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Asia Pacific Competition Law Bulletin

Introduction

Welcome to the second 2017 edition of our bi-monthly Asia Pacific Competition Law Bulletin. As with previous editions, this bulletin has been produced in collaboration with our Linklaters colleagues (China, Thailand) and with expert local law firms around the region: Allens (Australia, New Zealand, Vietnam), Vinod Dhall in collaboration with TT&A (India), Mori Hamada & Matsumoto (Japan), Allen & Gledhill LLP (Singapore), Lee & Ko (South Korea) and Tsar & Tsai Law Firm (Taiwan). We hope that you continue to find this newsletter a useful source of information on competition law issues across the Asia Pacific region.

In this edition, we outline several competition law and policy developments in the Asia Pacific region, with legislative reforms on competition law ongoing in Australia, Taiwan and Thailand, and new guidelines for the energy sector in Japan.

Competition authorities remain active on the enforcement front, with court appeals in India and in Malaysia, a bid-rigging case in Singapore, and a rare abuse of dominance case in Vietnam. In Australia, the ACCC rejected an application by local banks to collectively negotiate with Apple.

On the transaction side of things, we report on the blocking of the Vodafone/Sky merger in New Zealand.

Finally, the Hong Kong Competition Commission released the findings of its long-awaited market study in the retail auto-fuel sector.

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Carolyn Oddie, Rob Walker and Amanda Richman, Allens

ACCC announces 2017 enforcement priorities

On 24 February 2017, the Australian Competition and Consumer Commission ("**ACCC**") announced its key enforcement and compliance priorities for 2017. The regulator has stated that it will focus on cartels and anti-competitive conduct, price parity clauses (particularly in the e-commerce sector) and competition and consumer issues in the energy, private health insurance, new car retailing and commercial construction sectors generally. The ACCC has indicated that it will be pursuing higher penalties and may be less willing than it has been previously to settle matters on the basis of agreed penalties.

- Price parity clauses: the ACCC's focus on price parity clauses follows the High Court's decision in the *Flight Centre* case (discussed in February's APAC Bulletin). In that case the High Court found that a travel agent engaged in an attempted price fix when it sought to enter into agreements with airlines in relation to the price at which the airlines sold airfares direct-to-consumers online. ACCC Chairman Rod Sims has been quoted saying that the Flight Centre decision would have profound implications for businesses across the e-commerce sector.
- Cartels and anti-competitive conduct: two companies were charged under the criminal cartel provisions in 2016, and cartel conduct remains a priority for the ACCC this year. The ACCC has advanced investigations into alleged cartels and expects to see more criminal prosecutions in coming years. In addition to *per se* infringements, there will also be a focus on investigating conduct which has the purpose, effect or likely effect of substantially lessening competition.
- Industries in focus: the ACCC will focus on competition and consumer issues in a number of key industries including energy, private health insurance, new car retailing and commercial construction. The ACCC has recently been given powers to investigate and report on retail electricity prices.

Related links

Allens' summary of the ACCC'S 2017 Compliance and Enforcement Policy is available here and the ACCC's full policy is available here.

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Significant changes ahead for Australian competition laws

The Government has introduced to Parliament two Bills which, if passed, will make significant changes to Australian competition laws. The Bills are expected to progress expeditiously through Parliament.

The changes include broadening the prohibition on misuse of market power, defining the geographical reach of the prohibition on cartel conduct, making important changes to the joint venture exception to the cartel provisions, introducing a new prohibition on concerted practices, and making amendments to the merger clearance process. In addition, the proposed amendments include making third line forcing subject to a competition test (rather than being prohibited per se) and making it easier for businesses to obtain an exemption for resale price maintenance.

Misuse of market power

The proposed new prohibition on misuse of market power will prohibit a corporation with a substantial degree of power in a market from engaging in conduct which has the purpose, effect or likely effect of substantially lessening competition in any market in which the corporation does or is likely to acquire or supply goods or services.

For further detail (including key differences between the current prohibition and the proposed prohibition) see the February 2017 bulletin here.

Cartels and the exception for joint ventures

Under the proposed amendments, the reach of the cartel provisions will be narrowed to conduct that takes place either in Australia or between Australia and places outside Australia.

The current joint venture exception to the cartel provisions will be expanded to include joint ventures that are in a contract, arrangement or understanding (currently a joint venture needs to be in a contract to benefit from the exception) and joint ventures that are for the acquisition of goods or services (currently only joint ventures for the production or supply of goods or services benefit from the exception).

However, under the proposed new laws, it may be harder for businesses to rely on the exception. It will be necessary to demonstrate, on the balance of probabilities, that any cartel provisions in the joint venture are both for the purposes of the joint venture and reasonably necessary for undertaking the joint venture. Currently, it is only necessary to demonstrate that they are for the purposes of the joint venture.

Further, joint ventures which are found to be for the purpose of substantially lessening competition will be subject to the cartel provisions.

Concerted practices

The proposed amendments include a new prohibition on concerted practices that have the purpose or effect of substantially lessening competition. The Explanatory Memorandum to the Bill defines a concerted practice as “any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition”. It is not proposed to define the term “concerted practices” in the legislation itself, but the definition in the Explanatory Memorandum could be used in interpreting the legislation.

Merger process

The commonly-used, flexible informal merger clearance process will continue to be available. However, in addition, the government proposes to combine the current unused ACCC formal merger clearance process with the Competition Tribunal authorisation process. Under the proposed amendments, mergers will now need to be assessed by the ACCC with the option to seek review of the ACCC's decision by the Competition Tribunal. The ACCC will be able to approve a merger if it does not substantially lessen competition or if the public benefits outweigh the detriments.

On review, the Competition Tribunal will be able to affirm, set aside or vary the ACCC's decision. However, the review by the Tribunal is limited. The Tribunal can only have regard to information referred to in the ACCC's reasons and information provided by and to the ACCC, unless the information was not in existence at that time. The form of merger authorisation application may require a court enforceable undertaking that the applicant will not complete the acquisition while the ACCC is considering it.

ACCC proposes to deny authorisation for banks to collectively bargain with and boycott Apple on Apple Pay

On 31 March 2017, the ACCC issued a final determination denying authorisation to the Commonwealth Bank of Australia, Westpac Banking Corporation, National Australia Bank, and Bendigo and Adelaide Bank to collectively bargain with Apple and collectively boycott Apple Pay. The decision is consistent with the ACCC's draft determination (which was covered in the December 2016 bulletin).

Authorisation provides statutory protection from court action for conduct that might otherwise raise concerns under the competition provisions of the *Competition and Consumer Act 2010* (Cth). Broadly, the ACCC may grant an authorisation when it is satisfied that the public benefit resulting from the conduct outweighs any public detriment.

In this case, the ACCC was not satisfied that the likely benefits from the proposed conduct outweigh the likely detriments.

On 26 July 2016, the banks sought authorisation to negotiate with Apple on two key issues:

- access to the Near-Field Communication ("**NFC**") controller in iPhones. Such access would enable the banks to offer their own integrated digital wallets to iPhone customers in competition with Apple's digital wallet without using Apple Pay; and
- removing the restrictions Apple imposes on banks preventing them from passing on fees that Apple charges the banks for the use of its digital wallet.

The ACCC accepted that Apple providing the banks access to the iPhone NFC controller was likely to lead to increased competition in mobile payment services. However, the ACCC considered that this public benefit was outweighed by the distortions to and reductions in competition that could result from the banks' proposed conduct.

The ACCC identified a number of issues with the proposed conduct. It was concerned about the effect the conduct would have on future innovations in digital wallets and mobile payments technology. The ACCC stated this technology is in its infancy and authorising the banks' proposed conduct could direct the development of emerging markets to the use of NFC controllers, hampering the development of alternative innovations in relation to mobile payments.

The ACCC also raised concerns about the extent to which the conduct could reduce competition between the banks in the supply of mobile payment services. The ACCC stated that multi-user digital wallets (such as Apple Wallet) could increase competition between the banks by making it easier for consumers to switch card providers and limit any "lock in" effect that bank digital wallets may cause. The ACCC also indicated that, to the extent the proposed conduct alters Apple's mobile payments offering, authorisation could distort competition between mobile operating systems (in particular, between Apple and Android).

<u>Related links</u>

The ACCC's media release is available here.

Fay Zhou and Yuan Cheng

NDRC publishes draft antitrust guidelines to regulate trade associations

As a further effort to implement the State Council's Opinions on Promoting the Reform of Price Regime released in 2015, on 24 March 2017, NDRC published for consultation the draft Guidelines on the Price Activities of Trade Associations ("**Draft Guidelines**").

The Draft Guidelines identify a number of high-risk price-related activities by trade associations:

- organising business operators in the industry to conclude price monopoly agreements;
- organising business operators in the industry to collude with respect to the timing of promotions;
- guiding business operators to fix or change prices by (among others) publishing recommended prices, benchmark prices, reference prices, average prices or average costs in the industry;
- formulating rules, decisions or notices etc. which have the effect of eliminating or restricting price competition; and
- ensuring or encouraging business operators to implement price monopoly agreements by using disciplinary mechanisms.

In addition, the Draft Guidelines list several scenarios in which the release of price information by trade associations to members or industry players may lead to an agreement on price in violation of the AML, including:

- releasing production costs, sales price quotations, deal prices and other price information, particularly in industries with a high degree of concentration and where production and operating costs are stable;
- releasing future price information by market leaders, or by certain enterprises in an oligopoly market;
- releasing information on cost changes, or prices in the upstream or downstream market, which can facilitate concerted actions against such changes, particularly in industries where production and operation are closely connected with upstream and downstream markets; and
- releasing price trend analysis based on comprehensive data and specific change trend analysis, particularly where a trade association has a strong influence over its members.

The Draft Guidelines further clarify that whether a trade association's release of price information violates the AML requires a case-by-case analysis following the "rule of reason". The analysis will consider the trade association's influence and control over its members, the degree of market concentration, how competitive the industry is, the availability of price information from other sources, and other factors.

In China, many trade associations were formerly government agencies with a price regulation function, and some have been found to violate the AML in recent years. The Draft Guidelines are expected to help trade associations navigate risks by differentiating legitimate price-related practices from high-risk activities.

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Clara Ingen-Housz, Marcus Pollard, Alexander Lee and Knut Fournier

HKCC publishes results of market study in the petrol retail sector

The Hong Kong Competition Commission ("**HKCC**") published the much-awaited results of its market study in the petrol retail sector.

The study, which began before the law came fully into force, aimed at helping the HKCC understand the market for auto-fuel retail, amid claims and perceptions of high prices and low levels of competition between petrol retailers.

As the study was conducted under the HKCC's non-compulsory information gathering powers, the regulator was not able to compel market participants to disclose information. As a result, the study focuses on the factors which may explain high fuel prices. The HKCC makes six recommendations to the government, to encourage competition and promote lower prices in the market:

- introduction of the cheaper 95 RON petrol, by making it a lease condition for new fuel station leases;
- to make more fuel station sites available for tender;
- review the tendering system for sites, to encourage established players and new entrants to compete with one another more aggressively;
- to display pump prices and walk-in discounts on prominent boards that can be read by all motorists;
- to explore structural intervention, for instance at the terminal storage level and to facilitate alternative sources of auto-fuel; and
- to grant the HKCC compulsory information gathering powers when conducting market studies.

The study was slammed by representatives of motorists' associations as being insufficient to address other pricing issues, such as the large discounts offered to some companies, as opposed to independent truck drivers. LegCo members relied on the report to call for an antitrust probe of the sector.

Related links:

The Executive Summary of the HKCC's report can be found here.

Vinod Dhall and Avinash Amarnath, in collaboration with TT&A

Supreme Court of India issues first substantive ruling on Competition Act

The Supreme Court of India, the highest court of the country, has recently issued its first substantive ruling on the provisions of the Competition Act, 2002 (the "**Act**"). The judgment reinstated a finding of the Competition Commission of India ("**CCI**") that the Coordination Committee of Artists and Technicians of West Bengal Film and Television ("**Coordination Committee**") had engaged in cartel conduct through collective boycott.

The Supreme Court made certain important observations on the concept of relevant market. The Supreme Court observed that the term "market" used in Section 19(3) of the Act (which lists out the factors that the CCI should consider while assessing whether an agreement under Section 3 causes an appreciable adverse effect on competition in India) should be construed as referring to the *relevant* market. This implies that in every investigation under Section 3, the CCI will have to first delineate the relevant market.

Further, the Supreme Court also observed that the concept of "enterprise" under the Act was a functional one. Any entity carrying on an economic activity (i.e. any activity, whether or not profit-making or involving economic trade) is considered an "enterprise" *whilst engaged in this activity*. In the present case, the Supreme Court found that whilst a trade union is carrying out its collective bargaining functions, it is not engaged in an "economic activity". However, the Coordination Committee was acting as an association of enterprises representing the economic interests of its members, who were engaged in the production, distribution and exhibition of films and TV serials. Therefore, its conduct falls under the Act.

Related files:

A copy of the Supreme Court order is available here.

Government of India revises de minimis exemption for transactions

The Government of India, via a notification dated 27 March 2017 (the "**Notification**"), modified and extended the existing *de minimis* exemption from merger control rules for some transactions.

The Notification makes the following changes:

- for the purpose of assessing the applicability of the *de minimis* exemption, the value of assets being acquired, taken control of, merged or amalgamated will be considered, as opposed to the entire turnover of the target. Therefore, now, if the target (i.e. assets that are being acquired, merged or amalgamated) has assets of less than INR 3.5 billion (approximately USD 54 million) or turnover of less than INR 10 billion (approximately USD 154 million) in India, the said transaction would not require a notification with the CCI. To this effect, the earlier Government of India notification, dated 4 March 2016, has been rescinded;
- where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, are the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under section 5 of the Act. The practice followed to date was to consider the assets and turnover of the acquirer and the target enterprise – i.e. the entity that houses the assets or division or business; and
- the exemption now applies to mergers and amalgamations. This exemption was previously only available for acquisitions.

The Notification is valid for a period of five years.

Kenji Ito and Aruto Kagami, Mori Hamada & Matsumoto

Japan Consumer Affairs Agency issued its first fine for misleading representation

On 27 January 2017, the Japan Consumer Affairs Agency ("**CAA**") issued a JPY 485 million (approximately USD 4.3 million) fine against Mitsubishi Motors Corporation over false fuel economy claims in its advertising materials.

The CAA regulates advertising materials for consumer protection purposes, under the Act Against Unjustifiable Premiums and Misleading Representations (the "**Act**") and can issue surcharge payment orders for misleading representations, a violation of the Act. Article 4 of the Act defines a misleading representation as any representation to consumers in advertising materials as to the quality, standard or any other characteristics of goods or services that is portrayed as being excessively better than the reality. The Act was amended in April 2016 to allow the CAA to impose surcharge payment orders. The amount of the fines is fixed at 3% of the relevant sales of goods or services at issue for the duration of the infringement, for up to 3 years.

The fine against Mitsubishi Motors marks the first of its kind after the said amendment came into effect. Mitsubishi Motors was found to have misrepresented the fuel economy of certain car models. The cars failed to meet the government's standard when tested. The 2016 amendment also introduced a leniency program, but Mitsubishi Motors was not granted a reduction of fine in this instance because it self-reported the violation only after the government notified it of the commencement of a formal investigation.

This decision demonstrates the government's willingness to enforce consumer protection rules in advertising materials.

<u>Related Links</u>:

The announcement by the CAA (in Japanese) can be found here.

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JFTC and Ministry of Economy jointly published partial amendments to the electricity and gas trading guidelines

On 6 February 2017, the Japan Fair Trade Commission ("**JFTC**") and the Ministry of Economy, Trade and Industry ("**METI**") jointly published partial amendments to the Guidelines for Electricity Trading and the Guidelines for Gas Trading, following public consultations initiated in December 2016.

The amendment to the Guidelines for Electricity Trading relates to the "negawatts trading" program, under which businesses can resell power unused by consumers. The programme launched in April 2017, as a result of an amendment to the Electricity Business Act coming into effect.

The revised guidelines seek to promote competition in the negawatts market, and clarify when certain actions by former regional monopolies against negawatt traders may raise competition concerns.

In the gas sector, the Guidelines for Gas Trading are also introduced following a legislative reform. The current system of regional monopolies with be abolished, in favour of a full liberalisation of the gas trading market. The Guidelines for Gas Trading make it easier for consumers to switch provider, and clarify that tying of gas and other products by former regional monopolies can raise competition issues.

Both the JFTC and the METI intend to use the revised guidelines to prevent possible violations of the Anti-Monopoly Act, the Electricity Business Act and the Gas Business Act, in an effort to ensure fair competition in the domestic electricity and gas trading markets.

Related Links:

The announcement by METI on the revised Guidelines for Electricity Trading can be found here.

The announcement by METI on the revised Guidelines for Gas Trading can be found here.

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Raymond Yong and Penny Wong, Rahmat Lim & Partners

The Competition Appeal Tribunal Dismissed the Appeal of Prompt Dynamics

On 3 March 2017, the Competition Appeal Tribunal dismissed an appeal brought by Prompt Dynamics. The container depot operator was one of the companies found by the Malaysia Competition Commission ("**MyCC**") to have infringed the Competition Act's prohibition against anti-competitive agreements by engaging in price-cartel activities.

The investigation by MyCC started after complaints alleging that several container depot operators in Penang had issued notices and flyers informing customers of an increase in depot gate charges, from RM 5 to RM 25 per container.

The Tribunal found no reason to contradict the findings of the MyCC. The ruling leaves intact the RM 152,042 penalty (approximately USD 35,000) imposed on Prompt Dynamics. The Tribunal noted that Prompt Dynamics had not taken advantage of the remedies available under the law to mitigate the penalty.

Related links:

The June 2016 MyCC decision can be found here.

A copy of the press release is available here.

Carolyn Oddie, Rob Walker and Amanda Richman, Allens

Commission blocks Vodafone/Sky merger

On 23 February 2017, the New Zealand Commerce Commission (the "**Commission**") declined to grant clearance for a proposed merger between Sky Network Television and Vodafone New Zealand, citing concerns that the vertically-integrated entity would be able to bundle products and cross-sell services in a way that rivals would not be able to match. Sky is New Zealand's largest pay TV provider and holds the broadcasting rights to significant content.

The Commission identified the following concerns:

- the merged entity would have substantial market power by virtue of Sky's ownership of key content;
- the merged entity would have an increased incentive and ability to make buying Sky on a standalone basis relatively less attractive than buying it in a bundle, with mobile and/or broadband, offered by the merged entity; and
- the merged entity would have the incentive to prefer Vodafone over other telecommunication service providers.

The Commission considered the effect that the roll out of ultra-fast broadband fibre internet in New Zealand could have on Sky's subscriber base and market power. The Commission was concerned that this would increase the scope for the merged entity to attract customers and foreclose more of the market through bundling.

The Commission also focussed on the growing number of consumers that view content on mobile networks and considered that, if viewing content on mobile devices becomes an important revenue stream for telecommunication service providers, the merged entity could foreclose competitors by bundling content with Vodafone's mobile service.

On 22 March 2017, Sky and Vodafone filed an appeal to the High Court, pending the release of the Commission's reasons for the decision.

Related links:

The Commission's media release is available here.

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Daren Shiau and Elsa Chen, Allen & Gledhill LLP

CCS issues Proposed Infringement Decision for bid-rigging relating to electrical services and asset tagging tenders

The Competition Commission of Singapore (the “**CCS**”) announced that it had, on 21 March 2017, issued a Proposed Infringement Decision against the following companies for being involved in bid-rigging activities in relation to tenders for the provision of electrical services, and in the case of the Cyclect Group and HPH, for the provision of asset tagging services:

- Chemicrete Enterprises (“**Chemicrete**”), Cyclect Electrical Engineering (“**Cyclect Electrical**”) and Cyclect Holdings (“**Cyclect Holdings**”) (together the “**Cyclect Group**”);
- HPH Engineering (“**HPH**”); and
- Peak Top Engineering (“**Peak Top**”).

The CCS’ investigation, commenced after receiving a complaint, revealed that:

- in submitting the bids to the tender for the provision of electrical services for the Formula 1 Singapore Grand Prix for 2015 to 2017 (the “**F1 Tender**”), instead of each party independently preparing their own competitive bid, the Cyclect Group had prepared all price schedules and final bid prices for HPH’s and Peak Top’s submissions for the F1 Tender, so that Cyclect Electrical would win the F1 Tender; and
- On 5 March 2015, Chemicrete was invited to participate in an invitation to quote for the procurement of asset tagging services. Chemicrete had forwarded a competing quote to be submitted by HPH that was higher than Chemicrete’s own quote for the tender, which HPH eventually submitted in response to the invitation to quote.

This is the 12th cartel decision to-date by the CCS, and the third in the past 12 months, in addition to five other enforcement actions taken by the CCS during the same time frame. The CCS continues to take any form of anti-competitive activity very seriously and will not hesitate to take action to investigate complaints with merit.

Related Links:

The CCS’ media release on the Proposed Infringement Decision can be found here.

Matt Liu and Elvin Peng, Tsar & Tsai Law Firm

TFTC to be granted dawn raid powers

In March 2017, the Taiwan Fair Trade Commission (“**TFTC**”) announced the Taiwan Fair Trade Act amendment bill (the “**Bill**”). The Bill, if passed, will grant the TFTC the power to conduct search and seizure, or “dawn raids”.

The Bill provides that the TFTC may, with the approval of the prosecutor, search a target enterprise’s or a third party’s place of business or residence, to search for evidence. Upon finding relevant materials, the TFTC will be able to seize the relevant evidence, including electronic records.

The TFTC explains that it is important for the TFTC to have the power to conduct dawn raids because its current investigative powers are not sufficient to discover key evidence in cases involving sophisticated and IT-assisted anti-competitive activities. It also explained that competition authorities in most advanced jurisdictions have some form of search and seizure powers.

Not everyone agrees that the TFTC should be given the power to enter and search premises. The current TFTC’s investigation procedure is an administrative one, in contrast with criminal investigations governed by the Criminal Procedure Code. The exercise of search and seizure powers by the TFTC might cause confusion between administrative and criminal procedures. Second, unlike some other law enforcement agencies, TFTC officials are relatively inexperienced in criminal procedure. It is doubtful that TFTC officials could lead the police force in searching and seizing evidence, as the Bill requires. Third, Taiwanese competition law provides for criminal liability in some specific cases only (if the offender continues to engage in anti-competitive activity after being ordered by the TFTC to stop), making the use of criminal investigation powers disproportionate in most cases. Lastly, there are only some 10 to 20 antitrust cases every year, accounting for approximately 10% of the TFTC’s total cases. Very few cases result in criminal liability. It is likely that the TFTC will use dawn raids in administrative cases, instead of criminal cases.

The Bill underwent a round of public consultation and will shortly be submitted for review to the Executive Yuan – the executive branch of government. Although it is too early to say whether the new provision will become law, it is expected that the Bill will continue to be the subject of debate, given the dramatic change that it seeks to introduce.

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Pornpan Chayasuntorn, Ueamduean Jerasantpich and Wilailuk Okanurak, Linklaters Bangkok

Trade Competition Amendment Bill near promulgation

The draft amendments to the Trade Competition Act 1999 (the "**TCA**") have been approved by the National Legislative Assembly, the legislative body of Thailand, on the third reading of the Bill. After it receives royal endorsement, the Bill will then be announced in the Royal Gazette. The law is expected to take effect in September this year, and the Ministry of Commerce is currently preparing secondary legislation (detailing for instance the criteria to determine market dominance).

The most recent changes in the Bill include:

- <u>Merger notification</u>. The final version of the Bill provides for both pre- and post-merger notification. This contrasts with the previous version of the Bill, which only contemplated a post-merger notification mechanism. Mergers must be pre-notified if they *amount to a monopoly or create dominance*, whilst mergers which *may substantially lessen competition* may be notified up to 7 days after the transaction. The merger regulations, which will be published before the law enters into force, will clarify the thresholds and criteria to help parties determine which category their transactions fall into. The Trade Competition Commission (the "**TCC**") will have 90 calendar days to clear mergers after the parties file a transaction, with a possible additional 15 calendar days.

- <u>New criminal penalties for abuse of market dominance and certain concerted practices</u>. Abuse of market dominance and anti-competitive agreements between competitors (including price fixing, fixing of quantity of goods and service, bid rigging and market allocation schemes) expose violators to fines of up to 10% of their revenue for the year in which the violation took place. Fines are capped at Baht 1 billion (approximately USD 29 million) if a violation occurs during a company's first year of operation. Individuals may face imprisonment of up to 2 years.

- <u>Administrative penalty framework</u>. The Bill creates administrative penalties for several breaches, including:

  (i) breaches of merger control rules;

  (ii) certain concerted practices (other than those subject to criminal penalties discussed above) between business operators, including:

    (a) price fixing, fixing of quantity of goods and service and market allocation between business operators "*which are not considered competitors*";

    (b) agreements to lessen the quality of goods or services;

    (c) exclusive distribution agreements;

    (d) fixing conditions or trade practices in respect of the purchase or distribution of goods or provision of service; and

    (e) other practices the TCC may prescribe.

(iii) unreasonable agreements with foreign businesses having a significant negative impact on the economy and on consumer benefits; and

(iv) other unfair trade practices (e.g. coercive tied selling, abuse of a superior bargaining position, imposing unfair trade conditions to impede or restrict the business operations of others).

A violation of merger rules can result in a fine of up to 0.5% of the transaction value (pre-merger notification) or a Baht 200,000 fine and a daily fine of up to Baht 10,000 until the requirement is duly complied (post-merger notification). Violations discussed in (ii) to (iv) are punished by an administrative fine of up to 10% of the income earned in the financial year in which the violation occurs.

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Linh Bui and Linh Nguyen, Allens Linklaters

Vietnam competition regulator fines a travel company for abuse of dominant position

The Vietnam Competition Council ("**VCC**") recently fined a travel company for abuse of dominant position.

In 2014, a complaint was filed against Anh Duong Manufacturing Trading Services Import & Export (Anh Duong) alleging that Anh Duong had engaged in several abuses of dominant position on the market for Vietnam tours for tourists from Russia, Ukraine and other countries of the Commonwealth of Independent States ("**CIS**"). In particular, Anh Duong allegedly entered into contracts with various hotels in Nha Trang, Phan Thiet, Phan Rang and Phu Quoc island under which these hotels could only accept tourists from Russia, Ukraine and CIS introduced by Anh Duong and could not direct tourists introduced by Anh Duong and its affiliate to other tourism companies. The VCC also found that the hotels committed to displaying online prices 15 to 20% higher than the prices agreed with Ahn Duong.

Anh Duong was found to have a 51.6% market share in the market for Vietnam tours for tourists from Russia, Ukraine and CIS, and therefore was found to be in a dominant position. By requesting that hotels increase online prices, and by preventing introduction of tourism services by other tourism companies, the VCC found that Anh Duong violated Article 13.5 of the Vietnam Competition Law, which prohibits the imposition of irrelevant contractual terms. In addition, Anh Duong was found to have violated Article 13.6 of the Vietnam Competition Law by imposing exclusivity clauses.

As Anh Duong has voluntarily stopped its practices and the claimant has withdrawn its complaint, the VCC stayed the case. Anh Duong was ordered to pay an administrative penalty of VND 50 million (approximately USD 2,200).

The case is interesting as it shows how the Vietnamese competition regulator defines the relevant market in the tourism sector, and how it applies the prohibition on abuses of a dominant position in practice.