

Competition & Antitrust and Trade

European Commission Amends Article 102 TFEU Enforcement Priorities

Introduction

On 27 March 2023, the European Commission ("**EC**") published a Communication and Annex ("**Amending Communication**"), amending its 2008 Guidance on enforcement priorities concerning exclusionary abuses ("**Guidance on Enforcement Priorities**"). This came in conjunction with a Call for Evidence to seek feedback on the proposed introduction of Guidelines on exclusionary abuses of dominance ("**Proposed Guidelines**") by the EC. These Proposed Guidelines are slated to be released for public consultation by mid-2024 and the EC is seeking to adopt them by end 2025.

Background

The Guidance on Enforcement Priorities was first adopted by the EC in 2008 to reflect enforcement priorities in applying Article 82 (now Article 102) of the Treaty on the Functioning of the European Union ("**TFEU**"). The Guidance on Enforcement Priorities was part of the EC's move away from a formalistic approach to enforcing Article 102 TFEU, to an "effects-based" approach, which has since been endorsed in various judgments issued by the Court of Justice and the General Court of the European Union ("**Union Courts**").

Since the adoption of the Guidance on Enforcement Priorities, the Union Courts have further clarified the meaning and scope of various concepts introduced within that document. Social and economic changes, such as the rising influence of digital markets and services, and the fast-changing economic landscape have further highlighted the limitations of the original Guidance of Enforcement Priorities.

In the short term, the Amending Communication aims to reflect the EC's change in approach to pursuing Article 102 cases arising from the above developments. In the long term, the Call for Evidence is the first step in the introduction of formal Guidelines by the EC on Article 102 of the TFEU. Once these guidelines have been adopted (estimated by 2025), the Guidance on Enforcement Priorities will be withdrawn.

Key Changes to Guidelines on Enforcement Priorities

The Amending Communication identifies five key revisions made to the Guidance on Enforcement Priorities in light of the enforcement practices of the EC and judgments issued by the Union Courts.

Client Update: Singapore

2023 APRIL

Competition & Antitrust and Trade

Anti-competitive foreclosure

The Amending Communication introduces a key change to the concept and meaning of "anti-competitive foreclosure".

Conceptually, the Amending Communication broadens the meaning of "anti-competitive foreclosure". Rather than just capturing exclusionary abuse conduct which results in full exclusion or marginalisation of actual or potential competition, it will also capture conduct that weakens competition within the existing market structure, even if such conduct does not result in full exclusion or marginalisation of competitors.

Further, the Amending Communication replaces the language of having to show "profitability" of the dominant undertaking's abusive conduct with a requirement to show that the conduct has allowed the "*dominant undertaking to negatively influence, to its own advantage to the detriment of consumers*" the competitive conditions in the relevant market. In other parts, the EC has now expressly stated that it is not suitable to use profitability to determine its enforcement priorities.

As-efficient competitors vs less efficient competitors

The Amending Communication identifies the need to consider market effects beyond the market exit or marginalisation of competitors who are "as-efficient" as the dominant undertaking in terms of cost structure. Thus, paragraphs 23 and 24 of the Guidance on Enforcement Priorities have been revised to adopt the following:

- A change to only a "general rule" to prioritise the enforcement against conduct which has or is capable of hampering competition by as-efficient competitors. Here, "as-efficient" refers to the efficiency of cost structures and attractiveness to consumers who consider price, choice, quality and innovation, among other things.
- The EC will concurrently prioritise enforcement against conduct which has or is capable of hampering competition by competitors who are less efficient than the dominant undertaking if such competitors factually exert sufficient competitive constraints on the dominant undertaking.

This revision seeks to prevent an unduly strict application of Article 102 of the TFEU, as the EC recognises that less efficient competitors can also serve as competitive constraints, and loss of such competition should also be considered when assessing abuse.

The price-cost as-efficient competitor ("AEC") test

The Amending Communication clarifies that the price-cost AEC test should not be applied in a generalised manner to all forms of exclusionary conduct to find an infringement under Article 102 of the TFEU. While the AEC test is warranted in predatory pricing and margin squeeze cases, for other cases, the AEC test is one methodology considered, along with "*other relevant quantitative and/or qualitative evidence*". This means that merely showing that the exclusionary conduct by the dominant undertaking "passes" or "fails" the price-cost AEC test will not be conclusive in the EC finding any infringement under

Client Update: Singapore

2023 APRIL

Competition & Antitrust and Trade

Article 102 of the TFEU. Importantly, the EC has also noted that the AEC test is generally not warranted for exclusivity rebate cases, as such rebates are by their very nature capable of affecting competition. As such, paragraphs 25 and 27 of the Guidance on Enforcement Priorities have been amended to reflect that it is optional for the EC to apply the price-cost AEC test and consider the competitive effects of the exclusionary behaviour on a hypothetical as-efficient competitor. The EC can also consider other relevant quantitative and/or qualitative evidence in coming to any conclusion.

Outright and constructive refusals to supply and unfair access conditions

Constructive refusals to supply refer to situations where a dominant company makes access to certain inputs subject to unfair conditions. Judgments issued by the Union Courts have noted that this type of conduct is independent from, and should not be treated in the same way as, an outright refusal to supply situation.

The Guidance on Enforcement Priorities initially identified that the *Bronner* principles applied equally to both outright and constructive refusals to supply i.e. the conduct:

- related to a product or service which is indispensable to the recipient ("**Indispensability Criteria**");
- was likely to lead to the elimination of effective competition;
- was likely to lead to consumer harm; and
- cannot be objectively justified.

The Amending Communication makes clear that the scope of application of the *Bronner* principles should be limited to cases of outright refusals to supply, and paragraph 79 of the Guidance on Enforcement Priorities has been amended accordingly. The Amending Communication also notes that the Indispensability Criteria is not applicable when assessing constructive refusals to supply cases.

Margin squeeze

While the Guidance on Enforcement Priorities had previously considered margin squeeze a type of refusal to supply, the Amending Communication now recognises it as an independent type of abuse under Article 102.

This revision was made to reflect the position of the Union Courts. Amongst others, the Union Courts have previously noted that margin squeeze is an independent abuse and the Indispensability Criteria applicable to refusal to supply should not be applied to margin squeeze cases.

Our Comments

The amendments to the Guidance on Enforcement Priorities represent an important consolidation of jurisprudence coming out of the Union Courts in the past few years. These amendments are likely to influence the approach that Singapore and other Southeast Asian regulators will take in assessing

Client Update: Singapore

2023 APRIL

Competition & Antitrust and Trade

abuse of dominance cases. The present set of abuse of dominance guidelines in Singapore for example do not go into as much detail as the Guidance on Enforcement Priorities in analysis (e.g. in relation to the applicability of the Indispensability Criteria to refusal to supply / margin squeeze, or the use of the AEC test), and it is likely that regulators will be interested in developing European Union practice to fill analytical gaps.

If you have any queries on the above development, please feel free to contact our team members below who will be happy to assist.

For more information, please refer to the [Article 102 TFEU package](#) issued by the EC that sets out further details.

Contacts



Kala Anandarajah, BBM
Head, Competition & Antitrust
and Trade

T +65 6232 0111

kala.anandarajah@rajahtann.com



Tanya Tang
Partner (Chief Economic and
Policy Advisor)
Competition & Antitrust and Trade

T +65 6232 0298

tanya.tang@rajahtann.com



Alvin Tan
Partner
Competition & Antitrust and Trade

D +65 6232 0904

alvin.tan@rajahtann.com



Joshua Seet
Partner
Competition & Antitrust and Trade

D +65 6232 0104

joshua.seet@rajahtann.com

Please feel free to also contact Knowledge Management at eOASIS@rajahtann.com

Our Regional Contacts

R&T SOK & HENG | *Cambodia*

R&T Sok & Heng Law Office

T +855 23 963 112 / 113

F +855 23 963 116

kh.rajahtannasia.com

RAJAH & TANN | *Myanmar*

Rajah & Tann Myanmar Company Limited

T +95 1 9345 343 / +95 1 9345 346

F +95 1 9345 348

mm.rajahtannasia.com

RAJAH & TANN 立杰上海

SHANGHAI REPRESENTATIVE OFFICE | *China*

Rajah & Tann Singapore LLP

Shanghai Representative Office

T +86 21 6120 8818

F +86 21 6120 8820

cn.rajahtannasia.com

GATMAYTAN YAP PATACSIL

GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*

Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)

T +632 8894 0377 to 79 / +632 8894 4931 to 32

F +632 8552 1977 to 78

www.cagatlaw.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

Assegaf Hamzah & Partners

Jakarta Office

T +62 21 2555 7800

F +62 21 2555 7899

Surabaya Office

T +62 31 5116 4550

F +62 31 5116 4560

www.ahp.co.id

RAJAH & TANN | *Singapore*

Rajah & Tann Singapore LLP

T +65 6535 3600

sg.rajahtannasia.com

RAJAH & TANN | *Thailand*

R&T Asia (Thailand) Limited

T +66 2 656 1991

F +66 2 656 0833

th.rajahtannasia.com

RAJAH & TANN | *Lao PDR*

Rajah & Tann (Laos) Co., Ltd.

T +856 21 454 239

F +856 21 285 261

la.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office

T +84 28 3821 2382 / +84 28 3821 2673

F +84 28 3520 8206

CHRISTOPHER & LEE ONG | *Malaysia*

Christopher & Lee Ong

T +60 3 2273 1919

F +60 3 2273 8310

www.christopherleeong.com

Hanoi Office

T +84 24 3267 6127

F +84 24 3267 6128

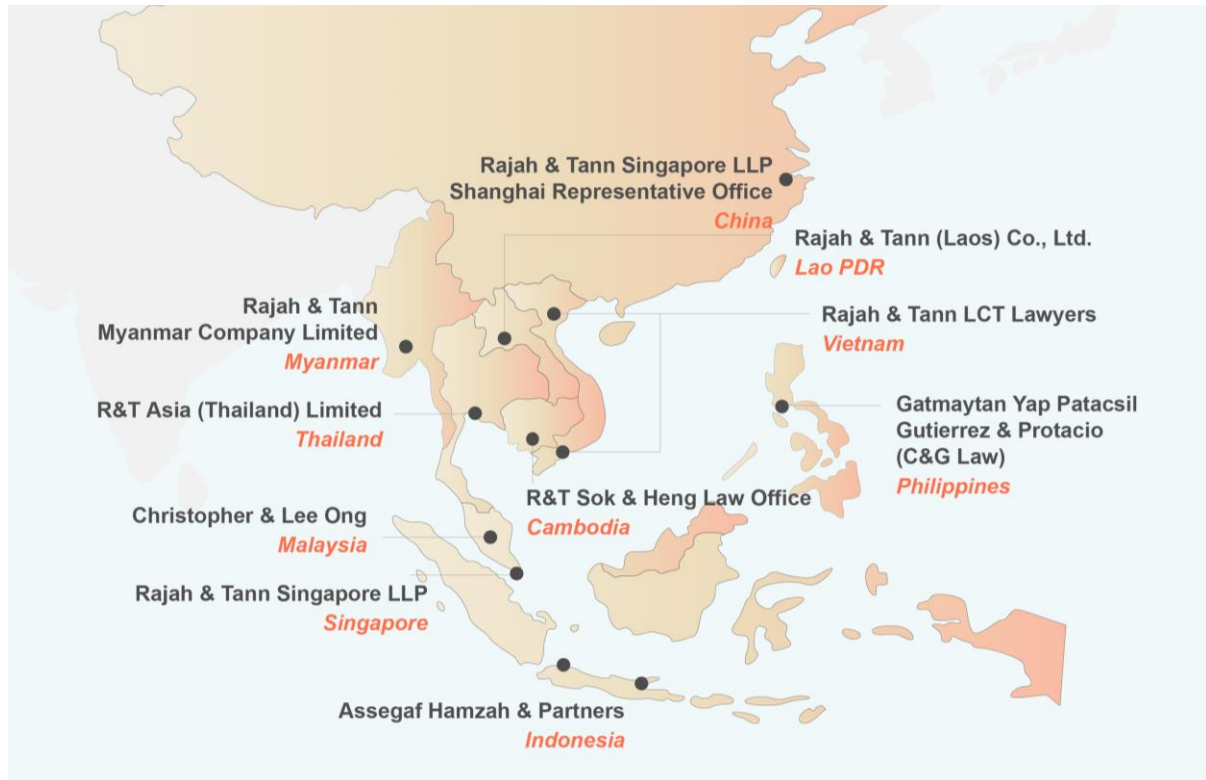
www.rajahtannlct.com

Rajah & Tann Asia is a network of legal practices based in Asia.

Member firms are independently constituted and regulated in accordance with relevant local legal requirements. Services provided by a member firm are governed by the terms of engagement between the member firm and the client.

This update is solely intended to provide general information and does not provide any advice or create any relationship, whether legally binding or otherwise. Rajah & Tann Asia and its member firms do not accept, and fully disclaim, responsibility for any loss or damage which may result from accessing or relying on this update.

Our Regional Presence



Rajah & Tann Singapore LLP is one of the largest full-service law firms in Singapore, providing high quality advice to an impressive list of clients. We place strong emphasis on promptness, accessibility and reliability in dealing with clients. At the same time, the firm strives towards a practical yet creative approach in dealing with business and commercial problems. As the Singapore member firm of the Lex Mundi Network, we are able to offer access to excellent legal expertise in more than 100 countries.

Rajah & Tann Singapore LLP is part of Rajah & Tann Asia, a network of local law firms in Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Our Asian network also includes regional desks focused on Brunei, Japan and South Asia.

The contents of this Update are owned by Rajah & Tann Singapore LLP and subject to copyright protection under the laws of Singapore and, through international treaties, other countries. No part of this Update may be reproduced, licensed, sold, published, transmitted, modified, adapted, publicly displayed, broadcast (including storage in any medium by electronic means whether or not transiently for any purpose save as permitted herein) without the prior written permission of Rajah & Tann Singapore LLP.

Please note also that whilst the information in this Update is correct to the best of our knowledge and belief at the time of writing, it is only intended to provide a general guide to the subject matter and should not be treated as a substitute for specific professional advice for any particular course of action as such information may not suit your specific business and operational requirements. It is to your advantage to seek legal advice for your specific situation. In this regard, you may call the lawyer you normally deal with in Rajah & Tann Singapore LLP or email Knowledge Management at eOASIS@rajahtann.com.