

Competition and Antitrust

Malaysia Competition Law: 2019 - Hindsight and 2020 - Foresight

2019, which marked Encik Iskandar Ismail's first full year as the Chief Executive Officer of the Malaysia Competition Commission ("**MyCC**"), saw considerable growth in the level of enforcement activities undertaken by MyCC. In 2019, MyCC received and screened a total of 154 complaints, issued its first proposed decision on bid-rigging (an activity which MyCC has since its inception focused on preventing and detecting especially in the public procurement sector) and also issued a final decision on resale price maintenance.

MyCC's Notable 2019 Events

January 2019

MyCC blazed into 2019 with a win as the High Court upheld the Competition Appeal Tribunal's decision which had also affirmed MyCC's decision that MyEG, the then sole online portal in Malaysia for applications of foreign workers' permits, had abused its dominant position when it discriminated between the different insurance companies who supplied compulsory foreign workers' insurances. In essence, MyEG made the application process for the foreign workers' permits easier for employers who purchased the compulsory foreign workers' insurances from MyEG's own subsidiary, who was an agent for one of the insurers. By the time the High Court's order was made, the financial penalty imposed by MyCC on MyEG had ballooned to RM9.46 million from an initial proposed fine of RM307,200. MyEG has since filed an appeal against this decision to the Court of Appeal.

March 2019

MyCC issued its first proposed decision on bid-rigging against eight enterprises for collusion on tenders by Akademi Seni Budaya dan Warisan Kebangsaan (ASWARA), a Malaysian public higher learning institution of performing arts. The total value of the project was RM1.92 million. MyCC found the enterprises shared tender proposal information, manipulated prices and also prepared documents for each other. The winning bidders were also alleged to have shared their profits with the losing bidders.

6 April 2019

MyCC's Guidelines on Intellectual Property Rights and Competition Law ("**IPR Guidelines**") came into force providing much needed guidance on MyCC's approach to competition issues relating to intellectual property rights under the Competition Act. The IPR Guidelines clarified that MyCC would

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consider IP licensing to be pro-competitive as long as the conduct of IP owners does not fall within the anti-competitive prohibitions imposed by the Competition Act. Various illustrations of anti-competitive agreements and abusive practices can be found in the IPR Guidelines. Unlike other MyCC guidelines which were not gazetted, the IPR Guidelines were gazetted on 5 April 2019 and stated to be issued pursuant to Section 66(1) of the Competition Act.

June 2019

Following the cement price hike announcements, MyCC announced that it would focus on monitoring the cement industry in order to complement the government's initiative to protect the welfare of consumers. MyCC took cognisance of the price increase notices issued by cement and ready-mixed concrete providers and of the effect of the merger between YTL Cement and Lafarge which resulted in the cement market becoming more concentrated in both upstream and downstream markets.

August 2019

MyCC conducted a market review of the food sector in Malaysia, specifically on beef, Indian mackerel, mustard leaf, round cabbage and infant milk powder, all considered as key consumption items in Malaysia. MyCC's report includes an analysis of the extent of market distortion and whether government intervention is necessary in curbing anti-competitive conduct. For the beef sector, MyCC recommended, amongst other recommendations, for the Government to re-strategise the ramping up of domestic beef production and explore additional countries for Malaysia's supply of imported beef. For the infant formula sector, MyCC recommended all sectors to support the Ministry of Health's recommendation for exclusive breastfeeding for infants during their first six months and for dissemination of communications to consumers that all infant formula in the market including the mainstream (ie. non-premium) brands, meet the minimum prescribed nutritional requirements. For the vegetables market, monitoring of the approved permits post-grant was a key recommendation. Further, a new wholesale market(s) was proposed to be established to modernise the existing Kuala Lumpur Wholesale Market (PBKL) and to develop a competitive centralised food hub with a view to providing new business and marketing channels and enhance efficiency of food distribution. For the fish market, consumer education of various substitutes for fresh mackerel fish was recommended and it was proposed that an inclusive e-commerce policy should be developed for fish distribution.

September 2019

While historically MyCC's enforcement actions have focused primarily on cartel activities and abuse of dominance, MyCC issued a decision of non-infringement to Coca-Cola Bottlers (Malaysia) Sdn Bhd and its wholly-owned subsidiary, Coca-Cola Refreshments Malaysia Sdn Bhd (collectively, "**Coca-Cola**") as MyCC found that no resale price maintenance was engaged by Coca-Cola. This decision was MyCC's first decision relating to vertical agreements involving resale price maintenance and illustrated the expansion of MyCC's enforcement activities to include anti-competitive vertical

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agreements although this is typically harder to prove infringement. It is also significant to note that: (a) MyCC's investigation arose from the Minister of Domestic Trade and Consumer Affairs' directive, which evidences regulatory cooperation between MyCC and the Ministry; and (b) MyCC made a legal presumption that Coca-Cola Bottlers had exercised decisive influence over Coca-Cola Refreshments since the latter was a wholly owned subsidiary of the former i.e. both Coca-Cola entities formed a single economic unit for the purpose of the Competition Act.

23 September 2019

MyCC accepted an undertaking from the Sabah Tourist Guides Association ("**STGA**") on behalf of its 477 members in response to concerns that the fixing of the tourist guide professional fees by STGA would be anti-competitive. STGA members gave an undertaking to MyCC: (a) to rescind the issued Minimum Tourist Guides Professional Fees; (b) not to hold any discussions about tourist guide fees applicable to STGA members; and (c) to halt the implementation of the proposed STGA Sabah Professional Guiding Fee Rates. STGA also undertook to ensure its members comply with the Competition Act and that it would cooperate fully with MyCC in the event of any complaints being made against its members.

3 October 2019

Although not empowered with merger control powers to prevent Grab's acquisition of Uber's Southeast Asia business in Malaysia, MyCC flexed its enforcement muscle and announced a proposed fine of RM86.7 million against Grab Inc, Grab Car Sdn Bhd and MyTeksi Sdn Bhd (collectively "**Grab**") for collectively infringing the Competition Act by abusing their dominance. MyCC alleged that Grab abused its dominance by imposing restrictive clauses on its drivers which prevented them from promoting and providing advertising services for Grab's competitors in the e-hailing and transit media advertising market.

November 2019

MyCC renewed the earlier block exemption granted to liner shippers (effective from 7 July 2019 to 6 July 2022). This block exemption was first granted in 2014 and was renewed once in 2017 and again in 2019. The liner shipping industry remains the only industry in Malaysia to receive a formal block exemption under the Competition Act since the legislation came into force in 2012.

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2020 Outlook

MyCC's bullish start in 2020 promises an eventful year ahead.

MyCC issued a proposed decision in January 2020 against seven warehouse operators for price fixing of surcharges on Long Length Handling and Heavy Lifting Handling services for all import and export cargos in the Northport and Westport areas in Port Klang. MyCC's CEO emphasised in MyCC's accompanying press release that "*price fixing cartel is the supreme evil of competition law, which must be stopped in order to protect the consumers*". We can therefore expect MyCC's continued enforcement against price fixing cartels in 2020.

MyCC also announced that it will actively probe government procurement activities, and is currently looking into 11 bid-rigging cartel investigations. Other focus areas for 2020 include the cement sector and digital economy issues. MyCC also aims to enhance its leniency regime which would encourage more whistle-blowing on cartels.

By far the most anticipated development among the competition law community is the expected introduction in 2020 of merger control laws in Malaysia. Large corporations and financial advisers are advised to watch this space as mergers and acquisition (M&A) activities may then be subject to MyCC's purview.

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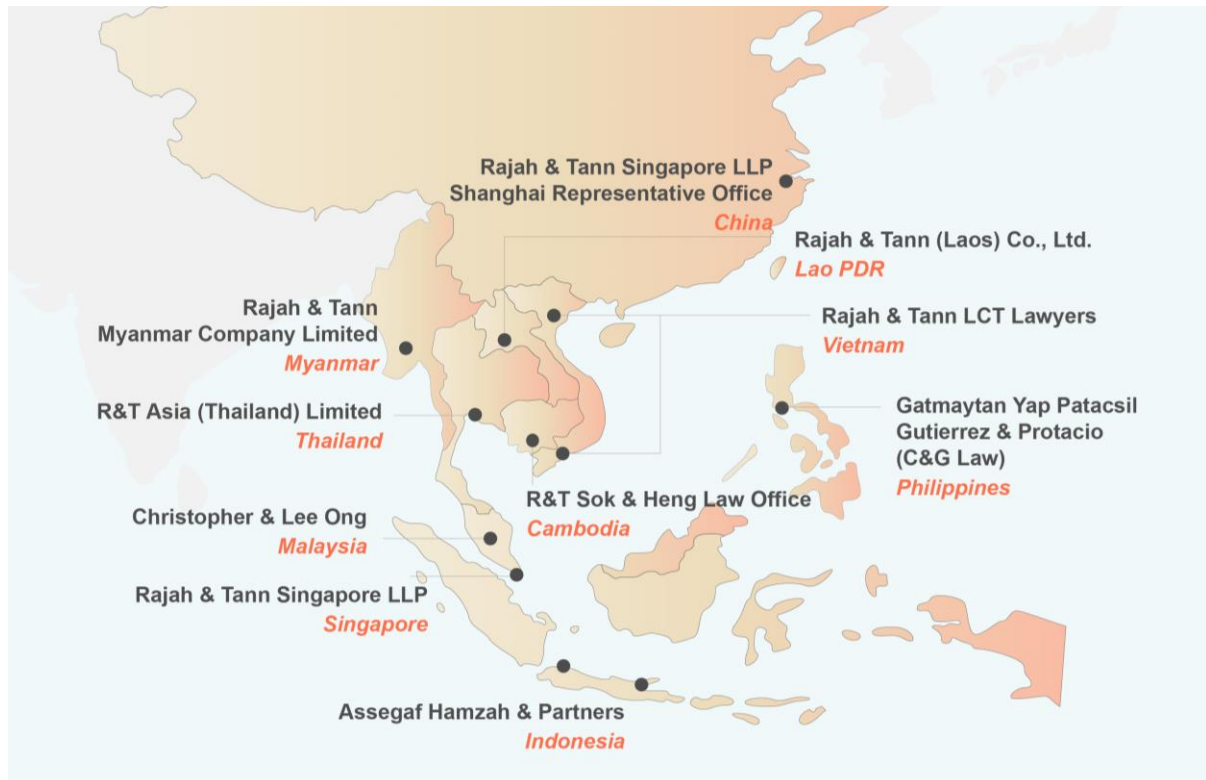
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