

RAJAH & TANN ASIA

# LAWYERS WHO KNOW ASIA

# REGIONAL COMPETITION REPORT 2022



RAJAH & TANN ASIA

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# Overview

Dear Friends,

2022 has been an interesting year as the world emerged from the pandemic. Hard core restrictions from the pandemic are all but gone and face-to-face meetings are starting to become the norm again. We are not quite at the fervour that we were at pre-pandemic, although the chorus would agree that 2021 remains an exceptional year.

Going into 2023, the prognosis is that it is going to be a challenging year with headwinds. Yet, this may not be the case for competition and antitrust laws, where numerous developments abound.

Competition law enforcement is seemingly taking a front-seat in the region. There is a re-focus on investigations, with some focus on but not limited to essential products against a backdrop of persistent inflation. The expiry of more relaxed pandemic-era merger filing thresholds will also make the regulatory environment more complex for businesses as we go into the new year. Regulators across the region seem primed to gear up with potential raids and more to ensure fair competition in the market. For those of you who attended the American Bar Association Antitrust in Asia Conference in Singapore in December 2022, you have heard first hand from the regulators on some of their plans.

Another fast developing theme in the region is the increasing focus on digital and e-commerce markets. Food delivery platforms have now been investigated in multiple South-east Asian countries and more than once in Singapore, whilst the large technology companies have faced scrutiny by regulators in the region too. Importantly, regional regulators have been upskilling and preparing themselves for further cases in digital and e-commerce markets. We discuss this and more in this Report.

The RTA Competition & Antitrust Team continues to be at the forefront of competition law cases in the region being involved in practically all the major investigations and every major merger occurring directly or indirectly. To illustrate, our Indonesia team acted in the blockbuster Gojek / GoTo merger while the Thailand team is currently involved in the precedent-setting True / DTAC merger. The Singapore team is involved in a number of matters including the tie up between SIA, Tata and Air India which consists of various moving parts. In Malaysia, we helped obtain sectoral clearance for Celcom / Digi merger and SIA Engineering / Pos Aviation.

The Team continues to be ranked as elite or in band 1 by various legal ranking journals including the reputed *Chambers*, *Global Competition Review* and *Who's Who Legal*. Our Team members are regarded as Thought Leaders, with Kala Anandarajah named as Most Highly Regarded Competition Lawyer in Southeast Asia by *Who's Who Legal: Southeast Asia* Competition in 2021 and 2022. We have also seen several new hires as well as returnees across the different offices. We are especially pleased to have Joshua Seet re-join us and now a partner in the team (bringing the total number of partners to 4 in Competition & Antitrust) in Singapore and over 15 across the region.

As we get into the 2023, we wish you the Very Best for the Year, and look forward to working with you. Our team stands ready to assist in any case or query or just to have a chat.

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# Our Achievements: Practice Accolades

Rajah & Tann Asia has been named as a leading Competition Practice across several different jurisdictions across South East Asia by all of the major legal ranking journals, including but not limited to:

Global Competition Review 100 (GCR100) 2023	Chambers Asia Pacific 2023	The Legal 500 Asia Pacific 2022
 <p>Assegaf Hamzah &amp; Partners: <b>Elite</b> (since 2012)</p> <p>Rajah &amp; Tann Singapore: <b>Elite</b> (since 2014)</p> <p>Christopher &amp; Lee Ong: Highly <b>Recommended</b></p>	 <p>Assegaf Hamzah &amp; Partners: <b>Band 1</b></p> <p>Rajah &amp; Tann Singapore: <b>Band 1</b></p> <p>Christopher &amp; Lee Ong: <b>Leading Firms</b></p>	 <p>Assegaf Hamzah &amp; Partners: <b>Tier 1</b></p> <p>Christopher &amp; Lee Ong: <b>Tier 1</b></p> <p>Rajah &amp; Tann Singapore: <b>Tier 1</b></p> <p>C&amp;G Law: <b>Tier 1</b></p>
asialaw Profiles 2023	ALB Indonesia Law Awards 2022	In-house Community Firm of the Year 2021
 <p>Assegaf Hamzah &amp; Partners: <b>Outstanding</b></p> <p>Rajah &amp; Tann Singapore: <b>Outstanding</b></p> <p>Christopher &amp; Lee Ong: <b>Highly Recommended</b></p> <p>C&amp;G Law: <b>Highly Recommended</b></p>	 <p>Assegaf Hamzah &amp; Partners: <b>Winner</b> (Antitrust and Competition Law Firm of the Year)</p>	 <p>Christopher &amp; Lee Ong: <b>Winner</b></p> <p>Rajah &amp; Tann Singapore: <b>Winner</b></p>

## Our Achievements: Individual Accolades

The members of our Rajah & Tann Asia Competition & Antitrust and Trade team have also been individually recognised in various legal ranking journals, including but not limited to:

Chambers Asia Pacific 2023 – Competition / Antitrust	Who's Who Legal - Thought Leaders: 2023 - Competition	Who's Who Legal – Global Leaders: 2022
 <p><i>Indonesia:</i> <b>Rikrik Rizkiyana</b> (Senior Statespeople) <b>Farid Nasution</b> (Band 1) <b>Asep Ridwan</b> (Band 1) <b>Situmorang Albert Boy</b> (Associate to watch)</p> <p><i>Singapore:</i> <b>Kala Anandarajah</b> (Band 1)</p> <p><i>Malaysia:</i> <b>Yon See Ting</b> (Band 2)</p> <p><i>Philippines:</i> <b>Norma Margarita B Patacsil</b> (Band 2 for Corporate/M&amp;A including Competition)</p>	 <p><i>Singapore:</i> <b>Kala Anandarajah</b> (Competition) <b>Tanya Tang</b> (Competition – Economists)</p>	 <p><b>Competition</b> <i>Singapore:</i> <b>Kala Anandarajah</b> <i>Thailand:</i> <b>Melisa Uremovic</b></p> <p><b>Trade &amp; Customs</b> <i>Singapore:</i> <b>Kala Anandarajah</b> <i>Thailand:</i> <b>Melisa Uremovic</b> <i>Thailand:</i> <b>Supawat Srirungruan</b></p> <p><b>Experts – Economics – Competition Economists</b> <i>Singapore:</i> <b>Tanya Tang</b></p> <p><b>Trade &amp; Customs – Economists &amp; Anti-Dumping Consultants</b> <i>Singapore:</i> <b>Kala Anandarajah</b> <i>Singapore:</i> <b>Tanya Tang</b></p>
Best Lawyers in Singapore 2023 Awards - Competition/ Antitrust	The Legal 500 Asia Pacific 2022 - Antitrust and Competition	asialaw Profiles 2023 - Competition / Antitrust
 <p><i>Singapore:</i> <b>Kala Anandarajah</b></p>	 <p><i>Indonesia:</i> <b>Farid Nasution</b> <i>Malaysia:</i> <b>Yon See Ting</b> <i>Singapore:</i> <b>Kala Anandarajah</b></p>	 <p><i>Singapore:</i> <b>Kala Anandarajah</b> (Elite Practitioner)</p> <p><i>Indonesia:</i> <b>Rikrik Rizkiyana</b> (Notable Practitioner)</p> <p><i>Malaysia:</i> <b>Yon See Ting</b> (Distinguished Practitioner)</p>

## ANTI-COMPETITIVE CONDUCT



*A key focus amongst regional competition regulators in the past year has been the impact of inflation, and there has been active crack down on anti-competitive conduct in key sectors relating to essential products. Cartel enforcement has remained robust, with various public and confidential investigations being carried out. There have also been legislative changes in some jurisdictions to further develop the investigation and enforcement process and make it more effective.*

### GREATER FOCUS ON ESSENTIAL PRODUCTS

2022 has seen inflationary pressures spike globally due to the war in Ukraine and significant fiscal stimulus that governments worldwide embarked on to tide over COVID-19. The South-east Asian region was no exception, and competition authorities have increasingly been focusing competition law enforcement on combating inflation, especially in relation to daily necessities and other essential products that are

important to end-consumers. Going into the new year, several competition authorities in the region have expressed that they will continue to focus on these sectors.

In **Indonesia**, the Indonesia Competition Commission (“KPPU”) started an investigation into allegations of price fixing and output restriction, and restriction of sales/distribution in the cooking oil industry in March 2022. In October 2022, the KPPU proceeded the case to the examination stage with the final allegation relating to Article 5 (price fixing) and Article 19c (market restriction) of the Indonesia Competition Law. In this case, 27 producers are alleged to have fixed the price of packaged cooking oil from October-December 2021 and March-May 2022 and collectively restrained the distribution and/or sale of packaged cooking oil from January-May 2022. The KPPU is expected to issue its decision in Q2 2023.

In **Malaysia**, the Malaysia Competition Commission (“MyCC”) issued a proposed infringement decision on 5 August 2022 against 5 feedmillers for entering into an arrangement to increase the price of certain poultry feed between early 2020 and mid-2022. MyCC’s investigations revealed that sensitive commercial

information had been shared between the investigated enterprises. By adjusting prices by the same quantum which resulted in similar increments amongst the enterprises, customers were restricted in choosing their preferred poultry feed supplier that offers the best value. This investigation follows a national ban on the export of chickens from 1 June 2022 in response to rising chicken prices amidst a supply shortage. The ban also affected chicken supply into Singapore, as Singapore imports around 1/3 of its chickens from Malaysia. The Competition and Consumer Commission of Singapore (“**CCCS**”) has not publicly indicated that it would take action for anti-competitive effects felt in Singapore, although the theoretical risk remains. The ban has reportedly now been lifted.

*RTA’s Malaysia firm was involved in this matter both at the MyCC stage and the CAT stage.*

MyCC’s enforcement efforts against hardcore cartels have also faced challenges. On 2 September 2022, the Malaysian Competition Appeal Tribunal (“**CAT**”) unanimously set aside MyCC’s decision against the General Insurance Association of Malaysia (“**PIAM**”) and 22 general insurers, including financial penalties of RM173,655,300 (approx. USD39.3 million). MyCC found that PIAM and the insurers infringed the Malaysian Competition Act by entering into an arrangement between PIAM and the Federation of Automobile Workshop Owners’ Association of Malaysia on the minimum hourly labour rates and the parts trade discounts for six vehicle makes namely Proton, Perodua, Naza, Nissan, Toyota and Honda. In overturning MyCC’s final decision, the CAT recognised that PIAM and the insurers’ participation in the arrangement was not a price fixing agreement or cartel. The arrangement – which was facilitated by Bank Negara Malaysia – was put in place to resolve the protracted dispute between insurers and repairers over parts trade discounts and labour rates which had adversely affected consumers. **RTA’s Malaysia firm was involved in this matter both at the MyCC stage and the CAT stage.**

On the procedural front, the rights of appeal of MyCC have as of late been subject to challenge by the courts. The Federal Court of Malaysia ruled on 9 February 2022 that MyCC was restricted from applying for judicial review against an adverse decision by the CAT relating

to the long running MAS-Airasia case, on the basis that MyCC cannot be considered a party that has been “aggrieved” by the tribunal’s decision.

In the **Philippines**, in a bid to tackle condominium and subdivisions with exclusivity arrangements with internet service providers (“**ISPs**”), the Philippine Competition Commission (“**PCC**”) issued Enforcement Advisory Letters to several condominium and subdivision developers. As of March 2022, eight developers voluntarily complied with the letters and opened their developments to other ISPs. This follows action by the PCC against other developers for similar conduct, where Statements of Objections for abuse of dominance were filed against at least two condominium developers which imposed exclusivity arrangements with ISPs upon their residents.

The PCC has stated that the priority enforcement sectors going forward include e-commerce, health and pharmaceuticals, food and agriculture, energy and electricity, insurance, construction, water, and telecommunications.

In **Singapore**, on 17 November 2022, CCCS imposed a total financial penalty of SGD2.8 million (approx. USD2.04 million) on four businesses for price fixing an additional charge for warehousing services at Keppel Distripark. The coordination was done via physical meetings, emails, phone calls, and WhatsApp conversations.

CCCS also issued a Guide on Fair Trading Practices for the Renovation Industry on 5 May 2022. This comes after the renovation industry saw one of the highest rates of complaints made to the Consumers Association of Singapore (“**CASE**”). The majority of complaints related to unsatisfactory service and failure to honour contractual obligations by suppliers of interior design or renovation services. The guide aims to improve business practices in the renovation industry and help contractors steer clear of unfair practices. The guide sets out the Dos and Don’ts for contractors in the following five main areas: (a) mutually agreed renovation timeline; (b) transparent pricing with no hidden costs; (c) accurate description of goods and services; (d) clear exchange, repair and refund policy; and (e) obtaining consumer’s consent for the supply of goods or services.

In **Vietnam**, the Vietnam Competition and Consumer Authority (“**VCCA**”) made a recommendation regarding a dispute relating to restrictions on the distribution of publications on the beer market between Saigon Beer, Alcohol and Beverage Co., Ltd. and Heineken Vietnam Brewery Co., Ltd in 2021. VCCA warned businesses engaged in beer production and trading to strictly comply with Vietnam’s Law on Competition and recommended these businesses to review and remove their business policies which show signs of violating Vietnam’s Law on Competition.

In **Thailand**, on 17 October 2022, the Trade Competition Commission of Thailand (“**TCCT**”) published a ruling on a hard-core cartel case in which 20 business operators and company representatives were found guilty of acting in concert with each other to fix a selling price of ‘ice’ in a particular area. While the fine imposed was not substantial as most of the convicted business operators are small enterprises, to our knowledge, this is the first hard-core cartel case where the business operators have been found guilty, and the case will act as an additional point of reference when considering whether business practices would be considered as cartel conduct under Thailand’s Trade Competition Act.

**Myanmar** has gone through a particularly difficult period over the past two years. In addition to the impact of the Covid-19 pandemic, the country also experienced a military coup on 1 February 2021 which led to the formation of the State Administration Council. This has not changed or amended most of the laws relating to business and competition, although they have amended and issued various notifications through governing bodies.

There have not been any public announcements or decisions issued by the Myanmar Competition Commission (“**MmCC**”) since its establishment in 2018. The MmCC has not been actively implementing or enforcing the Myanmar Competition Law 2015, nor has it been actively issuing orders and directives to provide guidance.

There have only been relevant government announcements for certain entities that hold a clear market dominance in Myanmar, and such entities may be subject to various sectoral specific ex-ante obligations. For example, Myanma Insurance was announced as the dominant market player in the Insurance market by the

Insurance Business Supervisory Board, Ministry of Planning and Finance. Another such example is the Ministry of Transport and Communications determining Myanmar Post and Telecommunications to be the dominant player in the telecommunications sector.

In **Cambodia**, the Cambodian Law on Competition was promulgated by virtue of the Royal Kram No. NS/RKM/1021/013 dated 5 October 2021. The Competition Commission of Cambodia (“**CCC**”), having the Consumer Protection Competition and Fraud Repression Directorate-General of the Ministry of Commerce (“**CCF**”) acting as its implementing body, will perform duties related to competition issues as provided for by the Law on Competition. Although the Law on Competition has been in force since 2021 and the composition of the CCC has been appointed, there has not been any cartel case filed with the authorities to date. The authorities are currently working on preparing and issuing the implementing regulations. As of end 2022, the Prakas on Investigation Procedure and Prakas on Negotiated Settlement have been issued. Full implementation is expected to begin soon, likely in 2023.

## DEVELOPMENTS IN INVESTIGATION AND ENFORCEMENT PROCESSES

The past year has also seen various competition regulators develop and refine their investigation and enforcement processes to detect anti-competitive cases more effectively and to settle investigations more quickly. Especially as regards younger regulators such as the MyCC and the PCC, these changes reflect an increasing sophistication in enforcement as they gain more experience and fine-tune the rules surrounding the process.

In **Malaysia**, MyCC has proposed three legislative changes regarding cartels:

- (a) Leniency Regime – The proposed amendments give MyCC the power to grant differing percentages of reduction of financial penalty to enterprises depending on the order in which they sought leniency from MyCC, amongst other things. While leniency is currently only available for “hardcore cartels” (i.e. bid rigging, price fixing, market sharing, limiting output or production), the proposed amendments will extend leniency to all anti-competitive agreement infringements (including vertical agreement infringements).

- (b) Settlement Regime – The proposed amendments give MyCC the power to introduce a settlement procedure to allow businesses that have infringed the anti-competitive agreement prohibition or abuse of dominance prohibition in the Malaysian Competition Act to settle with MyCC by admitting liability for the said infringement and enjoying a reduction in the financial penalty of up to 20%. This reduction will be added to any reduction that businesses may be entitled to under the leniency regime. However, as participation in this settlement regime requires the admission of liability, this may expose businesses to legal action from third parties or trigger competition authorities from other jurisdictions to commence an investigation.
- (c) Introduction of a Whistle-blower Regime – The proposed introduction of a whistle-blower regime gives MyCC the power to reward whistle-blowers to encourage the sharing of relevant information or assistance in relation to any investigations carried out by MyCC. Businesses should take note that disgruntled employees may seize on this financial incentive to provide information to MyCC.

The new settlement regime has been introduced in parallel with the leniency regime to provide companies with the option of quick resolutions to manage opportunity costs and settle these investigations. These amendments also allow MyCC to better pursue cartel conduct, with both businesses and whistle-blowers being incentivized to approach MyCC to provide tip-offs and relevant information relating to competition law violations. These proposed changes bring the enforcement process in Malaysia in line with the enforcement processes in some of the other South-east Asian jurisdictions such as Singapore.

In the **Philippines**, the PCC issued revised rules on Consent Orders in August 2022. A Consent Order is a remedy that allows an entity under investigation by the PCC to settle an investigation without an admission of liability by providing the PCC with commitments to address competition issues which the PCC may have identified. Highlights of the revised rules include:

- (a) An application for a Consent Order is non-adversarial, *ex parte* and summary in nature. It is within the full discretion of the PCC to deny or grant the application. The applicant may withdraw its application at any time.

- (b) The revised rules require the application for a Consent Order to state the following (amongst other matters):
- (i) A description of the conduct or agreement subject of the investigation.
  - (ii) The proposed commitments, which shall be complete, unambiguous, and self-executing. The proposals shall be considered self-executing if they are not dependent on the will of a third party. The proposed commitments must include a complete and adequate description of steps or measures which shall be undertaken by the applicant to ensure the prevention or cessation of the conduct or agreement subject of the investigation.
  - (iii) A clear explanation of how each proposed commitment will resolve particular competition concerns.
  - (iv) A statement of the amount that the applicant is willing to pay and explanation justifying the same. The amount shall be within the range of fines provided for under the Philippine Competition Act, its implementing rules, or other competition laws.
- (c) The revised rules also adjust the fees to be paid for a Consent Order application to 1% of the value of the Applicant's assets or annual revenues according to its latest audited financial statements, which should be no less than PHP250,000 (approx. USD4,500) but not more than PHP5,000,000 (approx. USD90,000).

In **Indonesia**, on 24 March 2022, the KPPU issued KPPU Regulation No. 1 of 2022 on the Competition Compliance Program, further reflecting the necessity of the competition compliance provisions imposed by Law No. 11 of 2020 on Job Creation (the Omnibus Law). The KPPU encourages businesses to develop and implement a competition compliance program that includes at least the following three components: (i) a code of ethics; (ii) a competition and antitrust handbook; and (iii) general or special training. Businesses must take their commercial endeavours, market dominance, and interactions with third parties (suppliers, competitors, and consumers) into account when creating the program.

This new regulation provides that on violation, a business may receive a reduced fine only if it has a registered compliance program with the KPPU. This policy approach is a strategy by the KPPU to provide a strong incentive to businesses to implement an effective competition compliance program. However, as this regulation is silent on the extent of the reduction, such as the percentage of reduction from the maximum fine, the KPPU Panel of Commissioners will likely have a large discretion in deciding the amount of reduction.

In **Thailand**, there is an increase in the number of decisions rendered by the TCCT in recent years, especially in 2022 where 56 decisions have been published, 43 of which related to merger control (i.e., acknowledgment of merger notification/merger approval/imposition of fines for late notification) and 13 of which were other competition related matters (i.e., unfair trade practices/cartels/etc). This trend suggests that the TCCT is becoming increasingly active in enforcing Thailand's Trade Competition Act. Business operators and the public are becoming more conscious of competition issues as well. It is expected that this trend will continue into 2023.

# MERGER CONTROL



*With the worst of the COVID-19 pandemic behind us and the world gradually recovering from pandemic-imposed constraints, competition regulators across the region are seeing an increase in the number of merger filings. The RTA team has been directly or indirectly involved in a significant number of these mergers. Coupled with competition law developments in the region, such as Malaysia's impending merger control regime and the reverting of pandemic merger thresholds and procedures back to the pre-pandemic standards, merger control in the region is becoming increasingly important. Companies will need to review their mergers carefully and assess whether there is a need to notify in the various South-east Asian jurisdictions as a failure to notify can have severe implications.*

## GREATER MERGER CONTROL SCRUTINY IN SOUTH-EAST ASIA

In **Indonesia**, the merger notification process has been reverted back to the pre-pandemic standard. Back in 2020, the KPPU issued KPPU Regulation No. 3 of 2020 on the Relaxation of Law Enforcement on Monopolistic Practices and Unfair Business Competition and Monitoring of Partnership Implementation to Support the National Economic Recovery, which extended the deadline to submit the mandatory post-closing notification to the KPPU from 30 business days to 60 business days. This relaxation on enforcement has been revoked as of 1 May 2022 with the issuing of KPPU Regulation No. 2 of 2022. This means that the KPPU has reverted the deadline for businesses to submit a post-closing notification from 60 business days back to 30 business days.

The KPPU is also reportedly finalising new guidelines for merger notification. The KPPU has yet to issue an official statement on new rules to be introduced in the upcoming guidelines. However, based on our informal discussion with the KPPU, the new guidelines will specify, among others, clearer criteria for foreign-to-foreign transactions that trigger notification in Indonesia. The KPPU has not

yet provided an indicative date for when the guidelines will be released.

In **Malaysia**, MyCC has released details of its proposed amendments to the Malaysian Competition Act on 25 April 2022 which introduces an economy-wide merger control regime in Malaysia. Under this new merger control regime, mergers which may result in a substantial lessening of competition are prohibited. This new regime (a) makes it mandatory to notify MyCC of anticipated mergers which exceed the threshold prescribed by MyCC; and (b) allows mergers which do not exceed the threshold to be voluntarily notified to MyCC, whether before or after closing. The threshold will be prescribed by an order published in the Gazette after the final amendments to the Malaysian Competition Act have been passed by Parliament. A failure to notify mergers would result in a financial penalty of up to 10% of the value of the merger transaction or anticipated merger transaction. Implementing a merger that leads to a substantial lessening of competition would also result in a financial penalty of up to 10% of the worldwide turnover of the enterprise in question. Based on public sources, MyCC expects to table its proposed amendments in the Malaysian Parliament before or by June 2023.

In the **Philippines**, the merger notification thresholds have been adjusted back to pre-pandemic levels. In light of the COVID-19 pandemic, the Philippines government, on 15 September 2020, enacted Bayanihan to Recover as One Act ("**Bayanihan 2**"), which increased the mandatory merger control notification threshold to PHP50 billion (approx. USD897 million). This increase applied to both the Size of Party and Size of Transaction thresholds. Over the two-year period in which Bayanihan 2 was in force, the PCC published 9 merger decisions, which is a significant reduction from its previous pre-pandemic average of 20 published merger decisions a year. From 16 September 2022, the thresholds have been adjusted down to PHP6.2 billion (approx. USD111 million) for the Size of Party test, and PHP2.5 billion (approx. USD45 million) for the Size of Transaction test. With these changes, a larger number of deals are expected to cross such thresholds and be subject to mandatory notification to the PCC.

The PCC also issued its draft Non-Horizontal Merger Guidelines on 28 September 2022. While the draft guidelines largely follow generally established principles

for assessing vertical and conglomerate mergers, it also contains certain more novel observations tied to family companies:

- (a) Conglomerate mergers have been linked to conglomerate family businesses, and a theory of harm has been enunciated based on this. The guidelines note that in family conglomerates, central control can be exercised across all the family entities, and this could result in possible predatory subsidization of entities in the conglomerate that may drive competitors out of business. This may create a reputation for toughness to discourage potential players from entering the market or competing head-to-head with the conglomerate. As such, when conglomerate family businesses acquire new targets as conglomerate mergers, these transactions would be more closely scrutinised.
- (b) The exercise of family links as a determinant of control has been emphasized multiple times in various parts of the guidelines.
- (c) The possibility of cross-subsidization – where the post-transaction conglomerate uses profits in one market to subsidize operations in another market – has been expressly recognized as potentially being restrictive of competition.

The release of these draft guidelines suggests that the PCC will more closely examine theories of harm arising from vertical and conglomerate mergers going forward, and especially in family businesses. Transaction parties should remain abreast of the ongoing consultation discussions and remain sensitive of transactions that could raise vertical and conglomerate issues in the Philippines. The draft guidelines are among the rules, governing both merger clearance and investigations, which the PCC is seeking to revise and release in 2023.

In **Singapore**, notwithstanding the pandemic, the volume of filings has increased from 3 filings in 2019 and 6 filings in 2020, to 10 filings in 2021. This makes 2021 the year with the most filings made to CCCS since the commencement of Singapore's merger regime in 2007, and also a year where the RTA team was involved practically in all of the mergers. This record has been equalled in 2022, with 10 filings made to CCCS in 2022 as well.

Additionally, in the past two years, CCCS has been increasingly focused on competition concerns arising from conglomerate mergers (i.e., mergers that occur between businesses that operate in different product markets). Apart from amending its merger guidelines and merger Form M1 requirements to focus more on conglomerate concerns, CCCS has also been more active in raising such concerns out of its own initiative in recently reviewed cases.

*RTA's Singapore team was involved in several of these deals.*

Following the global trend of an increasing level of scrutiny into the semiconductor industry, CCCS has also been looking into the semiconductor sector frequently in recent years. Within the past two years, there have been six semiconductor related deals notified to CCCS: (1) SK Holdings-LG Siltron; (2) Siltronic AG-GlobalWafers; (3) SK Hynix-Intel's NAND; (4) Xilinx, Inc.-Advanced Micro Devices; (5) CMC Materials-Entegris; and (6) CoorsTek KK-MOMQ Holding Company. **RTA's Singapore team was involved in several of these deals.**

**Vietnam** has become a common jurisdiction for businesses to file their transactions since the introduction of No. 35/2020/ND-CP ("**Decree 35**"), which took effect from May 2020. Decree 35 sets out the applicable thresholds for the notification of economic concentrations, which are based on transaction value (for onshore transactions only), total asset value, total turnover, or combined market share (for both onshore and offshore transactions). The thresholds are not high – for example, a filing is required if any party to the transaction has total Vietnamese turnover or asset of more than VND 3 trillion (approx. USD 126.9 million). Further, Decree 35 also explicitly states that offshore foreign-to-foreign transactions will have to be filed, which potentially catches more transactions.

From 2021 to June 2022, the VCCA received 192 economic concentration notification dossiers. In 2022, nearly 92% of the economic concentration transactions submitted to VCCA crossed the notifiable thresholds of total revenue and total asset in the Vietnam market while the remaining of 8% of the submitted economic concentration transactions crossed the notifiable threshold of transaction value.

Nearly half of the submitted economic concentration transactions belonged to real estate (including residential real estate and industrial and commercial real estate), services (including insurance, aviation, medical examination and treatment, retail, logistics, e-commerce, accommodation, commercial centers) and energy (including traditional and renewable energy). Out of the 62 notification dossiers in 2022, 48 dossiers have received clearance at the preliminary appraisal stage, 2 dossiers were withdrawn, and 12 dossiers are being appraised, with 1 dossier being in the process of official appraisal.

In **Thailand**, 2022 saw a significant jump in the number of decisions concerning business mergers rendered by the TCCT, with 43 decisions concerning business mergers being published in 2022 while there were only 8 and 5 decisions in 2021 and 2020 respectively.

In April 2022, the TCCT imposed fines on two acquisitions by a purchaser and two different targets in the automotive industry for a failure to notify the transaction within the stipulated timelines. The transactions closed on 2 November 2020 but were only notified on 12 November 2020. Under Thailand's Trade Competition Act, transaction parties that meet the post-notification thresholds are required to notify their mergers within 7 days of completion, which meant that the parties were 3 days late. The regulator imposed fines on the parties and also on a director who was considered responsible for notifying the merger to the regulator. This is an important reminder that the TCCT takes any failure to comply with merger control requirements seriously and will subject parties to penalties for non-compliance.

In **Myanmar**, the country's competition legislation does not include a procedure for notifying or approving transactions. It is not yet clear whether, or when, the MmCC intends to implement a notification/approval regime. Instead, the Myanmar Competition Law outright prohibits certain categories of transactions, namely those: (1) intended to raise the level of dominance over the market within a certain period; (2) intended to decrease competition; and (3) that result in a combined market share exceeding a market share to be specified by the MmCC. We have heard anecdotally that there are a small number of complaints before the MmCC although it has yet to issue any decision.

Apart from competition law, the Myanmar Investment Commission's ("MIC") approval is also required for Change of Controlling Interest in companies that hold an investment permit/endorsement. The MIC will review whether the application is in line with the Myanmar Investment Law, as well as whether the transaction for the Change of Controlling Interest will result in any impact on the socio-environment or is strategic towards the Union.

Notably, the Myanmar Competition Law applies to all economic sectors except the telecommunication sector, which has sector-specific rules. For example, the big 4 mobile network operators in Myanmar are prohibited from merging/collaborating with each other under the Telecommunication Licensing Rules and Competition Rules for the Telecommunications Sector. Other telecommunication service businesses (such as Network Facility Service Licensees) are also prevented from holding more than 10% ownership interest (directly and indirectly) in more than one license holder. For any change of control in such license holders, an approval from the Post and Telecommunications Department of the Ministry of Transport and Communication is required.

**Cambodia's** merger control rules, as contained in the Sub-Decree on Conditions and Procedures for Business Combinations, is currently being drafted and is expected to be issued in 2023.

## SAMPLE OF KEY TRANSACTIONS REVIEWED

The South-east Asian region has seen a number of large scale and significant mergers being reviewed in the past year, and the RTA team has been involved in many of these important decisions.

In **Thailand**, the National Broadcasting and Telecommunications Commission ("NBTC") acknowledged the USD8.6 billion merger between True Corporation ("True") and Total Access Communication ("DTAC") on 20 October 2022 and stipulated conditions for the merger. The merger is a three-to-two transaction - True and DTAC reportedly hold 34% and 21% market shares respectively (based on mobile subscribers), and the merged entity will become the largest player, overtaking the present market leader Advanced Info

Service Pcl with 44% market share. The merger is subject to various conditions stipulated by the NBTC, including pricing conditions, capacity allotment requirements for mobile virtual network operators' use, and hold-separate requirements.

*RTA's Thailand team is acting for True and DTAC to defend this case.*

The merger has now been subject to challenges. Lawsuits against the NBTC have been brought to the Central Administrative Court, notably, by the Thailand Consumers Council ("TCC"), to repeal the NBTC's decision on the True – DTAC merger. On 9 December 2022, the Central Administrative Court rejected the TCC's plea for an injunction as the court found 'no ground which would suggest that the NBTC's decision was unlawful'. The case is pending the court's decision. **RTA's Thailand team is acting for True and DTAC to defend this case.**

*RTA's Indonesia team acted for and assisted GoTo with the notification process to the KPPU.*

In **Indonesia**, the KPPU cleared the merger between PT Aplikasi Karya Anak Bangsa (Gojek) (now, PT GOTO Gojek Tokopedia, Tbk), Indonesia's mobile on-demand services and payment platform, and PT Tokopedia, a leading marketplace in Indonesia, to form GoTo. Based on the KPPU's comprehensive assessment, the merger would not create market concentration, and the KPPU did not find any indication of anti-competitive impacts of the merger. The merger was closed in May 2021 and at that time was Indonesia's largest-ever business deal. Through the merger, GoTo is poised to become the largest technology group in Indonesia by combining e-commerce, on-demand services, and financial services to create a "go to" ecosystem for people's daily lives. **RTA's Indonesia team acted for and assisted GoTo with the notification process to the KPPU.**

In **Singapore**, the regulator has also been active in reviewing mergers, and the RTA Singapore team has been involved in several of the more complex cases including:

- (a) **Entegris / CMC Materials:** This case involved the proposed acquisition by Entegris Inc ("Entegris")

of all shares of CMC Materials, Inc. (“**CMC Materials**”). Third parties raised feedback about competition concerns, including that the merged entity may limit its upstream supply of drums to downstream competitors, the possibility of potential tying/bundling of complementary products, and the possibility of price rise. Qualitative and quantitative inputs were required to convince CCCS that the transaction was unlikely to give rise to any horizontal, vertical or conglomerate effects. This transaction has been cleared by CCCS with no commitments.

(b) **StorHub / Mandarin:** This case involved the proposed acquisition of Mandarin Self Storage Target Companies (“**Mandarin**”) by StorHub Venture Pte Ltd (“**StorHub**”). Challenges arose from CCCS's approach of defining the geographic market narrowly based on catchment areas around StorHub's and Mandarin's self-storage facilities during the Phase 1 review. CCCS alerted the parties in a state of play meeting that there were potential competition concerns which, if left unaddressed, may result in the transaction being unable to be cleared at the end of the Phase 1 review. Although a Phase 2 review was avoided, CCCS took the unusual step of rewinding the Phase 1 clock and issued Section 61A notices to StorHub and Mandarin requiring the engagement of an independent auditor to verify that the data submitted by StorHub and Mandarin were materially true and accurate. This transaction has been cleared by CCCS with no commitments.

(c) **Tata Sons / Air India:** This case involved the acquisition by Talace Private Limited (“**TPL**”), a subsidiary of Tata Sons Private Limited (“**Tata Sons**”), of Air India Limited (“**Air India**”), India's national carrier, from the Government of India. The challenges arose from (a) the completion of the deal after its notification to CCCS but before CCCS issues its decision; (b) Tata Sons being already involved in the provision of air passenger transport services through Tata SIA Airlines Ltd., a joint venture with Singapore Airlines (“**SIA**”), operating under the brand name Vistara; and (c) a proposed cooperation agreement between SIA and Vistara concurrently under review by CCCS. The Phase 1 process has been completed, with an issues letter being issued to the parties. The transaction is currently still being reviewed by CCCS.

(d) **Vistara / Air India:** This case involves the proposed merger of Air India and Vistara, which was announced by SIA through a Singapore Exchange announcement on 29 November 2022. With the ongoing review of the Tata Sons-Air India acquisition, as well as the ongoing review of the proposed cooperation agreement between SIA and Vistara, this gives rise to a unique situation where the transaction parties are seeking to proceed with a larger overarching transaction despite parts of the transaction still pending review before CCCS.

Whilst **Malaysia** currently does not have an economy-wide merger control regime, it has sectoral merger control regimes. Currently, mergers and acquisitions are regulated only in the aviation and telecommunications sectors by their respective regulators.

*RTA's Malaysia team was involved in this matter and acted for one of the merger parties.*

On 28 June 2022, the Malaysian Communications and Multimedia Commission (“**MCMC**”) issued a Notice of No Objection in respect of the proposed merger between Digi.Com Berhad and Celcom Axiata Berhad (“**Celcom**”), which involves the businesses of Digi Telecommunications Sdn. Bhd. (“**Digi**”) and Celcom. On 1 April 2022, MCMC had issued a Statement of Issues and invited the parties to submit comments and remedies to address the competition concerns highlighted therein. Subsequently, the parties submitted an application for authorisation of the proposed merger, which included various commitments to address MCMC's concerns. MCMC was eventually satisfied that these commitments could mitigate MCMC's competition concerns. **RTA's Malaysia team was involved in this matter and acted for one of the merger parties.**

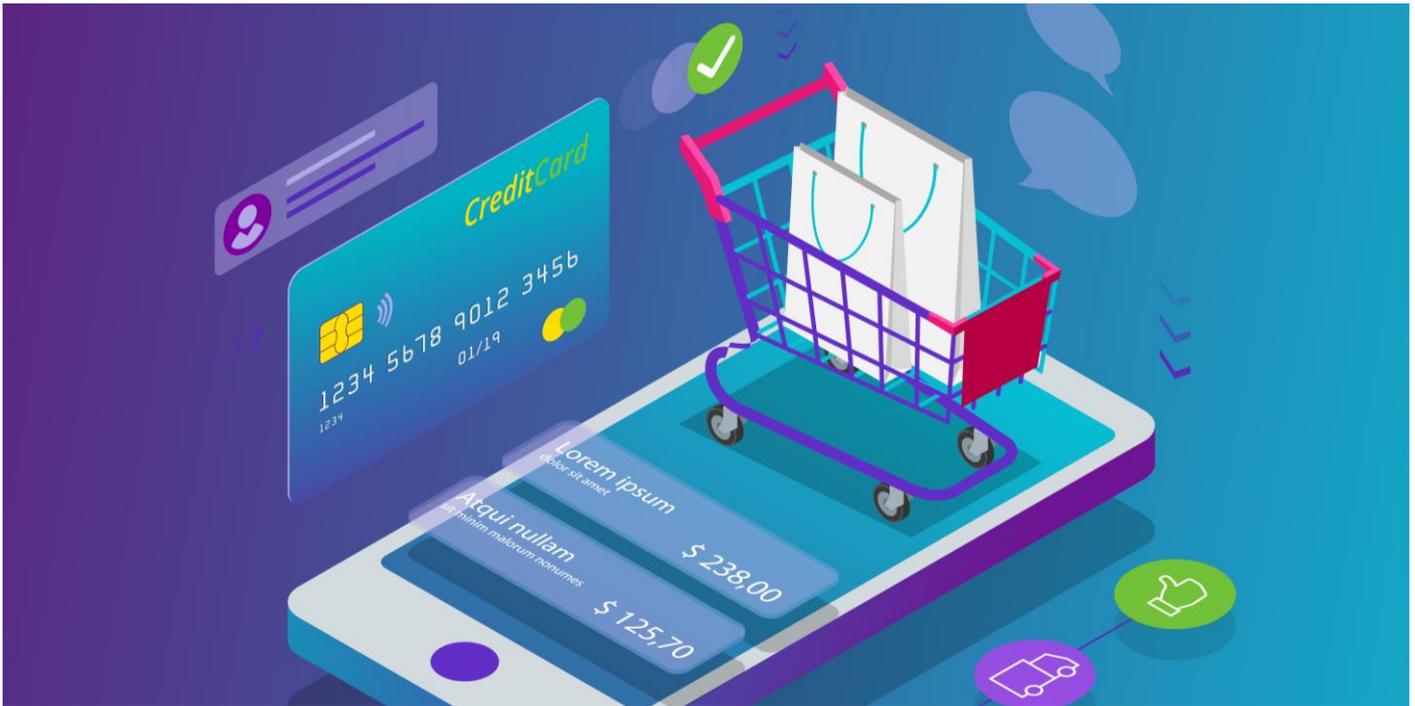
*RTA's Malaysia team acted for one of the merger parties in this case.*

The Malaysian Aviation Commission (“**MAVCOM**”) has also provided its provisional clearance to the anticipated merger between SIA Engineering Company Limited and

Pos Aviation Engineering Services Sdn Bhd on 7 July 2022. MAVCOM carried out a comprehensive competition analysis of this anticipated merger and was of the view that the anticipated merger would not give rise to competition concerns. ***RTA's Malaysia team acted for one of the merger parties in this case.***

In **Vietnam**, the VCCA has been active in reviewing mergers, and our Vietnam team has been involved in various complex cases. Amongst others, we obtained clearance in April 2022 for the merger between Japanese companies Juki Corporation, Meiryō Technica Corporation and Mitsubishi Electric Corporation. The parties were involved in the market for industrial sewing machines. The challenging issues during the VCCA's assessment related to the analysis and determination of the parties' market shares in Vietnam for the overlapping products.

## DIGITAL AND E-COMMERCE



*The digital economy has become increasingly ubiquitous in the past decade. In response to its growing prevalence, competition regulators in the region have closely scrutinise this market and have not hesitated to investigate technology companies for potential infringements. As regulators gain more experience by working through cases, make changes to the guidelines and regulations to be more fit for purpose for the digital economy, and upskill through training and acquiring relevant expertise, we can expect enforcement in this area to be more robust and sophisticated.*

The regional regulators are keenly aware of developments in the digital and e-commerce space in other major jurisdictions such as the US and EU, and cases coming out of these countries invariably influence the actions of regional regulators.

Following investigations into similar issues in the EU and India for example, the KPPU in **Indonesia** stated in September 2022 that it had started an investigation into

alleged violations of the Indonesia Competition Law against Google. Based on the result of the KPPU's initial research in mid-2022, the KPPU alleged that Google has abused its dominant position in the distribution of digital applications in Indonesia. The KPPU's research concludes that Google Play Store is the largest application distribution platform in Indonesia with the market share of 93% and no other platforms (e.g., Galaxy Store, Mi Store, Huawei App Gallery) is a perfect substitute of Google Play Store from the perspective of application developers.

Based on the press release, two of Google's practices are under the KPPU's scrutiny. First, Google had engaged in tying for services in two different business models by requiring application developers in Google Play Store to use Google Play Billing for any purchase of digital products or services in their applications. Through this strategy, Google charges application developers a 15-30% fee per purchase, much higher compared to a 5% fee charged by other payment service providers before the implementation of the tying practice. Application developers cannot opt out of such tying arrangement because they risk removal from the Google Play Store or being refused application updates. Secondly, the KPPU also views that Google has discriminated several payment gateway/system providers in Indonesia by

partnering only with one provider and not offering the same opportunity for negotiation to other payment method providers. This differs from Google's treatments of global digital content providers, who are allowed to partner with alternative payment systems.

In **Malaysia**, the CEO of MyCC, Iskandar Ismail, stated during MyCC's 3<sup>rd</sup> Competition Conference in June 2022 that the 'digital economy cannot be ignored at all' and this focus is clearly reflected in MyCC's current enforcement trends.

On 26 July 2021, MyCC announced that, following public outcry against food delivery platform companies, it is looking into the imposition of exorbitant commission fees by food delivery platform companies and the price of food and beverages sold on these platforms. This inquiry was reportedly being carried out at the behest of the then Ministry of Domestic Trade and Consumer Affairs ("KPDNHEP"), which is now named the Ministry of Domestic Trade and Living Costs. This was not the first time that MyCC addressed competition concerns as directed by the KPDNHEP – MyCC had previously investigated recommended retail prices pursuant to a ministerial direction but a finding of non-infringement was made by MyCC in that case.

Due to the escalating public outcry against certain practices of Shopee Mobile Malaysia Sdn Bhd ("Shopee"), MyCC announced on 21 October 2022 that it has engaged with Shopee to better understand the nature of the online marketplace platform industry and the logistic industry that provides the first and last mile delivery services to these platforms. Shopee was required to provide MyCC with justifications for its conduct and a detailed account on how issues would be addressed internally without jeopardising users' interest. MyCC also indicated that it would continue its efforts in monitoring the other industry players operating in the same relevant market.

In the **Philippines**, the PCC reported in March 2022 that, together with the Asia-Pacific Economic Cooperation, it is developing a data science toolkit to guide regulators in analysing data sourced from digital platforms. The toolkit seeks to aid in keeping competition authorities responsive to market trends to identify competition issues and abuses of dominance.

Additionally, the PCC reported in August 2022 that it had established an in-house digital forensics laboratory in order to improve its capacity to receive, process, and analyse electronic evidence in identifying the existence of cartels and instances of abuse of dominance by these cartels. The PCC will conduct training seminars for its investigators, to better equip them to use digital forensics tools to identify and tackle anti-competitive behaviour. These developments suggest that the PCC is increasingly growing in sophistication and is preparing to scrutinise digital and e-commerce markets more robustly.

In **Thailand**, there is a rise in competition cases involving e-commerce and food delivery platforms. The TCCT explicitly mentioned in its 2022 press release that it will emphasize more on regulating the digital platform operators (i.e., e-marketplace, e-logistic, and food delivery) in order to handle the changing landscape in business trends and promote competition in the market.

One notable decision published on 19 May 2022 saw the TCCT find a food delivery platform operator and its agent guilty of conducting an unfair trade practice under Thailand's Trade Competition Act. In particular, the platform operator wished to impose a new gross profit rate, which would increase the rate from 27% to 35%, on one of the restaurant business operators. One of its agents temporarily suspended the restaurant from accessing the platform during the negotiation in order to force the restaurant to unwillingly accept the new gross profit rate. The TCCT decided that the platform operator unfairly used its market power to force the restaurant to accept a higher gross profit rate and, in turn, the restaurant suffered a loss of revenue. Accordingly, the TCCT imposed a fine of over THB2.2 million (approx. USD65,000) on the platform operator and 10% of that amount on the person responsible for such conduct.

Moreover, in a decision published on 22 March 2022, the TCCT concluded its investigation into two digital food delivery platforms. The platforms that were investigated had required restaurant business operators to use the platforms exclusively in exchange for lower commission rates. The TCCT concluded that the stipulated conditions by default unfairly restrict or obstruct the restaurants' business operations under Thailand's Trade Competition Act. However, the TCCT found during its investigations that most restaurants willingly agreed to such conditions for additional benefits and were not penalised even when

they breached the platform's conditions, and therefore there could not have been any damage to these restaurants. The TCCT therefore decided not to pursue the case further. However, the TCCT expressed that it would closely monitor the behaviour of the two digital food delivery platforms.

In **Singapore**, CCCS has revised its guidelines which impact how CCCS assesses conduct and mergers involving the digital economy. These revisions took effect from 1 February 2022. Key changes include the following:

- (a) The Market Definition Guidelines was revised to clarify market definition in digital markets that are characterised by multi-sided platforms. When performing the market definition exercise for multi-sided platforms, CCCS will supplement the traditional market definition exercise with the consideration of additional factors, including interactions between the different sides of the platform, externalities such as indirect network effects and usage externality, price structure of the platform, and non-monetary aspects such as data security and the level of innovation.
- (b) The Section 47 Guidelines on Abuse of Dominance was revised to clarify issues relating to the assessment of market power, barriers to entry and expansion, and types of potentially abusive conduct in the context of multi-sided platforms and the digital economy. Factors such as strength of network effects, control or ownership of key inputs, multi-homing, etc., will be considered by CCCS when assessing market power and barriers to entry and expansion. For data in particular, the Section 47 Guidelines clarifies the importance of data as a key input when assessing market power, as well as how the use of data or the refusal to grant access to data can amount to an abuse of dominance.

- (c) Another significant change to the CCCS guidelines relates to the concept of product ecosystems, which arises more frequently in the digital economy context. In the revised Market Definition Guidelines, CCCS clarifies that it will take into account both demand-side and supply-side factors in considering whether products that are considered complementary or from adjacent markets should be included in the relevant market. CCCS explained that this concept of product ecosystems complements the analysis where the traditional framework may not suffice to deal with whether such distinct products should be included in a relevant market.

CCCS has also stepped up its efforts in monitoring developments relating to the digital economy. CCCS established a digital market coordination unit in 2022 to monitor regulatory actions taken in other jurisdictions. The role of the unit is to identify trends in the digital economy space and recommend actions for CCCS to follow. The unit will also focus on capacity building and coordinating internally with other agencies in Singapore on the development and implementation of the government's digital strategies.

On the consumer protection front, with the surge in e-commerce as a result of the COVID-19 pandemic, e-commerce scams have become one of the top scam types in Singapore. The Technical Reference 76 on Guidelines for Electronic Commerce Transactions ("**TR 76**") was updated to include additional guidelines on measures which e-commerce marketplaces and e-retailers may implement to secure different areas of e-commerce transactions (namely, prepurchase, purchase and post-purchase activities) from scams. The anti-scam measures introduced into the TR 76 include: (a) improving transaction security; (b) enabling merchant authenticity; (c) providing customer support; and (d) aiding enforcement against e-commerce scams.

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