditional news media, and that Nine and Fairfax were not sufficiently

close competitors to raise competition concerns in regional areas.

The proposed merger between telecommunication service providers, Vodafone Hutchinson Australia (**Vodafone**) and TPG Telecom Limited (**TPG**), has also gained significant attention. The proposed merger would give Vodafone a controlling interest of 50.1% in the merged entity, and TPG the remaining 49.9%. Vodafone is the third largest telecommunications provider in Australia, owning and operating its 3G and 4G mobile network. Since 2017, Vodafone has also been supplying fixed broadband services to its customers. TPG predominantly supplies retail fixed broadband and voice services, and owns an extensive fibre network. It also supplies mobile services as a mobile virtual network operator, and in 2017, announced plans to become a mobile network operator as well. After conducting initial market inquiries about the nature and scope of telecommunications markets and products in Australia, the ACCC published a Statement of Issues in December 2018, outlining its preliminary competition concerns. In particular, the ACCC is concerned that the merger will result in the removal of TPG as a vigorous competitor in retail mobile markets. The ACCC currently expects to announce its final decision on the proposed merger on 11 April 2019.

Australia's first gun jumping case

'Gun jumping' occurs when parties to a merger or acquisition coordinate their activities prior to the completion of their transaction. This conduct can amount to cartel conduct in Australia, as it often involves agreements between competitors. Gun jumping cases have been brought frequently by competition regulators in other jurisdictions such as the US and the EU, and it seems that the ACCC will follow suit.

In July 2018, the ACCC brought its first 'gun jumping' cartel case against Cryosite Limited (**Cryosite**). The case relates to an asset sale agreement between Cryosite and its competitor, Cell Care, for Cryosite's cord blood and tissue banking business. The asset sale agreement contained a provision requiring Cryosite to refer all customer enquiries to Cell Care after the agreement was signed, but before the acquisition was completed. The ACCC alleged that this amounted to cartel conduct, because it restricted output and allocated customers between competitors.

The Federal Court held that Cryosite engaged in cartel conduct in relation to the 'gun jumping', and it was ordered to pay $1.05 million in penalties.

The case serves as a timely reminder for parties to mergers and acquisitions that they must remain independent of each other before the transaction is completed.

Competition and IP developments

2018 saw the end of the longstanding litigation between the ACCC and Pfizer Australia Pty Ltd (**Pfizer**) in relation to misuse of market power allegations. Further, the Australian government introduced a bill into Federal Parliament which seeks to repeal the longstanding exceptions to competition law for the licensing and assignment of IP rights.

Pfizer misuse of market power litigation comes to a close

In October 2018, the High Court of Australia refused the ACCC's application for special leave to appeal its misuse of market power case against Pfizer, the owner of the patent for the cholesterol-lowering drug atorvastatin. The ACCC was unsuccessful in both the Federal Court and the Full Federal Court.

The case concerned Pfizer's conduct shortly before the patent's expiry. In order to minimise the impact of a large influx of competitors to the market, Pfizer commenced direct selling to pharmacies, offering significant discounts and rebates on the condition that the pharmacies acquire a minimum volume of Pfizer's atorvastatin products. The ACCC alleged that Pfizer took advantage of its substantial market power for an anti-competitive purpose, namely to prevent or deter other suppliers of generic atorvastatin from engaging in competitive conduct within the atorvastatin market. The ACCC further alleged that Pfizer's conduct amounted to exclusive dealing in contravention of section 47 of the *Competition and Consumer Act 2010* (**CCA**).

The Full Federal Court determined that whilst Pfizer held a substantial degree of market power within the atorvastatin market, and took advantage of that substantial market power, it was not for the purpose of substantially lessening competition. Rather, the Court found that Pfizer's conduct was for the legitimate purpose of ensuring it remained competitive in the atorvastatin market after the patent expiry.

Although the case was brought under the old misuse of market power provisions (and therefore does not consider the newly introduced effects test), it confirms that protecting a market position in the context of fierce competition is not an anti-competitive purpose.

IP exception to competition law to be repealed

Australia's competition law previously included exceptions for the assignment and licencing of intellectual property (**IP**) under s 51(3) of the CCA. These provisions were originally included to encourage innovation. However, following the Australian Productivity Commission's reports into competition and intellectual property in 2015 and 2016, this provision has been recommended for repeal. This is on the basis that competition and IP laws are not in "fundamental conflict" with each other, but that the aggregation of IP rights may give rise to market power and competition concerns.

In September 2018, the Australian government introduced a bill into Federal Parliament for the repeal of the IP exception under s 51(3). This bill has now passed the House of Representatives and the Senate.

Once the bill passes and comes into force, any commercial arrangements involving the assignment or licensing of IP rights will not enjoy blanket protections from Australian competition laws. The changes will impact on any existing or future IP assignments or licenses, particularly if they contain any form of market restrictions (eg restrictions on price, output, geographical restrictions, etc). As businesses will only have a 6 month grace period to comply with this change once passed, it is worthwhile reviewing any existing licensing or assignment arrangements to ensure compliance with the CCA.

ACCC releases its Digital Platforms Inquiry Preliminary report

In December 2017, the ACCC was directed by the Australian Government to undertake an inquiry into the impact of online search engines, social media and digital content aggregators (**digital platforms**) on competition and media in advertising markets. The preliminary report published on 10 December 2018 is the first of its kind globally, and outlines a broad scope of recommendations potentially impacting business, the media and consumer privacy.

A key finding of the report was that large digital platforms such as Google held substantial market power, which had the potential to be misused. The ACCC identified a number of concerns, including the ability and incentive for large digital platforms to use their market power to favour their own business interests, the negative impact on news and journalistic content, the impact on the ability for content creators to monetise their content, and the lack of understanding and choice by consumers as to the extent of personal information collected and used by digital platforms.

In response to the concerns raised in the report, the ACCC has made 11 preliminary recommendations, including:

- amending s 50(3) of the CCA to include additional mandatory factors to be considered by the ACCC for merger clearances, including the removal of a *potential* competitor, and extent of data that an acquirer will gain;
- preventing the pre-installation of browsers and search engines;
- the introduction of a new regulatory authority to review digital platforms' algorithms;
- conducting an independent review of existing media regulations and their application to digital platforms;
- amending privacy laws to strengthen notification and consent requirements, so that consumers are better informed on how their data is collected, used and disclosed; and
- amending the Australian Consumer Law to introduce civil penalties for unfair contract terms.

The ACCC also identified further areas for analysis and assessment, including the establishment of a digital platforms ombudsman, empowering a newly established regulatory authority to monitor the pricing of intermediary services supplied to advertisers or websites for digital display advertising, and the implementation of a general prohibition against unfair practices that fall short of societal norms. The final report is due to be provided to the Australian government on 3 June 2019.

Updated guidelines on concerted practices and misuse of market power

In 2017, Australia's competition laws were amended to incorporate recommendations arising from the Harper Review. These changes included the insertion of a new concerted practices prohibition (noting that a 'concerted practice' is not defined in the CCA), and the amendment of the existing misuse of market power prohibition to include an effects test.

In 2018, the ACCC published guidelines on how it plans to interpret and enforce these new and amended provisions. Although the guidelines are not legally binding (and are not necessarily a reflection of how courts may interpret the provisions), they do reflect the basis upon which the ACCC may decide to investigate a matter and bring proceedings.

The ACCC has indicated that it considers a 'concerted practice' to be communication or cooperative behaviour between two or more separate entities that falls short of the elements of an understanding, but involves more than an entity independently responding to market conditions. This kind of behaviour usually involves the disclosure of commercially sensitive information to competitors, and can occur in various ways, including through third parties such as industry associations. Examples that the ACCC provides include making information available in a new way, such as providing it more quickly, in a form that can be readily processed, or in a manner that is more reliable.

In respect of the amended misuse of market power provisions, the ACCC has indicated that it intends to determine the 'effect' by applying a 'with or without test'. This is similar to the existing framework of analysis for anti-competitive agreements (s 45 of the CCA) and exclusive dealing (s 47 of the CCA).

Industries under the spotlight

Telecommunications and 5G networks

In a speech delivered to RadComms 2018, the ACCC's Chairman Rod Sims indicated that the rollout of the 5G network is likely to have a significant impact on broadband markets, including the National Broadband Network (**nbn**), as 5G is the first mobile technology capable of delivering speeds and capacities comparable to fixed line services. 5G networks therefore potentially challenge **nbn**'s current wholesale fixed line. In Mr Sims' view, any future regulatory approaches should be geared towards promoting competition for the benefit of consumers, and not to protect the **nbn** business model. Moreover, Mr Sims noted that the 5G spectrum allocation process and limits will have a long-term impact on competition, calling for careful consideration of downstream impacts on competition beyond the spectrum allocation process itself.

Aviation and effective airport regulation

In June 2018, the Australian government requested the Productivity Commission to undertake an inquiry into the economic regulation of airports. In particular, the terms of reference require the Productivity Commission to examine the effectiveness of current price and quality of service monitoring mechanisms for airports, and its impacts on investments in airport infrastructure. The Productivity Commission released its draft report on 6 February 2019, and its final report is due to the government by June 2019. The inquiry is currently taking submissions and feedback on the draft report. The ACCC has already made submissions to the inquiry, indicating a strong view in favour of further regulation of airports given the monopoly nature of the infrastructure.

Historically, Australian airports have been heavily regulated in respect of pricing and conditions. Between 1997 and 2002, some Australian airports were subject to a price cap regime, and after a Productivity Commission report in 2002, price caps were replaced with a price and quality of service monitoring regime, implemented by the ACCC. Subsequent further monitoring and reporting regimes have also been implemented after further Productivity Commission inquiries. Currently, not all Australia airports are 'declared services' under Australia's National Access Regime for critical infrastructure.

Electricity markets and pricing concerns

In July 2018, the ACCC published its final report on the Retail Electricity Pricing Inquiry requested by the Australian government. The report considers the key causes of high electricity prices across the electricity supply chain, and makes 56 recommendations for reforming the National Electricity Market. These recommendations include further regulation by the Australian Energy Regulator (**AER**) through the introduction of

default retail 'standing' offers, increasing the AER's investigative powers to address issues in the market, asset base write downs by State governments of network overinvestment, and limiting companies with 20% or more market share from acquiring more generation capacity.

Agribusiness, collective bargaining and class exemptions

In December 2018, the ACCC published guidelines on collective bargaining for small businesses, including agribusinesses. Whilst collective bargaining can generally lead to more efficient negotiations, better access to information and scale efficiencies, it also risks contravening competition laws, particularly those relating to secondary boycotts and cartel conduct. The guidelines provide an overview of how businesses can go about notifying or seeking authorisation of proposed collective bargaining from the ACCC. Furthermore, given the well-established efficiencies of collective bargaining for small businesses, the ACCC is also considering the introduction of a collective bargaining 'class exemption' (similar to the block exemptions of the EU) to allow small businesses, agribusinesses and franchisees to negotiate collectively with their customers, suppliers, or franchisors. If introduced, it will be the first class exemption that the ACCC has implemented since being given the power to make them under the Harper Review reforms to the CCA.

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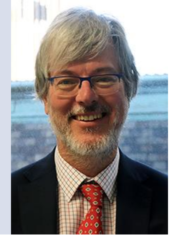

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China

10 Years of AML in China

2018 marked the 10 year anniversary of the Anti-Monopoly Law of China (**AML**) coming into force (it was enacted on 1 August 2008). Since its enactment, the Anti-Monopoly Commission (**AMC**) and its three law enforcement agencies, the Ministry of Commerce (**MOFCOM**), the State Administration for Industry & Commerce (**SAIC**), and the National Development and Reform Commission (**NDRC**) have sought to apply and further the purposes of the AML, which include preventing and repressing monopoly conduct, protecting competition, and promoting consumer welfare and the public interest. The competition authorities have been very active over the past 10 years, reviewing in excess of 2500 merger control cases, and investigating and concluding over 150 monopoly agreement cases, and 54 abuse of dominance cases, with the amount of penalties issued for contraventions reaching 11 billion yuan (approx. US$1.62 billion).

As is customary in China, a significant anniversary, including a 10 year anniversary, is an important milestone. In our 2017/2018 review, we anticipated that the competition law framework in China, including the AML, would undergo some significant changes and developments in "celebration" of this anniversary. Not surprisingly, 2018 saw a raft of significant changes, including the establishment of the State Administration for Market Regulation (**SAMR**), which aims to achieve greater administrative efficiency and regulatory consistency in the implementation of antitrust law in China by consolidating the functions of the three antitrust enforcement agencies referred to above. Additionally, MOFCOM (and SAMR) continued to streamline its review of notified transactions. A number of important antitrust cases also passed through the Supreme People's Court, providing much needed clarification on the interpretation of the AML.

Institutional reform – establishment of the SAMR

The SAMR is made up of 27 internal departments, including, in relation to the enforcement and administration of the AML, the Anti-Monopoly Bureau (**AMB**). The AMB is responsible for merger review as well as the conduct of investigations relating to anticompetitive agreements, monopolies and abuse of dominance cases.

The reach of the SAMR has also been strengthened by the network of local counterparts of the SAMR (**regional AMRs**) that have been established at a regional level. Although the reform of these local institutions is expected to be completed in 2019, the regional AMRs have become increasingly active in the conduct of antitrust investigations and taking direct enforcement action. This is largely in response to a notice issued by the SAMR in late 2018 which empowers, and authorises, them to undertake antitrust enforcement activities at a local level, leaving only certain matters within the exclusive remit of the SAMR. In a sign of the growing role to be played by regional AMRs in the coming years, of the 32 investigations initiated in 2018, of which 15 were closed, only 4 of them were subject to further actions from the SAMR directly.

It is expected that the establishment of the SAMR will help to:

- facilitate the harmonisation of rules and practices that have traditionally been applied inconsistently under the previous three separate bodies; and
- lead to a more consistent interpretation and application of the AML.

Key investigations and decisions

A few key themes also emerged in 2018:

- MOFCOM (and SAMR) continued to be more amenable to approving mergers with conditions as opposed to denying the transaction outright, imposing conditional clearances in Essilor/Luxottica and UTC/Rockwell Collins;
- SAMR sanctioned a number of Shenzhen tugboat companies for price-fixing and market sharing in a demonstration of its intent to take action against key industries, including ports and maritime; and
- Chinese competition authorities have continued to target companies in the pharmaceutical industry (including manufacturers of medical devices), utilities and construction industries with

a particular focus on price-fixing and abuse of dominance.

Merger control

MOFCOM/SAMR has imposed conditions in a number of cases that were unconditionally approved in other jurisdictions. These include, for example, the Bayer/Monsanto, Luxottica/Essilor and Linde/Praxair merger cases. SAMR has also demonstrated a strong willingness to impose fines for a failure to notify or in cases of gun-jumping. In 2018, SAMR imposed fines in 15 cases against a range of companies, including Chinese state-owned enterprises and national firms.

Essilor/Luxottica merger

In August 2018, SAMR approved the merger of Essilor, the French lens manufacturer, and Luxxotica, the Italian eyewear company. During the merger review process, the SAMR raised a number of competition concerns, including the potential for the merged entity to have substantial market power in the wholesale market for optical lenses, frames and sunglasses and for it to use this market power to impose unreasonable conditions on downstream retailers.

In light of these concerns, SAMR imposed a number of behavioural conditions on the merged entity. These included commitments to provide its products and services to Chinese consumers on fair, reasonable and non-discriminatory terms, to not engage in any forms of resale price maintenance or exclusivity arrangements with the downstream retailers and a requirement to inform the SAMR of any future acquisitions made by the entity.

Given the recent enhancement of the SAMR's supervision and monitoring functions, it is likely that it will continue to monitor compliance with these behavioural conditions by the new merged entity.

Didi/Uber merger

The SAMR is continuing to review the merger between Didi and Uber's Chinese branch. The two companies merged in 2016, but without providing notification of the merger to MOFCOM.

Wu Zhenguo, Director of the AMB, has declared that the SAMR will be continuing to conduct investigations to assess the impact of the merger on competition in the market for hail-riding services in China.

The outcome of this review will shed light on SAMR's treatment of mergers between Chinese and foreign companies.

Shenzhen ship tallying companies case

In July 2018, SAMR fined two ship tallying companies in Shenzhen for market partitioning and price fixing. This case followed another four ship tallying companies being fined in June 2018 for engaging in similar conduct, including price fixing. The July case was one of the first to be handed down following the establishment of the SAMR.

In this case the SAMR found that China United Tally Shenzhen and China Ocean Shipping Tally Shenzhen had come to an agreement to split the sales and service areas for the tallying market on the western side of the Port of Shenzhen. The two companies had also agreed to increase the tallying prices for a period of around 3 years between mid-2013 and August 2016.

Key cases

A number of cases were heard by the Supreme People's Court in 2018 which provided some important clarification on certain key aspects of the AML.

In particular, the decision of the Court to uphold the dismissal of Xu Shuqing's allegation of abuse of dominance against Tencent provides some insight into the SAMR's approach to the definition of key markets. In deciding that Tencent did not have a dominant position in the market for Internet emojis, the Court expressed a view of the Internet as an open marketplace in which the establishment of dominance is difficult. This view may come under challenge as regulators elsewhere focus more on the power of digital platforms.

Some clarity was also provided regarding the operation of the resale price maintenance (RPM) provisions in the AML. For some time there had been a divergence in approach between the enforcement authorities and the courts regarding whether or not plaintiffs had to demonstrate that RPM had the effect of lessening competition in a market. In *Yutai v Hainan Price Bureau*, the Hainan High People's Court held that the anticompetitive effects of RPM did not need to be proven by administrative enforcement authorities - RPM was, per se illegal – but the position was different with respect to civil lawsuits, which required proof of actual losses. In 2018 this view was affirmed by the Guandong High Court in a case

concerning a distributor, Gree, and a Chinese appliances brand.

More guidelines in place

In late 2018, four new draft guidelines were approved by the Anti-Monopoly Committee of the State Council which will provide industry with some greater clarity regarding the SAMR's approach to the application and enforcement of the AML.

These include the *Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights, the Guidelines on Anti-Monopoly in the Automotive Industry, the Guidelines for Leniency Application in Cases Concerning Horizontal Monopoly Agreements* and the *Guidelines on the Exemption Procedures for Anti-Monopoly Agreements*.

What's next for China?

Competition law as a weapon to retaliate

As the trade war between China and the US continues to play out on the global stage, it is possible that the Chinese government could attempt to use competition law as a weapon to retaliate. For example, it could seek to block the merger of US companies attempting to gain entry into the Chinese market.

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Hong Kong

The Competition Ordinance: its 3rd year

2018 marks the end of the third year of the Hong Kong Competition Ordinance (Cap.619) (the **Ordinance**) coming into effect. While enforcement activity has not been drastic, there are signs of increased focus and interest in this area.

The Hong Kong Competition Commission (the **Commission**) undertook various activities including its decision on the applicability of the First Conduct Rule on the Code of Banking Practice, issuing an advisory bulletin on employment practices and commencing proceedings before the Competition Tribunal for customer allocation and price fixing.

Throughout the year, the Commission also conducted seminars on the Ordinance, launched various public advocacy and outreach activities and hosted its first international conference – the Hong Kong Competition Exchange 2018.

The Commission in action

The Commission's enforcement efforts in a nutshell

Like many APAC counterparts, the Commission's enforcement efforts are twofold: it investigates possible contraventions of the Ordinance, and it ensures compliance with the Ordinance by businesses and professional associations.

During the year, a number of decisions have been handed down in respect of two actions before the Competition Tribunal and, in September 2018, the Commission commenced its third case before the Competition Tribunal - the first enforcement action against individuals.

The first direct enforcement action against individuals (CTEA1/2018)

On 6 September 2018, the Commission commenced its third case in the Competition Tribunal, alleging that three renovation and construction companies and two individuals have contravened the First Conduct Rule by participating in anti-competitive conduct.

The Companies are involved in renovation and decoration services. The anti-competitive conduct complained of concerned customer allocation and price fixing of renovation services provided at a subsidised housing estate. The Companies allegedly allocated amongst themselves certain units/floors in the housing estate where they offered and performed decoration works exclusively on their respective allocated floors. They also provided similar quotations and listed similar services in their renovation packages, in which some of the decoration items were identical.

Mr. Brent Snyder, CEO of the Commission, said, "*This is the second case in which the Commission has brought an enforcement action against a cartel targeting residents of public housing and we have, for the first time, brought direct enforcement action against individuals who were involved in the conduct. These proceedings drive home the deterrent message that not only companies, but also individuals who engage in cartels may expect to face the full force of the law.*"

Decision on First Conduct Rule's applicability on the Code of Banking Practice (AD/01XX)

On 11 December 2017, the Commission received an application (the **Application**) for a decision under Section 9 of the Ordinance in respect of the Code of Banking Practice (the **Code**), a non-statutory industry code issued on a voluntary basis for retail banking services. The Code was jointly issued by The Hong Kong Association of Banks (**HKAB**) and The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies (**DTCA**), and endorsed by the Hong Kong Monetary Authority (**HKMA**).

The 14 applicants (the **Applicants**), being banking institutions and members of HKAB or DTCA, sought a decision by the Commission that the First Conduct Rule does not apply to the Code by virtue of the exclusion in Section 2 (Compliance with legal requirements) of Schedule 1 of the Ordinance.

On 15 October 2018, the Commission rejected the Application, determining that the Code was not a legal requirement imposed “by” or “under” the Banking Ordinance (Cap. 155). As a result, it did not

immunise the Applicants against potential breaches of the Ordinance, including the First Conduct Rule.

However, the Commission observed that the Code has been formulated with the input and support of the Hong Kong Consumer Council and the HKMA with an intention to promote good banking practices to protect the interests of consumers. As a result, the Commission has confirmed that it has no current intention to pursue any investigation or enforcement action in respect of the present version of the Code.

Advisory bulletin on employment-related practices

On 9 April 2018, the Commission issued an advisory bulletin to raise awareness of some of the competition risks it had identified in the employment sector.

These included:

- Wage-fixing agreements – the Commission noted that undertakings which involve the reaching of agreement on compensation for employees may amount to illegal price-fixing on the price of labour in certain circumstances. Compensation under this context should be construed widely, including but not limited to salaries, benefits and allowances;
- Non-poaching agreements – the Commission noted that undertakings which involve the reaching of agreement on solicitation, recruitment or hiring of each other's employees may amount to illegal market sharing in circumstances where it involves allocating resources and sources of supply across a market; and
- Exchange of sensitive information – the sharing of competitively sensitive information on employment terms and conditions, such as benefits and salaries, whether done directly or through a third party, may raise competition concerns in circumstances where it adversely affects the level of competition in a market.

The Commission urged companies to determine their own employment terms and conditions independently, especially in relation to conditions such as employee compensation and the solicitation and recruitment of employees.

2018 in Summary

As Hong Kong's competition law and enforcement framework continues to mature, market participants should maintain a watching brief on news and developments in this area.

What's Next for Hong Kong?

In 2019, Hong Kong's first Tribunal decision in the customer allocation and price-fixing case against individuals (CTEA1/2018) will be handed down. This will set an important precedent for the Commission and the Tribunal's approach to taking action against individuals alleged to have engaged in anticompetitive conduct.

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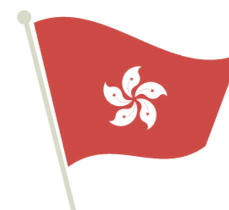

Indonesia

Background

Indonesia enacted anti-monopoly law since 1999 through the enactment of Law No. 5 of 1999 concerning Prohibition on Monopolistic Practice and Unfair Business Competition ("**Law 5/1999**"). For Indonesia, the existence of anti-monopoly law is important to create an equal opportunity for everyone to participate in the process of production and marketing of goods and or services, in a fair, effective and efficient business environment. The end goal is to achieve social welfare as mandated by the Indonesian 1945 constitution.

Supervisory Commission of Business Competition (also known as the "**KPPU**" in Indonesia) is the enforcement body for competition law in Indonesia. It has been active in enforcing the law since 2001 and up to now, KPPU has ruled over hundreds of anti-competition cases. In addition, it has also regularly issued guidance and regulations to supplement Law 5/1999.

Important Developments

Proposed Competition Law Reforms

Over the past few years, there has been pressure on the government to amend Law 5/1999. The strongest pressure came from the KPPU itself. One of the main reasons for the amendment of Law 5/1999 is related to the institutional status of KPPU. KPPU considered that Law 5/1999 does not give KPPU a clear institutional status as KPPU is still not regarded as state institution. This is confirmed by the Constitutional Supreme Court via its decision No. 85/PUU/XIV/2016, where the Supreme Court reiterated that KPPU is only a state auxiliary organ. The impact of this status is that there is no clarity over the employment status of those who work with KPPU. During an interview in 2017, the Head of KPPU at that time, Mr. Syarkawi Rauf said that he hoped the amendment to Law 5/1999 can strengthen the status of KPPU as an independent institution that is equal to other state institutions.

Further, the post notification merger control currently in force will instead be replaced with a pre-notification merger control. The rationale behind this proposed amendment is to minimise the loss suffered by the company (which has merged) for re-splitting the company after being found violating Law 5/1999. Currently the merger control regime is mainly regulated in Article 28 (3) and Article 29 (2) of Law 5/1999 and Government Regulation No. 57 of 2010 on Mergers, Consolidations and Acquisitions of Shares Which May Result in Monopolistic and Unfair Business Competition Practices. A transaction which constitutes a merger, consolidation or an acquisition should be notified to the KPPU. The current post notification merger obligation is triggered if the combined asset value resulted from the transaction exceeds IDR 2.5 trillion and/or the combines sales value exceed IDR 5 trillion.

Another point to note is related to sanctions. The amount of fine for violation of anti-monopoly law would be changed to up to maximum 25% of the company's sales, from IDR25 billion in Law 5/1999. The current applicable sanction is felt to be too light especially for foreign companies.

The effort to amend Law 5/1999 has been ongoing for almost 10 years and it does not seem like the amendment will be passed in the near future. Last year, the government identified there were around 502 issues relating to anti-monopoly that need to be discussed. Out of 502 issues, only around 75 have been resolved. The government awaits further discussion with parliament on the remaining issues.

In addition, there has also been disagreement on the current draft of amendment to Law 5/1999. The strongest opposition comes from the business community through Indonesian Business Association (or *Asosiai Pengusaha Indonesia* - **Apindo**). According to Apindo, although the business community supports a new anti-competition law, the enactment of amendments to Law 5/1999 must be delayed. The reason is because there are still issues which remain unclear and unresolved and there is a tendency that the draft amendment to Law 5/1999 will not support a healthy business environment in Indonesia.

Some issues that are pointed out by Apindo include the change from post-merger notification to pre-merger notification. Albeit the name indicates it is a

"notification", it is still unclear whether the pre-merger notification would mean that an approval from the KPPU is required before the transaction. Also, another issue which becomes the subject of criticism is the change of sanction from maximum IDR25 billion to maximum 25% of total sales value. Apindo is certain that a company's ability to run a business will be heavily impaired if this sanction is to be implemented.

Apart from Apindo, criticism to the current draft amendment to Law 5/1999 is also voiced by legal practitioners, especially from the Indonesian Competition Lawyers Association (ICLA). While most of the objections from ICLA are in line with those conveyed by Apindo, an emphasize is given to the legality of enforcement procedures stipulated under the draft amendment to Law 5/1999. The main critic is addressed to the KPPU's authority to prosecute and give ruling on an anti-monopoly case. According to ICLA, KPPU should not be given the authority to both prosecute and give ruling to an anti-monopoly case because KPPU is an administrative institution as confirmed by the decision of Constitutional Supreme Court. This means the case examined by KPPU must be administrative, not as a civil case. The authority to prosecute, hear, and decide on an anti-monopoly case at the same time makes KPPU able to rule on civil case, which is in contradictory with the institutional status of KPPU.

Enforcement Activity

On the enforcement front, KPPU imposed fines on several late notifications on merger control. The companies in these cases are across different industries including agriculture, telecommunications and mining. In the agriculture sector, there was a case known as the Garlic Importation Cartel. The case involved 22 reported parties. The decision on Garlic Importation Cartel was affirmed by Indonesian Supreme Court. In the decision, the reported parties were found to have violated Article 11, Article 19 sub-article c, and Article 24 of Law 5/1999.

Apart from the above mentioned cases, the KPPU continues to pursue a number of ongoing enforcement cases relating to tender and bid rigging issues, which have historically represented the majority of the KPPU's cases, as well as a number of merger control related breaches. In addition, the KPPU has made public statements that its key enforcement focuses include the staple foods, agriculture and banking sectors.

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Malaysia

Notable cases and developments by the Malaysia Competition Commission (MyCC) in 2018

Appointment of the MyCC's new Chairman and CEO

The MyCC has appointed Dato' Seri Mohd Hishamudin Md Yunus as its new Chairman effective from 5 September 2018 to 4 September 2021.

In addition, Mr. Iskandar Ismail has been appointed as the MyCC's new CEO (formerly the head of enforcement), effective from 15 October 2018.

MyCC proposed to fine Dagang Net MYR17.4 million for engaging in abuse of its dominance

On 11 July 2018, the MyCC published a news release confirming that a proposed decision had been made against Dagang Net Technologies Sdn Bhd (**Dagang Net**).

According to the proposed decision, Dagang Net had abused its dominant position in the provision of trade facilitation services under the Customs Department's National Single Window.

It also found that Dagang Net had infringed section 10 of the Malaysian *Competition Act 2010* (**Competition Act**) by refusing to supply new and/or additional electronic mailboxes to end users who use front-end software from software solutions providers which were not considered to be Dagang Net's authorised business partners.

It was found to have imposed an exclusivity clause which could undermine the ability of its competitors to effectively compete in the market for trade facilitation services in Malaysia.

In light of these findings, the MyCC proposed to impose a directive on Dagang Net requiring it to cease and desist the infringing conduct and not engage in any future conduct which could disrupt competition in the present and any future markets. The MyCC also proposed that the directors and senior management of Dagang Net and its related companies undergo a competition law compliance program within 3 months of the issuance of the proposed decision.

A final decision will be made by the MyCC once it has considered the representations and evidential information submitted by Dagang Net in defence of the allegations.

MyCC investigate tyres and beverage companies for possible anti-competitive behaviours

On 7 September 2018, the MyCC published a news release announcing that it had commenced investigations into tyres and beverage companies in Malaysia for possible anti-competitive behaviours following receipt of a direction from the Minister of Domestic Trade and Consumer Affairs.

The investigations were initiated in response to the perceived collusive conduct of a number of companies in the tyres and beverage industries that decided to issue price increase notices and price revision notices to downstream suppliers prior to the implementation of Sales and Services Tax in Malaysia in September 2018.

PIAM and its 22 members - MyCC ordered additional oral representation session before the new Chairman

On 28 February 2017, the MyCC published a press release confirming that a proposed decision had been made against PIAM and its 22 members alleging that the members were parties to an anti-competitive agreement to fix parts trade discount at 25% for six vehicle makes, namely Proton, Perodua, Nissan, Toyota, Honda and Naza, and at 15% for the Proton Saga BLM model, as well as a labour hourly rate of RM30.00 for PIAM Approved Repairers Scheme workshops. Although not mentioned in the MyCC's press release, it was reported in the media that the 22 members of the PIAM were fined a total of MYR213.45 million (USD48 million).

Since the issuance of the proposed decision by the MyCC against the General Insurance Association of Malaysia (**PIAM**) and its 22 members in early 2017 in relation to a potential anti-competitive agreement, several rounds of oral representations were heard in late 2017 and early 2018. However, given that any proposed decision in relation to the matter will now involve the participation and input

of the new Chairman of the MyCC, the final decision has been delayed.

MAS and AirAsia case – High Court reinstated MyCC's infringement decision

In 2018, the MyCC continued to pursue its judicial review application to the High Court. It is appealing the Competition Appeal Tribunal's (**CAT**) decision which overturned the MyCC's market sharing ruling against MAS and AirAsia.

To recap, on 31 March 2014 the MyCC ruled that MAS and AirAsia's Collaboration Agreement violated the prohibition against market-sharing under section 4(2)(b) of the Competition Act and imposed financial penalties of MYR10 million (USD 2.43 million) on each party. On 4 February 2016, the five members of the CAT unanimously decided that the MyCC had misinterpreted the Collaboration Agreement and failed to show there was a market sharing object.

The hearing on the merits of the case was held on 22 October 2018 and the High Court's final decision was released on 20 December 2018. The High Court found that the CAT's decision to set aside the fines was 'tainted with error of law and unreasonableness' and reinstated the fines of MYR10 million imposed by the MyCC on both parties.

On 16 January 2019, MAS and AirAsia appealed against the decision of the High Court at the Court of Appeal.

What's next for Malaysia?

The MyCC has a number of investigations in the pipeline in relation to various industries ranging from government procurement, food and beverages, agricultural and tourism. We are expecting to see at least some of these investigations result in proposed infringement decisions by the MyCC. As at the time of writing, MyCC has published its first bid-rigging proposed decision against 8 IT companies involved in government procurement in March 2019.

Wholesale amendment to Competition Act 2010 with introduction of merger control

The MyCC has proposed a wholesale amendment to the Competition Act which will include the introduction of a merger control regime. The proposed amendment is expected to be tabled in the Parliament by the end of 2019.

This proposed amendment is driven mainly by the merger of Grab and Uber in the South-East Asian region. This merger has caught the attention of competition regulators across SEA. In some countries, like Singapore, the competition regulators have even imposed pecuniary penalties on the parties. The Competition and Consumer Commission of Singapore fined Grab and Uber a total of S$13 million for the anti-competitive effects of what is effectively an irreversible merger. The MyCC, on the other hand, was conscious that it does not have jurisdiction over the merger of Grab and Uber due to the absence of express provisions for merger control in the Competition Act. In the absence of this, the MyCC is closely monitoring the post-merger impacts on the e-hailing to market to ensure competition is not harmed.

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Philippines

The Philippine Competition Act: Towards Real Competition

2018 marks the end of the first year of the complete operation of the Philippine Competition Act (**PCA**) and the Philippine Competition Commission (**PCC**). The PCA was introduced to foster competition, improve consumer protection and help accelerate investment and job creation in the Philippines. The PCC was given a very broad mandate under the Act to help achieve this. Based on its implementation efforts to date, the PCC appears to be wasting no time in doing so.

In particular, the PCC has been very active in pursuing its core functions of enforcement, merger review and advocacy, consistent with the Philippine Development Plan 2017-2022 (**PDP**). In 2018 there was a considerable increase in the number of ongoing investigations into anticompetitive arrangements across a number of key sectors and industries, along with an increase in the number of M&A transactions being reviewed by the PCC. Throughout the year, the PCC also entered into a host of new cooperative agreements with other government agencies, increased its engagement with government in reviewing competition policies and regulations and began assisting the National Economic and Development Authority in the formulation of the National Competition Policy which is expected to be adopted in 2019. The Commission's efforts were aided considerably by a significant increase in its financial budget and personnel capacities in 2018 - it now has over 150 positions, which includes around 40 lawyers and 15 economists.

The maturation of the regulatory framework in which the PCC operates, coupled with the strength of its resolve to promote competition and protect consumers in the Philippines, represent important developments for anti-trust law and enforcement in the country. The developments suggest that the Philippines is well on track to enjoying the benefits and opportunities presented by the emergence of real competition in the country.

Important developments

Merger review

Merger review remains a priority of the PCC. In March 2018, the PCC raised the merger notification thresholds from PHP 1 billion to PHP 5 Billion (approx. US$95.8 million) on the size of party and PHP 1 billion to PHP 2 billion (approx. US$28.4 million) on the size of transaction. In its policy statement, the PCC raised the thresholds to allow reviews of M&A that are more likely to pose harm in the market, reflective of economic growth and inflation, as well as cover a rational number of transactions. With the new thresholds in place, 2018 saw the PCC receiving thirty-nine (39) transactions for review, with a total value of PHP 438 billion, of which thirty-three (33) were approved. The sectors with the most M&A activity included the real estate, manufacturing, electricity and gas, and transportation and storage.

The PCC also decided the first case of non-notification of a covered transaction early in the year. In February 2018, the PCC declared as void the sale of KGL Investment Cooperatief U.A.'s shares in KGL Investment B.V. to Udenna Corporation. The transaction was covered by a Share Purchase Agreement entered into by the parties in 2016 and amounted to USD$120 million. The investigation on the transaction was triggered by a letter complaint filed with the PCC. In its decision, the PCC found that the transaction breached the threshold for mandatory notification but the parties nonetheless consummated the transaction without notifying the PCC. In addition to declaring the transaction void, the PCC also imposed a fine of PhP19M (approx. USD$362,000) on Udenna Corporation, among others, which was equivalent to 1% of the subject transaction. The decision is significant as it is the first case where the PCC imposed penalties for failure to comply with the notification requirements.

The year also marked the first *motu proprio* merger review case by the PCC. In August 2018, the PCC initiated *motu proprio* review when it learned about the acquisition by Grab Holdings, Inc. of Uber B.V.'s assets and various contracts in South East Asia, including the Philippines. While it was

confirmed that the transaction did not breach the mandatory notification thresholds, the PCC conducted a review of the transaction and thereafter issued a statement of concerns asserting that the transaction created a near monopoly by Grab in the ride-hailing market. The transaction was eventually cleared, subject to voluntary commitments of Grab relating to service quality and pricing standards. The PCC appointed Smith & Williamson, a UK audit firm, as an independent third-party monitor tasked to oversee Grab's compliance with such commitments. The same case drew an interim order from the PCC while the review was pending. In the course of the implementation of commitments, the PCC imposed a penalty on the parties for non-compliance with the interim measures.

As of the end of 2018, the PCC is reported to have received a total of 168 merger notifications, 159 of which have been cleared. The PCC also exacted fines for violation of the mandatory notification requirement and non-compliance with interim measures in the amount of PHP47.74 million.

Enforcement

As can be expected with the end of the transitory period (wherein businesses were allowed to correct anti-competitive practices in order to comply with competition law) last 2017, investigations against anti-competitive agreements and conduct have also gained traction. During the past year, the PCC's Competition Enforcement Office conducted eleven (11) preliminary inquiries, seven of which were initiated *motu proprio*. Nine out of these inquiries resulted in full administrative investigations. At least two of these full administrative investigations have been closed. These investigations have targeted the cement, power, garlic and life insurance sectors in particular.

The PCC's enforcement efforts were assisted by the signing of a number of new Memoranda of Agreement (**MOA**) with various government agencies, including the Department of Justice Office for Competition ("DOJ-OFC") and the Office of the Ombudsman, during the year. These agreements reinforce the PCC's original and primary jurisdiction in the enforcement and regulation of all competition related issues. For instance, the MOA with the DOJ provides for the DOJ's commitment to ensure that mechanisms are in place so that complaints involving criminal offenses under the PCA and other competition-related laws shall be referred to the PCC.

The enforcement framework in which the PCC operates has also been strengthened by the implementation of the Rules of Procedure which were introduced in September 2017. The Rules govern the conduct of the PCC's enforcement investigations, hearings and procedures of the PCC, excluding matters involving mergers and acquisitions (as detailed in our previous update). With the end of the transitory period in August 2017 and a period of leeway granted to businesses to undertake the necessary compliance measures, the PCC has stated that it now has the full arsenal of enforcement powers required to fully implement the PCA and penalise businesses in violation of the law, as well as to effectively detect violating businesses and manage an increased number of enforcement cases.

Advocacy

The PCC has continued to engage with government and industry and actively generate awareness within the wider community by educating businesses and individuals about the benefits of market competition and the need to enforce competition policy. The PCC's advocacy efforts adopted a particular sector focus in 2018.

In particular, the PCC released issues papers and commenced studies on a number of priority sectors including rice, pharmaceuticals, poultry and livestock, manufacturing, and transportation and logistics. It also targeted sectors in need of reform, such as the telecommunications sector. In this respect, the PCC engaged with the Department of Information and Communications Technology and the National Telecommunications Commission in addressing competition considerations relating to the selection of the third player in the Philippines telecommunications market. It also provided inputs on telecommunications legislative measures relating to issues such as mobile number portability, open access in data transmission and spectrum management reform (which will be critical in the context of the rollout of 5G). The PCC also advocated for pro-competition policies and stances on other key issues, including the amendments to the Retail Trade Liberalisation Act and the proposed amendments to the Public Services Act.

The PCC continued to organise advocacy and capacity-building activities in 2018 for both external stakeholders as well as its own staff. These included the inaugural Manila Forum (Forum on Competition in Developing Countries) in February,

which brought together local and foreign competition lawyers and economists, as well as leaders in the academe and in the business sector to engage in discussions in competition law and policy in the Asia Pacific region.

In terms of its global advocacy, Philippines has adopted the ASEAN Regional Cooperation Framework, which serve as a set of guidelines for ASEAN member states, including the Philippines, to cooperate on competition cases. In line with this, the PCC participated in the establishment of the ASEAN Competition Enforcers' Network, with its first meeting held on 9 October 2018 hosted by the Competition and Consumer Commission of Singapore.

Important developments

Adjustments to the notification thresholds

In the memorandum circular issued by the PCC for raising the merger notification thresholds, the PCC also provided a mechanism for regular adjustments of the thresholds. The thresholds will be adjusted on March 1 of every year– using as index the Philippine Statistics Authority's official estimate of the nominal Gross Domestic Product growth of the previous calendar year rounded up to the nearest hundred million. Starting March 1, 2019 – the thresholds are increased as follows:

a Size of Party: from PHP 5 billion to PhP 5.6 billion; and

b Size of Transaction: from PHP 2 billion to PHP 2.2 billion.

Guidelines for notification of joint ventures

The Joint Venture Guidelines are intended to guide parties in determining whether their transaction will be subject to mandatory notification requirements as a JV. It identifies the parties required to submit notification when either the JV has been formed, or where it is yet to be created. It also lists the JV assets that need to be included in applying the thresholds.

Importantly, the JV Guidelines introduce the concept of "joint control" as criteria for assessing when an acquisition of shares in an existing corporation will be considered a notifiable JV or an acquisition. Joint control is deemed to exist when an entity has the ability to determine or veto the strategic commercial decision of the joint venture. The distinction is important since in a share acquisition, the transaction involve a minimum number of shares (35% or 50%, if the entity already owns more than 35% prior to the proposed acquisition), for the threshold to be breached. Such is not the case in a notifiable joint venture.

Rules on the Leniency Program of the PCC

The PCC retained its momentum and closed 2018 with the publication of its Leniency Program Rules (**Leniency Rules**). The Leniency Rules were promulgated by the PCC in accordance with the directive under Section 35 of the PCA. They offer immunity from suit or reduction of administrative fines in exchange for voluntary information from participants in an anti-competitive agreement, including cartels. Under the Leniency Rules, current or former director, officer, trustee, partner, employee, or agent of a juridical entity who may be liable, independently of their employer or the entity that they are associated with. The PCC will use a marker system to identify and protect an applicant's place in the queue under the Leniency Program, giving the applicant a period of 30 days to gather and submit information and evidence on the reported anti-competitive behavior.

The Leniency Rules came into effect 19 January 2019, 20 days after its publication on 29 December 2018.

Other developments in merger control

At the start of 2019, the PCC released Clarificatory Note No. 19-001 regarding compulsory notification in land acquisitions. The PCC clarified instances when land acquisition will not be notifiable, such as those in which the acquiring entity will not obtain control over an acquired entity as a result of the acquisition. It also established when the acquiring entity is presumed to have acquired control over the acquired entity if the latter is engaged in a real estate business and the acquiring entity (including the entities within its notifying group), will be in a position to replace, or substantially replace, the acquired entity in the business or in part of the relevant business, or allow an acquirer to build up a market presence or develop market access within a reasonably short period of time.

Notable 2018 decisions

- The PCC approved in January 2018 the acquisition by Philippine retail giant SM Retail Inc. of Goldilocks Bakeshop Inc. after the parties submitted their voluntary commitments to address potential competition issues in the

transaction. However, the SM Group subsequently withdrew its bid to acquire the bakeshop chain the following month. By August 2018, the SM Group revived the deal to acquire 34 % of the total outstanding capital stock of Goldilocks, which makes it below the 35% notification threshold set under the PCA's implementing rules.

- In June 2018, the PCC declared the acquisition by Udenna Corporation (through Chelsea Logistics Holdings Corp) of Trans-Asia Shipping Lines Inc. void and imposed a PHP 22.8 million fine for failure to submit compulsory notification. The parties submitted the transaction for PCC review in September 2018. The transaction was cleared by the PCC in January 2019 after voluntary commitments were offered by the parties to address competition concerns.
- The PCC also issued a Statement of Concerns regarding Universal Robina Corporation's acquisition of assets of Central Azucarera Don Pedro and Roxas Holdings, Inc. The PCC found that the transaction will likely result in substantial lessening of competition in the market for sugar cane milling services in several provinces in Southern Luzon and considers the transaction as a merger-to-monopoly.
- The PCC is currently reviewing the proposed acquisition by International Container Terminal Services Inc. of 50% ownership interest in Manila North Harbour Port Inc. In its initial review, the PCC found that the proposed acquisition may affect port operation and transshipment services in the Port of Manila.

What's next for the Philippines?

With the PCC gaining confidence in the exercise of its regulatory powers, the agency is expected to be ramp up its enforcement of the PCA. According to PCC Chairman Balisacan, among the priority areas for competition analysis and enforcement in 2019 include logistics supply, corn milling and trading, as well as refined petroleum manufacturing and trading. Additional guidelines and issuances on enforcement, such as the Rules on Forbearance and the Rules on Inspection Orders, are planned for release and implementation in 2019.

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Singapore

Consumer protection and competition

The Competition Commission of Singapore (**CCS**) has been renamed the Competition and Consumer Commission of Singapore (**CCCS**) after taking on an additional function of administering the Consumer Protection (Fair Trading) Act (Chapter 52A) (**CPFTA**) with effect from 1 April 2018.

The change reflects the complementary relationship between competition and consumer protection. However, the mediation of complaints against offending retailers through the Consumers Association of Singapore (**CASE**) will continue to be the first port of call to assist consumers. Offending retailers who persist in unfair trade practices will be referred to CCCS for investigation.

To enhance the synergies between competition and consumer protection, CCCS' powers under the CPFTA work hand in glove with its powers under Singapore's *Competition Act* (**Competition Act**). Specifically, the CCCS' powers under the CPFTA can build on the existing market studies which CCCS had already been conducting to test the effectiveness of markets in specific sectors in Singapore.

In particular, two new market studies are already being undertaken: the first is a market study on the online travel booking sector to look into the impact of online travel booking platforms with the rise of the digital economy. The second is a joint study with the Personal Data Protection Commission to examine consumer protection, competition and personal data protection issues, which could arise if data portability is introduced in Singapore.

Amendments to Competition Act

Following a public consultation on the proposed changes to the Competition Act, the following changes to the Act were finalised and came into effect on 16 May 2018:-

Codification of CCCS' process for providing confidential advice on anticipated mergers

CCCS already has a process under its Guidelines on Merger Procedures 2012 for businesses to seek confidential and non-binding advice on anticipated mergers. This is now given statutory effect under the new section 55A.

This advice will be given strictly on the veracity of the information provided by the merging entities; CCCS will not request information from third parties or conduct any public consultation to make a comprehensive assessment. Accordingly, the advice that issued under section 55A will not be binding on CCCS.

Businesses under investigation may offer legally binding commitments for cases involving anticompetitive agreements and abuse of dominant position

Sections 60A and 60B of the Competition Act now allow the CCCS to accept binding and enforceable commitments for cases involving anti-competitive agreements and the abuse of a dominant position. Investigations will cease if CCCS accepts the offered commitments.

Previously, such commitments were only available in relation to mergers or acquisitions that substantially lessen market competition.

CCCS empowered to conduct general interviews during inspections and searches

CCCS officers are now empowered to ask general questions in relation to the same investigation without first serving a written notice when conducting inspections or searches of premises. Previously, occupants of the premises were only required to provide an explanation of the documents produced or seized on the premises or information uncovered during the inspections.

This is not an increase of CCCS' enforcement powers but addresses an administrative gap in the investigation process; CCCS can seek answers on the spot and is no longer required to serve written notices subsequent to the inspection or search in order to ask general questions.

Airline alliance agreements

Singapore's open skies policies encourage both local and foreign airlines to grow their connectivity at Singapore's Changi Airport and such policies have helped to boost Singapore's strong reputation as a key air hub in the region. Airline alliances can enhance operational efficiencies, and provide benefits to the traveling public, for example, through seamless travel and lower airfares. However, certain forms of airline alliances can potentially restrict competition, and lead to fewer options and higher airfares for passengers.

On 5 September 2018, the CCCS issued a comprehensive Guidance Note to streamline its review of airline alliance agreements to provide airlines with more clarity on the competition assessment of airline alliance agreements. The intention is to further streamline of CCCS's review process and criteria to facilitate easier self-assessment of airline alliance agreements. When a notification is made to CCCS, a timeline is also provided for CCCS to conduct its review.

The Airline Guidance Note aims to assist airlines in their self-assessment of whether their alliance agreements will breach Section 34 of the Competition Act (Cap. 50B), which prohibits anti-competitive agreements in Singapore, and whether the alliance generates economic benefits that would outweigh competition concerns. After such a self-assessment, should an airline choose to notify CCCS for guidance or decision, the Airline Guidance Note would serve to further provide assistance on how such notifications should be made and set out the required documentation for CCCS's review.

Competition impact of government initiatives

The CCCS has also issued a very useful note to assist sectoral regulators and governmental agencies which may need to deal with the competition impact of their policies, directives or initiatives.

Although the prohibitions in the Competition Act do not apply to activities, agreements or conduct of the government, government agencies are strongly encouraged to assess the impact of their initiatives on competition in the affected markets during the early part of their internal process and consider alternative options to reduce any adverse impact on market competition.

Recent cases and developments

CCCS imposes directions on Grab and Uber to restore market contestability and penalties to deter anti-competitive mergers

The sale of Uber's Southeast Asian business to Grab in exchange for a 27.5% stake in Grab (**Transaction**) drew significant public attention involving the two main ride-hailing services in the country and having an almost immediate and direct impact on users of their services.

After the parties publicly announced the Transaction, CCCS informed the parties of the voluntary merger notification regime but the parties proceeded to commence transfers of assets and complete the Transaction on 26 March 2018 without notification. CCCS commenced investigations the following day on 27 March 2018.

During its investigations, the CCCS had issued Interim Measures Directions (**IMD**) to lessen the impact of the Transaction on drivers and riders. The IMD included requirements to remove exclusivity obligations on drivers, prevent Uber's operational data from being used by Grab to enhance its market position, preserve pre-Transaction pricing and commission levels, and ensure that drivers and riders are free to choose their preferred platform.

After investigations, CCCS found that: (a) Grab had increased prices after the removal of its closest competitor, (b) due to exclusive agreements between Grab and various taxi companies, car rental partners, and some of its drivers, potential competitors could not scale and compete effectively, and (c) the parties had anticipated and provided for a mechanism to apportion potential competition law penalties.

CCCS issued extensive directions to lessen the impact of the Transaction on drivers and riders, and to open up the market and level the playing field for new players, including (a) the removal of exclusivity arrangements, (b) maintaining Grab's pre-merger pricing algorithm and commission rates (but not affecting Grab's flexibility to apply dynamic pricing under normal demand and supply conditions or restricting the amount of rider promotions and driver incentives that Grab wishes to offer), and (c) the sale of Uber's rental fleet to any potential competitor if a reasonable offer is made based on fair market value, and that the

vehicles can only be sold to Grab if CCCS' prior approval is obtained.

CCCS also imposed financial penalties on the parties totalling S$13,001,702:-

Grab	S$6,419,647	Grab
Uber	S$6,582,055	Uber

CCCS fines capacitor manufacturers involved in global cartel for price-fixing and information exchange

On 5 January 2018, CCCS issued an Infringement Decision (**ID**) against five capacitor manufacturers for engaging in anti-competitive agreements including price-fixing and the exchange of confidential sales, distribution and pricing information for Aluminium Electrolytic Capacitors (**AECs**) in relation to customers in Singapore.

Investigations commenced following an application from Panasonic for immunity under CCCS's leniency programme.

CCCS' investigations revealed that the parties held regular meetings in Singapore where they (i) exchanged confidential and commercially sensitive business information such as customer quotations, sales volumes, production capacities, business plans and pricing strategies; (ii) discussed and agreed on sales prices, including various price increases; and (iii) agreed to collectively reject customers' requests for reduction in prices of AECs being sold.

As the infringing conduct also impacted the markets in several jurisdictions, CCCS had exchanges and cooperated with competition authorities in those jurisdictions during investigations.

CCCS found that having begun in 1997, the long-running cartel sheltered the parties' profitability and market shares from competition, to the detriment of customers. Without the cartel activity, the parties would have been under greater competitive pressure and individual AEC suppliers may not have been able to sustain a price increase without losing market share. Without the cartel activity, the parties would have had to draw customers with better prices or quality of products.

Having considered the turnovers of the parties, the nature and long duration of the infringement, aggravating and mitigating factors, the parties having a combined market share of more than two-thirds of the AEC market, CCCS imposed financial penalties totalling S$19,552,464, the highest ever imposed at that time.

Panasonic received total immunity from the financial penalties as it was the first to provide information on the cartel. Three other parties came forward and provided further information during investigations and received reductions of their financial penalties under CCCS' leniency programme.

CCCS penalises fresh chicken distributors for price-fixing and non-compete agreements

On 12 September 2018, CCCS issued an infringement decision against 13 fresh chicken distributors for engaging in anti-competitive conduct to coordinate the amount and timing of price increases, and agreeing not to compete for each other's customers in the market for the supply of fresh chicken products in Singapore.

Investigations commenced in March 2014 following the receipt of information from a secret complainant. Under CCCS' Reward Scheme for informants, informants providing CCCS with direct or indirect access to inside information surrounding competition infringements may be entitled to a reward of up to S$120,000.

CCCS considered the relevant turnovers of the parties, the nature, long duration of the infringement, aggravating and mitigating factors, and in particular the significant size of the industry for the most commonly consumed meat in Singapore and extensive impact on the market from individual consumers to intermediate sellers and consumers, and imposed financial penalties totalling S$26,948,639.

Five of the infringing parties received reductions in their financial penalties for providing information under CCCS' leniency programme.

Proposed joint venture between CAE International Holdings Limited and Singapore Airlines Limited

CAE International Holdings Limited (**CAE**) and Singapore Airlines Limited (**SIA**) proposed the creation of a full function joint venture company that will establish, develop and operate a commercial flight training centre in Singapore to offer type-rated, recurrent, and conversion pilot training, for various Boeing aircraft.

The relevant markets affected by the proposed joint venture are:-

a the provision of pilot training services for the Boeing aircraft in the Asia Pacific region; and

b the supply of training devices (including simulation software) for the Boeing aircraft worldwide.

CCCS reviewed the parties' submissions and feedback from customers and competitors following a public consultation and found that:-

For the provision of pilot training services for the Boeing aircraft in the Asia Pacific region

a CAE and SIA are not actual competitors, as SIA mainly uses its capacity for internal training and does not actively provide training services to third parties. However, SIA's excess capacity could be used to provide pilot training services to third parties;

b the proposed joint venture would likely result in an increase in the capacity made available to third parties both within Singapore and in the Asia Pacific region and could increase competition for the provision of pilot training services for the Boeing aircraft;

c the barriers to expansion are unlikely to be high as existing players such as third-party training centres can expand to meet a sudden increase in demand. Many airlines also self-supply pilot training; and

d customers have a choice of numerous training providers in the region from which they can choose.

For the supply of training devices for the Boeing Aircraft Types worldwide

a CAE does not appear to have the market power to restrict the supply of its training devices, as there is countervailing buyer power;

b CAE has a limited incentive to restrict the supply of its training devices due to the interdependent relationships with its competitors;

c the proposed joint venture does not create additional incentives for CAE to restrict the supply of its training devices, given that CAE already operates a network of training centres in the Asia Pacific region; and

d CAE has limited incentives to restrict or slow down the updates to the simulation software specific for the training devices that it supplies, given that it sells training devices and would ultimately want its training devices to be functional.

With the above, CCCS concluded that the proposed joint venture is unlikely to lead to a substantial lessening of competition.

Proposed merger of Essilor International (Compagnie Generale d'Optique) S.A. and Luxottica Group S.p.A.

The proposed merger comprised the merger of Essilor International (Compagnie Generale d'Optique) S.A (**Essilor**) and Luxottica Group, S.p.A. (**Luxottica**). Essilor is primarily engaged in the wholesale distribution of ophthalmic lenses while Luxottica is involved in the wholesale distribution of prescription frames and sunglasses.

Based on evidence and feedback from third-parties, CCCS found that:-

a retailers are able to switch to other suppliers in response to any tying/bundling strategy by the merged entity;

b suppliers have excess capacity to accommodate a surge in orders;

c a large majority of retailers in Singapore do not carry Luxottica's products and end-consumers generally have low brand awareness and rely on opticians' recommendations on ophthalmic lenses;

d products of the parties are not "must have" for retailers;

e even in the absence of the merger, it is unlikely that the parties will enter and expand into each other's respective markets credibly and significantly, such that the merger would eliminate potential competition between the Parties that could have taken place if not for the merger.

CCCS assessed that, on balance, the evidence did not support a finding that the merger would lead to a substantial lessening of competition in Singapore.

What's next for Singapore?

With an expected uptick in merger and acquisition activity in the 2019 and following from the Grab - Uber merger, businesses involving disruptive technologies and having close interaction with end-consumers are likely to face greater scrutiny in their business practices and mergers and acquisitions.

CCCS continues to be involved in regional efforts to collaborate and cooperate on competition enforcement as well as representing Singapore as the chapter lead for competition provisions or chapters in various free trade agreements.

An MoU with Indonesia's Commission for the Supervision of Business Competition was signed in August 2018 which is expected to bring about greater cooperation and coordination of cross-border enforcement actions.

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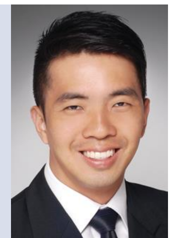

The Singapore Chapter was prepared by Bird & Bird ATMD LLP, a Singapore law practice associated with Bird & Bird LLP, an international legal practice.

STOMPING GROUND

South Korea

Comprehensive revision of the MRFTA for the first time in 38 years

For the first time in 38 years since the Monopoly Regulation and Fair Trade Act was enacted in 1980 (**MRFTA**) , the Korea Fair Trade Commission (**KFTC**) undertook a comprehensive revision. The review was aimed at updating the competition law regime in order to better accommodate, and prepare for, existing and forthcoming changes in the economic environment and market conditions in the 21st century, and growing demand for a fairer economy and innovation-driven growth.

The proposed amendments put forward by the KFTC extended to a broad range of issues covering almost every subject matter regulated by the MRFTA (e.g. mergers, cartels, unfair trade practices, regulations on large business groups, private enforcement and penalties). After receiving a variety of suggestions on its proposals from interested parties over the past few months, the KFTC is now waiting for the revised MRFTA to be passed by the National Assembly. This is expected to occur within the first half of 2019.

Major changes under the KFTC's proposal

Some of the issues raised in the proposed amendments to the MRFTA put forward by the KFTC are expected to apply to international companies who also conduct business in South Korea. We have outlined below those legislative proposals that we anticipate may have the most significant effect on those international companies or their local subsidiaries conducting operations in South Korea.

Additional thresholds for merger control

The KFTC changed the statutory thresholds for merger notification as follows:

[Before] A mandatory filing can be triggered only if the target company has worldwide assets or sales revenues (plus Korean sales revenues in case of a foreign-to-foreign merger) of at least 30 billion Korean won.

[After] Even if the target threshold is not met, a merger filing is required when (i) the acquisition value is substantial and (ii) the target company is active in South Korea to a considerable extent (e.g. supplying goods or services in the domestic market, utilizing local research facilities, etc.).

This change stems from practical concerns about large companies acquiring start-ups with substantial growth potential, which in the future may lead to anti-competitive conduct, without going through the KFTC's merger review processes. For example, the Facebook and WhatsApp merger case in 2014, which had a transaction amount of 24 trillion Korean won, was not subject to any merger control review process as the Korean sales revenue of the target company was much lower than 30 billion Korean won.

Abolition of the KFTC's exclusive right to refer to the prosecutor's office

The KFTC has agreed to the eventual abolition of the exclusive criminal referral system whereby the KFTC had the exclusive right to refer antitrust violations for criminal prosecution to the prosecutor's office, in case of hard-core cartels. As a result of the substantial diversity of opinion on the scope of the repeal, the KFTC eventually agreed to abandon its exclusive criminal referral authority for hard-core cartels (such as price fixing and bid-rigging) only. This change will allow the prosecutor's office to conduct its own investigations into, and prosecute at its discretion, any hard-core cartel case regardless of whether or not the KFTC has referred the case to the prosecutor's office. This indicates that companies involved in any hard-core

cartel case may, from now on, have to deal with the prosecutor's office, as well as the KFTC.

Tightened regulation on information exchange

Given that recent cases of collusion have tended to occur tacitly through information exchanges, rather than through explicit agreements, and given the difficulties in enforcing the existing regulations around such types of collusive behaviour, the KFTC recently added the following wording to expand the meaning of cartel conduct as it occurs in the MRFTA: "conduct that substantially restricts competition through information exchanges on price, production volume, etc." The purpose of this amendment is to tighten the regulations around the exchange of information in relation to possible cartel conduct.

Adoption of rule of reason with respect to the resale price maintenance

The KFTC has modified the resale price maintenance provisions of the MRFTA to make it clear that both the maximum and minimum resale price maintenance will be governed by the "rule of reason" approach (rather than the "per-se illegal" approach).

This change has been made in accordance with court precedents, where the courts have declared that the rule of reason approach applies to both the maximum and minimum resale price maintenance.

Adoption of private enforcement

In response to a rising demand for the adoption of the private enforcement system, borne out of the difficulties injured parties may have in obtaining damages relief, the KFTC introduced a new remedy of "injunction relief" in the antitrust area. This amendment allows the injured party to directly request the court to suspend unfair trade practice(s) without reporting the same to the KFTC, or (if it has been reported already) without waiting for relevant measures to be imposed by the KFTC.

Increase in penalty surcharge

The KFTC determined that the current level of penalty surcharges under the MRFTA were too low to have a sufficient deterrent effect. As a result, the KFTC doubled the upper limits of the penalties that can be imposed in respect of all types of MRFTA violations as follows:

Cartel: from 10% to 20% of the relevant sales turnover;

Abuse of Dominance: from 3% to 6% of the relevant sales turnover; and

Unfair Trade Practice: from 2% to 4% of the relevant sales turnover.

What's next for South Korea?

It is now up to the National Assembly to determine when the comprehensive reform of the MRFTA will come into effect. However, once passed, the KFTC will begin to enforce the revised provisions of the MRFTA in earnest.

The KFTC is also expected to continue to proceed with its so-called "economic democracy" policy as pledged by President Moon Jae-In and the Democrats in the presidential campaign, and by Kim Sang-Jo when he first came on board as the chairman of the KFTC in 2017.

Pursuant to this policy, the KFTC is likely to continue its two-front attack on the conglomerates (often called as "chaebol"), as well as the large businesses with superior bargaining positions, in order to promote a fairer economy and more efficacious transactions.

Those businesses in the sights of the KFTC include both local companies, as well as international firms doing business in South Korea (including through their subsidiaries). In fact, there are an increasing number of cases where an international firm or its local subsidiary has been subjected to the KFTC's investigation, and one should never underestimate the capacity of the KFTC to enforce the MRFTA globally.

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ASEAN competition laws round-up

ASEAN pledge for competition policies by 2015

Members of ASEAN (the Association of Southeast Asian Nations) Economic Community pledged to have general competition policies in place by the end of 2015. Following this pledge, some member countries introduced comprehensive competition legislation for the first time. Others took this as an opportunity to amend existing laws to improve their effectiveness. We have covered the activities of those jurisdictions with more established and ambitious competition regimes in this publication. This section provides a 'round-up' of the smaller regimes that are either actively enforcing their competition laws or are still establishing the necessary infrastructure to be able to do so.

Lao PDR

The National Assembly of Lao People's Democratic Republic passed the Law on Business Competition (No. 60/NA) in July 2015 and it became effective on 9 December 2015. In October 2018 the country's national competition authority was formally established.

In light of the establishment of the competition authority, we expect further regulatory developments to take place in 2019 as the Competition Law becomes more fully implemented and operational.

Myanmar

Following the entry into force of Myanmar's Competition Law on 24 February 2017, the Myanmar Competition Commission (**Commission**) was established in October 2018. The Commission is made up of 11 members, including the Union Minister for Commerce (Chair), the Director General of the Department of Trade (Secretary) as well as other government officials and professionals, including lawyers and economists.

The Commission is responsible for implementing Myanmar's Competition Law, as well as the Competition Rules, which are issued by the Ministry of Commerce on a periodic basis (the first of which was issued in 2017). The Competition Department, which was also established by the Ministry of Commerce in 2018, will support the work of the Commission, including by conducting investigations and assessing merger filings.

As Myanmar's competition law regime becomes fully operational, businesses will need to be increasingly mindful of the local competition laws and regulations in Myanmar, and how these might apply to their business operations.

Vietnam

In June 2018 the National Assembly of Vietnam passed a new Competition Law (**New Law**), which will replace the current Competition Law from 2004. The New Law will become effective from 1 July 2019.

Some of the key changes and introductions in the New Law include the following:

- **Scope:** The New Law will apply to any acts, whether by Vietnamese or foreign individuals or entities, 'which have or may have a competition restraining impact' in a Vietnamese market. This will allow Vietnamese authorities to exercise jurisdiction over offshore activities or transactions in circumstances where there is a 'competition restraining impact' in a Vietnamese market;
- **Regulatory bodies:** The Ministry of Industry and Trade (**MOIT**) will remain responsible for the administration of competition, but a new National Competition Committee (**NCC**) will be established which consolidates the former Vietnam Competition Authority and the Vietnam Competition Council. The NCC will assist the MOIT with the administration of competition, conduct of investigations, managing competition

cases, reviewing exemption requests and economic concentrations;

- **New prohibitions:** The New Law will also introduce new types of prohibited anticompetitive agreements, including cartel agreements between competitors (i.e. price fixing, customer allocation, restrictions on output, bid rigging), and exclusive dealing agreements and other agreements which have, or may have, competition restraining impacts;
- **Leniency program:** A leniency program will also be introduced which may be available to companies that have engaged in anti-competitive conduct, but have voluntarily reported their participation or the conduct to the competent authority before the authority's decision to investigate the matter;
- **Economic concentration:** Under the New Law, all economic concentrations which have, or may have, substantial anti-competitive effects on the Vietnamese market will be prohibited. Under the old Law, only economic concentrations in which the combined market shares of the participating companies was above 50% were prohibited; and
- **New criteria for assessing market dominance:** Under the New Law, a company will be in a market-dominant position if it has (i) market share of 30% or above, or (ii) substantial market power. 'Substantial market power' is a new concept which will be determined using several criteria, including the market shares of the companies in the relevant market, the financial size and strength of the companies, the existence of any barriers to entry and ownership of, and right to use, intellectual property.

Bird & Bird in Asia Pacific

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

Bird & Bird is noted by clients for its 'excellent response times, commercial approach, appropriate advice and excellent value for money',

Legal 500 Asia Pacific, 2018

In addition to our regional network, we have established a series of strategic and dynamic Co-operation Agreements throughout the Asia Pacific region which include Tay & Partners in Malaysia, K&K Advocates and Nurjadin Sumono Mulyadi & Partners in Indonesia, HMP Law in South Korea and AllBright Law Offices in China.

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

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What are the benefits for clients?

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Co-operation firms often share our sector focus, meaning they understand our approach and our passion for understanding our clients' businesses and sector challenges.

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