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Key Lessons from the Rise of Antitrust Enforcement in South-East Asia

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I. Antitrust Laws in South-East Asia

The Association of Southeast Asian Nations, or "ASEAN," comprises ten Member States: Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam (collectively, the "ASEAN Member State**s**"). Further to the commitment by ASEAN Member States in the ASEAN Economic Community Blueprint to endeavour to introduce national competition policy and law ("CPL") by 2015, all the ASEAN Member States have, as of 2022, introduced competition laws.

While all ASEAN Member States have competition laws in place, the framework of competition laws and enforcement levels vary from jurisdiction to jurisdiction. There is no supra-national competition law framework in ASEAN; however, there is growing cooperation between ASEAN Member States. In August 2007, the ASEAN Economic Ministers endorsed the establishment of the ASEAN Experts Group on Competition ("AEGC") as a regional forum to discuss and cooperate on competition policy and law. The AEGC will continue to ensure a level playing field and foster a culture of fair business competition, for enhanced regional economic performance. At the 54th ASEAN Economic Ministers Meeting held in 2022, the Negotiations for the ASEAN Framework Agreement on Competition was launched, which will serve as a formal cooperation agreement that would facilitate cross-border cooperation and coordination on CPL matters among ASEAN Member States.

South-east Asia is a major global hub of manufacturing and trade (collectively the size of the fifth largest economy in the world by GDP), and is on track to becoming the fourth largest economy by 2030. It accounts for almost one-fifth of the global foreign direct investment inflow annually. South-east Asia also has robust population growth, with higher population growth rate relative to the global average across every age group. Overall, there is growing investment in South-east Asia and interest by corporates in growing their presence in South-east Asia. With global corporates increasingly exposed to South-east Asia, they now also have to navigate competition laws in the region.

II. Current State of Antitrust Laws in South-East Asia

Notwithstanding the differences in the competition law framework in each South-east Asian Member State, the framework is still generally organized around the three main prohibitions of anti-competitive agreements, abuse of dominance, and mergers that substantially lessen competition.

Below is a brief overview of the current state of competition law regimes in South-east Asia.

Singapore

The Competition Act 2004 of Singapore ("Competition Act") was enacted in 2004, and it regulates anti-competitive agreements, abuse of dominance, and includes merger control. There is active enforcement of competition laws in Singapore, with the Competition and Consumer Commission of Singapore ("CCCS") conducting frequent competition law reviews of proposed merger transactions, dawn raids, and cartel decisions. As of March 31, 2022, the CCCS has completed a total of 700 competition cases, which includes investigations, leniency, merger notifications, and market studies.

In 2018, the CCCS issued its largest fine to date of approximately S$26.95 million (approx. US$18.76 million) to 13 distributors in the agricultural sector for fixing prices and agreeing not to compete during a seven-year period, which highlights its growing enforcement

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prowess against cartel activities and parties with large market shares and with protracted, serious infringements of the Competition Act.

The CCCS has also to-date conducted 20 complex Phase 2 merger reviews, issued five conditional merger clearances (*SEEK/JobStreet, ADB/Safegate, Times/Penguin, PAH/Innovative/Quest, and LSEG/Refinitiv*), issued three statements of decision (provisional) to block mergers (*Greif/GEP, Parkway/Radlink, and WMS/Drew Marine*), and one merger infringement decision (*Grab/Uber*).

Malaysia

The Malaysian Competition Act 2010 was enacted in 2010 and came into force in 2012. It regulates anti-competitive agreements and abuse of dominance. The Malaysian Competition Commission ("MyCC") is active in enforcement, with several high-profile price-fixing and abuse of dominance cases over the years. In 2017, the MyCC issued a fine against insurance companies amounting to approximately RM173 million (approx. US$37.2 million).

On April 25, 2022, the MyCC also initiated a public consultation relating to proposed amendments to the Competition Act 2010 which introduce a pre-notification merger regime. The MyCC has expressed that it expects the new merger control regime to be in force by 2023.

Indonesia

Indonesia was one of the first jurisdictions in ASEAN to introduce competition laws in 1999. It prohibits anti-competitive agreements, abuse of dominance, and includes a merger control regime for transactions which may result in monopolistic practices or unfair business competition. The Indonesian Competition Commission ("KPPU") is active in enforcement, receiving around 100 complaints every year relating to various industries.

In 2019, the KPPU imposed its highest level of fines of IDR20.66 billion (approx. US$1.46 million) against a company for failing to notify the KPPU of two transactions relating to its acquisition of two mining companies within the required timeframe.

Vietnam

Competition law has been in effect in Vietnam since 2004, but a new Law on Competition came into effect on July 1, 2019. The Law on Competition regulates anti-competitive agreements, abuse of dominance, economic concentrations, and unfair practices. There is active enforcement of competition laws in Vietnam, with the Vietnam Competition and Consumer Authority ("VCCA") Report of 2021 highlighting that the VCCA received and processed 130 notifications of economic concentrations in 2021.

Philippines

The Philippine Competition Act was enacted in 2015 and came into force in 2017. It regulates anti-competitive agreements, abuse of dominance, and mergers and acquisitions which substantially lessen competition in the Philippines. The Philippine Competition Commission ("PCC") is active in enforcement, actively opening investigations into alleged anticompetitive conduct, and it increased the fine in 2021 for anti-competitive behavior to a maximum of PHP110 million (approx. US$1.87 million).

Thailand

Thailand's competition law was enacted in 1999, which has since been superseded by the Trade Competition Act B.E. 2560, which came into force in 2017. It regulates anti-competitive agreements, abuse of dominance, mergers which may cause a monopoly, result in a dominant position or substantially reduce competition, and unfair trade practices. Thailand's Trade Competition Commission ("TCCT") has been increasing its enforcement. In 2019, the TCCT imposed fines amounting to 12 million baht (approx. US$0.32 million), for abuse of dominance and unfair trade practices.

Myanmar

Myanmar's competition law was enacted in 2015 and came into force in 2017. It regulates anti-competitive agreements, abuse of dominance, mergers and unfair trade practices. However, there has not been any significant level of enforcement in Myanmar, as further detail and guidance is required from various guidelines and rules to be issued by the

Myanmar Competition Commission to ensure effective implementation of the competition law.

Cambodia

The Cambodia Competition Law was enacted in 2021, and regulates anti-competitive agreements, abuse of dominance and anti-competitive business combinations. However, the competition law regime is not active yet, with the Cambodia Competition Commission just established in February 2022.

Laos

The Laos Business Competition Law came into force in 2015 and regulates anti-competitive agreements, abuse of dominance and anti-competitive mergers. While the Laos Competition Commission has been established, the competition law regime is not active yet.

Brunei

The Brunei Competition Act came into force in 2015 and regulates anti-competitive agreements, abuse of dominance and anti-competitive mergers. However, the competition law regime in Brunei is not active yet, and there has also been no formal announcement on the establishment of the Competition Appeal Tribunal and its members.

III. Notable Cases of Antitrust Enforcement in ASEAN

In navigating the competition law regimes in South-east Asia, it would be relevant to consider recent notable cases of antitrust enforcement, which can provide some indication of the priorities for antitrust enforcement and the enforcement approach in this region.

Singapore

In Singapore, the recent noteworthy antitrust enforcement activity includes the following:

(a) In 2018, the CCCS investigated the *Grab/Uber* transaction. Grab had acquired the South-east Asia business of Uber, following which Uber held a 27.5 percent interest in Grab. Both provide ride-hailing services in Singapore. The CCCS disagreed with the parties' definition of the relevant market, and found the failure to notify pre-completion and the implementation of the transaction, among other things, to be an intentional and negligent infringement of Singapore competition laws, and imposed financial penalties of around S$13 million (approx. US$9 million), in addition to other directions. This has led to market observations that the Singapore merger regime is "not truly voluntary."

The *Grab/Uber* investigation also demonstrated that:

- the CCCS can reject a post-completion notification even though the Singapore merger control regime allows it, and conduct an investigation instead;
- the CCCS can refuse to accept commitments offered by parties, but elect to impose these as directions instead;
- the CCCS can impose financial penalties in a voluntary regime as a percentage of turnover (not capped at an absolute dollar figure), as it considers that the failure to make a pre-completion notification is a basis that the infringement is intentional or negligent; and
- if the CCCS disagrees with the parties' self-assessment (e.g. market definition), even though the parties did duly conduct a self-assessment, the CCCS can find that there was an intentional or negligent infringement by the parties in entering into the transaction.

(b) In May 2018, the CCCS also issued a provisional statement of its decision to block a foreign-to-foreign merger on the proposed acquisition by WMS of Drew Marine Group Coöperatief U.A. and Drew Marine Partners L.P.'s technical solutions, fire, safety, and rescue businesses in the marine chemicals sector in Singapore. This is the first foreign-to-foreign merger that the CCCS has proposed to block. Both parties were

foreign-incorporated companies, but the CCCS was prepared to block the acquisition on the basis that it potentially resulted in a substantial lessening of competition in Singapore, and prior to other jurisdictions having made their decisions.

(c) More recently on May 24, 2021, the CCCS conditionally approved the proposed acquisition by London Stock Exchange Group plc ("LSEG") of Refinitiv Holdings Limited ("Refinitiv") in the financial markets sector after accepting commitments from LSEG. The parties were both foreign companies with business activities in financial information and risk management services in the global market. The CCCS identified competition concerns in Singapore arising from the transaction, which led to the Parties proposing the accepted commitments.

Malaysia

In 2021, the MyCC issued a proposed infringement decision against Grab Inc, GrabCar Sdn Bhd and MyTeksi Sdn Bhd (collectively, Grab) for allegedly abusing its dominant position. The proposed decision followed Grab's merger with Uber in South-east Asia in March 2018, following which the MyCC announced that it would look into the merger. The decision was built on the basis that Grab has abused its dominant position by preventing its driver-partners from promoting and providing advertising services for Grab competitors to Grab passengers in the e-hailing and transit media advertising markets. The MyCC proposed to impose a financial penalty of RM86.8 million (approx. US$18.6 million) against Grab as well as a daily penalty of RM15,000 (approx. US$3,210.62) from the date of service of its proposed decision (predating its finalized decision) should it fail to take remedial actions as directed by the MyCC. As of 2022, the proposed decision is currently pending judicial review which was applied by Grab. If a finding of infringement is eventually made against Grab, the proposed financial penalty would be the highest financial penalty imposed against a single company to date for an abuse of dominance in Malaysia.

Indonesia

On September 15, 2022, the KPPU announced that it is initiating an investigation into the alleged violations of Law No. 5/1999 conducted by Google and its subsidiaries in Indonesia, in relation to a potential abuse of dominant position, by conducting conditional sales and discriminatory practices in the distribution of digital applications in Indonesia.

In particular, Google's policies require the use of Google Pay Billing ("GPB") in the purchases of in-app digital products and services on certain applications distributed on the Google Play Store. The various types of applications that users of the GPB are subjected to include (i) applications that offer subscriptions (such as education, fitness, music, or video); (ii) applications that offer digital items that can be used in games; (iii) applications that provide content or benefits (such as an ad-free version of the application); and (iv) applications that offer cloud software and services (such as data storage services, productivity applications, and others). The GPB usage policy requires that applications downloaded from the Google Play Store must use GPB as the transaction method, and Google also does not allow the use of other payment alternatives.

Additionally, the KPPU also suspected that Google has practiced conditional sales, or tying, by requiring application developers to purchase in bundle the Google Play Store application (the digital application marketplace) and Google Play Billing (the payment service). It was also found that for in-app purchases, Google only cooperated with one payment gateway/system provider, whereas several other providers in Indonesia did not have the same opportunity to negotiate the financing method. The allegation is that this differs from the treatment intended for global digital content providers, where Google gives opportunities to providers to cooperate with alternative payment systems.

Philippines

In August 2018, the PCC approved the acquisition by Grab of Uber's business in South-east Asia for a 27.5 percent. stake in Grab's

operations in the region, after accepting Grab's voluntary commitments which relate to non-exclusivity, upholding service quality and transparency of fares. The PCC has since imposed a series of penalties on Grab for violating its voluntary commitments ranging from PHP50,000 to PHP2 million (approx. US$846.98 to US$33,879).

Thailand

In 2020, the TCCT approved a landmark merger transaction which involved CP Group's acquisition of Tesco's Lotus business. This was the first case in which the TCCT imposed behavioral remedies on the parties. In 2021, the TCCT also imposed its first penalty on an unfair pricing practice by a fruit wholesaler, where the fine amounted to more than 5 percent. of its annual revenue.

IV. General Learning Points

The key lessons that can be gleaned from the introduction of competition laws in South-east Asia, and the notable cases of antitrust enforcement over recent years are as follows:

A. Increased Competition Law Enforcement in ASEAN

As highlighted above, there is an overall increase in enforcement activity across ASEAN jurisdictions, with new guidelines, strategic plans and amendments to competition laws being introduced to enhance the enforcement abilities of competition authorities. Based on past enforcement activity in ASEAN in 2021, the priority sectors for enforcement include digital platforms, e-commerce, logistics and distribution, technology, financial services, land transport, food delivery and supermarkets.

In Singapore, the CCCS received the highest number of merger notifications in 2021 since 2014, including four in the semiconductor sector, and three on-going reviews in aviation cooperation agreements. In the past five years (2017 to 2021), more than 1 out of every 5 (over 24 percent.) merger notifications have proceeded to a Phase 2 review. For Vietnam, the VCCA reported that it received and reviewed 130 merger notifications, which is almost double the figures for 2020. In Indonesia, the KPPU reported that it decided 15 cases and imposed a total fine of approximately IDR66 billion (approx. US$4.3 million).

B. Strong Regional Cooperation in ASEAN

The ASEAN Experts Group on Competition ("AEGC") noted that it will continue to strengthen cooperation among ASEAN competition authorities, ensure timely exchange of information, and facilitate sharing of best practices among by member states to address anti-competitive activity. The Chief Executive of the CCCS, Sia Aik Kor, has noted that strong regional cooperation is a priority for the CCCS, and that she would like the CCCS to be able to share its thinking on more complex issues involving digital markets with its counterparts in the region.

As part of the ASEAN Competition Action Plan 2025, various competition authorities in ASEAN discussed the progress and developments of regional cooperation on competition policy and law in ASEAN, with new deliverables introduced, including a new ASEAN Information Portal on merger cases, and a new ASEAN Investigation Manual on Competition Policy and Law for the Digital Economy.

As of December 31, 2021, the CCCS has entered into five cooperation agreements with foreign competition authorities, including Indonesia's KPPU and the Philippine's PCC. These cooperation agreements foster greater cooperation between competition agencies on competition law enforcement, including areas such as notification of cases of mutual interest or significant impact, coordination of enforcement activities, exchange of information, as well as technical cooperation and experience sharing. The cooperation agreements also enhance the capabilities of competition authorities to handle a broader spectrum of cases, including many which have a cross-border dimension.

In the light of this, entities engaged in transactions with a cross-border element should understand the new regulatory frameworks across jurisdictions and plan their transactions accordingly.

C. Sharpened Enforcement Against Big Data and the Digital Economy

The CCCS, together with other jurisdictions including Indonesia and Thailand, is taking an active interest in the implications of data issues and the digital economy on competition policy.

In an interview for the April 2018 edition of the Asia-Pacific Competition Update (a publication by the OECD/Korea Policy Centre), Toh Han Li, the former chief executive of the CCCS, noted that "with the rise of the digital economy, more sophisticated business models have emerged and CCCS is seeing an increase in the complexity of the cases handled." The current Chief Executive of the CCCS, Sia Aik Kor, also expressed that the CCCS will "closely examine deals" in markets where innovation is an important feature of competition. The CCCS has, over the years, also issue multiple occasional papers and market studies into the role of competition policy in the digital economy and competition issues around e-commerce platforms. Similarly, the TCCT has also been scrutinizing the e-commerce platform market for anti-competitive conduct, and has issued the Guidelines on Unfair Trade Practices between Digital Platform Operators for Food Delivery and Restaurant Operators. Iskandar Ismail, the Chief Executive Officer of MyCC, further stated in a press release that the MyCC will "ensure rigorous and robust enforcement of competition law and policy" in the e-commerce sector and the digital market, which they expect to be the "mainstay of the Malaysian economy."

This has manifested in new legislation and enforcement against entities in the digital sector. Accordingly, firms in the digital sector should review their structures and operations and conduct a risk assessment of its transactions to ensure that they are compliant with competition laws in ASEAN.

In addition, there are also other regulatory trends that will likely impact antitrust enforcement in South-east Asia moving forward.

D. Greater Role of Sustainability

Sustainability is expected to play a bigger role in competition law policy in ASEAN. In Singapore, the CCCS has stressed that businesses are encouraged to make the shift towards more sustainable practices, and to capture opportunities in the green economy. Additionally, the CCCS has launched a research grant and invited research proposals on the topic of "Sustainability, Competition and Consumer Protection in Singapore" on September 17, 2021. In Malaysia, the MyCC expressed that as part of its strategic plan for 2021 to 2025, it will promote the environmental, social and governance agenda along with championing competition in markets, for long-term economic sustainability.

Firms are encouraged to consider how competition laws may apply to its sustainability initiatives, in terms of potential infringements.