



Handbook on Competition Policy and Law in ASEAN for Business 2013



one vision
one identity
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The ASEAN Secretariat
Jakarta

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Foreword

The first edition of the Handbook on Competition Policy and Law in ASEAN for Business was launched on 24 August 2010 at the 42nd ASEAN Economic Ministers Meeting with the aim of providing basic notions of substantive and procedural competition laws applicable in ASEAN Member States, in a language easily comprehensible by non-experts.

Since then, considerable progress has been achieved in advancing the development of competition policy and law in ASEAN Member States. These include, amongst others, updating regulations and legislation, implementing competition law, establishing competition authority and putting in place competition-related laws using a sectoral approach.

As the deadline for achieving the ASEAN Economic Community by 2015 draws nearer, it is important that all stakeholders are fully informed of such developments and how these will impact them, especially through the creation of a level-playing field and the enhancement of business efficiency and dynamism, which will in turn improve consumer welfare.

I hope you will find this updated Handbook on Competition Policy and Law in ASEAN for Business 2013 useful which would not have been possible without the relentless support from the ASEAN Experts Group on Competition and the generosity of the Federal Foreign Office of the Federal Republic of Germany.

Le Luong Minh
Secretary-General of ASEAN

Jakarta, May 2013



Introduction

It is widely acknowledged that a well-crafted competition law, effective law enforcement and competition-based economic reform increase efficiency, economic growth and employment to the benefit of all. Across the world, Competition Policy and Law (hereinafter “CPL”) is an essential tool to prevent and prosecute unlawful business practices, and eliminate barriers to competition, which adversely affect domestic or international trade and/or hinder economic development.



During the last decade, a majority of ASEAN Member States (hereinafter “AMSs”) have adopted or are in the process of enacting economy-wide competition laws. There is growing awareness of the adverse effects of anti-competitive practices on their economies as well as their populations, and wide recognition of the potential benefits that derive from competition law enforcement.

Progress of CPL implementation in AMSs has been positive. There are comprehensive competition laws and competition authorities in place in Indonesia, Singapore, Thailand and Vietnam. Malaysia’s competition law and competition authority started operating in 2012. Brunei Darussalam, Cambodia, Lao PDR and Myanmar are currently drafting competition laws. The Philippines established a competition authority

to begin implementing competition-related laws using a sectoral approach. A draft competition law is awaiting legislation.

Against this backdrop, the Handbook on Competition Policy and Law in ASEAN for Business (hereinafter “Handbook”) aims at providing, in a language easily understandable to non-experts, basic notions of the substantive and procedural competition laws applicable in AMSs, to the benefit of regional and transnational businesses engaged in the ASEAN region.

The Handbook does not intend to be a comprehensive guide to applicable laws and it is meant purely as a documentation tool. Its overall aim is to inform the business community and investors of the current approaches and practices relating to CPL in AMSs, thus raising awareness among this target group, and to foster the development of a competition culture within the business community, creating a favourable environment for compliance and for the introduction and enforcement of CPL.

Following a general overview of the ASEAN CPL framework covering the objectives and scope of CPL, Part I of the Handbook will cover the key areas of AMSs’ CPL that are of relevance for the business community. Acquaintance with the basic structure of CPL enforcement is of fundamental importance for business and thus the Handbook will also illustrate the basic principles supporting CPL enforcement, of which the responsible business operators should duly take into account.

Part II of the Handbook will provide country-specific illustrations of the substantive and enforcement rules of each AMS. The country chapters will follow the same structure as the general overview conducted in Part I, using questions and answers formulated with a business perspective in mind. This approach aims at helping the reader to understand and compare the most relevant aspects of AMSs’ CPL.



PART I

Competition Policy and Law in ASEAN: Basic Principles

Chapter 1: Overview of ASEAN CPL Framework

The ASEAN regional framework for CPL

ASEAN Economic Community Blueprint

The ASEAN Leaders have agreed to the establishment of the ASEAN Economic Community by 2015 and to the transformation of ASEAN into a region with largely free movement of goods, services, investment, skilled labour, and freer flow of capital.



In their Declaration on the ASEAN Economic Community Blueprint (AEC Blueprint) in Singapore in November 2007, the ASEAN Leaders agreed that:

“... the AEC Blueprint which each ASEAN Member Country shall abide by and implement the AEC by 2015. The AEC Blueprint will transform ASEAN into a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy... ”.

ASEAN Experts Group on Competition

In August 2007, the ASEAN Economic Ministers endorsed the establishment of the ASEAN Experts Group on Competition (hereinafter, “AEGC”) as a regional forum to discuss and cooperate in CPL. The AEGC is an official body comprising representatives from the competition authorities and agencies responsible for competition policy in AMSs. Implementation of the tasks and activities relating to competition policy, as targeted for delivery under the AEC Blueprint, is overseen by AEGC.

The AEGC first met in 2008 and has completed the ASEAN Regional Guidelines on Competition Policy (hereinafter “Guidelines”) and this Handbook, among other deliverables. Both the Guidelines and the Handbook were launched at the 42nd ASEAN Economic Ministers Meeting in Da Nang, Viet Nam in August 2010. For advocacy and outreach purposes, the launch of the Guidelines and Handbook was followed by region-wide socialisation workshops in several AMSs with government officials and the private sector as the target beneficiaries. These two publications and the subsequent workshops were intended to help raise awareness concerning fair business competition among the regional enterprises and trans-national businesses, and ultimately to enhance the economic performance and competitiveness of the ASEAN region.

AEGC also completed in December 2012 the Guidelines on Developing Core Competencies in CPL for ASEAN (“RCC Guidelines”), which are based on AMSs’ experiences and internationally-recommended practices for use by staff of competition-related agencies in AMSs to develop and strengthen their required core competencies. The RCC Guidelines focus on three key areas of competency, namely (i) Institutional Building, (ii) Enforcement, and (iii) Advocacy.

Capacity building and intra- and extra-regional

networking are another focus of the AEGC. Other focal activities for completion in the medium-term are the development of Strategy and Tools for Regional Advocacy on CPL, strengthening the Core Competencies in competition policy and law as well as the finalization of AEGC Capacity Building Roadmap.

Chapter 2: Scope of Competition Law

Introduction

While the substance and practice of competition law vary substantially within each AMS, the establishment of a competition law regime shows a number of common features.

This Chapter provides a basic, comprehensive description of what competition rules are and which practices they cover. A country-specific description of the applicable rules follows in the country-chapters that constitute Part II.

The Handbook also includes Annex I, which summarises selected case studies from some AMSs, in order to provide concrete examples of enforcement practices, and Annex II, which lists the relevant websites and contact points at AMSs' level.

The legal and institutional framework: what is competition law and who enforces it?

In general, the basic substantive and procedural competition law provisions are based on primary law (in the form of a **“Competition Act”**), while the more detailed implementing rules are left to secondary legislation and “soft law” measures

(i.e., guidelines and other non-binding instruments).

The Competition Act generally establishes an agency (a **“Competition Authority”**), which is in charge of competition law enforcement. Its main tasks are those of investigating and adjudicating cases, and of imposing sanctions for infringements of competition law. In some legal systems, adjudication may be left to a judicial or third authority. Depending on national law, the Competition Authority may also provide advice to the Government and the public administration on competition-related issues and play an advocacy role in promoting compliance within the business world and creating consensus within the general public.



Obviously, countries that have yet to adopt a law, have not set up a Competition Authority. In these cases, pending the adoption of a competition law regime, anti-competitive practices and conducts which are relevant to competition in the market will have to be analysed under general civil or criminal law.

Finally, in some AMSs, certain industries or sectors may be subject to sector-specific regulation. In these cases, the applicable regulation may establish ad hoc agencies (“Regulatory

Authorities”), which are in charge of enforcing sectoral regulation, and sometimes also competition law.

The addressees: to whom does competition law apply?

Competition law applies to market operators, i.e., a business person (whether an individual or a corporation) engaged in an economic activity (i.e., the purchase or sale of goods or services). It generally does not distinguish between private and State-owned enterprises, provided that they engage in an economic activity.

However, it is for the national law of the AMSs to define the exact scope of application of competition law. AMSs may exclude from the scope of application of competition law (or from some of its provisions) specific business operators (e.g., companies in charge of a public service, small and medium Enterprises (“SMEs”), and others) or business operators operating in specific (sensitive) sectors (e.g., defence industry), as explained below.

The substance: what practices are prohibited under competition law?

Competition law generally prohibits three main practices: (i) anti-competitive agreements; (ii) abuse of a dominant position or a monopoly; (iii) anti-competitive mergers. It can also have provisions related to unfair commercial practices.

Anti-competitive agreements

Anti-competitive agreements are agreements or other arrangements between market operators that negatively affect competition in a specific (“relevant”) market (competition laws often

refer to agreements which “prevent, restrict or distort” competition or to similar expressions). The term “agreements” is not limited to formal, enforceable agreements, but usually includes concerted practices (i.e., informal collusion and other non-formal arrangements) as well as decisions by associations of business operators (regardless of whether they are binding or not).

Anti-competitive agreements may be horizontal - i.e., between market operators operating at the same level (either production/distribution/sale) in the market chain (e.g., between two or more producers, two or more distributors, etc.) - or vertical - i.e., between market operators operating at a different level of the market chain (e.g., between a producer and its distributors, etc.). Both horizontal and vertical agreements are generally subject to the above prohibition, with a few exceptions (e.g., under Singapore law vertical agreements are, with some exceptions, excluded from the prohibition).

Agreements are usually prohibited if they have an anti-competitive effect. For example, a cartel might agree to set a high price or set production limits on each member of the cartel, which also results in a higher price. The competition authority would have to prove the anti-competitive effect, which is sometime difficult to do. To make it easier for a competition authority to take action against a cartel some jurisdictions allow for legal action to be taken against a cartel by proving that the cartel had the ‘object’ or the intention of restricting competition in some way. So an exchange of emails between two or more firms setting price, even if the higher price had not been introduced, would be caught under some competition laws because the email indicated the intention to fix a higher price.

Agreements which are in principle anti-competitive may be exempted, provided that they produce beneficial effects. In general, ag-

reements which are otherwise prohibited are exempted only by way of a specific authorisation or permission by the Competition Authority or other competent agency. Competition law usually indicates the conditions under which anti-competitive agreements may be exempted and the procedures to be followed in order to get the exemption.

In some competition laws, a whole category of agreements (e.g., distribution agreements) can be automatically exempted by law (block exemption). The law generally specifies the conditions under which the exemption applies.

Abuse of dominant position

Competition law prohibits the abuse of dominant position (i.e. a monopoly or a firm with substantial market power). Normally the term abuse covers practices where a business operator with substantial market power restricts competition in a market.

The notion of dominant position, or substantial market power, may vary according to national legislation. Generally, it refers to a situation where the business operator has enough economic strength to act in the market without regard to what its competitors (actual or potential) do. In order to determine dominance, competition law may refer to market shares and/or a series of other market structure indicators, such as the extent of vertical integration, technological advantages, financial resources, the importance of brand name, etc.

Competition law can apply both to single firm dominance and to collective dominance (where two or more business operators jointly hold a position of market power). To determine collective dominance, competition law may refer to market shares and other indicators.

Seeking or reaching a dominant position is usually not prohibited; only abuse of a dominant position.

Abusive behaviours can either be an exploitative abuse (setting excessive prices or unfair conditions for the customers) or an exclusionary abuse (conduct that excludes efficient competitors from the market, such as predatory pricing or exclusive dealing contracts with the only supplier of materials needed for production). Competition law may provide examples of abusive conduct to provide greater business certainty.

Anticompetitive mergers

Generally, competition law covers the following categories of mergers: mergers, acquisitions, and joint ventures (joint ventures may be regulated either under merger or anti-competitive agreement provisions).

Mergers are only prohibited when they lead to a restriction of competition. For many jurisdictions the merger test is whether there is a “substantial lessening of competition”.

Mergers falling under the prohibition should be screened and approved by the Competition Authority or other competent agency. Competition law may establish a system of either voluntary or mandatory notification of the (proposed) transaction to the Competition Authority. Competition law often provides for minimum (market share and/or turnover) thresholds over which a transaction shall or may be notified. Where notification is mandatory, failure to notify may lead to sanctions. Generally, a merger cannot be completed until approved by the Competition Authority.

Other restrictive commercial practices

In some AMSs, competition law also regulates (prohibits) practices that, while not strictly related to the basic competition law provisions discussed above, belong to the more general category of restrictive/unfair commercial practices.

Where such provisions are included within the

national competition law, they will be illustrated in a specific paragraph of the relevant country-chapter of this Handbook.

The procedures: how are the prohibitions enforced?

In most cases, competition law establishes specific procedural rules for enforcement. Generally, the Competition Authority opens a case either following a complaint or on its own motion. Where exemptions or authorisations are sought an investigation may also be triggered by notification from the parties to the transaction.

The investigation entails a series of activities, some of which may be regulated by competition law. For example, the law may specify the phases and time-limits of the investigation, the investigative powers of the Competition Authority (e.g., the power to interrogate, search, seize evidence, etc.), and the right of the parties involved in the investigation (e.g., business or other secret, confidentiality, right of a fair trial, right of appeal, etc.).

The investigation is followed by an adjudication (i.e., the adoption of a preliminary or final decision), which, depending on national law, may be carried out by the Competition Authority itself or may be left to another (judicial or administrative) authority.

Once an infringement has been established, competition law provides the applicable sanctions. Sanctions may be applied both to procedural infringements (e.g., violation of investigative measures) and infringements of the substantive law (e.g., participation in a cartel or abuse of dominance etc). Sanctions may consist of pecuniary fines, orders or injunctions, which may impose behavioural or structural remedies (e.g., to refrain from or to adopt a cer-

tain behaviour, to sell/divest assets, etc.), and other measures.

Decisions by the Competition Authority or other competent agency may be subject to review by a judicial or administrative authority.

Are there any exclusions or exemptions from the application of competition law?

Competition law is usually a law of general application (i.e., it applies to all economic sectors and to all business persons engaged in economic activities). However, according to national systems and constitutional requirements, some (sensitive) sectors (e.g., defence or agriculture) or certain businesses (such as State-owned enterprises or enterprises in charge of public services) may be fully or partially excluded from the application of the CPL. These will be referred to as "exclusions".

In addition to exclusions, which apply to a whole economic sector or category of business operators, competition law may also grant exemption from specific provisions in the competition law. For example, an exemption may be given for agreements that restrict competition between business operators because they contribute to specific national objectives (e.g., technical development, consumer welfare, environment, development of SMEs, etc.).

In the following country-chapters, exclusions and exemptions are treated separately: exemptions are dealt within the specific sections relating to anti-competitive agreements, while exclusions are dealt separately in dedicated sections.



PART II

Competition Law in Individual ASEAN Member States



BRUNEI DARUSSALAM

Legislation and Jurisdiction

The Law

What is the relevant legislation?

Brunei Darussalam currently does not have a comprehensive legislation that regulates competition in general. In 2011, however, Brunei Darussalam started the process to prepare for a draft national competition law.

In this regard also, elementary competition-related provisions have been implemented in the telecommunications sector by the Authority for Info-communications Technology Industry of Brunei Darussalam (AITI) for its licensees under the Telecommunications Order 2001 (the Telecommunications Order). Licensees' behaviour in the telecommunications market are guided by the licence conditions, which includes a prohibition against anti-competitive behaviour. This Order is available from the Attorney General Chamber's website www.agc.gov.bn.

To whom does it apply?

The Telecommunications Order applies to entities that have obtained a license to operate as a service and/or infrastructure provider in the telecommunications industry except Government agencies who are carrying out sovereign functions. The converged competition code of practice being developed by AITI will apply to the same and be extended to cover broadcasting activities.

On the other hand, the national competition law that is currently being drafted is aimed to apply to all commercial activities in Brunei.

Which practices does it cover?

The AITI Order tasks AITI, in general terms, "to promote and maintain fair and efficient market conduct and effective competition between persons engaged in commercial activities connected with telecommunication technology in Brunei Darussalam" (Section 6(1)(c)). Furthermore, under the Telecommunications Order the AITI may give directions to telecommunication licensees, amongst others, to ensure fair and efficient market conduct (Section 27(1)(c)).

Meanwhile the draft national competition law covers the key prohibitions of anti-competitive behaviour.

Are there proposals for reform?

The national competition law for Brunei Darussalam is in the drafting stage.

AITI's converged competition code of practice will co-exist and generally be aligned with national policies with regards to general competition. The converged competition code of practice aims to promote efficiency and competitiveness in these sectors, promote fair and efficient market conduct and transparent market access, and further the advancement of technology and research and development in these sectors through the promotion of efficient market conduct.

The Authorities

Who is the enforcement authority?

There is no enforcement authority for the national competition law at the moment since the law is still in drafting.

Are there any sector-specific regulatory authorities (RAs) with competition enforcement powers?

AITI is responsible for the enforcement of competition in the telecommunications sector as part of obligations contained in the terms of licences issued under the Telecommunications Order. In light of convergence of the telecommunications and broadcasting sectors, AITI will also take on responsibility for managing competition in the broadcasting sector.

Anticompetitive practices

The Telecommunications Order allows AITI to give directions to telecommunications licensees to ensure fair and efficient market conduct. While the Order does not specifically refer to agreements or dominant position, the licences issued under the said Order contain provisions to regulate the following practices:

1. Unfair Competitive Practices
2. Undue Preference and Undue Discrimination
3. Anti-Competitive Arrangements
4. Exclusive Arrangements
5. Contracts with Third Party
6. Agreements that Restrict Competition
7. Pricing Abuse
8. Predatory Network Alteration
9. Abuse of Market Dominance in a Foreign Market

Procedures

Investigations

Upon passing the national competition law, there are plans to put in place clear guidelines to provide a proper procedural framework for general competition law enforcement. This also holds true for the converged telecommunications and broadcasting sectors.

At present, enforcement in the telecommunications market follows the rules and procedures set by AITI by virtue of its powers under the Telecommunications Order.

How does an investigation start, what are the procedural steps and how long does the investigation take?

Aggrieved parties are welcome to bring anti-competitive behaviour to AITI's attention and investigations will be conducted and decisions made on a case to case basis.

What are the investigation powers?

The investigative powers of AITI are laid down in Sections 7 and 18, and in the Second Schedule of the AITI Order, and in Part III of the Telecommunications Order.

Is it possible to obtain any informal guidance?

General guidance on Brunei Darussalam competition-related legislation for the telecommunications and broadcasting industries can be obtained at the following contacts:

Authority of Info-Communication Technology Industry (AITI)

Block B14, Simpang 32-5, Jalan Berakas,
Kampong Anggerek Desa BB3713,
Brunei Darussalam

 +673 – 2323232

 +673 – 2382447

 info@aiti.gov.bn

 www.aiti.gov.bn

Adjudication

What are the final decisions?

Final decisions which AITI may take are contained in Section 8 of the Telecommunications Order. This includes financial penalties, suspension or cancellation of licences.

What are the sanctions?

Sanctions which AITI may impose are contained in Section 8 of the Telecommunications Order. This includes financial penalties, suspension or cancellation of licences. Section 27 of the Telecommunications Order also allows AITI to issue directions to licensees if the situation warrants. This does not preclude civil rights of action such as injunctions.

Meanwhile under the draft national law, sanctions are envisaged to include financial penalties and structural/behavioural remedies for infringements of the anti-competitive prohibitions.

Judicial review

Can the enforcement authorities' decisions be appealed?

Under the Telecommunications Order, any telecommunication licensee aggrieved by any decision of AITI may appeal to the Minister of Communications, whose decision shall be final. The Minister of Communication may exercise his right to appoint an advisory panel to consider appeals received. This advisory panel may ask the aggrieved party for representations and make recommendations to the Minister.

In the draft national law, there are plans for the establishment of a Competition Appeal Tribunal which would be responsible for handling appeals on decisions made by the competition authority.



CAMBODIA

Legislation and Jurisdiction

The Law

What is the relevant legislation?

There is no comprehensive competition law in Cambodia. At the time of writing, the Ministry of Commerce is finalizing a draft law. It is expected that this draft law will be submitted to the Council of Ministers of Cambodia in the middle of 2013.

To whom does it apply?

This draft Law applies to all actions that cause unlawful competitive harms to the Cambodian economy regardless of where the actions occur i.e. whether the source of the harm arises inside or outside the territory of the Kingdom of Cambodia.

This draft Law applies to all Persons conducting business regardless of whether they are formed as profit-making organizations, non-profit organizations or charitable organizations and includes: Business Operators engaged in the production or supply of public utility products or services; Business Operators conducting business in Government Monopoly industries and sectors, except for, subject to Article 66, the Business Operators listed in Annex 1 to the draft Law.

Which practices does it cover?

The draft law will cover unlawful coordinated activities by business operators in a horizontal relationship, unlawful activities by monopolies or business operators in a dominant position, unlawful activities between business operators

in a vertical relationship, unlawful price discrimination and unlawful deceptive activities. The draft law will also cover those assisting in these unlawful activities.

Are there proposals for reform?

The draft law is currently being discussed.

The Authority

Who is the enforcement authority?

The competition institutions are the Cambodian Competition Commission and the Directorate.

The Commission is created to promote a competitive market economy for Cambodia and to enforce the provisions of this law. Subject to this law, initially the Commission shall be composed of 9 (nine) Commissioners: The Minister of Commerce or his designate; a representative of the Ministry of Economy and Finance; a representative of the Office of the Council of Ministers; a representative of the Ministry of Justice; a representative of the Ministry for Industry, Mines and Energy; and four other members appointed by the Prime Minister on the recommendation of the Minister of Commerce, who have experience and knowledge in matters relating to business, industry, commerce, law, economics, public administration, competition, consumer protection or any other suitable qualification as the Minister may determine.

The Commission shall perform these duties: Issue Decisions and Orders requiring violators of the draft law to restore competition in their industry and to remedy competitive harms to persons; levy fines and impose other non-criminal sanctions against violators to deter

future violations of this law; issue regulations that implement the law; conduct competition studies at the request of the Parliament or the Prime Minister or on its own initiative conduct studies that the Commission deems to be in the public interest; develop strategies and policies for promoting a competitive market economy in Cambodia; monitor and supervise the operation of the Directorate; report annually to the Prime Minister on the operations of the Commission and the Directorate; establish rules concerning conflict of interest of Commissioners; provide advice at the request of the Royal Government and Parliament on issues concerning competition matters; advise, on its own initiative, the Parliament, the Prime Minister or any public or institution or authority on all matters concerning competition including current or proposed legislation relating, but not limited to public procurement, licensing, taxes and levies imposed on Business Operators; and advise the Prime Minister on cooperation arrangements relating to matters arising under this Law between the Commission and any other authorities in Cambodia or in a foreign jurisdiction or any international organization and determine the arrangements for such cooperation or membership of international organizations.

The Directorate of the Commission is established to implement this Law and the directions of the Commission. The functions of the Directorate comprise investigation and enforcement and dispute resolution.

- (a) The Director-General for Investigation and Enforcement shall be appointed on the basis of a recommendation by the Minister of Commerce to the Prime Minister and is responsible for the investigation and enforcement provisions of this Law. The Director-General for Investigation and Enforcement shall be assisted by a number of Deputy Director-Generals and such other staff as is determined to be necessary including, but not limited to a: Deputy Director-General for Administration and Finance and Deputy Director-General for Legal Affairs.
- (b) The Director-General for Dispute Resolution is responsible for the dispute resolution functions of the Directorate. The Director-General for Dispute Resolution and his or her representatives have the sole authority to present proposed Decisions and Orders, and proposed Statements on Remedies and Sanctions to the Commission. The Director-General for Dispute Resolution shall be appointed by the Commission. The organization and functioning of the Directorate shall be determined by Sub-decree.

Are there any sector-specific regulatory authorities (RAs) with competition enforcement powers?

The Commission and Directorate are responsible for the application of competition law in all sectors. The existing RAs will not have competition enforcement powers after this law enters into force.

 **INDONESIA**

Legislation and Jurisdiction

The Law

What is the relevant legislation?

The relevant legislation is Law No. 5 of 1999 concerning the prohibition of monopolistic practices and unfair business competition (the “Law”), together with the Elucidation on the Law, the Decree of the President of the Republic of Indonesia No. 75 of 1999 on the Komisi Pengawas Persaingan Usaha or KPPU (the “Decree”), four procedural regulations and several guidelines, available on the KPPU website at: <http://eng.kppu.go.id> (English page).

1. Regulation of the Supreme Court of the Republic of Indonesia No. 3 of 2005 regarding the Procedures for Filing Objections to the Decisions of KPPU;
2. KPPU Regulation No. 1 of 2006 regarding the Procedures for Case-Handling in KPPU;
3. KPPU Regulation No. 2 of 2008 regarding the Authorities of the Commission Secretariat in Case-Handling;
4. KPPU Regulation No. 1 of 2010 regarding Case Handling Procedures replaces KPPU Regulation No. 1 of 2006 and No. 2 of 2008 for cases introduced as of 5 April 2010.

To whom does it apply?

The Law applies to all “business actors”, defined by Article 1(5) of the Law as “individual(s) or business entities, either incorporated as legal entities or not, established and domiciled

or conducting business activities within the jurisdiction of the Republic of Indonesia, either independently or jointly based on agreement, conducting various business activities in the economic field”. Therefore, it applies to any business actor doing business in Indonesia, including, amongst other, state-owned enterprises and subsidiaries of foreign enterprises.

Which practices does it cover?

The Law covers practices, which include anti-competitive agreements; anti-competitive activities; abuse of dominant position; and mergers which lessen competition.

Are there proposals for reform?

A new draft law is being prepared. It will mainly reform the procedure (e.g. providing for an extended investigation timeframe and increased investigative powers) and the institutional capacity of the authority (functions of the KPPU).

The Authority

Who is the enforcement authority?

The enforcement authority is the Komisi Pengawas Persaingan Usaha (KPPU).

According to Chapter VI of the Law, the Decree and the regulations, the KPPU is a state-independent institution, free from the Government and other stakeholders’ influence, accountable to the President of Indonesia. Its members are appointed and dismissed by the President upon approval of the People’s Legislative Assembly.

The KPPU is responsible for supervising and evaluating the conduct of business actors in the

Indonesian markets under the Law. It carries out investigations and enforces the Law (e.g., issues decisions on the alleged violations), provides advice and opinions concerning Government's policies related to monopolistic practices and/or unfair business competition, issues guidelines and submits periodic reports on its activity to the President of Indonesia and the People's Legislative Assembly.

Are there any sector-specific regulatory authorities (RAs) with competition enforcement powers?

The KPPU is responsible for the application of competition law in all sectors. The existing RAs do not have competition enforcement powers.

Anticompetitive practices

Agreements

Which agreements are prohibited?

Chapter III of the Law (Articles 4 to 16) identifies a list of agreements, classified according to their object, which are prohibited "per se" or insofar as they result in monopolistic practices and/or unfair business competition (under the "rule of reason").

The agreements prohibited per se are the following:

- Agreements leading to price fixing (Article 5(1)), except agreements in the context of a joint venture or expressly prescribed by law (Article 5(2));
- Price discrimination (Article 6);
- Agreements aimed at boycott (Article 10) that (a) injure or may injure other business actors or (b) limit access of other competitors to sell or to buy goods and services in the relevant market;

- "Exclusive agreements", i.e. agreements leading to resale restrictions, tying and exclusive supply (Article 15);

The agreements prohibited under the rule of reason, are the following:

- Agreements leading to oligopoly (Article 4(1)). Business actors may be suspected or deemed of being part of oligopolies when two or three of them control the production and or marketing of over 75% of the relevant market (Article 4(2));
- Agreements leading to predatory pricing (i.e. price below cost) (Article 7) and resale price maintenance (Article 8).
- Agreements leading to market partitioning and market allocation (Article 9);
- Cartels (Article 11);
- Trusts (Article 12);
- Agreements leading to oligopsony (Article 13(1)). Business actors may be suspected or deemed of being part of oligopsonies when two or three of them control the purchases or acquisitions of over 75% of the relevant market (Article 13(2));
- Agreements leading to vertical integration (Article 14);
- Agreements with foreign parties (Article 16).

According to Article 1(7) of the Law, anti-competitive agreements are prohibited regardless of their form: both formal agreements ("in writing") and concerted practices ("not in writing") are included.

The Law includes both horizontal and vertical agreements.

Which agreements may be exempted?

The Law does not explicitly foresee any possibility of individual exemption. However, some instances, including some categories of agreements, are excluded from the scope of application of the Law (see below, under “Exclusions”).

Monopoly and dominant position**Is monopoly or dominant position regulated?**

The Law separately prohibits monopolistic practices (i.e., monopoly and monopsony) (Chapter IV) and the abuse of a dominant position and, in specific cases, the creation thereof (Chapter V).

What is a monopoly/monopsony position?

According to Article 1(1) of the Law, “monopoly” refers to the “control over the production and or marketing of goods and or over the utilization of certain services by one business actor or by one group of business actors”.

According to Article 17(2), business actors are deemed to have a monopoly position if:

- there is no actual substitute available for the goods or services concerned;
- other business actors are unable to compete for the same goods or services; or
- one business actor or a group of business actors control over 50% of the relevant market.

According to Article 18(2), business actors are deemed to have a monopsony position when one business actor or a group of business actors controls over 50% of the relevant market.

What is a dominant position?

According to Article 25(2) business actors are deemed to have a dominant position when:

- one business actor or a group of business actors controls over 50% of the relevant market; or
- two or three business actors or a group of business actors control over 75% of the relevant market.

When are monopoly and dominant position prohibited?

According to Articles 17(1) and 18(1) monopoly and monopsony are prohibited from:

- “controlling the production and or marketing of goods or service” or, respectively,
- “controlling the acquisition of supplies or from acting as sole buyer of goods and or services”

when this may “result in monopolistic practices and or unfair business competition”.

Furthermore, the following practices are prohibited when they may result in monopolistic practices or unfair business competition:

- Market control, defined as:
 - ▶ “(a) Reject and or impede certain other business actors from conducting the same business activities in the relevant market; or (b) bar consumers or customers of their competitors from engaging in a business relationship with such business competitors; or (c) limit the distribution and or sales of goods and or services in the relevant market; or (d) engage in discriminatory practices towards certain business actors” (Article 19);
 - ▶ Predatory pricing (Article 20);
 - ▶ “Determining false production cost and

other costs as part of the price component of goods and or services” (Article 21);

- Conspiracy, defined as:
 - ▶ Bid rigging/collusive tendering (Article 22);
 - ▶ Violating company secrets (Article 23);
 - ▶ Reducing quantity, quality or timeliness of goods or services (Article 24).

According to Article 25(1), business actors are prohibited from using a dominant position either directly or indirectly to:

- Determine the conditions of trading with the intention of preventing and or barring consumers from obtaining competitive goods or services both in terms of price and quality;
- Limit markets and technology development; or
- Bar other potential business actors from entering the relevant market.

Article 26 of the Law also prohibits a person, concurrently holding a position as member of the board of directors or as a commissioner of a company, from simultaneously holding either of the same position in other companies in the event that such companies:

- Are in the same relevant market;
- Have a strong bond in the field and/or type of business activities; or,
- Are jointly capable of controlling the market share of certain goods or services

Which may result in monopolistic practices or unfair business competition.

Likewise, Article 27 of the Law prohibits business actors from owning majority shares in several similar companies conducting business activities in the same relevant market, or establishing several companies with the same business activities when:

- one business actor or a group of business actors control over 50% of the relevant market; or
- two or three business actors or groups of business actors control over 75% of the relevant market.

Can abuses of dominant position be exempted?

No exemption is allowed.

Merger control

What is a merger?

Merger is regulated by Articles 28 and 29 of the Law, and further implemented through Government Regulation No. 57 Year 2010 concerning a Merger and Acquisition which may Cause Monopolistic Practices and Unfair Business Competition (the “Merger Regulation”).

According to the Law, a merger includes the following transactions:

- concentration of control of several previously independent business actors into one business actor or a group of business actors; or
- transfer of control (for example, through the acquisition of shares) from one previously independent business actor to another, leading to control or market concentration.

Specifically, the scope of a merger by the Law and the Merger Regulation is limited to a merger (merger of one business actor into another, or merger of some business actors into one new entity) and the acquisition of shares.

Are foreign-to-foreign mergers included?

Foreign mergers are defined as (i) mergers between two foreign business entities where both or one of them operate in Indonesia (ii) mergers

between a foreign business entity operating in Indonesia and an Indonesian legal entity; (iii) mergers between a foreign business entity which does not operate in Indonesia and an Indonesian business entity; and (iv) other forms of merger involving foreign elements.

Foreign mergers are included when all the parties conduct business activities in the domestic market. Foreign mergers taking place beyond Indonesian jurisdiction are not subject to investigation, insofar as they do not bring any direct or individual control over an Indonesia business entity.

Do mergers need to be notified?

The Law and the Merger Regulation establishes a system of both voluntary consultation (pre-merger notification) and mandatory post-merger notification.

According to the Merger Regulation, the merging parties must notify the KPPU on any merger that meet the following conditions:

- combined asset value of the merged business actors exceeding IDR 2.5 trillion (IDR 20 trillion for banking institutions); and/or
- combined sales value of the merged business actors exceeding IDR 5 trillion.

The notification must be made no later than 30 (thirty) working days after the merger is legally effective.

The mandatory post-merger notification is not applicable to mergers between affiliated business actors.

Any merging business actors that meet the threshold (above) can ask for a voluntary consultation (or in other jurisdiction define as voluntary pre-merger notification) to the KPPU. The result of a consultation should be made within 90 (ninety) working days after the submitted

proposal is completed. However, it shall be noted that an opinion from a consultation does not prevent the KPPU from assessing the merger after it has been implemented. Further explanation on the consultation process is described by KPPU Regulation No. 11 Year 2010 regarding Consultation of Merger.

Are there any filing fees?

There are no filing fees.

Are there sanctions for not notifying?

As mentioned above, the Merger Regulation stipulates that any failure to notify (late notification) means an administrative fine can be imposed amounting to IDR 1 billion per day, with maximum fine of IDR 25 billion. Further explanation on the fines for delay is describe by KPPU Regulation No. 4 Year 2012 on Guideline on Imposing Fines to Delay in Merger Notification.

How long does it take for approval?

According to the Merger Regulation, merger assessment by the KPPU should be made within 90 (ninety) working days after the submitted notification document is completed. If the KPPU finds the existence of a competition violation due to the merger, the KPPU can continue the process using the applicable case handling procedure stipulated by KPPU Regulation No. 1 Year 2010 regarding Case Handling Procedures.

Is there any obligation to suspend the transaction pending the outcome of the assessment (standstill clause)?

There is no standstill obligation.

Which mergers are prohibited?

According to the Merger Regulation, the prohibited merger is a merger that results in

monopolistic practices and or unfair business competition. In assessing whether the merger will lead to monopolistic practices and or unfair business competition, the KPPU will analyze a number of factors, including market concentration, entry barriers, potential anti competitive practices, business efficiency, and or likely bankruptcy.

For example, market concentration is mainly assessed on the basis of the Herfindahl-Hirschman Index (HHI). If not applicable, then the KPPU can use other tools such the Concentration Ratio (CR) or any other measures of market concentration. Two spectrums are use for the HHI, namely Spectrum I (HHI under 1,800) for a low market concentration, and Spectrum II (HHI over 1,800) for high market concentration.

It is important to note that market concentration is only the first step in the analysis conducted by the KPPU in assessing a merger.

What happens if prohibited mergers are implemented?

If it was being implemented, then the KPPU will enter the investigation process as defined by KPPU Regulation No. 1 Year 2010 regarding Case Handling Procedures, as the violation of Article 28 or 29 of the Law.

Can mergers be exempted/authorized?

Mandatory post-merger notification between affiliated business actors may be exempted from the application of the Merger Regulation.

Procedure

Investigations

How does an investigation start?

Investigations are regulated by Chapter VII of the Law and by the Procedural Regulations. KPPU can start an investigation on its own motion or following a complaint. Any person having knowledge or a reasonable suspicion of infringements of the Law, or suffering losses as a result thereof, may file a complaint to the KPPU.

What are the procedural steps and how long does the investigation take?

The KPPU conducts a preliminary examination and determines, within 30 days, whether or not a follow-up examination is needed. The follow-up examination must be completed within 60 days, which may be extended by not more than 30 days. The KPPU must determine whether or not an infringement occurred within 30 days from the conclusion of the follow-up examination.

What are the investigation powers of the KPPU?

The KPPU has the power to:

- conduct investigations and hearings on allegations of cases of monopolistic practices and/or unfair business competition;
- summon business actors suspected of having infringed the Law or witnesses, expert witnesses, or any person deemed to have knowledge of violations of the Law;
- seek the assistance of investigators to invite the above mentioned persons;

- require business actors and other parties to submit evidence;
- request statements from Government institutions;
- obtain, examine and/or evaluate letters, documents or other evidence for investigations and/or hearings.

What are the rights and safeguards of the parties?

The KPPU is bound by the duty of confidentiality in respect of all information classified as company secrets, as well as all information provided by complainants and reporting parties.

Is there any leniency programme?

The Law does not provide for a leniency programme. However, currently discussions are being held on whether a leniency programme should be introduced as part of the reform.

Is it possible to obtain any informal guidance?

Interested parties can contact the Public Relation and Legal Bureau for any inquiries through the official e-mail address at infokom@kppu.go.id or to Foreign Cooperation Division at international@kppu.go.id. Guidance on mergers may be obtained from the Merger Division at merger@kppu.go.id.

Adjudication

What are the final decisions?

According to Article 43(3) of the Law, at the end of the examination, the KPPU decides whether or not the Law has been violated.

What are the sanctions?

According to Article 47 of the Law, the KPPU may impose sanctions in the form of administrative measures against business actors violating the provisions of the Law. Sanctions include:

- declarations that anti-competitive agreements be null and void;
- orders to stop vertical integration, monopolistic practises, unfair business competition, misuse of dominant position;
- declarations that mergers or consolidation of business entities or acquisition of shares are null and void;
- stipulation of compensation payments;
- fines between IDR 1 billion and IDR 25 billion.

According to Article 48 of the Law, basic criminal sanctions may be imposed by the courts: the most serious infringements are subject to a fine between IDR 25 billion and IDR 100 billion or to imprisonment up to six months. Other infringements are subject to a fine of between IDR 5 billion and IDR 25 billion or to imprisonment up to five months, Procedural infringements (refusal to provide required evidence, or to provide information, or impeding the investigation) are subject to a fine between IDR 1 billion and IDR 5 billion or to imprisonment up to 3 months.

According to Article 49 of the Law, additional criminal sanctions may be imposed, in the form of:

- Revocation of business licenses;
- Prohibition of holding the positions of director or commissioner for a period between two and five years;
- Orders to stop certain activities or actions producing damages to other parties.
- Criminal sanctions are imposed by the courts on the basis of Indonesian criminal law.

Judicial review

Can the enforcement authority's decisions be appealed?

According to Article 44 of the Law, business actors may appeal KPPU's decisions before the District Court no later than 14 days after receiving notification of the decision. District Courts' decisions can be appealed to the Supreme Court of the Republic of Indonesia within 14 days.

Private enforcement

Are private actions for damages available?

Not available.

Exclusions

Is there any exclusion from the application of the Law?

According to Article 5 (2) of the Law, price fixing agreements in the context of joint ventures or expressly prescribed by law are excluded from the application of the Law.

According to Article 50 of the Law, the following are excluded from the provisions of the Law:

- (a) actions and or agreements intended to implement applicable laws and regulations;
- (b) agreements related to intellectual property rights, such as licenses, patents, trademarks, copyright, industrial product design, integrated electronic circuits and trade secrets, as well as agreements related to franchise;

- (c) agreements for the stipulations of technical standards of goods or services which do not inhibit, and/or impede, competition;
- (d) agency agreements which do not stipulate the re-supply of goods or services at a price lower than the contracted price;
- (e) cooperation agreements in the field of re-search for the upgrading or improvement of the living standard of society at large;
- (f) international agreements ratified by the Government of the Republic of Indonesia;
- (g) export-oriented agreements or actions not disrupting domestic needs and/or supplies;
- (h) business actors of small scale, according to the provisions of Law No. 20 of 2008 on micro, small and medium enterprises.
- (i) activities of cooperatives aimed specifically at serving their members.

In addition, Article 51 specifies that "monopoly and concentration of activities related to the production and or marketing of goods and or services affecting the livelihood of society at large and branches of production of a strategic nature for the state shall be stipulated in a law and shall be implemented by State-Owned Enterprises and or institution formed or appointed by the Government".

Enforcement Practices

Please refer to the Annex I - Case Studies.

Legislation and Jurisdiction

The Law

What is the relevant legislation?

The relevant legislation is Decree 15/PMO (4/2/2004) on Trade Competition (the “Decree”). However, the Decree has not been implemented.

To whom does it apply?

The Decree applies to the sale of goods and services in business activities by business persons. A “business person” is defined by Article 2 of the Decree as “a person who sells goods, buys goods for further processing and sale or buys goods for resale or is a service provider”. The Decree does not make a distinction between national and foreign business persons.

Which practices does it cover?

The Decree prohibits specific restrictive business practices leading to monopolisation, namely: mergers and acquisitions leading to monopolisation, elimination of other business entities, collusion and arrangements and cartels with foreign business persons.

Are there proposals for reform?

There are plans to reform the Decree and adopt a comprehensive law on competition that will be passed by the National Assembly Conference in 2015. The Division on Consumer Protection and Competition under the Ministry of Industry and Commerce has been set up.

The Authorities

Who is the enforcement authority?

Article 5 of the Decree provides for the establishment of a Trade Competition Commission (TCC) within the Ministry of Industry and Commerce, which shall be chaired by the Minister of Industry and Commerce. The TCC has not been established yet.

Are there any sector-specific regulatory authorities (RAs) with competition enforcement powers?

Sector-specific authorities have powers to regulate their respective sector and issue (or request the Prime Minister to issue) notices to address disruptive behaviours. These might include, though there is no precedent in this respect, anti-competitive behaviours.

Informal guidance can be requested at the authority concerned:

the Ministry of Industry and Commerce:
 www.moic.gov.la  +856 21 412015;

the Ministry of Posts and Telecommunications:
 www.mpt.gov.la  +856 21 219858;

the Ministry of Public Works and Transport:
 www.mpwt.gov.la  +856 21 412255;

the Ministry of Energy and Mining:
 www.mem.gov.la  +856 21 413000;

the Ministry of Information, Culture and Tourism:
 www.kplnet.net  +85621 212412;

the Ministry of Public Health:
 www.moh.gov.la  +856 21 214000;

the Ministry of Science and Technology:
 +85621 213470.

Anticompetitive practices

Agreements

Which agreements are prohibited?

Article 11 of the Decree prohibits collusion and arrangements to engage in unfair trade practices in any form, such as:

- Price fixing, and fixing the sale and purchase price of goods and services;
- Stocking goods, limiting, reducing the quantity or limiting the production, purchase, sale, distribution or import of goods and services;
- Colluding in tenders for purchase, sale and supply of goods and services;
- Fixing conditions that, directly or indirectly, force their customers to reduce production, purchase or sale of goods or the supply of services;
- Limiting the customer's choice to purchase, sell goods and receive services;
- Prohibiting their suppliers or retailers from purchasing or selling goods to other business entities;
- Entering into allocation arrangements of markets, customers or suppliers restricting competition;
- Appointing, or giving authority to an individual for the sole right to sell goods or supply services in one market;
- Arrangements to fix conditions or the manner of purchase and sale of goods or services to restrict other business entities;
- Other acts that are contrary to the trade competition regulations prescribed by the TCC.

Article 12 of the Decree prohibits cartels with foreign business persons, i.e., "to establish and operate a business in Lao PDR that has business relations with a foreign business entity either by contract, share holding or other form to act to limit the opportunity of local businesses to choose to purchase from or sell goods or provide services directly to, a foreign business entity".

Which agreements may be exempted?

According to Article 13 of the Decree, the TCC may exempt any of the above acts for some specific sector or business for socio-economic or security reasons. No exemption has been adopted as yet.

Is there any formal notification requirement and to which authority should a notification be made?

Procedural implementing rules for exemptions have not been adopted yet.

Monopoly, dominant position and other unilateral conducts

Is monopoly or dominant position regulated?

The Decree does not specifically regulate a monopoly or a dominant position. Instead Article 8 prohibits a business person from engaging in a merger, eliminating a competitor, engaging in collusive activities "so as to monopolize any market of goods and services."

What is a dominant or a monopoly position?

Article 2 of the Decree defines a **monopoly** as "the dominance of the market individually or in collusion with other businesses" and **market dominance** as a situation where the "sales volume or market share of an goods or services of one or more business entities is above that prescribed by the TCC."

When are monopoly and dominant positions prohibited?

Conduct which leads to a monopoly (including dominance) is prohibited. Article 8 of the Decree prohibits any business person to perform mergers and acquisitions, exclusionary abuses, collusion and arrangements and cartels (i.e., any act stipulated in Articles 9, 10, 11 and 12 of the Decree), “so as to monopolize any market of goods and services”. Article 10 of the Decree prohibits any business entity “to act or behave so as to cause losses directly or indirectly, by such conduct as dumping, limiting or intervening with intent to eliminate other business entities”.

Can abuses of dominant or monopoly position be exempted?

According to Article 13 of the Decree, any of the above acts may be exempted “for some specific sector or business for socio-economic or security reasons”. To this purpose, the Article establishes that the TCC is assigned to consider and provide exemptions from time to time. No exemption has been adopted as yet.

Merger control

What is a merger?

Article 2 of the Decree defines a merger as “two or more business entities coming together and forming into one business entity with the result the individual business entity will cease to exist”.

Are foreign-to-foreign mergers included?

The Decree does not make any difference between national and foreign business persons.

Do mergers need to be notified?

The Decree does not provide for an obligation to notify a proposed merger.

Which mergers are prohibited?

Under Article 9 of the Decree, “it is prohibited for a business person to monopolize the market in the form of a merger or acquisition that destroys competitors or substantially reduces or limits competition”.

What happens if prohibited mergers are implemented?

The Decree does not establish specific sanctions for implementing prohibited mergers. The general sanctions under Article 14 of the Decree apply (see below).

Can mergers be exempted/authorised?

Under Article 13 of the Decree, mergers and acquisitions may be exempted by the TCC for specific sectors or businesses for socio-economic or security reasons.

How to apply for an exemption?

Implementing rules have not been adopted yet.

Procedure

Investigations

Implementing procedural rules have not been adopted yet by the Ministry of Industry and Commerce and the TCC.

Adjudication

What are the final decisions?

Under the Decree, it is for the TCC to decide the case and apply the sanctions where it finds a violation of the Decree. Implementing rules have not been adopted yet by the Ministry of Industry and Commerce.

What are the sanctions?

Sanctions for violation of any of the offence under the Article 14 of the Decree are the following:

- Notice to change and rectify the behaviour;
- Temporary suspension of the activity until the behaviour is rectified and changed;
- Indefinite close down of the activity and possible punishment according to the law;
- Compensation for a business entity that has incurred losses as a result of the offences.

Judicial review

Can the enforcement authorities' decisions be appealed?

There are no provisions in this respect in the Decree.

Private enforcement

Are private actions for damages available?

There are no specific provisions in the Decree related to private actions for damages from anti-competitive behaviours.

Exclusions

Is there any exclusion from the application of the Decree?

No exclusion is provided for by the Decree.



Legislation and Jurisdiction

The Law

What is the relevant legislation?

The **Competition Act 2010** came into force on 1st January 2012 and introduces a comprehensive set of competition rules. It is accompanied by the **Competition Commission Act 2010**, which establishes the Competition Commission as the authority in charge of competition enforcement.

The Competition Act 2010 does not apply to any commercial activity regulated under the legislation specified in the First Schedule, i.e., the Communications and Multimedia Act 1998 and the Energy Commission Act 2001. These activities are subject to some competition-related provisions, which can be found in the following acts:

- Part VI, Chapter 2, of the **Communications and Multimedia Act 1998**. The Malaysian Communications and Multimedia Commission has issued the Guideline on Substantial Lessening of Competition (the “Guideline on Substantial Lessening of Competition (‘SLC’)”) under section 134 of the Communications and Multimedia Act 1998 to define the meaning of “substantial lessening of competition” and the Guideline on Dominant Position on a Communications Market (the “Guideline on Dominant Position”) under section 138 of the CMA to clarify how it will apply the test of “dominant position” to a licensee;
- The **Energy Commission Act 2001 (Act 610)**, the **Electricity Supply Act 1990 (Act 447)** and the **Gas Supply Act 1993**

(Act 501) are the “energy supply laws” that govern the electricity and downstream pipeline gas supply sectors in Malaysia. The Energy Commission which was established in 2001, apply these energy supply laws in regulating both respective sectors in the aspects of economic, technical and safety including competition in these sectors involving utilities and other licenced generators, transmission operators, distributors and suppliers, qualified practitioners, contractors and the consuming public.

- On competition matters, **Act 610** in Part III (paragraph 14(1)(h)) provides a wide function and power of the Energy Commission to “to promote and safeguard competition and fair and efficient market conduct or, in the absence of a competitive market, to prevent misuse of monopoly or market power in respect of the generation, production, transmission, distribution and supply of electricity and the supply of gas through pipelines”.
- Pursuant to the above and in specific reference to the regulation of competition in the electricity sector, **Act 447** in Part III (subsection 4(c)) provides for the function, duty and power of the Energy Commission to “promote competition in the generation and supply of electricity to, inter alia, ensure the optimum supply of electricity at reasonable prices.”
- Similarly for competition in the downstream pipeline gas supply sector, **Act 501** in Part III (paragraph 4(1)(g)) provides the specific function and duty of the Energy Commission to “enable persons to compete effectively in the supply of gas through pipelines.”

To whom does it apply?

The Competition Act 2010 applies to “**enterprises**”, defined as any entities carrying on commercial activities relating to goods or services, both within and outside Malaysia, provided that the commercial activity has an effect on competition in any market in Malaysia.

The Communications and Multimedia Act 1998 refers to any “conduct” in its broadest sense, encompassing any licensees engaged in commercial activity (Guideline on SLC, §6.1a). The energy supply laws govern the licenced electricity utilities and generators including the Independent Power Producers (IPPs), transmission and distribution licensees, licenced gas utilities and private gas licensees, all of whom perform their respective licenced activities in accordance with the competition provisions of the energy supply laws as regulated by the Energy Commission.

Which practices does it cover?

The Competition Act 2010 prohibits agreements which have the object or effect of significantly preventing, restricting or distorting competition, and the abuse of dominant position in any market for goods or services.

The Communications and Multimedia Act 1998 covers both concerted practices (agreements) and unilateral conduct with the purpose or effect of substantially lessening competition in the communications markets.

In accordance with the competition provisions under the energy supply laws, the Energy Commission promotes and safeguards competition and fair and efficient market conduct by persons governed under the laws as well as implementing numerous measures to prevent the misuse of monopoly or market power in the electricity and downstream pipeline gas supply markets.

Are there proposals for reform?

To date, there are no proposals for reform.

For the electricity supply sector, there are measures currently undertaken to enhance competition, for example to ensure transparency through competitive bidding for future power generation capacity.

For the downstream pipeline gas supply sector, a major reform has been introduced for Third Party Access (TPA) to the gas supply sector involving regasification facilities and gas delivery network. As a result, **Act 501** has been proposed to be amended including to enhance the existing competition provisions to be regulated by the Energy Commission.

The Authorities

Who is the enforcement authority?

Pursuant to the Competition Commission Act 2010, the enforcement authority is the **Malaysia Competition Commission**. The Malaysia Competition Commission became fully operational on 1st April 2011.

Under Section 16 of the Act, the Malaysia Competition Commission has both enforcement and implementation powers (e.g., through guidelines). It also has advisory powers towards the Minister and other public authorities (e.g., through recommendations), as well as advocacy functions, carries out general studies in relation to issues connected with competition in the Malaysian economy or particular sectors thereof, and collects and publishes information.

For the electricity supply and downstream pipeline gas supply (“energy supply sectors”) and including competition under the energy supply laws, the Energy Commission is the enforcement authority.

Are there any sector-specific regulatory authorities (RAs) with competition enforcement powers?

The **Malaysian Communications and Multimedia Commission** is responsible for the enforcement of the competition-related provisions under the Communications and Multimedia Act 1998, while the Energy Commission is responsible for the enforcement of the competition-related provisions under the **Energy Commission Act 2001**, the Electricity Supply Act 1990 and the Gas Supply Act 1993.

- any conduct by a licensee which has the purpose of substantially lessening competition in a communications market (Section 133 of the Communications and Multimedia Act 1998 and Guideline on SLC);
- arrangements and practices, whether legally enforceable or not, which provide for rate fixing, market sharing, boycott of a supplier of apparatus, or boycott of another competitor (Section 135 of the Communications and Multimedia Act 1998); and
- mandatory tying or linking arrangements regarding the provision or supply of products and services (Section 136 of the Communications and Multimedia Act 1998).

Anticompetitive practices

Agreements

Which agreements are prohibited?

The Competition Act 2010 prohibits any horizontal or vertical agreement between enterprises, insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services. The term “agreement” is defined as “any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices”.

In particular, the Competition Act 2010 prohibits horizontal agreements aimed at fixing prices or other trading conditions; sharing markets or sources of supply; limiting or controlling production, market outlets or market access, technical or technological development, or investment; or bid rigging.

In the **communications markets**, the Communications and Multimedia Act 1998 contains a prohibition of the following practices:

According to the Guideline on SLC (§6.1b), examples of prohibited conducts include, but are not limited to: predatory pricing, market foreclosure, refusal to supply, bundling, parallel pricing.

These prohibitions apply both to multilateral conduct (i.e., agreements) and unilateral conduct.

In the energy supply sectors, the competition provisions under the energy supply laws enable the Energy Commission to regulate the conduct of the parties governed under the laws, including agreements for the supply of electricity or gas through pipelines.

Which agreements may be exempted?

Agreements which are prohibited under the Competition Act 2010 can be exempted, provided that: (a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement; (b) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition; (c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and

(d) the agreement does not allow the enterprises concerned to eliminate competition completely in respect of a substantial part of the goods and services.

More detailed information can be found in the **Guidelines on Chapter 1 Prohibition (Anti-competitive Agreements)**. This can be viewed at www.mycc.gov.my/guideline.asp

In the **communications markets**, under Section 140 of the Communications and Multimedia Act 1998 “any conduct which may be construed to have the purpose or the effect of substantially lessening competition in a communications market” can be authorised by the Malaysian Communications and Multimedia Commission when this is in the national interest. This will normally require that the national interest in the conduct outweighs the possible negative effects (if any) of substantially lessening competition in a communications market. The Malaysian Communications and Multimedia Commission can also authorise a conduct subject to undertakings.

In the energy supply sectors, the competition provisions under the energy supply laws enable the Energy Commission to regulate competition and the parties governed under the laws except that the power to issue any exemption is only exercisable by the Ministers responsible for electricity and downstream pipeline gas supply respectively.

Is there any formal notification requirement and to which authority should a notification be made?

An enterprise may apply for an individual exemption to the Malaysia Competition Commission, which may grant an exemption if the abovementioned requirements are fulfilled. An exemption may be subject to conditions or obligations, or granted for a limited duration.

The Malaysia Competition Commission may cancel the exemption, vary or remove any condition or obligation, or impose additional conditions or obligations in case of a material change of circumstances or a breach of an obligation. The exemption may also be cancelled when it is based on false or misleading information or any condition has been breached.

The Malaysia Competition Commission may also, after public consultation, grant block exemptions for agreements falling within a particular category.

Neither the Communications and Multimedia Act 1998 nor the Energy Act set up any notification procedure for exemption from the competition provisions. However in the communications markets, according to Section 140(1) of the Communications and Multimedia Act 1998, a licensee may apply to the Communications and Multimedia Commission for authorisation, “prior to engaging into any conduct which may be construed to have the purpose or the effect of substantially lessening competition in a communications market”.

For the energy supply sectors, any notification may be issued in the formal process as practiced by Government bodies and agencies for example, through official circulars and notices. In addition, notification may also be made by the Ministers in accordance with the legal process under the energy supply laws i.e. by publication in the Gazette.

Procedure and timeline

The Competition Act 2010 does not specify the procedural steps and timeline for an exemption. Guidelines shall be issued in due course.

Neither the Communications and Multimedia Act 1998 set up any notification procedure for exemption from competition provisions.

In the energy supply sectors, the procedures and timeline, wherever applicable, are usually included in the formal notification to be issued.

Monopoly and dominant position

Is monopoly or dominant position regulated?

The Competition Act 2010 prohibits an enterprise from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.

Both the Communications and Multimedia Act 1998 and the energy supply laws prohibit specific unilateral conduct by enterprises in a position of monopoly or dominant position in those sectors.

What is a dominant or a monopoly position?

The Competition Act 2010 defines a dominant position as “a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors”.

In the **communications markets**, according to the Guideline on Dominant Position (§7.2), “the primary characteristic of a firm in a dominant position in a market is its ability to undertake conduct to a significant extent independently of its competitive rivals and its customers (whether consumers or intermediate industry participants), and the pressures they would exert on the firm in a competitive market. This independence generally manifests itself as the ability to independently fix prices, although it extends to the ability to fix levels of output or the quality of output with similar disregard for the responses of rivals and customers in the market”.

In the energy supply sectors, the energy supply laws regulate monopoly or market power and the Energy Commission implements measures to prevent to prevent any misuse or abuse of dominant position or monopoly.

When are monopoly and dominant positions prohibited?

Under the Competition Act 2010, dominance will only be prohibited if there is abuse. According to Section 10(2) of the Competition Act 2010, an abuse of a dominant position includes, but is not limited to, the following conducts:

- (a) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer;
- (b) limiting or controlling production, market outlets or market access, technical or technological development, or investment, to the prejudice of consumers;
- (c) refusing to supply to a particular enterprise or group or category of enterprises;
- (d) applying different conditions to equivalent transactions with other trading parties to an extent that may (i) discourage new market entry or expansion or investment by an existing competitor; (ii) force from the market or otherwise seriously damage an existing competitor which is no less efficient than the enterprise in a dominant position; or (iii) harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market;
- (e) making the conclusion of contract subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contract;

- (f) predatory behaviour towards competitors;
or
- (g) buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification for buying up the intermediate goods or resources to meet its own needs.

In the **communications markets**, the Communications and Multimedia Act 1998 contains a prohibition of the following practices:

- any conduct by any licensee which has the purpose of substantially lessening competition in a communications market (Section 133 of the Communications and Multimedia Act 1998 and Guideline on SLC);
- understandings, agreements or arrangements which provides for rate fixing, market sharing, boycott of a supplier or competitor (Section 135 of the Communications and Multimedia Act 1998); and
- mandatory tying or linking arrangements regarding the provision or supply of products and services (Section 136 of the Communications and Multimedia Act 1998).

According to the Guideline on Substantial Lessening of Competition (§6.1b), examples of conducts which would concern the Malaysian Communications and Multimedia Commission include (but are not limited) to: predatory pricing, market foreclosure, refusal to supply, bundling.

According to Section 139, the Malaysian Communications and Multimedia Commission may direct a licensee in a dominant position in a communications market to cease a conduct in that communications market which has, or may have, the effect of substantially lessening competition in any communications market, and to implement appropriate remedies.

In the **energy markets**, the energy supply laws provide for the prevention of misuse of monopoly or market power in respect of the generation, production, transmission, distribution and supply of electricity and the supply of gas through pipelines and the Energy Commission implements the necessary measures, for example licensing requirements, to regulate the competition matters and the parties governed.

Can abuses of dominant or monopoly position be exempted?

According to Section 10(3) of the Competition Act 2010, Section 10 “does not prohibit an enterprise in a dominant position from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor”.

More detailed information can be found in the **Guidelines on Chapter 2 Prohibition (Abuse of Dominant Position)**. This can be viewed at www.mycc.gov.my/guideline.asp

In the **communications markets**, under Section 140, “any conduct which may be construed to have the purpose or the effect of substantially lessening competition in a communications market” can be authorised by the Malaysian Communications and Multimedia Commission when this is in the national interest. This will normally require that the national interest in the conduct outweighs the possible negative effects (if any) of substantially lessening competition in a communications market. The Malaysian Communications and Multimedia Commission can also authorise a conduct subject to conditions.

In the **energy supply sectors**, a similar approach is implemented under the exemption powers of Ministers as aforementioned (page 24).

Merger control

There is no merger control regulation under the Competition Act 2010.

Procedure

Investigations

The Competition Act 2010 provides the Competition Commission with powers to investigate any infringement or offence in accordance to the rules and procedures under Part III of the same Act.

Enforcement in the **communications markets** follows the rules and procedures of the Communications and Multimedia Act 1998. As for the **energy supply sectors**, the Electricity Supply Act 1990 and the Gas Supply Act 1993 provide the Energy Commission with investigative powers and procedures in respect of accidents, offences, information gathering and any non-compliance or contravention of these Acts and the Regulations made thereunder.

How does an investigation start?

Under the Competition Act 2010, an investigation can start on the Competition Commission's initiative, on the direction of the Minister or following a complaint.

The complaint shall specify the person against whom it is made and details of the alleged infringement or offence under the Act (Section 15(2) of the Competition Act 2010). If the Competition Commission decides not to investigate a complaint, it shall inform the complainant and state reasons for the decision (Section 16(2) of the Competition Act 2010).

More detailed information can be found in the

Guidelines on Complaints Procedures. This can be viewed at www.mycc.gov.my/guideline.asp

In the **communications markets**, the Malaysian Communications and Multimedia Commission is empowered to start an investigation upon its own initiative, following a complaint, or if directed by the Minister (Sections 68 and 69 of the Communications and Multimedia Act 1998).

A complainant must identify the person against whom the complaint is made.

The Malaysian Communications and Multimedia Commission will inform the respondent that the matter is being investigated at the beginning of the investigative phase (Section 70 of the Communications and Multimedia Act 1998). During the preliminary and investigating phases, the Communications and Multimedia Commission may ask further information from all related parties.

In the **energy supply sectors**, there are provisions on the conduct of investigation by the Commission through their authorized officers which also covers competition-related matters under the energy supply laws. For **Act 447**, Part III sections 4A until 8 provide for such powers and procedures of investigation and in the case of **Act 501**, similar provisions are contained in Part IV sections 4A until 9.

Lastly, Part III paragraph 14(1)(o) of the Energy Commission Act 2001 [Act 610] grants the Energy Commission the power to carry on all such activities as may appear necessary, advantageous or convenient for the purpose of carrying out or in connection with the performance of its functions.

What are the procedural steps and how long does the investigation take?

During the investigation, the Malaysia Competition Commission may give directions to prevent

serious and irreparable damage, economic or otherwise, or for protecting the interests of the public, when it has reasonable grounds to believe that any prohibition under the Act has been infringed or is likely to be infringed (Section 35 of the Competition Act 2010).

Upon completion of investigation, when it considers that one of the prohibitions under the Competition Act 2010 has been infringed, the Malaysia Competition Commission shall give written notice of its proposed decision to the enterprise(s) that may be directly affected by the decision (Section 36).

The enterprise(s) concerned may submit written representations and/or ask for oral representations, in which case an oral hearing will take place (Section 37).

The Competition Act 2010 does not introduce further detailed rules on procedural steps and timing. The Malaysia Competition Commission may decide to introduce procedural rules in the future.

In the **communications markets**, there are three stages: preliminary phase (up to 30 days); investigation phase (up to 90 days, and further 90 days if it involves the assessment of a dominant position); decision-making phase (up to 30 days).

For the energy supply sectors, the provisions on investigation powers and procedures under **Act 447** and **Act 501** do not limit the process and period of investigation and any further action to be taken by the Energy Commission.

What are the investigation powers?

The Competition Act 2010 confers extensive investigation powers on the Competition Commission.

In general, the Commission officer investigating any offence under the Act "shall have all or any

of the powers of a police officer in relation to police investigation in seizable cases as provided for under the Criminal Procedure Code" (Section 17(2)).

In particular, the Commission has the power to require information (Section 18), take and retain documents (Section 19), access records and other material (Section 20), including computerized data (Section 27). The Commission can also, under the warrant of a Magistrate, enter and search premises and seize relevant material (Section 25). These activities can be conducted without a warrant when, due to the time needed for search warrant, the investigation would be adversely affected or when evidence is likely to be tampered with, removed, damaged or destroyed (Section 26).

In the **communications markets**, the investigation powers of the Malaysian Communications and Multimedia Commission are outlined in Part V, Chapters 4 and 5 and Part X, Chapter 3 of the Communications and Multimedia Act 1998. Under Section 246 of the Communications and Multimedia Act 1998, the Malaysian Communications and Multimedia Commission may investigate "the activities of a licensee or other person material" to ensure compliance with the Communications and Multimedia Act 1998 or its subsidiary legislation.

In the **energy supply sectors**, the investigation powers and procedures of the Energy Commission are specified under Part III, Sections 4A to 8 of the Electricity Supply Act 1990 [**Act 447**] and Part IV, Sections 4A to 9 of the Gas Supply Act 1993 [**Act 501**]. The Energy Commission has the general power to investigate any accident, misconduct, non-compliance and commission of offences under the said Acts and Regulations made under the Acts.

What are the rights and safeguards of the parties?

The Competition Act 2010 guarantees, in particular, confidentiality (Section 21) and privileged communication between a professional legal adviser and his client (Section 22).

In the communications, as there are no specific provisions on the rights and safeguards of the parties in competition-related investigations, it is advisable to refer to the provisions on investigatory powers and limits of the respective authorities' officials, outlined in Part X, Chapter 3 of the Communications and Multimedia Act 1998.

In the energy supply sectors, the rights of any party are safeguarded under the general provisions of the energy supply laws. The powers and procedures of investigation, prosecution of offences in court and the determination of disputes by the Commission under the energy supply laws are to be performed strictly and in accordance with the requirements of the laws and in good faith. In this respect, section 37 of **Act 610** specifies that "The Public Authorities Protection Act 1948 [**Act 198**] shall apply to any action, suit, prosecution or proceedings against the Commission or a member of the Commission, a member of a committee, and an officer or agent of the Commission in respect of any act, neglect or default done or committed by him in good faith or any omission omitted by him in good faith, in such capacity."

Is there any leniency programme?

Section 41 of the Competition Act 2010 introduces a leniency regime.

A reduction of up to a maximum of one hundred percent of the applicable penalty applies to any enterprise which has admitted its involvement in an anti-competitive agreement under Section 4(2) and provided information or other form of

co-operation to the Competition Commission. Different percentages of reductions apply depending on (a) whether the enterprise was the first person to bring the suspected infringement to the attention of the Commission; (b) the stage in the investigation at which an involvement in the infringement was admitted or any information or other co-operation was provided; or (c) any other appropriate circumstance.

The Communications and Multimedia Act 1998 provide for a leniency programme.

In the energy supply sector, the energy supply laws provide for compounding of offences i.e. reduction of up to 50% of the maximum fine with the result that the offender will not be prosecuted further in court if the compound is awarded. For electricity supply under **Act 447**, the compounding provisions of Part IX section 43 allows the Chairman of the Energy Commission with the written consent of the Public Prosecutor to compound certain offences, including the offence of obstruction of investigation, access to premises or information or the giving of false information by any person on any matter (section 8).

Under **Act 501**, Part VIII section 34 gives power to the Minister to prescribe by order in the Gazette, any offence pertaining to the supply of gas through pipelines in the Act or any regulation made thereunder as an offence which may be compounded. Pursuant to this, the Gas Supply (Compoundable Offences) Order 2006 [P.U.(A)320] allows for the compounding of all offences except offences relating to investigation, inquiry and obstruction or giving false information to an authorized officer of the Commission (sections 5(4), 29(5) and 30(3) respectively). Consequently, offences by a licensee under the Act, including activities beyond area of supply and non-compliance of licence conditions, may be compounded (subsections 30(2) and 30(4) respectively).

Is it possible to obtain any informal guidance?

For further enquiries please refer to the Guidelines and Publications on the Competition Act 2010 which can be obtained at www.mycc.gov.my or contact:

Malaysia Competition Commission (MyCC)
Level 15, Menara SSM, No. 7 Jalan Stesen
Sentral 5, KL Sentral,
59623 Kuala Lumpur, Malaysia

 +603 22732277
 +603 2272 1692

Specific guidance on the application of the Communications and Multimedia Act 1998 can be obtained at the following contacts:

Malaysian Communications and
Multimedia Commission
Competition & Access Department
Market Regulation Division
63000 Cyberjaya, Malaysia

 + 603 8688 8000
 + 603 8688 1001
 Aduan_SKMM@cmc.gov.my
 www.skmm.gov.my

The relevant Unit and Department in the Energy Commission can be contacted as follows:

Energy Commission
Legal Unit
Energy Management and
Industry Development Department
7th and 5th Floors
No. 12 Jalan Tun Hussein
Precinct 2
62100 Putrajaya MALAYSIA
 + 603 88708500
 + 603 88888648
 www.st.gov.my

Adjudication

What are the final decisions?

Under the Competition Act 2010, further to the investigation the Competition Commission may take:

- (a) a decision that there is no infringement under the Act, in which case the Commission shall give notice of the decision to any person affected by the decision, stating the reason for the decision (Section 39);
- (b) a decision finding an infringement under the Act and requiring that the infringement be ceased immediately. The decision may specify the appropriate steps which are required for bringing the infringement to an end, and may impose a financial penalty or give any other appropriate direction; the Commission shall state the reasons for the decision (Section 40).

Under Section 43, the Competition Commission may also, subject to possible conditions, accept undertakings to do or refrain from doing anything, as the Commission considers appropriate, in which case the Commission shall close the investigation without making any finding of infringement and shall not impose a penalty.

In the **communications markets**, under Section 139 of the Communications and Multimedia Act 1998, the Communications and Multimedia Commission may direct a licensee with a dominant position in a communications market to cease a conduct which has, or may have, the effect of substantially lessening competition. The Communications and Multimedia Commission may also seek interim or interlocutory injunctions under Section 142 or seek the imposition of fines under Section 143, against a licensee engaging in any conduct prohibited under Section 133. The offence is prosecuted by the Public Prosecutor in the Sessions Court.

In the **energy supply** sectors the Energy Commission may make use of the general powers of determining disputes, holding enquiries and investigation and prosecution of offences in accordance with the energy supply laws. For electricity supply, **Act 447** provides for such powers in sections 30, 34, 5 to 7 and 42 respectively. Under **Act 501**, similar provisions are found under sections 29, 5 to 8 and 9 respectively.

What are the sanctions?

Under Section 40 of the Competition Act 2010, the Competition Commission may impose a financial penalty not exceeding ten percent of the worldwide turnover of an enterprise over the period during which an infringement occurred, or give any other appropriate direction.

Specific provisions on general penalties, compounding of offences and offences by body corporate are established under Sections 61 to 63.

In the **communications markets**, under Section 143, a person who contravenes any of the prohibitions under the Act shall be liable to a fine not exceeding five hundred thousand MYR and/or to imprisonment for a term not exceeding five years and shall also be liable to a further fine of one thousand MYR for every day or part of a day during which the offence is continued after conviction.

In the **energy supply sectors**, there are provisions on the sanctions applicable to include anti-competitive conduct or abuse of monopoly, especially by licensees. Under **Act 447**, Part IX subsections 37(6) and (7) provides for the offence by a licensee of carrying out activities outside the area of supply and the offence of non-compliance with licence conditions for which the punishments are provided i.e. RM 5,000.00 fine and RM 10,000.00 fine respectively. These offences are non-compoundable.

For the compoundable offence of obstruction and giving of false information under section 8, the punishment is a fine not exceeding RM 5,000.00 or imprisonment for a term not exceeding 2 years or both.

Under **Act 501**, Part VIII subsections 30(2) and (4) provides for the compoundable offence by a licensee of carrying out activities outside the area of supply and the offence of non-compliance with licence conditions for which the punishments are provided i.e. a fine not exceeding RM 100,000.00 or imprisonment not exceeding 5 years or both and RM 10,000.00 fine respectively.

Judicial review

Can the enforcement authorities' decisions be appealed?

Section 44 of the Competition Act 2010 establishes a **Competition Appeal Tribunal**, which shall have exclusive jurisdiction to review any decision made by the Competition Commission under Sections 35 (interim measures), 39 (finding of non-infringement) and 40 (finding of an infringement).

Under Section 53 of the Act, pending the decision of an appeal by the Competition Appeal Tribunal, a decision of the Competition Commission is enforceable, except where a stay of decision has been granted by the Competition Appeal Tribunal.

Under Section 58(2) of the Act, the Competition Appeal Tribunal may confirm or set aside the appealed decision, or any part of it, and may: (a) remit the matter to the Commission; (b) impose or revoke, or vary the amount of, a financial penalty; (c) give such direction, or take such other step as the Commission could itself have given or taken; or (d) make any other decision which the Commission could itself have made. A decision of the Competition Appeal Tribunal is final.

In the **communications markets**, according to Section 18 of the Communications and Multimedia Act 1998, the Appeal Tribunal, established by the Ministry, may review any decision or direction (but not a determination) of the Communications and Multimedia Commission. Under Section 18 (2) of the Act, any decision by the Appeal Tribunal is final and binding on the parties to the appeal and it is not subject to further appeal.

In the **energy supply sectors**, the energy supply laws provide for appeals to the Minister from the decisions of the Energy Commission. Under **Act 447**, the relevant provisions are in Part VIII subsection 34(2) where any person aggrieved by

a decision of the Commission "may apply to the Minister for a re-consideration of the matter in dispute."

Under **Act 501**, similar provisions are found under Part VII subsection 29(8).

Private enforcement

Are private actions for damages available?

Under Section 64 of the Competition Act 2010, any person who suffers loss or damage directly as a result of an infringement of any prohibition under Part II shall have a right of civil action for damages against any enterprise which is, or which has been, party to the infringement. The action may be brought regardless of whether the applicant dealt directly or indirectly with the enterprise.

In the energy supply sectors, the licensees which supply electricity or gas, as the case may be, hold a monopoly in their respective sectors. As such they cannot cease or reduce the supply of electricity or gas to customers except in the circumstances as provided under the laws since the customers have no other source of supply.

Under **Act 447**, Part IV subsection 17(3) allows for a claim for damage to person or property where "the damage or cessation is shown to have resulted from negligence on the part of persons employed by the licensee, his agents or servants, as the case may be, or from his faulty construction of the installation."

Under **Act 501**, Part VI subsection 20(4) allows for a claim for "damage to any person or property for any cessation or reduction of the supply of gas which is shown to have resulted from negligence on the part of persons employed by the licensee, his agents or servants, as the case may be, or from his faulty construction of the pipeline or installation."

Exclusions

Is there any exclusion from the application of the Law?

According to the Second Schedule of the Competition Act 2010, the above prohibitions do not apply to the following instances:

- (a) An agreement or conduct to the extent to which it is engaged in an order to comply with a legislative requirement;
- (b) Collective bargaining activities or collective agreements in respect of employment terms and conditions and which are negotiated or concluded between parties, which include both employers and employees or organisations established to represent the interests of employers or employees;
- (c) An enterprise entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibitions would obstruct the performance, in law or in fact, of the particular tasks assigned to that enterprise.

The Commissions and Multimedia Act do not provide for specific exclusions.

For the energy supply sectors, this matter has already been covered under the exemptions as aforementioned (page 24).



MYANMAR

Legislation and Jurisdiction

The Law

What is the relevant legislation?

Myanmar does not have a comprehensive competition law.

The New **Constitution**, at Article 36b, provides that Myanmar shall “protect and prevent acts that injure public interests through monopolization or manipulation of prices by an individual or group with intent to endanger fair competition in economic activities”.

Furthermore, under section 27 of the **Contract Act** of 1872, “any agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void”. The prohibition does not apply to non-compete agreements in the framework of the sale of goodwill to a competing business, within reasonable limits.

Are there proposals for reform?

Myanmar is preparing to adopt competition policy and law by 2015.

The Authorities

Who is the enforcement authority?

There is currently no competition authority.

Are there any sector-specific regulatory authorities (RAs) with competition enforcement powers?

There are no RAs with competition enforcement powers.

 THE PHILIPPINES

Legislation and Jurisdiction

The Law

What is the relevant legislation?

The Philippines adopts a sectoral approach to competition policy and law enforcement with over 30 competition laws, industry-specific and consumer welfare laws addressing competition-related practices. The main sources are as follows:

1. The 1987 Constitution;
2. The Act to Prohibit Monopolies and Combinations in Restraint of Trade (Act No. 3247);
3. The Revised Penal Code (Act No. 3815), as amended;
4. The New Civil Code (Republic Act No. 386);
5. Amending the Law Prescribing the Duties and Qualifications of Legal Staff in the Office of the Secretary of Justice (Republic Act No. 4152); and
6. Executive Order No. 45, series of 2011, Designating the DOJ as the Competition Authority.

To whom does it apply?

The provisions of the Revised Penal Code, as amended, apply to **“any person”**. Special laws and statutes also apply to “any person”, while other civil and administrative provisions address both natural and legal persons.

Which practices does it cover?

The above legislations cover anti-competitive practices, both multilateral (such as combina-

tions in restraint of trade) and unilateral (such as monopolization, hoarding, profiteering).

Are there proposals for reform?

Recognizing the need to promote competition and level the playing field, President Benigno S. Aquino III signed Executive Order No. 45, series of 2011, designating the Department of Justice as the Competition Authority. E.O. No. 45 created the Office for Competition (OFC) under the Secretary of Justice to carry out, among others, the duty and responsibility to investigate all cases involving violations of competition laws and prosecute violators to prevent, restrain and punish monopolization, cartels and combinations in restraint of trade.

Legislative efforts toward the adoption of a comprehensive competition law continue. The 15th Congress beginning in June 2010 saw the filing of several bills seeking to bring under one body authority over competition matters. The Senate had consolidated the various versions of the bills filed in its chamber with the DOJ serving as the competition authority. The House of Representatives had also consolidated bills seeking to establish a Commission.

The Authorities

Who is the enforcement authority?

Executive Order No. 45 designated the DOJ as the country’s competition authority and established the OFC. The sector regulators will continue to enforce their respective sector’s competition policies.

The functions of the DOJ-OFC under E.O. 45 are the following:

1. Investigate all cases involving violations of competition laws and prosecute violators to prevent, restrain and punish monopolization, cartels and combinations in restraint of trade;
 2. Enforce competition policies and laws to protect consumers from abusive, fraudulent, or harmful corrupt business practices;
 3. Supervise competition in markets by ensuring that prohibitions and requirements of competition laws are adhered to, and to this end, call on other government agencies and/or entities for submission of reports and provision for assistance;
 4. Monitor and implement measures to promote transparency and accountability in markets;
 5. Prepare, publish and disseminate studies and reports on competition to inform and guide the industry and consumers; and
 6. Promote international cooperation and strengthen Philippine trade relations with other countries, economies, and institutions in trade agreements.
2. Electric Power Industry Reform Act - Energy Regulatory Commission (ERC);
 3. Public Telecommunications Policy Act - National Telecommunications Commission (NTC);
 4. Revised Charter of the Philippine Ports Authority - Philippine Ports Authority (PPA)
 5. Domestic Shipping Development Act - Maritime Industry Authority (MARINA);
 6. Consumer Act and Price Act - Department of Trade and Industry (DTI);
 7. Tariff and Customs Code of the Philippines - Tariff Commission (TC);
 8. Securities Regulation Code, Corporation Code and Revised Securities Act - Securities and Exchange Commission (SEC);
 9. Civil Aeronautics Act - Civil Aeronautics Board (CAB);
 10. New Central Bank Act - Bangko Sentral ng Pilipinas (BSP);
 11. Insurance Code - Insurance Commission (IC); and
 12. National Food Authority Act - National Food Authority (NFA).

Are there any sector-specific regulatory authorities (RAs) with competition enforcement powers?

Yes. Enforcement of competition-related laws/statutes and, consequently, regulation or monitoring of unfair trade practices and anti-competitive behaviour is vested in different agencies as mandated by several laws, some of which are the following:

1. Downstream Oil Industry Deregulation Act - Department of Energy (DOE);

Anticompetitive practices

Agreements

Which agreements are prohibited?

Article XII, Section 19, of the Constitution establishes that “the State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or un-

fair competition shall be allowed". It constitutes a statement of public policy on monopolies and on combinations in restraint of trade.

Article 186 of the Revised Penal Code, as amended, sanctions:

- "any person who shall enter into any contract or agreement or shall take part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition in the market".
- "any person who [...] shall combine with any other person or persons to monopolize and merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other article to restrain free competition in the market".
- "any person who, being a manufacturer, producer, or processor of any merchandise or object of commerce or an importer of any merchandise or object of commerce from any foreign country, either as principal or agent, wholesaler or retailer, shall combine, conspire or agree in any manner with any person likewise engaged in the manufacture, production, processing, assembling or importation of such merchandise or object of commerce or with any other persons not so similarly engaged for the purpose of making transactions prejudicial to lawful commerce, or of increasing the market price in any part of the Philippines, of any such merchandise or object of commerce manufactured, produced, processed, assembled in or imported into the Philippines, or of any article in the manufacture of which such manufactured, produced, or imported merchandise or object of commerce is used".

The Supreme Court has defined "combination in restraint of trade" as "an agreement or under-

standing between two or more persons, in the form of a contract, trust, pool, holding company, or other form of association, for the purpose of unduly restricting competition, monopolizing trade and commerce in a certain commodity, controlling its production, distribution and price, or otherwise interfering with freedom of trade without statutory authority" (Francisco S. Tatad vs. The Secretary of the Department of Energy and the Secretary of the Department of Finance, G.R. No. 124360, November 5, 1997, and Edcel C. Lagman, et al. vs. Hon. Ruben Torres, et al., G.R. No. 127867, November 5, 1997). The concept of restraint of trade embraces "acts, contracts, agreements or combinations which restrict competition or obstruct due course of trade" (Avon Cosmetics Inc., et. al. vs. Leticia H. De Luna, G.R. No. 153674, December 20, 2006). The Supreme Court has also specified that "where two or three or a few companies act in concert to control market prices and resultant profits, the monopoly is called an oligopoly or cartel. It is a combination in restraint of trade" (Congressman Enrique Garcia vs. Hon. Renato Corona, G.R. No. 132451, December 17, 1999).

In addition, Section 5, Paragraph 3, of the Price Act prohibits "cartels", which are defined as "any combination of or agreement between two or more persons engaged in the production, manufacture, processing, storage, supply, distribution, marketing, sale or disposition of any basic necessity or prime commodity designed to artificially and unreasonably increase or manipulate its price".

Furthermore, Section 11 of the Downstream Oil Industry Deregulation Act prohibits "cartelization", defined as "any agreement, combination or concerted action by refiners, importers and/or dealers, or their representatives, to fix prices, restrict outputs or divide markets, either by products or by areas, or allocate markets, either by products or by areas, in restraint of trade or free competition, including any contractual

stipulation which prescribes pricing levels and profit margins”.

Which agreements may be exempted?

Combinations in restraint of trade are illegal per se. No exemption is allowed.

Is there any formal notification requirement and to which authority should a notification be made?

There are no notification requirements.

Monopoly and dominant position

Is monopoly or dominant position regulated?

Article XII, Section 19, of the Constitution provides that the State shall regulate or prohibit monopolies when the public interest so requires. Therefore, it does not prohibit monopolies per se, but requires a previous determination as to whether the public interest requires a monopoly.

Article 186(2) of the Revised Penal Code, as amended, sanctions “any person who shall monopolize any merchandise or object of trade or commerce”.

None of the applicable provisions refers to a dominant position. A special case exists, however, for the energy sector. Section 45 of the Electric Power Industry Reform Act mandates the regulator to enforce the following safeguard: “No company or related group can own, operate or control more than thirty percent (30%) of the installed generating capacity of a grid and/or twenty-five percent (25%) of the national installed generating capacity. “Related group” includes a person’s business interests, including its subsidiaries, affiliates, directors or officers or any of their relatives by consanguinity or affinity, legitimate or common law, within the fourth civil degree”.

What is a monopoly or a dominant position?

The Supreme Court has defined monopoly as „a privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right (or power) to carry on a particular business or trade, manufacture a particular article, or control the sale of a particular commodity“ (Demosthenes Agan vs. Philippine International Air Company, et.al., G.R. No. 155001,155407, 15566, May 5, 2003).

When are monopoly and dominant positions prohibited?

According to Article XII, Section 19 of the Constitution, it is for the government (“the State”) to prohibit specific monopolies, based on the public interest. Article 186(2) of the Revised Penal Code, as amended, prohibits monopolization without exceptions. The Supreme Court has made it clear that “monopolies are not per se prohibited by the Constitution but may be permitted to exist to aid the government in carrying on an enterprise or to aid in the performance of various services and functions in the interest of the public”, and has specified that “a determination must first be made as to whether public interest requires a monopoly. As monopolies are subject to abuses that can inflict severe prejudice to the public, they are subject to a higher level of state regulation than an ordinary business undertaking” (Agan case, quoted above).

Can abuses of monopoly or dominant position be exempted?

To reiterate, the Revised Penal Code, as amended, prohibits monopolization without exceptions.

Other unilateral practices

Section 5 of the Price Act prohibits:

- Hoarding, which is defined as “the undue accumulation by a person or combination of persons of any basic commodity beyond his or their normal inventory levels or the unreasonable limitation or refusal to dispose of, sell or distribute the stocks of any basic necessity of prime commodity to the general public or the unjustified taking out of any basic necessity or prime commodity from the channels of reproduction, trade, commerce and industry” (Paragraph 1); and
- Profiteering, which is defined as “the sale or offering for sale of any basic necessity or prime commodity at a price grossly in excess of its true worth”.

Section 11 of the Downstream Oil Industry Deregulation Act prohibits predatory pricing, defined as “selling or offering to sell any oil product at a price below the seller’s or offeror’s average variable cost for the purpose of destroying competition, eliminating a competitor or discouraging a potential competitor from entering the market”. However, pricing below average variable cost in order to match the lower price of a competitor and not for the purpose of destroying competition is not deemed to be predatory pricing.

Merger control

Mergers of listed companies require the prior approval of the Securities and Exchange Commission (SEC) before becoming effective. Title IX of the Corporation Code of the Philippines prescribes the process for mergers and consolidations. In particular, Section 79 (effectivity of merger or consolidation) states that “The articles of merger or of consolidation,

signed and certified as herein above required, shall be submitted to the SEC in quadruplicate for its approval: Provided, That in the case of merger or consolidation of banks or banking institutions, building and loan associations, trust companies, insurance companies, public utilities, educational institutions and other special corporations governed by special laws, the favourable recommendation of the appropriate government agency shall first be obtained.” If the SEC is satisfied that the merger or consolidation of the corporations concerned is not inconsistent with the provisions of this Code and existing laws, it shall issue a certificate of merger or of consolidation, at which time the merger or consolidation shall be effective.

If, upon investigation, the SEC has reason to believe that the proposed merger or consolidation is contrary to or inconsistent with the provisions of this Code or existing laws, it shall set a hearing to give the corporations concerned the opportunity to be heard. Written notice of the date, time and place of hearing shall be given to each constituent corporation at least two (2) weeks before said hearing. The Commission shall thereafter proceed as provided in this Code.

What is a merger?

A merger is the fusion of two or more corporations into a single corporation which shall be one of the constituent corporations, or into a new single corporation which shall be the consolidated corporation. A merger only becomes effective upon the issuance by the SEC of a certificate of merger.

Are foreign-to-foreign mergers included?

Foreign to foreign mergers are not included. However, one or more foreign corporations authorized to transact business in the Philippines may merge or consolidate with any domestic corporation or corporations if it is permitted un-

der Philippine laws and by the law of its incorporation, provided that the requirements on merger or consolidation as provided in the Corporation Code are followed. The domestic corporation shall be the surviving entity.

Do mergers need to be notified?

Mergers of listed companies need notification. As noted above, notification on merger is done when the articles of merger or of consolidation, signed and certified, are submitted to the SEC in quadruplicate for its approval. In case of merger or consolidation of banks or banking institutions, building and loan associations, trust companies, insurance companies, public utilities, educational institutions and other special corporations governed by special laws, the favourable recommendation of the appropriate government agency shall first be obtained.

Are there any filing fees?

Yes. Filing fees at the SEC shall be based on the net asset to be transferred by or the shareholders' equity of the absorbed corporation.

Each sector regulator has its own process for obtaining a favourable recommendation for mergers. The filing fees, if any, are dependent on their own regulations.

Are there sanctions for not notifying?

In the absence of a notification, the merger shall not be recognized, as if no merger took place. The concerned corporations may also be held liable for violating the Philippine Corporation Code.

Section 144 of the said Code states that "Violations of any of the provisions of this Code or its amendments not otherwise specifically penalized therein shall be punished by a fine of not less than one thousand (P1,000.00) pesos but not more than ten thousand (P10,000.00) pesos or by imprisonment for not less than thirty (30) days but not

more than five (5) years, or both, in the discretion of the court. If the violation is committed by a corporation, the same may, after notice and hearing, be dissolved in appropriate proceedings before the SEC: Provided, That such dissolution shall not preclude the institution of appropriate action against the director, trustee or officer of the corporation responsible for said violation: Provided, further, That nothing in this section shall be construed to repeal the other causes for dissolution of a corporation provided in this Code".

How long does it take for approval or exemption?

It takes two weeks to one month for the SEC to approve a merger, depending on the adequacy of the submissions.

Is there any obligation to suspend the transaction pending the outcome of the assessment (standstill clause)?

Under Section 79 of the Corporation code, the merger or consolidation shall be effective only after the SEC has issued a certificate of merger or of consolidation.

Which mergers are prohibited?

Prohibited mergers are those that are inconsistent with or violate the Corporation Code and other relevant laws as provided under Section 79 of the Code, and those that are established for the purpose of putting up cartels and the promotion of combinations in restraint of trade or unfair competition.

What happens if prohibited mergers are implemented?

Prohibited mergers will not be recognized, as if no merger took place. The concerned corporations may also be penalized with administrative sanctions, including the payment of fines and revocation of their certificate of registration.

Procedure

Investigations

How does an investigation start?

The DOJ-Office for Competition (OFC), by virtue of Executive Order No. 45, may commence an investigation upon complaint under oath from any person or motu proprio. Investigations for criminal violations under the Revised Penal Code, as amended, and other special laws with penal provisions are undertaken by the National Prosecution Service (NPS) of the DOJ. The sector regulators, in the exercise of their administrative powers, generally conduct investigations upon complaint or motu proprio.

What are the procedural steps and how long does the investigation take?

The OFC as competition authority shall undertake an initial assessment of all cases received to determine the necessity of further investigation. During this phase, the OFC may make use of investigative measures such as request for information. The OFC shall conduct investigation within 90 calendar days. Complaints involving purely technical regulation filed with the OFC shall be formally endorsed to the appropriate sector regulator.

There shall be an ad hoc team composed of sector regulators and chaired by the OFC, to undertake joint investigation of cases, consistent with existing laws. The procedure for joint investigation shall be governed by the Guidelines for OFC – Sector Regulators Cooperation and Guidelines for Complaints Intake and Case Handling.

Based on the OFC's investigation report, as approved by the Secretary of Justice, the filing of administrative, civil and/or criminal charges,

may be recommended. Within 15 calendar days, the OFC shall prepare and file the appropriate complaint/s.

Administrative cases shall be filed with the appropriate government agency while civil cases shall be filed with the court of competent jurisdiction. Criminal complaints shall be filed with the NPS of DOJ for preliminary investigation.

What are the investigation powers?

The OFC has the authority to request for information addressed in writing to the respondent or any person or entity which may have information relevant to the case, indicating the legal basis and the purpose of the request as well as the sanctions for supplying incorrect information as provided by law. It may require the submission of additional documents from the complainant.

Subject to the necessary processes, including the issuance of search warrants by the court, the OFC may enter premises and inspect any pertinent document and/or record pursuant to the purpose of the investigation and secure certified true copies of any document necessary for the conduct of the investigation and/or the preparation of the investigation report.

As allowed by law, the OFC shall sanction any act committed by the respondent under investigation or by any of its directors, officers, employees or agents that is intended to or shall prevent, impede or obstruct the exercise by the investigator/s of the foregoing authority.

On the other hand, the preliminary investigation power of the public prosecutor refers to a determination whether probable cause exists to hold the respondent for trial for criminal violations.

Each sector regulator, in the exercise of its administrative powers, has its own process for conducting investigations.

What are the rights and safeguards of the parties?

Parties have the right to due process, both procedural and substantive. The rights and safeguards of the parties in civil and criminal procedures are provided for in the Rules of Court, Revised Penal Code, as amended, and the New Civil Code.

Is there any leniency programme?

The leniency programme is being formulated and is expected for completion by the end of 2013.

Is it possible to obtain any informal guidance?

Yes, the OFC, in accordance with the implementing guidelines of Executive Order No. 45, series of 2011, may issue advisory opinion/s to provide guidance to businesses, industry associations, consumers and other related stakeholders.

Adjudication

What are the final decisions?

Final decisions vary according to the jurisdiction. Violations prosecuted under the Revised Penal Code, as amended, and proceedings under the New Civil Code are decided by the court. Parties are allowed judicial recourse up to the Supreme Court. Other violations will be adjudicated by an administrative decision of the competent authority.

What are the sanctions?

For violations of criminal laws and other special laws with penal provisions, the sanctions are either imprisonment and/or fines.

Those convicted for violating Article 186 of the Revised Penal Code, as amended, shall suffer the penalty of prison correctional in its minimum

period and/or a fine ranging from two hundred to six thousand PHP. The penalty of prison mayor in its maximum and medium periods applies where "the offence affects any food substance, motor fuel or lubricants, or other articles of prime necessity".

Those convicted for violating the Downstream Oil Industry Deregulation Act shall suffer penal sanctions under Section 24 of the Act (i.e. three months to one year imprisonment and a fine ranging from fifty thousand PHP to three hundred thousand PHP).

Those convicted for violating the Price Act shall suffer penal sanctions under Sections 15 and 16 of the Act (i.e. five to fifteen years imprisonment and a fine ranging from five thousand PHP to two million PHP for price manipulation and one to ten years imprisonment and/or a fine ranging from five thousand PHP to one million PHP, or both, for violating price ceilings).

Violations of the Corporation Code, particularly on merger and consolidation, are sanctioned under Section 144 of the Code.

Any person who is found guilty of any of the prohibited acts pursuant to Section 45 (Cross Ownership, Market Power Abuse and Anti-Competitive Behavior) of the Electric Power Industry Reform Act (EPIRA) shall suffer the penalty of prison mayor and fine ranging from ten thousand PHP to ten million PHP, or both, at the discretion of the court.

The EPIRA further states that "If the offender is a government official or employee, he shall, in addition, be dismissed from the government service with prejudice to reinstatement and with perpetual or temporary disqualification from holding any elective or appointive office. If the offender is an alien, he may, in addition to the penalties prescribed, be deported without further proceedings after service of sentence".

Judicial review

Can the enforcement authorities' decisions be appealed?

The appeal system varies according to the authority in charge of the adjudication. Reference may be made to the Rules of Court.

Nonetheless, decisions of lower courts and administrative bodies are appealable. In case of lower courts, their decisions are appealable to higher courts. In case of administrative bodies, the appeal process is governed by the rules related to their jurisdiction. Appeals can also be brought to the Office of the President, following the principle of exhaustion of administrative remedies.

Private enforcement

Are private actions for damages available?

Private actions are available under Article 28 of the New Civil Code, which establishes that “unfair competition in agricultural, commercial or industrial enterprises or in labor through the use of force, intimidation, deceit, machination or any other unjust, oppressive or highhanded method shall give rise to a right of action by the person who thereby suffers damage”. This includes the right to prove a breach in order to seek damages

In addition, Section 6 of the Act Prohibiting Monopolies and Combinations in Restraint of Trade provides for recovery of treble damages for civil liability arising from anti-competitive behavior, plus the costs of the suit and a reasonable attorney's fee.

Exclusions

Is there any exclusion from the application of the Law?

Article 8 of the Cooperative Code establishes that “no cooperative or method or act thereof which complies with this Code shall be deemed a conspiracy or combination in restraint of trade or an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily in violation of any of the laws of the Philippines”.

Section 45 of the Electric Power Industry Reform Act provides an exemption for isolated grids that are not connected to the high voltage transmission system regarding the ownership, operation and control limitations of the installed generation capacity.



SINGAPORE

Legislation and jurisdiction

The Law

What is the relevant legislation?

The relevant legislation is the Competition Act (Chapter 50B), together with the following regulations/orders:

- Competition Regulations;
- Competition (Notification) Regulations;
- Competition (Transitional Provisions for Section 34 Prohibition) Regulations;
- Competition (Fees) Regulations;
- Competition (Composition of Offences) Regulations;
- Competition (Appeals) Regulations;
- Competition (Financial Penalties) Order 2007; and
- Competition (Financial Penalties) (Amendment) Order 2010.

The Competition Act (the “Act”) and the relevant regulations/orders are available at the Competition Commission of Singapore (CCS) website (www.ccs.gov.sg, under “Legislation”).

CCS has also issued a set of 13 guidelines in order to provide greater transparency and clarity on how CCS will administer and enforce the Competition Act. They are available at CCS’ website (www.ccs.gov.sg, under “legislation” > CCS Guidelines).

To whom does it apply?

The Act applies to **undertakings**, i.e., any na-

tural or legal person (including individuals operating as sole traders, businesses, companies, firms, partnerships, societies, co-operatives, business chambers, trade associations or even non-profit organizations) capable of engaging in economic activities, regardless of its legal and ownership status and the way in which it is financed (Sections 2 and 33 of the Act and CCS Guidelines on the Major Provisions, §1.1 and §2.5).

Which practices does it cover?

Part III of the Act covers the following practices:

- **anti-competitive agreements**, which include decisions by associations and concerted practices (Section 34 of the Act);
- **abuse of a dominant position** (Section 47 of the Act); and
- **mergers and acquisitions that substantially lessen competition** (Section 54 of the Act)

Are there proposals for reform?

There are no proposals for reform at the date of publication. For the latest information please refer to CCS website at www.ccs.gov.sg.

The Authority

Who is the enforcement authority?

The enforcement authority is the **Competition Commission of Singapore (CCS)**, an independent statutory board under the Ministry of Trade and Industry (MTI).

CCS investigates and adjudicates anti-competitive practices. It also undertakes outreach

activities to promote competition and advises the Government on competition-related issues (Section 6 of the Act).

Are there any sector-specific regulatory authorities (RAs) with competition enforcement powers?

In Singapore, the following RAs have enforcement powers under their laws or competition codes:

- Civil Aviation Authority of Singapore (www.caas.gov.sg): regulation of airport services under the Civil Aviation Authority of Singapore Act 2009 (Act No. 17 of 2009) and Airport Competition Code;
- Energy Market Authority of Singapore (www.ema.gov.sg): regulation of electricity and gas services under the Energy Market Authority of Singapore Act (Chapter 92B), the Electricity Act (Chapter 89A) and the Gas Act (Chapter 116A);
- Infocomm Development Authority of Singapore (www.ida.gov.sg): regulation of telecommunications and postal services under the Infocomm Development Authority of Singapore Act (Chapter 137A), the Telecommunications Act (Chapter 323), the Postal Services Act (Chapter 237A), the Telecom Competition Code and the Postal Competition Code;
- Media Development Authority of Singapore (www.mda.gov.sg): regulation of media services under the Media Authority of Singapore (Chapter 172) and Code of Practice for Market Conduct in the Provision of Mass Media Services;
- Singapore Police Force (www.spf.gov.sg): regulation of auxiliary police force services under the Police Force Act (Chapter 235).

Anticompetitive practices

Agreements

Which agreements are prohibited?

Section 34 of the Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices, which have the object or effect of appreciably preventing, restricting or distorting competition within Singapore.

Section 34(2) provides for an illustrative list of such agreements which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The prohibition applies notwithstanding that the agreement was entered outside of Singapore, or that the party to the agreement is outside Singapore (Section 33(1) of the Act).

Only horizontal agreements are prohibited under Section 34. Vertical agreements, as defined in the Third Schedule to the Act, are excluded from the Section 34 prohibition (please see the section on Exclusions, under “Third Schedule” or refer to CCS Guidelines on Section 34 prohibition).

Which agreements may be exempted?

Section 36 provides that the MTI may issue block exemption orders to exclude particular categories of agreements, from the section 34 prohibition on anti-competitive agreements, decisions and practices, which contributes to —

- (a) improving production or distribution; or
- (b) promoting technical or economic progress,

but which does not -

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
- afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

The block exemption order may impose conditions or obligations subject to which the exemption is granted. The only block exemption currently in force covers liner shipping agreements, which is valid until 31 December 2015.

Specified goods and services are excluded from the Section 34 prohibition under the Third Schedule to the Act (please see the section on Exclusions, under “Third Schedule”).

Is there any formal notification requirement and to which authority should a notification be made?

Undertakings may apply in writing to CCS for a **block exemption**.

Otherwise, undertakings may (but are not required to) notify their agreements (with respect to the section 34 prohibition) or conduct (with respect to the Section 47 prohibition) and formally apply to CCS for either:

- **guidance** as to whether the agreement is likely to infringe the Act (Sections 43);
- **guidance** as to whether the conduct is likely to infringe the Act (Sections 50);
- **decision** as to whether the agreement infringes the Act (Sections 44);
- **decision** as to whether the conduct infringes the Act (Sections 51);

if they have serious concerns as to whether they are infringing the Act’s prohibitions.

Notification cannot be made in respect of prospective agreements (i.e. agreements where the parties have yet to enter into the agreement) or prospective conduct.

Is there a notification form?

Notification forms for guidance or decision from CCS can be found at CCS website (www.ccs.gov.sg, under “Reporting to CCS> Seeking Guidance and Decision”). Notifying parties are required to submit Form 1 and subsequently, if requested by CCS, to submit Form 2 (CCS Guidelines on Filing Notifications for Guidance and Decision with respect to the Section 34 Prohibition and Section 47 Prohibition).

Are there any filing fees?

Please refer to the table below on filing fees (source: CCS website www.ccs.gov.sg, under “Reporting to CCS> Seeking Guidance and Decision”):

| | Initial Fee | Further Fee |
|---------------------------|-------------|-------------|
| Notification for Guidance | SGD 3,000 | SGD 20,000 |
| Notification for Decision | SGD 5,000 | SGD 40,000 |

Is there any obligation to suspend the transaction pending the outcome of the assessment (standstill clause)?

There is no standstill clause. The notification for

guidance or decision provides parties to an agreement with immunity from financial penalties for any infringement of the prohibition occurring during the period beginning from the date on which the notification was given and ending with such date as may be specified in a written notice to the applicant by CCS when the outcome of the notification has been determined (Guidance - Sections 43(4) and 45(4), Decision - 44(3) and 46(4) of the Act). There is no immunity for notifications covering single-firm conduct.

Procedure and timeline

Applications for guidance or decision are made by filling out Form 1 and submitting it to CCS, together with the prescribed initial fee. Where requested by CCS, the applicant must also fill out and submit Form 2, after having submitted Form 1. The information in Form 2 may not be required in all cases. The application forms can be found on CCS website (www.ccs.gov.sg), under "Reporting to CCS> Apply for a guidance or decision".

In cases where Form 2 is submitted, CCS may, within 2 months of receiving Form 2, specify a time frame within which the applicant is to pay CCS a further fee, over and above that which was paid with the initial filing. This further fee will be levied in cases where CCS is of the opinion that the application requires significant analysis. The applicant may choose not to pay the further fee, in which case CCS may then determine the application by not giving guidance or a decision.

The applicant is required to submit the completed Form 1 or Form 2 in both hard and soft copies (stored in CD-Rom) to CCS from 0900 hrs to 1700 hrs on weekdays (except on Public Holidays).

The applicant is required to notify all other parties to the agreement or conduct about the

application, either before the filing with CCS or later, within 7 working days from the filing.

The time taken by CCS to furnish guidance or decisions will depend very much on the nature and complexity of the application, as well as on the volume of applications which have been filed at that point in time.

Please refer to CCS website at www.ccs.gov.sg and CCS Guidelines on Filing Notifications for Guidance and Decision with respect to the Section 34 Prohibition and Section 47 Prohibition for more information.

Monopoly and dominant position

Is monopoly or dominant position regulated?

Section 47 of the Act prohibits undertakings (whether established in Singapore or elsewhere) from abusing their **dominant position** in any market in Singapore.

These practices may refer both to **single dominance** and to **collective dominance**.

What is a dominant position?

A dominant position exists when an undertaking has **substantial market power**. An undertaking's market share is an important factor in assessing dominance but does not, on its own, determine whether an undertaking is dominant. For example, it is also important to consider the positions of other undertakings operating in the same market. Generally, as a starting point, CCS will consider a market share above 60% as likely to indicate that an undertaking is dominant in the relevant market (CCS Guidelines on the Section 47 Prohibition).

When are dominant positions prohibited?

Section 47(2) of the Act provides an illustrative

list of such conduct:

- predatory behaviour towards competitors;
- limiting production, markets, or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Examples of conduct that may amount to an abuse can be found in Annex C of CCS Guidelines on the Section 47 Prohibition.

It is not necessary for the dominant position, the abuse and the effects of the abuse, to be in the same market. Examples of different possible scenarios where the Section 47 Prohibition may apply can be found in §4.6 of CCS Guidelines on the Section 47 Prohibition.

Can abuses of dominant position be exempted?

The Act does not contain provisions for block exemption from the Section 47 Prohibition. Specified goods and services are excluded from the Section 47 prohibition under the Third Schedule to the Act (please see the section on **Exclusions** under “Third Schedule”).

Is there any formal notification requirement and to which authority should a notification be made?

Refer to section on procedures relating to filing a notification for guidance or decision with respect to the section 34 prohibition or the Section 47 prohibition above.

Merger control

What is a merger?

Section 54 of the Act prohibits **mergers**, that have resulted, or may be expected to result, in a substantial lessening of competition within any markets in Singapore.

Section 54(2) of the Act provides that a merger occurs where:

- two or more undertakings, previously independent of each other, merge;
- one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings;
- one undertaking acquires the assets (including goodwill), or a substantial part of the assets, of another undertaking, with the result that the acquiring undertaking is placed in a position to replace or substantially replace the second undertaking in the business (or the part concerned of the business) in which that undertaking was engaged immediately before the acquisition;
- the creation of a joint venture where two or more undertakings establish, on a lasting basis, an autonomous economic entity.

The Act covers both mergers which are already implemented and projects of mergers (referred to as “anticipated mergers”).

The determination of whether a merger exists for the purposes of Section 54 of the Act is based on qualitative rather than quantitative criteria, focusing on the concept of control. These criteria include considerations of both law and fact (Section 54(3) of the Act).

However, Section 54(7) introduces four situations where the acquisition of a controlling interest does not constitute a prohibited merger:

- The person acquiring the control is acting

in its capacity as a receiver or liquidator, or underwriter;

- All of the undertakings involved in the merger are, directly or indirectly, under the control of the same undertaking (intra-group merger);
- Control is acquired solely as a result of a testamentary disposition, intestacy or right of survivorship under a joint tenancy; or
- Securities are acquired on a temporary basis by an undertaking whose normal activities include the carrying out of transactions and the dealing in securities, where the acquiring undertaking exercises its voting rights in respect of the securities: i) with a view to the disposal of the acquired undertaking (or of its assets or securities) within 12 months (or the longer period set by CCS) from the acquisition; and ii) not for the purpose of setting the strategic commercial behaviour of the acquired undertaking (Section 54(8), (9) and (10)).

Are foreign-to-foreign mergers included?

Foreign mergers are included when they have the effect of substantially lessening competition within a market in Singapore (Section 33(1) of the Act).

Do mergers need to be notified?

Notification is not mandatory.

Merging parties are not required to notify mergers or anticipated mergers. They may do so if they have serious concerns as to whether the merger or the anticipated merger has resulted (or may result) in a substantial lessening of competition (SLC).

Merging parties may, on a **voluntary basis**, formally apply to CCS for a decision on whether the

- **Anticipated merger** will infringe the Act, if carried into effect (Sections 57);
- **Merger** has infringed the Act (Sections 58).

In the case of an anticipated merger, notification will not be accepted if the transaction is still confidential (CCS Guidelines on the Substantive Assessment of Mergers, §3.4, and CCS Guidelines on Merger Procedures 2012, §2.5).

In order to help merging parties identify the information needed for a complete submission, as well as any additional useful information to expedite CCS' review of the submission, merging parties intending to make an application may approach CCS for a **pre-notification discussion (PND)** (CCS Guidelines on Merger Procedures 2012 §§ 4.6-4.11).

With the revision of the CCS Guidelines on Merger Procedures in July 2012, CCS has introduced a new service whereby merger parties can obtain confidential advice from CCS as to whether or not a merger raises concerns, subject to the fulfillment of certain conditions. Essentially, businesses that intend to keep their mergers confidential for the time being, but nevertheless wish to get an indication from CCS on whether or not their mergers would infringe the Competition Act could approach CCS for confidential advice.

At the same time, new turnover guidelines that provide greater certainty to SMEs were implemented. The new guidelines make it clear that the CCS is unlikely to investigate a merger situation that involves only small businesses. For greater clarity, small business is defined by turnover. The CCS is unlikely to investigate a merger if the turnover in Singapore of each of the parties in the financial year preceding the transaction is below SGD 5 million, and where the combined worldwide turnover of all of the parties in the financial year preceding the transaction is below SGD 50 million.

The merger notification forms were also streamlined for greater clarity and to be more business-friendly. Applicants should refer to the CCS Guidelines on Merger Procedures 2012 and the Competition (Notification) Regulations before completing the forms. They may also wish to consider the assessment criteria in the forms to ascertain if notification is necessary.

Merger notification forms can be found on CCS website (www.ccs.gov.sg, under “Reporting to CCS > Notifying a Merger – filing a merger notification with CCS”).

Are there any filing fees?

According to the Competition (Fees) Regulations, a fee is charged for filing the notification, depending on the turnover of the undertaking/assets acquired in the merger (i.e., “net aggregate turnover”) and on whether the acquiring party is a SME.

For the following mergers involving SMEs, the fee payable is a standard SGD 5,000:

- in a merger situation under Section 54(2)(a) of the Act, where all the merging undertakings are SMEs; or
- in a merger situation involving the acquisition of undertakings or assets, where the acquiring party is an SME and there is no acquisition of direct or indirect control of the SME arising from the transaction.

In most of the other merger situations, the fees are based on the turnover of the target undertaking or turnover attributed to the acquired asset, and are calculated as follows (source: CCS website www.ccs.gov.sg, under “Reporting to CCS > Notifying a Merger – how much does it cost”):

| Description | Amount of fees |
|---|----------------|
| The turnover is equal to or less than \$200 million | SGD 15,000 |
| The turnover is between \$200 million and \$600 million | SGD 50,000 |
| The turnover is above \$600 million | SGD 100,000 |

More details and updates can be found on CCS website (www.ccs.gov.sg, under “Reporting to CCS > Notifying a Merger”).

Are there sanctions for not notifying?

There are no sanctions for not notifying, as merger notification is **voluntary**.

However, if a merger infringes the Section 54 prohibition, Section 69(2) of the Act provides that CCS may impose a financial penalty if satisfied that the infringement has been committed intentionally or negligently.

How long does it take for approval?

According to the CCS Guidelines on Merger Procedures 2012, the analysis of a merger consists of two phases.

In “Phase 1”, within an indicative timeframe of 30 working days, CCS assesses that the notification form meets all applicable filing requirements, charges the filing fee and makes a quick assessment of the filing. This allows CCS to give a favourable decision for proposed mergers that clearly do not raise any competition concerns under the Act.

If CCS is unable during the Phase 1 review to conclude that the proposed merger does not raise any competition concerns, CCS will provide the applicants(s) with a summary of the key concerns, and upon the filing of a complete Form M2 and response to the Phase 2 information request, CCS will proceed to carry out a more detailed assessment (“Phase 2” review). CCS endeavours to complete “Phase 2” within 120 working days.

Is there any obligation to suspend the transaction pending the outcome of the assessment (standstill clause)?

The merger procedure has no suspensive or holding effect, and merging parties may carry the anticipated merger into effect or proceed with further integration of the merger prior to a decision (CCS Guidelines on Merger Procedures 2012, §4.66).

However, according to Section 58A of the Act, CCS may impose **interim measures** (“directions”), including suspension of the transaction, where it has reasonable grounds that the prohibition will be infringed by an anticipated merger, if carried into effect, or the prohibition has been infringed by a merger, to prevent the merging parties from taking any action that might prejudice CCS’ ability to assess the merger situation and/or to impose the appropriate remedies. Such directions may also be issued as a matter of urgency in order to prevent serious, irreparable damages to a particular person or category of persons or to protect the public interest.

Which mergers are prohibited?

Only mergers which **substantially lessen competition** (SLC) within a market in Singapore are prohibited (Section 54(1) of the Act and Guidelines on the Substantive Assessment of Mergers, §4.3).

There are no specific criteria that automatically makes a proposed merger prohibited. Instead whether a proposed merger is prohibited depends on a range of economic criteria applied to the facts of each particular merger situation.

However, according to §3.6 of the CCS Guidelines on Merger procedures 2012, CCS considers that an SLC is unlikely to result, and CCS is unlikely to investigate a merger situation unless:

- the merged entity has a market share of at least 40%; or

- the merged entity has a market share of between 20% and 40% and the post-merger combined market share of the three largest undertakings is at least 70%.

Mergers may also be approved on the basis of **commitments** presented by the merging parties (Section 60A of the Act).

Some mergers are excluded from the Section 54 prohibition under the Fourth Schedule to the Act (please see the section on Exclusions under “Fourth Schedule”)

What happens if prohibited mergers are implemented?

Under Section 69 of the Act, where CCS finds that the prohibition has been infringed, it may issue such directions as it deems appropriate to result in the prohibited merger from being effected and, where necessary, to remedy, mitigate or eliminate any adverse effects of such infringement, which include (CCS Guidelines on Merger Procedures 2012, §§6.17 to 6.29):

- de-concentration or other modifications;
- divestments;
- requiring the merged entity to enter into agreements designed to prevent or lessen the anti-competitive effects of the merger;
- financial penalties up to 10% of the turnover of each relevant merger party in Singapore for each year of infringement for a maximum period of three years ; and
- guarantees or other appropriate securities

Can mergers be exempted/authorised?

Mergers may be exempted under public interest considerations.

The section 54 prohibitions does not apply to mergers specified in the Fourth Schedule of the Act (please see the section on Exclusions,

under “Fourth Schedule”).

How to apply for an exemption?

The Act provides that merging parties may apply to MTI for exemption on the grounds of **public interest considerations**, within 14 days from CCS’ notice proposing to issue an infringement decision (Sections 57(3), 58(3) and 68(3) of the Act).

Procedure

Investigations

How does an investigation start?

CCS is empowered to commence proceedings (formal investigation), either following a complaint or upon its own initiative.

A general complaint form and a merger complaint form can be found at CCS website (www.ccs.gov.sg, under “Reporting to CCS”).

Parties may submit a complaint to CCS via:

- Online form: <http://www.ccs.gov.sg/content/ccs/en/Reporting-to-CCS/Making-Complaints/Complaint-online-form.html>
- E-Mail: ccs_feedback@ccs.gov.sg
- Post: Competition Commission of Singapore, 45 Maxwell Road, #09-01 The URA Centre, Singapore 069118
- Fax: + 65-6224 6929

For queries on how to complete the Complaint Form, parties may contact CCS’ hotline at 1800-325 8282 for assistance.

CCS accepts anonymous complaints, but complainants are required to provide all the information requested in the complaint form to allow CCS to seek clarifications or further details

necessary for the evaluation of the complaint (Guidelines on the Major Provisions, §8.2).

What are the procedural steps and how long does the investigation take?

CCS may launch a **formal investigation** if there are reasonable grounds for suspecting an infringement (Section 62 of the Act) of any of the prohibitions of the Act.

CCS may also conduct **preliminary enquiries** before launching a formal investigation.

Upon completion of investigation, if CCS proposes to make an infringement decision, CCS shall give written notice of its Proposed Infringement Decision to the affected person and give that person an opportunity to make representation to CCS. CCS may, as it thinks fit, make an infringement decision after considering the representations.

What are the investigation powers of CCS?

Under Sections 63, 64 and 65 of the Act, CCS has the power to:

- require, by notice in writing, the disclosure of documents and information related to any matter relevant to the investigation (no privilege against self-incrimination is granted – Section 66(1)). CCS can take copies of, or extracts from, or seek an explanation of any document produced, with the exemption of legal privileged communications (Section 66(3) and CCS Guidelines on the Powers of Investigation, §7.1);
- enter premises with (Section 65) or without warrant (Section 64). If the premises are occupied by an undertaking under investigation, no advance notice of entry needs to be given. Premises include any vehicle, but do not include domestic premises unless they are used in connection with the affairs of the

business activities or documents related to the business activities are kept there.

According to Section 67, CCS may also impose **interim measures** (“directions”) during investigations, where:

- there are reasonable grounds for suspecting an infringement; and
- it is necessary to act urgently, either to prevent serious, irreparable damage to a particular person or category of persons, or to protect public interest.

In addition, with reference to Section 54 prohibition of the Act, directions may also be imposed for the purpose of preventing any action that may prejudice CCS’ investigations or its ability to give directions under Section 69.

What are the rights and safeguards of the parties?

Section 89 of the Act introduces safeguards to protect the **confidentiality** (“preservation of secrecy”) of information, which may come to the knowledge of CCS when performing its functions and duties:

- containing commercial/business sensitive data;
- containing details of individuals’ private affairs acquired during searches/investigations; or
- relating to matters which have been identified as confidential, unless disclosure is necessary, or lawfully required by any court or the Competition Appeal Board (CAB) or required by law.

The Guidelines on the Major Provisions also introduces safeguards to protect the identity and commercial interests of **complainants** (§8.4).

For these purposes, when providing information or documents to CCS, complainants may:

- clearly identify any confidential information;
- explain the reasons why the information should be treated as confidential; and
- provide confidential information in a separate annex. However, where it is necessary to reveal confidential information for effective handling of complaints, CCS will consult the person who provided the information (§8.5).

Sections 89(5), (6) and (7) introduce **exceptions to disclosure of evidence** and identify the extent to which disclosure is authorized.

Should CCS propose an infringement decision, Section 68 of the Act provides safeguards for the parties involved. The CCS must provide written notice to the party/parties likely to be affected by the decision and to give such parties an opportunity to make representations to the CCS. The Competition Regulations 2007 (§8) also require CCS to provide the relevant party or parties a reasonable opportunity to inspect documents relating to the decision issued.

Parties affected by CCS’ decision may make an appeal to the Competition Appeal Board (CAB), an independent specialized tribunal which may confirm or set aside the decision which is the subject of the appeal. The CAB may also vary or revoke the amount of financial penalties. The functions and powers of the CAB are detailed in Section 72 and 73 of the Act.

The Act also provides for judicial review and private rights of action (elaborated subsequently in this section).

Is there any leniency programme?

According to CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases 2009, lenient treatment is granted to organisations or persons participating or having participated in

cartel activities for providing effective cooperation to CCS, where certain conditions are met, i.e.: i) coming forward with all the information to establish the alleged cartel existence and fully cooperate in the investigations; ii) refraining from further participation in the cartel; and iii) not being an instigator or coercer (§2.2).

Leniency includes:

- **immunity** from financial penalties: granted to undertakings which cooperate before an investigation has started, provided that CCS does not already have sufficient information to establish the existence of the alleged cartel activity (§2.2);
- **reduction of financial penalties up to 100%**: granted to undertakings being the first to come forward, which cooperate after an investigation has started, but before CCS issues a notice of its Proposed Infringement Decision (§3.1);
- **reduction of financial penalties up to 50%**: granted to undertakings which come forward after the first cooperative undertaking, but before CCS issues a notice of its Proposed Infringement Decision (§4.1).

CCS has introduced a **marker system** for leniency applications to obtain immunity or a reduction of up to 100% in financial penalties (§§ from 5.5 to 5.9). A marker protects an undertaking's place in the queue for a given period of time and allows it to gather evidence and necessary information on the cartel activity while maintaining its place in the queue for leniency. The grant of a marker is discretionary, but it is expected to be the norm rather than the exception.

Additional reduction from financial penalties (**Leniency Plus**) may be granted for a cartel member involved in completely separate cartel activities (failing to obtain 100% reduction in respect of the first cartel), where it provides

information on a second cartel. Under the Leniency Plus system, the cartel member may obtain a significant reduction in the financial penalties for the first cartel, which is additional to the reduction which it would have received for its cooperation in the first cartel alone (§6).

Is it possible to obtain any informal guidance?

The Guidelines on Merger Procedures (§§ 3.7, 3.8 and 3.9) allow for (informal) **pre-notification discussion (PND)**, prior to the submission of a merger notification, in order to help merging parties to identify the information needed for a complete submission and make any additional useful queries pertaining to filing procedures. CCS has also introduced a channel whereby merger parties can obtain confidential advice from CCS as to whether or not a merger raises concerns

Undertakings may also obtain formal guidance from CCS in relation to anti-competitive practices (see the above section on Agreements).

Interested parties who require further information/assistance on procedures can call CCS' hotline number (1800-325 8282).

Adjudication

What are the final decisions?

Following the investigation, CCS may issue:

- an **infringement decision** establishing the infringement of the Act (Section 68);
- a **decision** establishing that there are no grounds for action.

What are the sanctions?

Sanctions for infringing the Act include:

- **directions** requiring among others to: i) modify agreement or conduct; ii) terminate the agreement or cease the conduct; or iii) make structural changes to the business of the undertaking involved (Section 69 (1) and (2));
- **financial penalties** provided that the infringement has been committed intentionally or negligently (up to 10% of the turnover in Singapore for each year of infringement, for a maximum of three years) (Section 69(3) and (4)). When setting the amount of penalties, CCS takes into account, among others: i) the seriousness and the duration of the infringement; ii) the deterrent value; and iii) any other aggravating or mitigating factor (CCS Guidelines on Appropriate Amount of Penalties); and
- **criminal sanctions** where a person fails to cooperate with CCS during investigations (e.g., refusing to provide information, destroying or falsifying documents, provide false or misleading information). Such person may be prosecuted in Court and be subject to fine (not exceeding \$10,000) and/or to imprisonment (not exceeding 12 months) or both (Section 83). Section 81 of the Act also refers to criminal offences committed by a “body corporate”, a “partnership” or an “unincorporated association (other than a partnership)”.

Judicial review

Can the enforcement authority’s decisions be appealed?

According to Section 71 of the Act, CCS’ decisions and directions imposing financial penalties may be appealed before the Competition Ap-

peal Board (CAB), an independent specialized tribunal.

The appeal does not have suspensive effect, except against the imposition of, or the amount of, financial penalties (Section 71(2)).

A further appeal from a CAB decision may be made, under Section 74, to the High Court and then to the Court of Appeal, either on a point of law arising from a decision of the CAB or from any decision of the CAB as to the amount of financial penalties.

Private enforcement

Are private actions for damages available?

Section 86 of the Act allows individuals who suffer loss or damage to seek damages for losses incurred following an infringement decision.

According to Section 86(6), actions may be brought before civil courts within the time-limit of two years from CCS’ decision or from the determination of the appeal (if any).

Exclusions

Is there any exclusion from the application of the Law?

Activities of the Government

Under Section 33(4) of the Act, the prohibitions under the Act do not apply to any activity, agreement or conduct undertaken by the Government, any statutory body or any person acting on behalf of the Government or that statutory body in relation to that activity, agreement or conduct. Under Section 33(5), the Act shall apply to such statutory body or person acting on behalf of such statutory body or such

activity, agreement or conduct undertaken by a statutory body or person acting on behalf of the statutory body in relation to such activity, agreement or conduct, as the Minister may, by order published in the Gazette, prescribe.

Exclusions from Section 34 and 47 prohibitions

The Law provides for certain exclusions from Section 34 and Section 47 prohibitions in the Third Schedule to the Act ('Third Schedule'). These are:

- An undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, insofar as the prohibition would obstruct the performance, in law or fact, of the particular tasks assigned to that undertaking;
- An agreement/conduct to the extent to which it is made in order to comply with a legal requirement, that is any requirement imposed by or under any written law;
- An agreement/conduct which is necessary to avoid conflict with an international obligation of Singapore, and which is also the subject of an order by the Minister for Trade and Industry ('Minister');
- An agreement/conduct which is necessary for exceptional and compelling reasons of public policy and which is also the subject of an order by the Minister;
- An agreement/conduct which relates to any goods or services to the extent to which any other written law, or code of practice issued under any written law, relating to competition gives another regulatory authority jurisdiction in the matter (See Section under The Authority, for a list of goods and services under the jurisdiction of another regulatory authority);
- An agreement/conduct which relates to any

of the following specified activities:

- ▶ The supply of ordinary letter and post-card services by a person licensed and regulated under the Postal Services Act (Chapter 237A);
- ▶ The supply of piped potable water;
- ▶ The supply of wastewater management services, including the collection, treatment and disposal of wastewater;
- ▶ The supply of scheduled bus services by any person licensed and regulated under the Public Transport Council Act (Chapter 259B);
- ▶ The supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act (Chapter 263A); and
- ▶ Cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act (Chapter 170A);
- An agreement/conduct which relates to the clearing and exchanging of articles undertaken by the Automated Clearing House established under the Banking (Clearing House) Regulations (Chapter 19, Rg 1); or any related activities of the Singapore Clearing Houses Association;
- Any agreement or conduct that is directly related and necessary to the implementation of a merger;
- Any agreement (either on its own or when taken together with another agreement) to the extent that it results, or if carried out would result, in a merger; and
- Any conduct (either on its own or when taken together with other conduct) to the extent that it results in a merger.

In addition to the above, the Section 34 prohibition does not apply to vertical agreements and agreements which have net economic benefits.

Section 34 of the Act does not apply to **vertical agreements** (see definition in Part I of this Handbook), except for those whose primary object is related to intellectual property rights (IPRs) and other IPRs agreements, such as IP licensing agreements. However, MTI may, by order, apply the Act to vertical agreements if there is cause for concern under the Act (Third Schedule of the Act, §8 and Guidelines on the Section 34 prohibition, §2.12).

Under § 9 of the Third Schedule of the Act and Section 35 of the Act, agreements with **net economic benefits** (i.e. there are economic benefits from the agreement that are greater than the negative effects on competition) are excluded from Section 34 prohibition. In order to be excluded, the agreements must generate net economic benefits by improving production or distribution, or promoting technical or economic progress. The exclusion covers only those agreements leading to restrictions that are absolutely indispensable to achieve these benefits and do not unduly impose restrictions on undertakings or substantially eliminate competition.

Exclusions from the Section 54 prohibition

The Act also provides for certain exclusions from the Section 54 prohibition in the Fourth Schedule to the Act ('Fourth Schedule'). These are:

- A merger:
 - ▶ approved by any Minister or regulatory authority pursuant to any requirement for such approval imposed by any written law;
 - ▶ approved by the Monetary Authority of Singapore pursuant to any requirement for such approval under any written law; or
 - ▶ under the jurisdiction of another regula-

tory authority under any written law relating to competition, or code of practice relating to competition issued under any written law;

- Any merger involving any undertaking relating to any of the following specified activities:
 - ▶ The supply of ordinary letter and post-card services by a person licensed and regulated under the Postal Services Act (Chapter 237A);
 - ▶ The supply of piped potable water;
 - ▶ The supply of wastewater management services, including the collection, treatment and disposal of wastewater;
 - ▶ The supply of scheduled bus services by any person licensed and regulated under the Public Transport Council Act (Chapter 259B);
 - ▶ The supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act (Chapter 263A); and
 - ▶ Cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act (Chapter 170A);
- Any merger with net economic efficiencies.

Enforcement Practices

Please refer to the Annex I - Case Studies.

 THAILAND

Legislation and Jurisdiction

The Law

What is the relevant legislation?

The relevant legislation includes the **Trade Competition Act B.E. 2542 (1999)** (the “Act”) and the following implementing rules:

- Notice on dominant business operators;
- Guidelines on unfair trade practices in the wholesales/retail business.

To whom does it apply?

The Act is of general application and does not make any distinction between corporations and individuals. It applies to any “**business operator**”, defined in Section 3 as “a distributor, producer for distribution, orderer or importer into the Kingdom for distribution or purchaser for production or redistribution of goods or a service provider in the course of business”.

However, under Section 4 of the Act, some categories are excluded from the application of the Act (see below, under “Exclusions”).

Which practices does it cover?

Chapter III of the Act (Sections 25 to 34) covers both anti-competitive practices (agreements, abuse of dominant position and mergers) and some forms of restrictive/unfair trade commercial practices.

Are there proposals for reform?

The Act is currently being revised.

The Authorities

Who is the enforcement authority?

The enforcement authority is the **Trade Competition Commission (TCC)**.

According to Chapter II of the Act, the Office of Trade Competition (OTCC) is established in the Department of Internal Trade within the Ministry of Commerce. Its main duties are: application and implementation of the Act and recommendations to the Minister of Commerce on the content of Ministerial Regulations based on the Act.

Are there any sector-specific regulatory authorities (RAs) with competition enforcement powers?

The TCC is responsible for the enforcement of competition law in all sectors. However, in the broadcasting and telecommunications sectors, the National Broadcasting and Telecommunications Commission (NBTC), under the Act on Organisation to Assign Radio Frequency and to Regulate the Broadcasting and Telecommunications Services B.E. (2010) has the power to decide competition cases and to issue rules and regulations concerning competition in its sector.

According to the Telecommunications Business Act B.E. 2544 (2001), in operating the telecommunications business, the Commission shall, in addition to the law on competition, prescribe specific measures according to the nature of telecommunications business, to prevent the licensee from committing any act that leads to monopoly, reduction or restriction of competition in supplying the telecommunications service in the following matters: (1) cross-subsidization; (2) cross-holding in the same category of service; (3) abuse of dominant power; (4) anti-

competitive behavior; (5) protection of small-sized operators (Section 21). Any licensee who violates **Section 21** shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding six hundred thousand THB or to both, and to a double penalty in the case of repeated violation (Section 69). Furthermore, in relation to the Broadcasting and Television Business Operations Act B.E. 2551 (2008), in the broadcasting business, there are specific sections concerning anti-monopoly issues (sections 31-32). Any licensee who violates section 31 or 32 shall be subject to imprisonment for a term not exceeding three years or a fine not exceeding three million baht or both and a daily fine not exceeding thirty thousand baht throughout the period of violation (Section 67)

Anticompetitive practices

Agreements

Which agreements are prohibited?

Section 27 of the Act prohibits any agreements between business operators that may amount to monopoly restrictions or reductions of competition in any goods or services market and identifies the following prohibited agreements:

- (Sale or purchase) price fixing agreements and agreements to restrict the (sale or purchase) volume of goods or services (Section 27 (1) and (2));
- Agreements “with a view to having market domination or market control” (Section 27 (3));
- Bid rigging/collusive tendering (Section 27 (4));
- (Distribution or purchase) market partitioning and customer or supplier allocation (Section 27 (5) and (6));

- Output restrictions (Section 27 (7));
- Reduction of quality (Section 27 (8));
- Exclusive distribution agreements (Section 27 (9));
- Fixing purchase or distribution conditions (Section 27 (10)).

The list includes both horizontal and vertical agreements.

Which agreements may be exempted?

According to Sections 27, 35 and 37, agreements under subsection 5 to 10 above may be exempted, with or without conditions, from the prohibition (under previous permission by the TCC), where it is “commercially necessary, has no serious harm to the economy, and has no effect on due interests of general consumers” that they “be undertaken within a particular period of time”.

Is there any formal notification requirement and to which authority should a notification be made?

Under Section 35, business operators shall apply to the TCC to obtain permission to conclude and implement agreements that may be exempted.

Is there a notification form?

A notification form is available on TCC website at <http://otcc.dit.go.th/otcc/> (Thai version).

Are there any filing fees?

Filing is not subject to any fee.

Is there any obligation to suspend the transaction pending the outcome of the assessment (standstill clause)?

There is an obligation to suspend the transaction until permission is granted by the TCC.

Procedure and timeline

Under Section 36 of the Act, the TCC shall complete the assessment within 90 days, extended of additional 15 days in case the assessment cannot be completed within the deadline “by reason of necessity”.

Monopoly and dominant position

Is monopoly or dominant position regulated?

Section 25 of the Act prohibits the abuse of a dominant position (referred to as “market domination”).

What is a dominant position?

According to Section 3 of the Act and the Notice on Dominant Business Operators with Market Domination, business operator(s) have a dominant position when the following thresholds are met:

- Market share exceeding 50% market share and a turnover of at least 1,000 million THB in the previous year;
- Top three business operators with combined market shares exceeding 75% and a turnover of at least 1,000 million THB in the previous year, except business operators whose market share is less than 10% or whose turnover is less than 1,000 million THB.

The Act includes both single and collective dominance.

When is dominant position prohibited?

Under Section 25 of the Act, the following practices by a dominant operator are prohibited:

- unreasonably fixing or maintain purchasing or selling prices;
- unreasonably fixing compulsory conditions, directly or indirectly, requiring customers to restrict services, production, purchase or distribution of goods, or restrict opportunities in purchasing or selling goods, receiving or providing services or securing credits from other business operators;
- suspending, reducing or restricting services, production, purchase, distribution, deliveries or importation without justifiable reasons, destroying or causing damage to goods in order to reduce the quality below market demand;

- intervening in the operation of other operators' business without justification.

In addition, under Section 30, the TCC can require a dominant business operator whose market share exceeds 75% to "suspend, cease or vary the market share".

Can abuses of dominant position be exempted?

No exemption is allowed.

Other unilateral restrictive practices

Which other practices are prohibited?

Under Section 28 of the Act, "a business operator who has business relation with business operators outside the Kingdom, whether it is on a contractual basis or through policies, partnership, shareholding or any other similar form, shall not carry out any act in order that a person residing in the Kingdom and intending to purchase goods or services for personal consumption will have restricted opportunities to purchase goods or services directly from business operators outside the Kingdom".

Furthermore, Section 29 prohibits "any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business".

Procedures and sanctions are the same described below (under "Procedures").

Merger control

What is a merger?

Section 26 of the Act regulates "business mergers", which include the following transactions:

- merger: "a merger made by a manufacturer with another manufacturer, by a distributor with another distributor, by a manufacturer with a distributor, or by a service provider with another service provider, which has the effect of maintaining the status of one business and terminating the status of the other business or creating a new business";
- acquisition of assets: "a purchase of the whole or part of assets of another business with a view to controlling business administration policies, administration and management";
- acquisition of shares: "a purchase of the whole or part of shares of another business with a view to controlling business policies, administration and management".

Are foreign-to-foreign mergers included?

The Act makes no distinction between national and foreign mergers. Section 26 regulates business mergers between business operators, which are defined in the Section 3 of the Act as distributors, producers for distribution, orders or importers into the Kingdom of Thailand for distribution or purchasers for production or redistribution of goods or service providers in the course of business.

Do mergers need to be notified?

Notification is mandatory, if the merger falls within the merger thresholds.

The TCC shall introduce thresholds (with reference to market share, sale volume, capital,

shares or assets) above which mergers will have to be notified and authorised, being otherwise prohibited. The TCC is currently drafting the implementing rules.

Are there any filing fees?

The issue is under consideration and will be clarified in the forthcoming merger guidelines, which will be made available on the TCC website.

Are there sanctions for not notifying?

According to the Act, a business merger which may result in monopoly or unfair competition with reference to the merger thresholds, without the permission of the Commission shall be liable to imprisonment for a term not exceeding three years and/or to a fine not exceeding six million THB (Section 51). However, since the notification thresholds have not been introduced yet, there are no sanctions for not notifying.

How long does it take for approval?

Under Section 36 of the Act, the proceedings shall be concluded within 90 days, which can be extended by 15 days “by reason of necessity”.

Is there any obligation to suspend the transaction pending the outcome of the assessment (standstill clause)?

There is an obligation to suspend the transaction until permission is granted by the TCC.

Which mergers are prohibited?

Under Section 26 of the Act, mergers are prohibited when they “may result in monopoly or unfair competition”.

What happens if prohibited mergers are implemented?

Under Section 51 of the Act, any person who vi-

olates section 26 shall be liable to imprisonment for a term not exceeding three years and/or to a fine not exceeding six million THB.

Under Section 31, the TCC may also order the merging parties to suspend, cease, rectify or modify the transaction and impose rules and conditions for the compliance.

Can mergers be exempted/authorised?

Under Section 37, 1st Paragraph, of the Act, a merger can be authorised, provided that it is “reasonably necessary in the business, beneficial to business promotion, has no serious harm to the economy and has no effect on due interests of general consumers”.

Under Section 37, 2nd Paragraph, mergers may also be approved under conditions.

How to apply for an exemption?

Under Section 35 of the Act, merging parties shall submit an application for permission to the TCC, according to the procedural rules which will be introduced in the due course.

Procedure

Investigations

How does an investigation start?

Under Section 8 and section 15 of the Act, the TCC can start an investigation on its own initiative or on the basis of a complaint.

A complaint may be lodged:

- by telephone (hotline 1569),
- through the TCC website (<http://otcc.dit.go.th/otcc/>),

- by email (compro@dit.go.th),
- by post to the Secretary General of the Office of Trade Competition Commission, 44/100 Nonthaburi1 Rd., Nonthaburi 11000 Thailand, and
- in person, to the above address.

What are the procedural steps and how long does the investigation take?

Under Sections 14 and 15 of the Act, the TCC may conduct an investigation or appoint one or more inquiry sub-committees if there are reasonable grounds for suspecting an infringement of the Act. The inquiry subcommittee submits opinions to the TCC, which can report the case to the public prosecutor.

What are the investigation powers of the TCC?

Under Section 19 of the Act, the competent official has the power, amongst other, to:

- require any person to give statements, facts or written explanations or supply accounts, records, documents or any evidence for examination;
- enter the business premises of a business operator to collect evidence of an infringement;
- arrest the person(s) responsible for an offence an offender under the Act, according to specific cases, with or without a warrant;
- collect or take goods as samples for an examination;
- attach documents, accounts, records or evidence for the purpose of examination and pursuit of infringements to the Act.

What are the rights and safeguards of the parties?

Under Sections 31, 32, 33 and 53 of the Act, a business operator under investigation has the right to be heard, the right of appeal and the right to confidentiality.

Is there any leniency programme?

There is no leniency programme in force. However, the possibility of introducing such a programme is being discussed.

Is it possible to obtain any informal guidance?

Business operators may contact the following address:

Business Competition Bureau,
Department of Internal Trade
44/100 Nonthaburi1 Rd. Nonthaburi 11000
Thailand

 +66 2 507 5882

 +66 2 547 5434

 <http://otcc.dit.go.th/otcc/>

 compet@dit.go.th

Adjudication

What are the final decisions?

The TCC final decisions are the following:

- Under Section 37 of the Act, the TCC may authorise agreements or mergers;
- Under Section 39, the TCC can revoke a permission order under Section 37 for failure to comply with its conditions;
- Under section 31, the TCC can issue a written order requiring the business operator to “suspend, cease or vary” the anti-competitive conduct;

- Under Sections 48, 49, 50, 56, the TCC can settle cases when the applicable sanction does not exceed one year imprisonment

Which are the sanctions?

Under Chapter VII of the Act (Sections 48 to 56), the following criminal sanctions apply to any person who infringes procedural and substantive provisions of the Act:

- infringement of the substantive provisions of the Act (Sections 25 to 29): imprisonment up to three years and/or fine up to six million THB (double penalty in case of repeated offence);
- criminal sanctions for obstruction of the performance of the competent officials' duties: imprisonment up to one year and/or fine up to 20 thousand THB;
- criminal sanctions for failure to comply with a TCC order under section 30 or 31 or with the decision of the Appellate Committee under section 47: imprisonment up to three years and/or fine up to 6 million THB and daily fine not exceeding fifty thousand THB during the period in which the violation is ongoing;
- criminal sanctions for disclosure of information concerning the business or the operation of a business operator which is restricted and confidential and which such person has acquired or knows in application of duties performed under the Act: imprisonment up to one year and/or fine up to 100 thousand THB, unless the information is disclosed in the performance of Government service or for the purpose of an inquiry or trial;
- criminal sanctions for failure to comply with the written summons issued by the specialised-committee, a competent official or the Appellate Committee under Section 13(3), Section 19(1) or Section 44(3): imprisonment

for a term not exceeding three months or fine not exceeding five thousand THB or to both;

- criminal sanctions for failure to render assistance to the competent official under Section 20: imprisonment for a term not exceeding one month and/or fine not exceeding two thousand THB.

Section 54 specifies that, in case of an infringement committed by a legal person, the managing director, the managing partner or the person responsible for the operation shall also be liable, unless it is proven that the infringement has been committed without his/her knowledge or consent or he/she has already taken reasonable action for preventing the infringement.

Judicial review

Can the enforcement authority's decisions be appealed?

Under Chapter VI, Section 46, of the Act, appeals against a decision of the TCC in respect of Section 31 and Section 37 may be lodged, within 30 days, to the Appellate Committee.

Under Section 47 of the Act, the Appellate Committee shall decide within 90 days, which can be extended by 15 days "by reason of necessity". Its decisions are final, subject to appeal to the Administrative Courts of First Instance, according to the Administrative Procedure Act.

Private enforcement

Are private actions for damages available?

Under Section 40, 1st Paragraph, of the Act, any person suffering damages as a consequence of a competition infringement may initiate an action for compensation.

Section 40, 2nd Paragraph, allows the Consumer Protection Commission or any other association under the law on consumer protection to initiate an action for compensation on behalf of consumers or members of the association.

Exclusions

Is there any exclusion from the application of the Law?

Under Section 4, the Act does not apply to the following:

- Acts of central, provincial or local administrations;
- State enterprises under the law on budgetary procedure;
- Farmers' groups, co-operatives or co-operative societies recognized by law and having as their object the operation of businesses for the benefit of the occupation of farmers;
- Sectors fully or partially exempted from the application of the Law by Ministerial regulation. No such regulations have been issued so far.

Enforcement Practices

Please refer to the Annex I - Case Studies.

 VIETNAM

Legislation and Jurisdiction

The Law

What is the relevant legislation?

The relevant legislation includes the **Competition Law No. 27/2004/QH11** (the “Law”) and six implementing guidelines (five decrees and a circular).

The implementing provisions are the following:

- Decree No.116/2005/ND-CP of 15 September 2005, setting forth detailed provisions for implementing a number of Articles of the Law;
- Decree No. 120/2005/ND-CP of 30 September 2005 on administrative offences in the field of competition;
- Decree No.110/2005/ND-CP of 24 August 2005 on management of multi-level sales of goods;
- Decree No. 06/2006/ND-CP of 9 January 2006 on the functions, tasks, power and organization structure of the Competition Administration Department;
- Decree No. 05/ 2006/ND-CP of 6 January 2006 on the functions, tasks, powers, and organization structure of the VCC;
- Circular No. 19/ 2005/TT-BTM of 8 November 2005 on guiding the implementation of a number of provisions prescribed in Decree No. 110/ 2005/ ND-CP.

Both the law and the implementing guidelines are available on the Vietnam Competition Authority website (www.vca.gov.vn, under “legal resources”).

To whom does it apply?

According to Article 2, the Law applies to any business organisations and individuals (referred to as “**enterprises**”), including enterprises providing public-utility products or services, enterprises operating in State monopoly industries and sectors (“State-monopolized sectors and domains”), as well as foreign enterprises and professional associations operating in Vietnam.

Which practices does it cover?

The Law covers the following practices:

- “**competition-restriction acts**” (Chapter II), which include agreements, abuse of monopoly/dominant position and economic concentrations which distort or restrain competition in the market; and
- “**unfair competition acts**” (Chapter III), defined as business practices, which run counter to common standards of business ethics and cause actual or potential damage to State’s interests, legitimate rights and interests of other enterprises or consumers.

Are there proposals for reform?

As foreseen by the VCA work program, a comprehensive programme for amending the Law is in progress.

The Authorities

Who is the enforcement authority?

According to Chapter IV of the Law, there are two authorities: the Vietnam Competition **Authority (VCA)** and the **Vietnam Competition Council (VCC)**.

The VCA (Article 49 of the Law), established within the Ministry of Industry and Trade (MoIT), is responsible for investigating competition-restriction acts, application for exemptions for agreements and mergers, and unfair competition practices.

The VCC (Article 53 of the Law), established by the Government, is responsible for adjudicating cases concerning competition restrictive acts. In competition matters, the VCC establishes a Competition Case-Handling Council, composed of at least five members of the VCC.

The VCA adjudicates unfair competition cases and decides on whether mergers fall within the prohibited category. In all other cases, the VCA submits a report, respectively to the VCC (who decides competition-restriction cases), to the MoIT (who decides on exemptions for competition-restriction agreements and economic concentrations between parties in danger or dissolution or bankruptcy) or to the Prime Minister (who decides on exemptions for economic concentrations which may have the effect of expanding export or contributing to socio-economic development, technical and technological development).

Are there any sector-specific regulatory authorities (RAs) with competition enforcement powers?

There are no RAs with exclusive competition enforcement powers. However, there are a number of RAs or administrative authorities which cooperate with the VCA in competition cases, such as:

- In the electricity sector, the Electricity Regulatory Authority of Vietnam (Ministry of Industry and Trade);
- In the telecommunications sector, the Department of Telecommunications (Ministry of

Information and Communications) (under the new telecommunications law, a regulatory authority for telecommunications is to be established);

- In the maritime sector, the Vietnam National Maritime Bureau (Ministry of Transport);
- In the civil aviation sector, the Civil Aviation Administration of Vietnam (Ministry of Transport);
- In the foreign investment sector, the Foreign Investment Agency (Ministry of Planning and Investment);
- In the financial sector, the Ministry of Finance and The State Bank of Vietnam;
- In the pharmaceutical sector, the Drug Administration of Vietnam (Ministry of Health);
- In the intellectual property sector, the National Office of Intellectual Property of Vietnam (Ministry of Science and Technology);
- In the insurance sector, the Insurance Administration and Supervision Department (Ministry of Finance).

In other industries and sectors the VCA may cooperate with the relevant administrative authorities.

Anticompetitive practices

Agreements

Which agreements are prohibited?

Article 8 of the Law identifies a list of “competition-restrictive agreements”. According to Article 9, some of these agreements are prohibited per se, namely agreements:

- preventing, restraining or impeding other enterprises from entering the market or develop business (Article 8, Paragraph 6);
- excluding other enterprises from the market (Article 8, Paragraph 7); and
- favouring one or all of the parties in tender procedures (collusive tendering) (Article 8, Paragraph 8).

In addition, some agreements are prohibited only where the parties’ combined market share is equal to or above 30%, namely agreements:

- directly or indirectly fixing prices for goods or services (Article 8, Paragraph 1);
- partitioning outlets, sources of supply of goods and provision of services (Article 8, Paragraph 2);
- restricting or controlling production, purchase or sale output of goods or services (Article 8, Paragraph 3);
- restricting technical and technological development and investments (Article 8, Paragraph 4); and
- imposing on other enterprises conditions on goods or services purchase or sale contracts or forcing other enterprises to accept obligations which have no direct connection with the subject of such contracts (Article 8, Paragraph 5).

These categories include both vertical and horizontal anti-competitive agreements.

Which agreements may be exempted?

According to Article 10 of the Law, exemptions for a specific period may be granted by the MoIT to agreements that are not per se prohibited and when the parties’ combined market share is equal to or above 30%, provided that the agreements aim to:

- rationalise an organisational structure or business scale and increase business efficiency;
- promote technical or technological progress, improve the quality of goods or services;
- promote the uniform application of quality standards and technical norms of certain products;
- harmonise business, goods delivery and payment conditions, which are not related to prices or any price factors;
- enhance the competitiveness of medium and small-size enterprises;
- enhance the competitiveness of Vietnamese enterprises in the international market.

Is there any formal notification requirement and to which authority should a notification be made?

There is a formal notification system. Notifications shall be made to the VCA at the following address:

Competition Policy Board,
Vietnam Competition Authority,
Ministry of Industry and Trade
Address: 25 Ngo Quyen Street,
Hoan Kiem district, Hanoi, Vietnam

 +84 4.22205014 –

 +84 4.22205003 -

 lantp@moit.gov.vn

Alternatively, submissions can be sent online at www.vca.gov.vn, under the section “competition > submit information online”.

Is there a notification form?

Applications for exemption shall be submitted according to the VCA notification form, which is available at the above addresses.

Further information is available online (www.vca.gov.vn, under the section “competition > exemption of competition restriction agreements” - Vietnamese text).

Are there any filing fees?

Filing fees currently amount to fifty million VND, under Article 57 of Decree No. 116/2005/ND-CP of 15 September 2005, implementing Article 30(3) of the Law.

Further updates on applicable fees will be available online (www.vca.gov.vn, under the section “competition”).

Is there any obligation to suspend the transaction pending the outcome of the assessment (standstill clause)?

According to Article 36(1) of the Law, parties are prevented from implementing the agreement until the formal decision approving the exemption is granted.

Procedure and timeline

The MoIT is responsible for granting exemptions.

According to Article 34(1) of the Law, within 60 days from receiving the exemption application from the VCA, the MoIT issues a decision approving or disapproving the exemption. According to Article 34(2), the MOIT may extend the deadline no more than twice, for up to 30 days per time.

Further information on notification requirements and procedure for exemption of competition restriction agreements can be found at www.vca.gov.vn, under the section “competition > competition-restrictive acts > exemptions and procedures”.

Monopoly and dominant position

Is monopoly or dominant position regulated?

Chapter II, Section 2 of the Law prohibits both the abuse of a dominant position (“market dominance”) and the abuse of a monopoly position in the market.

What is a dominant position?

According to the Article 11 of the Law, one or more enterprises are presumed to hold a dominant position when:

- (single dominance): an enterprise has a market share of at least 30% in the relevant

market or it is capable of restricting competition considerably on the basis of specific factors (provided for in Article 22 of Decree 116/2005/ND-CP);

- (collective dominance): more enterprises hold a combined market share of at least 50% (two enterprises), 65% (three enterprises) or 75% (four enterprises) in the relevant market.

What is a monopoly position?

According to Article 12, an enterprise holds a monopoly position when there are no other enterprises competing in the relevant market.

When are monopoly and dominant positions prohibited?

Under Article 13, **abuse of dominant position** includes the following practices:

- Predatory pricing (selling goods or providing services below cost in order to eliminate competitors) (Paragraph 1);
- Unreasonable purchase or selling prices or minimum re-selling prices causing damage to customers (Paragraph 2);
- Restricting production, distribution, and limiting markets or preventing technical and technological development causing damage to customers (Paragraph 3);
- Imposing discriminatory commercial conditions in similar transactions with the aim of creating inequality in competition (Paragraph 4);
- Imposing conditions on other enterprises in purchase or sale contracts or forcing other enterprises to accept obligations which have no direct connection with the object of such contracts (Paragraph 5);
- Preventing competitors from entering the market (Paragraph 6).

Under Article 14, **abuse of a monopoly position** includes all the practices above and:

- Imposing unfavourable conditions on customers (Paragraph 2); and
- Abusing the monopoly position to unilaterally modify or terminate a contract without plausible reasons (Paragraph 3).

Can abuses of dominant or monopoly position be exempted?

No exemption is allowed.

Merger control

What is a merger?

Chapter II, Section 3 of the Law regulates “economic concentrations”, which include the following transactions:

- Mergers: one or more enterprises transfer all of its/their property rights, obligations and legitimate interests to another enterprise and, at the same time, terminate the existence of the merged enterprise(s) (Articles 16 and 17, Paragraph 1);
- Consolidations: two or more enterprises transfer all their property rights, obligations and legitimate interests to form a new enterprise and, at the same time, terminate the existence of the consolidated enterprises (Articles 16 and 17, Paragraph 2);
- Acquisitions: one enterprise acquires the whole or part of another enterprise sufficient to obtain control on the latter (Articles 16 and 17, Paragraph 3);
- Joint ventures: two or more enterprises jointly contribute to the establishment of a new enterprise (Articles 16 and 17, Paragraph 4); and

- Other acts of economic concentrations, as it may be prescribed by law (Article 16, Paragraph 5).

Are foreign-to-foreign mergers included?

The Law also applies to foreign enterprises operating in Vietnam, which are therefore subject to merger control (Article 2.1 of the Law).

Do mergers need to be notified?

According to Article 20(1) of the Law, enterprises having a combined market share of between 30% and 50% must notify the VCA before implementing the transaction (requirements for merger notification are laid down in Article 21), except where the enterprises are, and remain after the concentration, of small or medium-size. The definition of small and medium-sized enterprises, specified under Article 3 of Decree 56/2009/ND-CP with reference to registered capital or average employees, varies according to the sector, i.e., agriculture, industry or services.

The VCA notification form is available online (www.vca.gov.vn). Further information on notification requirements and procedure for exemption of economic concentrations may be found online (www.vca.gov.vn, under the section “competition > competition-restrictive acts > exemption of economic concentration”).

According to Article 20(2) of the Law, enterprises which apply for an exemption from the prohibition shall, instead of notifying the merger according to Article 21, submit an application for exemption according to Section 4 of Chapter II (procedures for execution of exemption cases).

Are there any filing fees?

There are no filing fees for merger notification. <http://www.vca.gov.vn/>

Are there sanctions for not notifying?

Fines for not notifying a merger range from 1% to 3% of the previous fiscal year total turnover of the parties involved, according to Article 29 of Decree No. 120/2005/ND-CP, implementing Article 20 of the Law.

How long does it take for approval or exemption?

According to Article 23 of the Law, within 45 days from the receipt of a complete file the VCA shall establish whether the economic concentration (i) does not fall under a prohibited category or (ii) is prohibited under Article 18.

When the merger “involves many complicated circumstances” the VCA may extend the deadline no more than twice, for up to 30 days per time (in any case, under Article 24 the expiry of the time limit does not provide for an automatic clearance of the merger).

According to Article 34, the procedure for exemption before the MoIT lasts 60 days from the receipt of the exemption application from the VCA. The VCA may extend the deadline no more than twice, for up to 30 days per time.

Is there any obligation to suspend the transaction pending the outcome of the assessment (standstill clause)?

According to Article 24, a merger may only be implemented after approval.

Which mergers are prohibited?

According to Article 18 of the Law, economic concentrations are prohibited where the parties' combined market share exceeds 50%, except where the enterprises are (and remain after the concentration) of small or medium-size or are exempted under Article 19 (see below).

What happens if prohibited mergers are implemented?

According to Article 117, the Law allows the VCA to impose

- Warnings or fines (up to 10% of the previous fiscal year total turnover of the merging parties);
- Additional sanctions, namely the revocation of business registration certificates, deprivation of licenses and practicing certificates, and the confiscation of exhibits and means used for competition law infringements;
- Remedies, namely the de-concentration of prohibited mergers, i.e., dividing or separating the merged or consolidated enterprises, or forcing the resale of the share of the acquired enterprise.

Can mergers be exempted/authorised?

Under Article 23 of the Law, an economic concentration is approved when it does not fall into Article 18 prohibition.

Under Article 19, prohibited economic concentrations (i.e., concentrations which exceed the 50% threshold) may be exempted if:

- one or more of the parties is/are at risk of being dissolved or declared bankrupt, or
- the economic concentration has the effect of expanding export or contributing to socio-economic development, technical and technological progress.

According to Article 25, the Minister of Industry and Trade is responsible for approving economic concentrations under Article 19(1), while the Prime Minister is responsible for granting exemptions under Article 19(2).

How to apply for an exemption?

As explained above, the merging parties may

notify for approval under Article 20 (notification requirements are laid down in Article 21) or apply for exemption under Section 4 (application requirements are laid down in Article 29).

The VCA application form is available from the Competition Policy Board, Vietnam Competition Authority, Ministry of Industry and Trade
25 Ngo Quyen, Hoan Kiem, Hanoi, Vietnam,

 +84 4 2220 5014

 +84 4 2220 5003

or on the Internet at

 www.vca.gov.vn,

under the section "competition > competition-restrictive acts > exemption of economic concentration" (Vietnamese text).

Interested parties may require further information/assistance on procedures/exemptions at the above address and number.

State management agencies, state monopolies and public utilities

Which special provisions apply to State management agencies, State monopolies and public utilities?

Under the Law, the following special provisions apply to State management agencies, State monopolies and public utilities.

According to Article 6 of the Law, State management agencies are prohibited from:

- Forcing enterprises, organisations or individuals to buy or sell goods, or provide services to enterprises which are designated by these agencies, except for goods and services in the State monopoly sectors or in emergency cases prescribed by law;
- Discriminating between enterprises;
- Forcing professional associations or enter-

prises to align with one another with a view to precluding, restricting or preventing other enterprises from competing in the market;

- Engaging in other acts that prevent lawful business activities of enterprises.

According to Article 15(1), the State controls enterprises operating in the State-monopolized domains through deciding, in the State monopolized domains: (a) buying and selling prices of goods and services; (b) quantities, volumes and scope of market of goods and services.

According to Article 15(2), the State controls enterprises producing and supplying public-utility products and services through ordering goods, assigning plans or bidding according to prices or charges set by the State.

Article 15(3) specifies that, when undertaking other business activities outside the State-monopolized and public-utility sectors, enterprises shall not be subject to the application of Article 15(1) and (2).

Other unfair commercial practices

Which unfair commercial practices are regulated?

Chapter III of the Law prohibits “unfair competition acts”, defined in Article 3, Paragraph 4, as “competition acts performed by enterprises in the process of doing business, which run counter to common standards of business ethics and cause damage or can cause damage to the State’s interests, legitimate rights and interests of other enterprises or consumers”. According to Article 39, these include:

- misleading indications (Article 40);
- infringement of business secrets (Article 41);
- coercion in business (Article 42);
- discrediting other enterprises (Article 43);
- disturbing business activities of other enterprises (Article 44);
- advertising for the purpose of unfair competition (Article 45);
- sale promotion for the purpose of unfair competition (Article 46);
- discrimination by associations (Article 47);
- illicit multi-level sale (Article 48);
- other unfair competition acts as prescribed by the Government (Article 39, Paragraph 10).

Does the Law provide for any exemption?

No exemption is allowed.

Procedure

Investigations

How does an investigation start?

Under Article 58 of the Law, interested parties (business organisations and individuals) who believe that their rights and interests have been infringed due to a breach of the Law can submit a complaint to the VCA, within two years from the violation. Under Article 86, the VCA can also open an investigation on its own initiative.

A complaint may be submitted directly or posted to the Office of Vietnam Competition Authority, Ministry of Industry and Trade (25 Ngo Quyen, Hoan Kiem, Hanoi, Vietnam, ☎ +84 4 2220 5002 - 📠 +84 4 2220 5003).

What are the procedural steps and how long does the investigation take?

Under Article 87 of the Law, the VCA conducts a

preliminary inquiry within 30 days from the start of the investigation.

Where indications of an offence are found, the VCA opens an official inquiry, which according to Article 90 is concluded within 180 days for competition-restrictive cases (extended “in case of necessity” no more than twice, for up to 60 days per time) and 90 days for unfair competition cases (extended “in case of necessity” for up to 60 days).

The procedure in competition-restrictive cases follows three stages: investigation, processing and adjudication (details are provided for in Article 90 of the Law and Articles 46 and 47 of Decree 116/2005/ND-CP).

What are the investigation powers of the VCA?

Under Article 77 of the Law, the investigators of the VCA have the power to:

- Request organisations and individuals to provide necessary information and documents;
- Request parties under investigation to produce documents and give explanations concerning competition cases;
- Request expertise; and
- Apply administrative preventive measures.

What are the rights and safeguards of the parties?

Article 56(3) of the Law introduces general safeguards to protect the confidentiality of information containing business secrets and to protect rights and interests of organizations and individuals.

A more detailed description of the rights of parties involved in the proceedings (investigated parties and complainants) are specified in Article 66, while Articles 67 to 71 specify, respectively, the rights of lawyers (of both com-

plainants and investigated parties), witnesses, experts, interpreters and persons with interests and obligations related to the case.

Is there any leniency programme?

Currently, there is no leniency programme in Vietnam. However, a voluntary declaration of prohibited acts, before they are detected by competent agencies, is treated as an attenuating circumstance (Article 85(1.a) of Decree 116/2005/ND-CP).

Is it possible to obtain any informal guidance?

Interested parties may obtain informal guidance from the VCA in relation to anti-competitive practices and unfair commercial practices at the following addresses:

For anticompetitive cases:

Antitrust Investigation Board,
Vietnam Competition Authority,
Ministry of Industry and Trade
Address: 25 Ngo Quyen Str.,
Hoan Kiem Dist., Hanoi, Vietnam

 +84 4 2220 5016

 +84 4 2220 5003

For unfair commercial cases:

Unfair Competition Investigation Board
Vietnam Competition Authority –
Ministry of Industry and Trade
Address: 25 Ngo Quyen Street,
Hoan Kiem District, Hanoi

 +84 4 2220 5015

 +84 4 2220 5003

Adjudication

What are the final decisions?

Under the procedures for exemption (Chapter II, Section 4), a final decision approving or disapproving the exemption (Article 34) is taken by the MoIT in case of exemption from restrictive agreements and merger approval and by the Prime Minister in case of exemption from prohibited mergers (Article 25).

Following an investigation (under Chapter V of the Law), a final decision is taken by the VCC in case of restrictive-agreements and abuse of dominant position or monopoly cases and by the VCA in unfair competition cases.

What are the sanctions?

Sanctions for infringing the Law are dealt with by Section 8 of Chapter V. In particular, Articles 117 and 118 list the following sanctions and remedies:

- Sanctions in the form of warnings or fines (Article 117(1)), which may be:
 - ▶ Fines up to 10% of the previous fiscal year total turnover of the parties involved in case of competition-restrictive acts (Article 118(1));
 - ▶ sanctions according to the relevant administrative law provisions in case of unfair competition and other acts violating the Law (Article 118(2));
- Additional sanctions, namely (a) revocation of business registration certificates, deprivation of licenses and practicing certificates; (b) confiscation of exhibits and means used for competition law infringements (Article 117(2));
- Remedies, namely (a) restructuring enterprises who have abused a dominant position; (b) de-concentration of prohibited mergers,

i.e., dividing or separating the merged or consolidated enterprises, or forcing the resale of the share of the acquired enterprise; (c) public corrections; (d) removing illegal provisions from business contracts or transactions; (e) “other necessary measures to overcome the competition restriction impacts of the violation acts” (Article 117(3)).

Judicial review

Can the enforcement authorities’ decisions be appealed?

According to Article 107 of the Law, decisions of the Competition Case-Handling Council may be appealed before the VCC, while decisions issued by the head of the VCA may be appealed before the Minister of Industry and Trade.

In both cases, according to Article 115 further appeal (“administrative lawsuit”) may be lodged before the competent provincial/municipal Peoples’ Court.

Private enforcement

Are private actions for damages available?

Private parties (individual and organizations) may bring actions in court for damages resulting from the violation of competition law, according to general civil procedural law, according to Article 117.

Exclusions

Is there any exclusion from the application of the Law?

There are no specific exclusions from the application of competition law. However, enterprises operating as State monopolies (in “State-monopolised domains”) or in public-utility sectors are subject to specific State control measures, as explained above.

Enforcement Practices

Please refer to the Annex I - Case Studies.



ANNEX I

Case Studies

Introduction

This Annex includes summaries of selected cases from some national competition authorities in ASEAN. The cases have been summarised and simplified and are meant for informative purposes.

More information about the cases below and competition enforcement in general can be found at the contacts listed in Annex II.

Indonesia

Price fixing cartel in the mobile telecommunications short message service (SMS) market

In June 2008, the KPPU sanctioned a price fixing cartel amongst six Indonesian mobile telecommunications operators related to the off-net SMS tariffs, infringing Article 5 of Indonesian Competition Law, during the period from 2004 until April 2008 (Case No. 26/KPPU-L/2007).

Following a preliminary and an advanced examination, the KPPU established that:

- Before 2004, high SMS rates were justified as a result of the oligopoly structure of the mobile telecommunications market (which only included three operators);
- Between 2004 and 2007, in spite of new entries in the market, the off-net SMS rates remained excessive and there was evidence of collusion amongst the operators;
- In June 2007, further to a meeting with the Regulatory Authority for Telecommunications (BRTI), the Indonesian Mobile Phone Operators Association (ATSI) requested all members to repeal all agreements on SMS rates. However, there was no significant decrease of the off-net SMS rates;
- The SMS rates cartel was effective until

April 2008, when off-net SMS rates started decreasing.

The KPPU defined the relevant market as the market for SMS services throughout the territory of Indonesia provided by mobile telecommunications operators and found that the conditions for application of Article 5 of the Competition Law were fulfilled, and in particular: (i) the parties of the cartels are “business actors”; (ii) they entered into a “price fixing agreement”, and (iii) they are competitors.

With particular reference to the evidence of a price fixing agreement, the KPPU found written confirmation in an integrated Interconnection Cooperation Agreement entered into by the six mobile telecommunications operators, on the initiative of the two incumbent operators.

Although the cartel constitutes by itself a violation of Article 5 of the Competition Law (regardless of its impact), the KPPU also assessed the impact of the cartel, establishing that the latter had caused losses to the consumers, which were qualified as: (i) loss of opportunity to obtain lower SMS rates; (ii) loss of opportunity to use more SMS services with the same rate; (iii) other intangible losses; (iv) limited choices. The consumer loss, which was estimated with reference to the difference between the revenues of the operators at cartel prices and the revenues at the competitive prices, was estimated in IDR 2.827 trillion.

The KPPU concluded that the six mobile telecommunications operators violated the cartel prohibition under Article 5 of the Competition Law and imposed fines between IDR 4 billion and IDR 25 billion. A seventh company has been also considered as a member (to a limited extent) of the cartel; yet, it has not been fined, due to the fact that it was the last entrant to the market, with the weakest bargaining position. The decision has not been appealed.

Market control in the procurement of very large crude carriers (VLCC)

In 2004, the KPPU found that a market operator violated Article 19 letter (d) of Indonesian Competition Law (prohibiting discriminatory practices towards certain business operators) in the procurement process for selling two units of VLCC (Case No. 07/KPPU-L/2004).

The tenderer had appointed a financial advisor for the organisation of the tender process. The latter set up a restricted procedure, inviting 43 potential bidders, seven of which submitted offers (four of those were represented by a broker agency). It subsequently short-listed three bidders, in order to carry out an on-site due diligence and submit enhanced offers, and finally awarded the tender.

At the end of a detailed investigation (including 23 witnesses, 3 experts and a significant amount of documents), the KPPU found that the tenderer and its financial advisor had colluded in order to favour the winning bidder. It took into account, in particular, the very small difference of the winning bidder's offer with respect to the second best offer, the covert facilitations granted to the winner as to the deadline for submitting the cover, and procedural irregularities in the opening of the winner's offer. It also established that the collusive behaviour produced a loss as to the final price of the products, which was significantly lower than the market price. Moreover, the KPPU also established that the tenderer infringed the non-discrimination rule by directly appointing its financial advisor as the organiser of the tender process.

As a consequence, the KPPU established that the tenderer infringed Article 19(d) of the Competition Law.

The Philippines

Unauthorized Use Of A Container Bearing A Trademark In Connection With The Sale, Distribution Or Advertising Of Goods Which Is Likely To Cause Confusion, Mistake Or Deception Among The Consumers Constitutes Trademark Infringement

In June 2007, the Philippine Supreme Court (PSC) issued a trademark infringement decision against the directors and officers of Masagana Gas Corporation ("Masagana") for violating **Section 155 of Republic Act 8923, or otherwise known as "Intellectual Property Code of the Philippines"**. The PSC upheld, in this instance, a search warrant issued by the Regional Trial Court ordering the search of Masagana's compound and the seizure of several items being used by the latter to refill, sell and distribute LPG tanks bearing the marks "Gasul" and "Shellane" without authority from the registered brand or mark owners, Petron Corporation ("Petron") and Pilipinas Shell Petroleum Corporation ("Pilipinas Shell"), two of the largest bulk suppliers and producers of LPG in the Philippines. Said provision is quoted below:

SEC. 155. Remedies; Infringement. – Any person who shall, without the consent of the owner of the registered mark:

155.1. Use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark or the same container or a dominant feature thereof in connection with the sale, offering for sale, distribution, advertising of any goods or services including other preparatory steps necessary to carry out the sale of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

155.2. Reproduce, counterfeit, copy or colorably imitate a registered mark or a dominant

feature thereof and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action for infringement by the registrant for the remedies hereinafter set forth: Provided, That the infringement takes place at the moment any of the acts stated in Subsection 155.1 or this subsection are committed regardless of whether there is actual sale of goods or services using the infringing material.

Based on the above provisions, mere unauthorized use of a container bearing a registered trademark in connection with the sale, distribution or advertising of goods or services which is likely to cause confusion, mistake, or deception among the buyers or consumers is considered a trademark infringement.

The PSC likewise upheld the doctrine of piercing the corporate veil, a fundamental principle of corporation law that treats a corporation as an entity separate and distinct from its stockholders, directors or officers. However, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons, or in the case of two corporations, merge them into one. Hence, liability will attach personally or directly to the officers and stockholders.

In this case, the directors and officers of Masagana were held liable as one and the same person for utilizing the Corporation in violating the intellectual property right of Petron and Pilipinas Shell. (A.Yao, et al. vs. People of the Philippines, et al., G.R. No. 168306, June 19, 2007)



Bid rigging in the market for pest control services (2008)

In January 2008, CCS issued its first infringement decision under Section 34 of the Competition Act, which prohibits bid-rigging or collusive tendering, against six pest control companies.

The companies colluded to submit tenders or quotations for termite treatment projects involving the use of Agenda, which is a pesticide. The projects included a hotel, a hospital, two schools and two condominiums.

In each of the projects, one of the companies („the first company“) was already providing pest control services or had recommended the use of Agenda to the customer. The first company would then inform some or all of the other companies of the project via email, phone or SMS to request them to submit bids at prices higher than its own bid, thereby increasing its chances of winning the job. The first company would also let them know the price of its bid or the prices at which they should quote. The others would either agree to the request, thus giving the first company the assurance that there would be no competition, or they would simply submit higher bids.

This meant that competing bids from the other companies were not priced independently. Customers therefore did not receive competitive proposals.

CCS was able to uncover this case because it received a complaint from a procurement officer enclosing an incriminating email between the

companies. This case highlights the importance of having public education awareness through advocacy or outreach programmes as the procurement officer had attended a CCS outreach session on competition law and remembered that CCS had the power to investigate and enforce against such anti-competitive activity.

The total amount of financial penalties imposed was SGD 262,759.66. In determining the appropriate amount of financial penalty, CCS also took into account the cooperation rendered by the companies during the investigations.

Price fixing amongst coach operators (2009)

In November 2009, a CCS investigation revealed that a number of coach operators, together with the Express Bus Agencies Association (EBAA), had agreed to fix the prices of coach tickets for travelling between Singapore and destinations in Malaysia from 2006 to 2008. Through regular meetings arranged under the auspices of EBAA, the coach operators agreed to fix the coach prices through setting minimum selling prices and imposing fuel & insurance charges (FIC).

It is estimated that the coach operators pocketed over SGD 3.65 million from the sale of the FIC during this period.

As a result, the financial penalties levied on the 17 infringing parties totalled SGD 1.69 million. In deciding the appropriate amount of the financial penalty, the CCS took into consideration a number of factors, including the nature and structure of the market, market shares of the parties involved in the infringement and the impact and effect of the infringement. Six of the infringing parties appealed CCS' decision.

In 2011, the Competition Appeal Board (CAB) issued its decision on the appeals. The CAB upheld CCS' findings on liability on all counts. In addition, the CAB found that the appellants

had entered into the agreements knowing or ought to have known that the agreements restricted competition. However, the CAB varied the quantum of financial penalties imposed, from \$1,699,133 to \$1,135,170.

Abuse of dominant position in the ticketing services market (2010)

In June 2010, the Competition Commission of Singapore (CCS) issued an infringement decision against SISTIC.com Pte Ltd (SISTIC) for abusing its dominant position under Section 47 of the Competition Act via a series of exclusive agreements.

The CCS found that SISTIC is the dominant ticketing service provider in Singapore with a persistent market share of 85-95%, and that the restrictions under the exclusive agreements are harmful to competition by restricting the choices of venue operators, event promoters and ticket buyers. Symptoms of such harmful effects were observed in the market, such as an increase in SISTIC's booking fee for ticket buyers in 2008.

Ticketing service providers such as SISTIC act as intermediaries between two groups of customers – the event promoters and the ticket buyers – by providing them with a platform to buy and sell tickets. When key venues are required to use SISTIC exclusively, event promoters who wish to hold their events at these venues have no choice but to sell tickets through SISTIC. This, together with other event promoters who are also required to use SISTIC exclusively, leave ticket buyers with no choice but to buy tickets through SISTIC as well.

The CCS highlighted that the Competition Act does not prohibit dominant companies obtaining their dominance on merit. Instead, it prohibits a dominant company from using abusive practices that prevent or restrict competitors

from competing on the merits. In this case, the CCS cannot accept the restrictions under the exclusive agreements as merit-based practices, as they are unnecessary and anti-competitive.

The CCS directed SISTIC to modify the exclusive agreements with immediate effect, to remove any clause(s) that require SISTIC's contractual partners to use SISTIC exclusively. In addition, the CCS imposed a financial penalty on SISTIC of SGD 989,000 for infringing section 47 of the Act.

In fixing the appropriate amount of financial penalty, the CCS took into account the seriousness and duration of the infringement, the turnover of the infringing party, aggravating and mitigating factors amongst other considerations.

SISTIC subsequently filed an appeal against CCS' decision to the CAB. In May 2012, the CAB issued its ruling, which affirmed CCS' decision on liability but scaled down the quantum of penalty to SGD 769,000. CAB also ordered SISTIC to pay CCS 70% of the appeal costs.

Post-decision, the ticketing industry in Singapore has become more vibrant and competitive. There has been a new entrant and existing small ticketing service providers are now able to bid for events held at key venues, which was not previously possible. Some new and innovative services have also been introduced by competitors attempting to differentiate themselves from one another. One such example is leveraging on new distribution channels to give consumers more choice and added convenience. Ultimately, CCS' intervention resulted in a better competitive outcome for the industry to the benefit of consumers.

Bid rigging in the market for electrical and building works (2010)

In June 2010, the CCS issued an infringement

decision under the Competition Act against fourteen electrical and building works companies for violating Section 34 of the Competition Act, which prohibits bid-rigging or collusive tendering. The total amount of fines handed out was SGD 187,592.94.

The companies colluded to submit bids for 10 electrical or building works projects. The CCS started its investigations into the cartel after receiving information from one of the companies involved in the cartel. It was revealed to the CCS that the companies had entered into bid-rigging arrangements with other companies to coordinate the price of quotations.

Typically, the company that was interested in winning the project (the requester) would request for a cover bid from at least one other company (the supporter). The requester would inform the supporters of his bid price so that the latter could submit a higher quote. In some instances, the requester even prepared the quotation for the supporters. This aimed to create the false impression of competition. The CCS considers bid-rigging to be a serious infringement of the Section 34 prohibition against anti-competitive agreements.

The company who had come forward to the CCS with information on the bid-rigging arrangement before any investigation, who met all the conditions of the CCS leniency programme, was granted total immunity from financial penalties.

The CCS leniency programme is aimed at encouraging cartel members to come forward to assist CCS in uncovering cartels. Given the secretive nature of cartels, many competition agencies around the world have put in place leniency programmes to combat cartels. Without the leniency programmes, some cartels may never be uncovered and consumers will continue to be harmed by the cartels. Organisations which

meet the conditions for leniency will enjoy full or partial immunity from financial penalties.

Price fixing of monthly salaries of Indonesian foreign domestic workers by employment agencies (2011)

On 30 September 2011, CCS issued an infringement decision against 16 employment agencies for breaching the Competition Act. The employment agencies had engaged in anti-competitive conduct by participating in a meeting that attempted to collectively fix the monthly salaries of new Indonesian Foreign Domestic Workers (FDWs) in Singapore, with the object to restrict competition. The financial penalties levied totalled SGD 152,530.

CCS considers price fixing to be a serious infringement of Section 34 of the Competition Act, which sets out the prohibition against anti-competitive agreements. In arriving at its decision, CCS does not take a view on what should be the appropriate level of monthly salaries for new Indonesian FDWs in Singapore. What is prohibited under the Act is the attempt by competitors to collectively fix the monthly salaries of new Indonesian FDWs in Singapore, thereby restricting competition in the market.

Price fixing by modelling agencies (2011)

On 23 November 2011, CCS issued an infringement decision against 11 modelling agencies, who were fined a total of SGD 361,596 for breaching the Competition Act. The modelling agencies engaged in anti-competitive conduct by agreeing to fix rates of modelling services in Singapore. The anti-competitive behaviour was carried out through the Association of Modelling Industry Professionals (AMIP).

Investigations by CCS revealed that the modelling agencies had fixed prices on a wide variety of modelling services, including editorials,

advertorials, fashion shows and media loading usage. Customers who were impacted included publishers, photographers, show choreographers, show organizers and fashion labels. Businesses are free to independently determine their own prices. However, trade or industry associations should not become a vehicle to facilitate price collusion or price-fixing.

Exchange and provision of confidential price information for ferry tickets (2012)

On 18 July 2012, CCS issued an infringement decision against two ferry operators for breaching the Competition Act. The financial penalties levied on the two ferry operators totalled SGD 286,766. The ferry operators had engaged in anti-competitive conduct by exchanging and sharing commercially-sensitive price information on ferry tickets. This is the first case involving the unlawful exchange of information and sets the precedence on how CCS investigates and enforces similar cases in future.

Price is an important parameter of competition in markets and parties have incentives to closely monitor the prices of their competitors. However, attempts by competitors to exchange price information, especially future prices and non-counter prices (in this case, to travel agents and corporate clients) which are not readily observable, will restrict competition in the market and is prohibited.

For the latest information on cases, please refer to the CCS public register at <http://www.ccs.gov.sg/content/ccs/en/Public-Register-and-Consultation/Public-Register.html>, and CCS casebank at <http://www.ccs.gov.sg/content/ccs/en/Education-and-Compliance/CaseBank.html>.



Thailand

Motorcycle case (2003)

This case related to an abuse of dominant position by the national motorcycle market leader, with a market share of almost 75%, measured on sales value, which amounted to approximately 24 million THB in the fiscal year 2002.

The TCC found that the dominant company had entered into the following practices: (i) exclusive agreements with its distributors; (ii) removal of competitors' advertising boarding; (iii) turning dealers away from other manufacturers.

Therefore, the TCC found that the dominant company may have infringed Section 29 of the Competition Act and reported the case to the public prosecutor, with a recommendation to open criminal proceedings.

The case is currently under consideration by the public prosecutor.



Vietnam

Abuse of dominant position in the aircraft fuel market (2008)

In April 2008, Vietnam Air Petrol Company (Vinapco), an affiliate of the State-owned company Vietnam Airlines, stopped supplying aircraft fuel to Jetstar Pacific Airline (JPA), causing a number of JPA flights to be delayed and cancelled.

After a preliminary investigation that showed the likelihood of an abuse by Vinapco, the VCA opened an official investigation and submitted a case report to the VCC, which, having confirmed the abuse of monopolistic power, imposed on Vinapco a fine of VND 3.4 billion.

Economic concentration in the newsprint manufacturing market (2008)

In November 2008, the consolidation of Tan Mai Paper and Dong Nai Paper in a new enterprise, Tan Mai, was notified to the VCA.

The consolidation had a potential effect in the market of newsprint manufacturing in Vietnam.

Following a detailed assessment (based, in particular, on information from interested parties and market investigations), the VCA approved the consolidation, as only one of the merging enterprises was previously active in the market for newsprint manufacturing and the combined market share of the post-consolidation entity would not exceed 44%. The VCA also took into account the fact that another enterprise, Bai Bang Paper, would have entered the market in 2009.

Abuse of dominant position motion pictures/movies market (2010)

In April 2010, VCA received the petition filed by cinema companies in Vietnam accusing Megastar Media Company Limited (Megastar) of abusing its dominant position in distribution of imported motion pictures or movies in 35 provinces and cities in the territory of Vietnam. This action violates the Competition Law as follows:

- Fixing an unreasonable selling price on goods and services, thereby causing loss to customers, which is prohibited under Clause 12 Article 13 Competition Law;
- Tying the sale of goods and services which is subject of the contract with the sale of other goods and services having no connection with the contract, which is prohibited under Clause 15 Article 13 Competition Law
- Forcing the enterprises to implement obligations which does not fall under the scope of the contract; imposing condition on enter-

prises signing contract for the purchase and the sale of goods and services, which is prohibited under Clause 5 Article 13 Competition Law

Based on the documents submitted by related companies, VCA decided to initiate an investigation and collected evidences for the case. To date, the investigation process was almost finished and VCA is completing the investigation report before transferring the dossier to VCC for final decision.

Competition restriction agreement in the field of roofing panel (2011)

In Vietnam, the roofing industry was formed in 1960s with only 2 companies. By 2008, this number had increased to 44 companies and manufacturers operating in fibro-cement roofing sector nationwide (of those, 37 companies and manufacturers are members of the Vietnam Roofing Association).

As the number of enterprises and manufacturers has increased rapidly, resulting to more and fiercer price competition in this market. Given this context, some member enterprises of the Vietnam Roofing Association engaged in an agreement to increase selling prices of their products.

On 5th April 2011, VCA detected a copy of a document from the Vietnam Roofing Association requesting member enterprises to adjust selling prices on roofing panels.

On the basis of the above documents, VCA began the initial investigation in order to collect more information and evidence. After consideration, it decided to start a preliminary investigation on 5th May 2011 following by an official investigation on 14th July 2011 on the basis of a price fixing agreement in the roofing market.

Currently, VCA investigation team is completing the necessary steps, including evidence synthesis and analysis for producing an investigation report.



ANNEX II

Relevant Websites and Contact Points



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Cambodia

Ministry of Commerce

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Commission for the Supervision of Business Competition

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Lao PDR

Ministry of Industry and Commerce

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Malaysian Communications and Multimedia Commission

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Licensing & Economic Regulation and
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For a comprehensive listing of contact details, please visit the Ministry's directory at Singapore Government Directory Interactive.

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Sector-specific regulators

- Civil Aviation Authority of Singapore (www.caas.gov.sg): regulation of airport services under the Civil Aviation Authority of Singapore Act 2009 (Act No. 17 of 2009) and Airport Competition Code;
- Energy Market Authority of Singapore (www.ema.gov.sg): regulation of electricity and gas services under the Energy Market Authority of Singapore Act (Chapter 92B), the Electricity Act (Chapter 89A) and the Gas Act (Chapter 116A);
- Infocomm Development Authority of Singapore (www.ida.gov.sg): regulation of telecommunications and postal services under the Infocomm Development Authority of Singapore Act (Chapter 137A), the Telecom-

munications Act (Chapter 323), the Postal Services Act (Chapter 237A), the Telecom Competition Code and the Postal Competition Code;

- Media Development Authority of Singapore (www.mda.gov.sg): regulation of media services under the Media Authority of Singapore (Chapter 172) and Code of Practice for Market Conduct in the Provision of Mass Media Services;
- Singapore Police Force (www.spf.gov.sg): regulation of auxiliary police force services under the Police Force Act (Chapter 235).



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- In the intellectual property sector, the National Office of Intellectual Property of Vietnam www.noip.gov.vn (the Ministry of Science and Technology www.most.gov.vn);
- In the insurance sector, the Insurance Department of the Ministry of Finance www.mof.gov.vn

Sector-specific regulators

- In the electricity sector, the Electricity Regulatory Authority of Vietnam (Ministry of Industry and Trade, www.moit.gov.vn);
- In the telecommunications sector, the Department of Telecommunications (Ministry of Information and Communications, www.mic.gov.vn);
- In the maritime sector, the Vietnam National Maritime Bureau (Ministry of Transport www.mt.gov.vn);
- In the civil aviation sector, the Civil Aviation Administration of Vietnam (Ministry of Transport, www.mt.gov.vn);
- In the foreign investment sector, the Foreign Investment Agency, www.fia.mpi.gov.vn (Ministry of Planning and Investment, www.mpi.gov.vn);
- In the financial sector, the Ministry of Finance (www.mof.gov.vn) and The State Bank of Vietnam (www.sbv.gov.vn);
- In the pharmaceutical sector, the Drug Administration of Vietnam www.dav.gov.vn (Ministry of Health, www.moh.gov.vn);

ANNEX III: COMPARATIVE TABLE ON COMPETITION LAW FRAMEWORKS IN ASEAN

| ASEAN MEMBER STATE | National Competition Law | Authority administering the National Competition Law | Does the agency also take on functions to protect consumer interests? | Are there specific sectors that come under sectoral regulators with own competition laws? | Prohibition on anti-competitive Agreements | Prohibition against abuse of dominant position | Prohibition against anti-competitive mergers | Main exemptions from the National Competition Law (e.g. SOEs/GLCs are exempted, statutory boards, etc.) | Adjudication | Appeal | Leniency Program | Mandatory or Voluntary Merger Regime? | Are there provisions which allow entities to seek guidance or decision from the authority whether a particular agreement, conduct or merger is likely to or has infringed the competition law? | Does national competition law have settlement provisions? | Criminal Liability for breaching prohibitions against anti-competitive conduct? | Main investigative powers conferred by the Law | Rights of Private Action (Standalone or follow-on) |
|---|--|---|---|--|---|--|---|---|--|---|--|--|--|--|--|---|--|
|  Brunei | Brunei is in the process of drafting a national competition law. | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A |
|  Cambodia | Ministry of Commerce finalizing a draft national competition law, which is expected to be submitted to the Council of Ministers mid 2013. | Proposed to be the Cambodian Competition Commission and the Directorate. However, this might be changed if the draft is modified. | No. There will be another agency established by different law to protect consumer interests. | Under the proposed law the Commission and Directorate are responsible for the application of competition law in all sectors. The existing RAs will not have competition enforcement powers after this law enters into force. | Yes | Yes | No | Yes. The prohibitions of this law shall not apply to independent small Business Operators whose profits are exempted from taxation. | Yes | Yes. A decision, statement on remedies and sanctions, and order issued by the Commission may be appealed to the Competent Court of the Kingdom of Cambodia. | Yes | No | No | Yes | Yes | No | N/A |
|  Indonesia | Yes. The Law No. 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Competition | Komisi Pengawas Persaingan Usaha (KPPU) http://www.kppu.go.id/new/index.php http://eng.kppu.go.id/ (English version) | No | No | Yes. Article 5 excluded price fixing agreement by joint venture. Article 50 excluded violation in implementing certain law, IPR, franchise, technical standard, agency, research, international agreement, export, SMEs, and cooperatives | Yes. Article 50 excluded violation in implementing certain law, IPR, franchise, technical standard, agency, research, international agreement, export, SMEs, and cooperatives | Yes. Article 28 and 29. Exclusion gives to mergers between affiliated companies. | Exemption is provided by Article 51 to the establishment of monopoly or concentration by SOE and enterprises by certain Law under public interest's background. | Yes | Yes | No | Both, voluntary pre-merger and mandatory post-merger notification. Thresholds are IDR 2.5 trillion of combined asset, or IDR 5 trillion of combined sales. For banking, the combined asset is IDR 20 trillion. | Not specified, but companies may propose for unbinding consultation to KPPU | No | Yes. Rules by Article 48, but can be imposed by Court at appeal proceeding | Power to summon, and request for documents. No power for raid or seizure. | No |
|  Lao PDR | Decree 15/PMO (2004) on Trade Competition. This decree has not been implemented. Currently drafting new Law on Competition for submission to National Assembly in 2015. | Division on Consumer Protection and Competition | Yes | Sectoral regulators have wide powers to consider matters in their sectors including, potentially, competition law matters. No cases as yet. | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A |
|  Malaysia | Yes Competition Act 2010 (Enacted 2010) | Malaysia Competition Commission (MyCC) www.mycc.gov.my | No | Yes (1) Communication and multimedia regulated by the Malaysian Multimedia and Communications Commission and (2) Energy regulated by the Energy Commission | Yes under Section 4 (exclusions: non-commercial activities, agreements with net benefits, individual exemptions, block exemptions, agreements in pursuance of legislative requirements, collective bargaining activities for employment terms, services of general economic interests, activities regulated by the Malaysian Multimedia and Communications Commission and the Energy Commission | Yes, under Section 10 | No | Activities in exercise of governmental authority, activities conducted on the principle of solidarity, purchase of goods/ services not for the purposes of an economic activity, agreements in pursuance to a legislative requirement, collective bargaining activities for employment terms, services of general economic interests, activities regulated by the Malaysian Multimedia and Communications Commission and the Energy Commission | Yes | Yes | Yes | N/A | No | No. However the CA 2010 contains a provision to accept voluntary undertakings as per Section 43 | No with regard to infringing the main provisions of the CA 2010 but there is criminal liability with regard to certain acts in relation to powers of investigation. | (1) Power of search and seizure (with and without a warrant) (2) Power to require information | Yes, under section 64 (follow-on) |
|  Myanmar | Still drafting | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A |
|  Philippines | Yes The Philippines adopts a sectoral approach to competition policy and law. Initially, in 1925, an Act Prohibiting Monopolies and Combinations in Restraint of Trade was adopted, followed by the Revised Penal Code, as amended, and several others. The 1987 Constitution prohibits monopolies when the public interest so requires and the latest is an Executive Order in 2011 Designating the Department of Justice as the Competition Authority. | Department of Justice -Office for Competition (DOJ - OFC) http://www.doj.gov.ph/office-for-competition.html | Yes One of DOJ-OF's functions under Executive Order No. 45, series of 2011, is to "enforce competition policies and laws to protect consumers from abusive, fraudulent, or harmful corrupt business practices". | Yes Enforcement of competition-related laws/statutes and, consequently, regulation or monitoring of unfair trade practices and anti-competitive behaviour is vested in different agencies as mandated by several laws. | Yes Article XII, Section 19, of the Constitution establishes that "the State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed." It constitutes a statement of public policy on monopolies and combinations in restraint of trade. Article 186 of the Revised Penal Code, as amended, deals with anti-competitive agreements. Combinations in restraint of trade are illegal per se. No exemption is allowed. | Yes According to Article XII, Section 19, of the Constitution, it is for the government ("the State") to prohibit specific monopolies, based on the public interest. Article 186(2) of the Revised Penal Code, as amended, prohibits monopolization without exceptions. The Supreme Court has made it clear that "monopolies are not per se prohibited by the Constitution but may be permitted to exist to aid the government in carrying on an enterprise or to aid in the performance of various services and functions in the interest of the public", and has specified that "a determination must first be made as to whether public interest requires a monopoly. | Yes Mergers of listed companies require the prior approval of the Securities and Exchange Commission (SEC) before becoming effective. Prohibited mergers are those inconsistent with or violate the Corporation Code and those that are established for the purpose of putting up cartels and the promotion of restraint of trade and unfair competition. | Article 8 of the Cooperative Code establishes that "no cooperative or method or act thereof which complies with this Code shall be deemed a conspiracy or combination in restraint of trade or an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily in violation of any of the laws of the Philippines". Section 45 of the Electric Power Industry Reform Act provides an exemption for isolated grids that are not connected to the high voltage transmission system regarding the ownership, operation and control limitations of the installed generation capacity. | Final decisions vary according to the jurisdiction. Violations prosecuted under the Revised Penal Code, as amended, and proceedings under the New Civil Code are decided by the court. Parties are allowed judicial recourse up to the Supreme Court. Other violations will be adjudicated by an administrative decision of the competent authority. | The appeal system varies according to the authority in charge of the adjudication. In the case of administrative bodies, the appeal process is governed by the rules related to their jurisdiction. Appeals can also be brought to the Office of the President, following the principle of exhaustion of administrative remedies. | The leniency programme is being formulated and expected for completion by end of 2013. | Mergers of listed companies need notification. | Yes - The DOJ-OF, in accordance with the implementing guidelines of Executive Order No. 45, series of 2011, may issue advisory opinion/s to provide guidance to businesses, industry associations, consumers and other related stakeholders. | Section 2, Rule 116 of the Rules of Court provides for plea bargaining in criminal cases where, at arraignment, the accused, with the consent of the offended party and prosecutor, may be allowed by the trial court to plead guilty to a lesser offense. In civil cases, compromise agreements are allowed in accordance with Title XIV of the New Civil Code. | The DOJ-OF has the power to request information and to seek additional documents from the complainant. Subject to the issuance of search warrants by the court, the DOJ-OF may enter premises and inspect any relevant document and/or record and secure certified true copies of any necessary document. The DOJ-OF can sanction any act that prevents, impedes or obstructs investigators. Each sector regulator, in the exercise of its administrative powers, has its own process for conducting investigations. | Yes - Private actions are available under Article 28 of the New Civil Code. In addition, Section 6 of the Act Prohibiting Monopolies and Combinations in Restraint of Trade provides for recovery of treble damages plus the costs of the suit and a reasonable attorney's fee. | |
|  Singapore | Yes Competition Act (Chapter 50B) Original Enactment: 2004 Revised: 2006 | Competition Commission of Singapore (CCS) http://www.ccs.gov.sg/ | No | Yes (telecoms; media; energy; airport services) | Yes, under section 34 (exclusions: vertical agreements; agreements with net economic benefit; block exemptions) | Yes, under section 47 | Yes, under section 54 | Government activities; supply of piped potable water & waste-water management services; bus and rail services; cargo terminal operations; clearing houses for banks; armed security services | Yes | Yes | Yes | Voluntary | Yes | No | (no criminal liability for infringing the prohibitions under the Act; however criminal liability exists for offences relating to powers of investigation under the Act) | (1) Powers to require documents or information; (2) Powers to enter and search premises | Yes, follow-on action. |
|  Thailand | Yes Competition Act B.E. 2542 (1999) | The Trade Competition Commission (TTCC) http://otcc.dit.go.th/otcc/index_en.php | No | Yes The National Telecommunications Commission decides competition cases in telecoms. | Yes, under section 27 subsections (5)-(10). Can be exempted under Section 37 if "it is commercially necessary, has no serious harm to the economy, and has no effect on due interests of consumers" | Yes, under section 25. No exemption | Yes, under section 26 Can be exempted under section 37 if "it is reasonably necessary in the business, beneficial to business promotion, has no serious harm to the economy and has no effect on due interests of general consumers." | Section 4 excludes: act of central, provincial and local administrations; state enterprises under the law on budgetary procedure; farmer's groups, co-operatives; sectors exempted by Ministerial Regulation (none so far under this category). | Yes, a judicial process enforced by criminal procedures. | Yes | No | Mandatory where merger results in monopoly or unfair competition as prescribed and published in the Government Gazette. | No provision but can ask guidance from the Trade Competition Commission. | Yes - under section 56 offences under the Act punishable by fine or imprisonment of less than one year can be settled by the Commission. | Under section 19 the power to require persons to give statement, explanations, supply documents, to enter premises, arrest with and without a warrant in certain cases | Under section 40 anyone suffering loss as result of competition infringement can sue for damages. | |
|  Vietnam | Yes The Law on Competition (Law No. 27/2004). Enactment: 01/7/2005 | The Vietnam Competition Authority (VCA) http://www.vca.gov.vn/web/default.aspx?lang=en-US and the Vietnam Competition Council (VCC) | Yes | No, (there are specific sectors that come under sectoral regulators, but the competition law still applies). | Yes, Chapter II Section I (Article 8,9,10). Exclusions: agreements with net economic benefit. | Yes, Chapter II (from Article 11-Article 15). No exclusions. | Yes, Chapter II Section III (from Article 16-Article 24). Exclusions: mergers with net economic benefits; SMEs. | Supply of public goods and services; SMEs; enterprises go bankrupt. | Yes | Yes | No | Mandatory (combined market share >= 30%). | Yes (Government Decree No. 116/2005) | No | Yes (1) Powers to require documents or information; (2) Powers to enter and search premises; (3) Powers to seize persons and documents. | No (private damage claim can be taken in civil court under civil procedure). | |

