



Indirect Tax Alert

New Anti-profiteering regulations for ALL businesses

Background

The Ministry of Domestic Trade, Co-operatives and Consumerism (MDTCC) has gazetted the new Price Control and Anti-profiteering (Mechanism to Determine Unreasonably High Profit for Goods) Regulations 2018 (New Regulations), effective **6 June 2018**. The New Regulations, replace the 'Old' Regulations that were in force since 1 January 2017.

Universal application to ALL goods and services

The New Regulations are in substance similar to the Old Regulations, except the New Regulations are expressed to apply universally to **ALL** goods and services. This means the scope of coverage includes all businesses making any supply of goods or services.

(In contrast, the Old Regulations had applied to the following classes of goods only:

- a) Food and beverages; and
- b) Non-durable household goods and personal care products, excluding cosmetic products.)

The universal scope of the New Regulations is understandable, given that they follow close on the heels of the reduction of the widely applicable Goods and Services Tax (GST), from 6% to 0%, effective 1 June 2018.

There is no expiry date to the New Regulations and it remains to be seen whether the New Regulations would still be in place, when the expectedly narrower Sales and Services Tax (SST), takes effect from 1 September 2018.

Salient anti-profiteering principles

For businesses unfamiliar with the Old Regulations' principles, which have been replicated into the New Regulations, we set out below some brief, salient features of the New Regulations:

1. The New Regulations broadly implement a formula-based mechanism to determine unreasonably high profit, i.e., profit is determined as unreasonably high if the % mark-up (%MU) or % margin (%MG) for goods/services sold/supplied or offered for sale/supply on any date in a particular financial year (FY) or calendar year (CY) exceeds the %MU or %MG in respect of those goods/services, as at the 'baseline' first day of that particular FY or CY.
2. The formulas broadly compute the %MU and %MG of the goods/services for the baseline first day of the particular

FY or CY by reference to the %MU or %MG of the goods/services for up to 3 FYs or CYs preceding the particular FY or CY. The preceding 3 FYs or CYs are termed as X_1 , X_2 and X_3 , respectively, which represent the 1st, 2nd and 3rd year preceding, respectively. The basic principle is that the baseline %MU or %MG on the first day of the particular FY/CY would be based on the preceding 1st year's %MU or %MG (X_1) plus the higher of the following variances (in practice known as 'tolerance'): $X_1 - X_2$ or $X_2 - X_3$. There are exceptions to this basic principle for certain scenarios.

3. For the purpose of the New Regulations, "goods or services" mean goods or services of the "same class" or "same description" (both of these terms are defined in the New Regulations).
4. The New Regulations allow for an exception to the above general rule, whereby the %MU or %MG on a date in a particular FY/CY may exceed the %MU or %MG on the baseline first day of that FY/CY. This is due to reduction in costs in that particular FY/CY.
5. The New Regulations broadly also reflect the factors in the Old Regulations as to goods sold (or services supplied) at prices below their normal selling price, i.e., "cheap sale price", "introductory selling price", etc., which are essentially not considered in the formulas to determine unreasonably high profit.

Criminal offences for non-compliance

Non-compliance with the formulas under the New Regulations would technically tantamount to "unreasonably high profit". This in turn would technically constitute an offence under the current provisions of the Price Control and Anti-Profiteering Act 2011, for which the penalties on court conviction, are as follows:

- a) For corporate entity – a fine not exceeding MYR500,000 for first offence and not exceeding MYR1 million for second and subsequent offence.
- b) For any person other than the above- a fine not exceeding MYR100,000 and/or imprisonment for up to 3

years or both for first offence and not exceeding MYR250,000 and/or imprisonment for up to 5 years for second and subsequent offence.

What should businesses do?

From experience with the implementation of the Old Regulations, businesses could likely face practical issues associated with compliance with the formulas under the New Regulations. These issues would require analyses of pricing and costs in the context of the formulas under the New Regulations and, if necessary, seeking guidance from MDTCC for administrative flexibility in practice. Such an approach to MDTCC could involve arguments based on a fair and reasonable, principle-based approach, to mitigate the rigours of the strict, formula-based approach under the New Regulations.

Even though the New Regulations are only effective from 6 June 2018, MDTCC had commenced enforcement action since 1 June 2018 when the GST rate change from 6% to 0% took effect. Some businesses have already received MDTCC notices of enforcement action. There are other laws within the purview of MDTCC (e.g. trade descriptions legislation) that may potentially be the basis for such enforcement action, before the enactment of the New Regulations. But with the New Regulations in effect, businesses would have to be mindful of its impact and take proactive action to face any MDTCC query/enforcement action based on the New Regulations.

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Best regards,

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