

COMPETITION ACT 2010

Promoting Competition, Protecting You.



Handbook for General Public

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INTRODUCTION

What is the Competition Act 2010?

- The Competition Act 2010 (CA 2010) was passed by the Parliament of Malaysia in May 2010 and came into effect on 1 January 2012.
- It is implemented by the Malaysia Competition Commission (MyCC), which was established under the Competition Commission Act 2010.
- The CA 2010 is intended to enhance:
 - consumer welfare;
 - business practices;
 - economic development.

What are the Prohibitions under the CA 2010?

The CA 2010 prohibits enterprises from engaging in two forms of conduct:

- Anti-competitive agreements.
- Abuse of dominant position.

The CA 2010 classifies these as infringements because such acts are harmful to consumers, businesses and the economy.

Why This Handbook?

This handbook has been published to help the public understand how the **CA 2010 SERVES THE PUBLIC INTEREST** and the role of the public in its enforcement.



OBJECTIVES & BENEFITS

Why Do We Need a Competition Law?



Competition forces enterprises to be more **EFFICIENT, INNOVATIVE** and **RESPONSIVE** to consumer demand. The benefits of competition are competitive prices, better products, wider choice for consumers, and greater efficiency of enterprises and the economy as a whole.



The CA 2010 is **NOT MEANT TO PROTECT COMPETITORS**. It is meant to ensure that enterprises compete **FREELY** and **FAIRLY**.

What Happens If There is No Competition?

Instead of doing business independently and competing fairly with one another, what if some enterprises collectively agree to engage in unfair conduct? What if they collectively set the selling price way above their cost of production to reap maximum profits? Such **ANTI-COMPETITIVE AGREEMENTS** reduce competition and prevent the market forces of demand and supply from determining prices.

Competition in the marketplace can also be affected by the anti-competitive conduct of monopolies and enterprises that on their own, or in combination with other enterprises, dominate the marketplace. Such conduct is referred to as abuse of dominance.

Both anti-competitive agreements and abuse of dominance may prevent, restrict or distort competition in the marketplace.

- Businesses (also, known as enterprises) that are not party to the anti-competitive agreement, or are adversely affected by the abuse of a dominant enterprise, will have to cease operation as they will be priced out or otherwise driven out of the market.
- Consumers lose as they will have less choice, prices will be high and products may not be of good quality.
- Enterprises which are consumers of goods and services in the course of their own business will also lose because the products they need to buy are denied to them or provided only on unfair terms (high prices, unfair payment terms, etc.)
- The economy will not expand as new enterprises will be prevented from entering the market and existing enterprises will have no incentive to be innovative and efficient.

When enterprises genuinely compete, the economy, businesses and consumers will reap the benefits.





Consumers benefit when there is healthy competition and are much happier thanks to competitive prices, more choices and better quality products that would then be available for them.

SCOPE OF THE CA 2010

Activities Covered by the CA 2010 are:

- All commercial activities – both within and out of Malaysia – that have negative or anti-competitive effects in any market in Malaysia.

Activities NOT Covered by the CA 2010 Include:

- Activities that involve an exercise of governmental authority.
- Activities carried out pursuant to the principle of solidarity.
- Purchase of goods or services not intended for resale or resupply.

The CA 2010 Also Does NOT Apply to Commercial Activities Regulated by the:

- Communications and Multimedia Act 1998.
- Energy Commission Act 2001.
- Petroleum Development Act 1974.
- Malaysian Aviation Commission Act 2015.

Other Conducts or Agreements EXCLUDED from the Scope of the CA 2010:

- Conducts or agreements that comply with any law.
- Collective bargaining or collective agreements on behalf of employees between employers and trade unions.
- Services of general economic interest, covers public utilities, or having the character of a revenue producing monopoly.

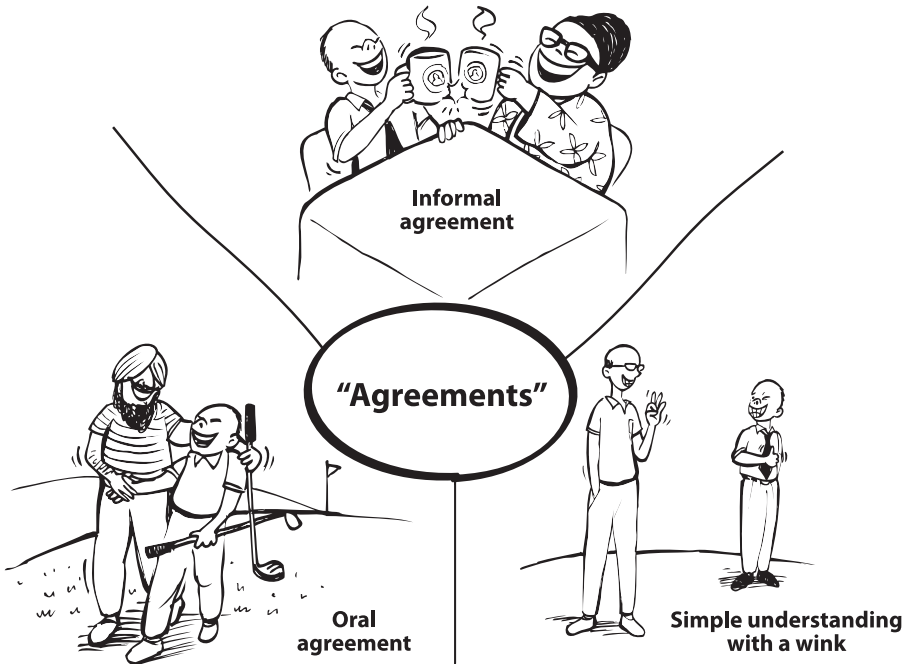
ANTI-COMPETITIVE “AGREEMENTS” ARE PROHIBITED

What is an “Agreement”?

An agreement between enterprises to avoid competition need not be in a written and legally enforceable document. It can be:

- An informal agreement.
- An oral agreement made in person, over the telephone or at a private meeting or social setting.
- A simple understanding with a “nod and a wink”.

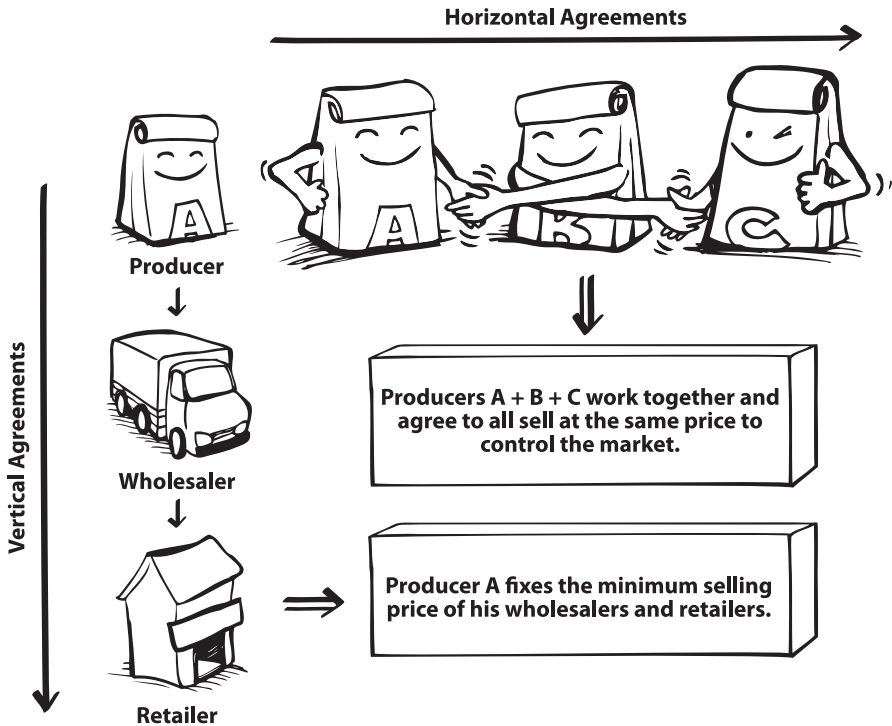
Trade associations and associations of the professions (e.g. doctors, lawyers, accountants, etc.) often make rules and issue guidelines and recommendations that are binding on their members. The activities of these associations are also covered by the provisions against anti-competitive agreements.



Horizontal and Vertical Agreements

The CA 2010 deals with two categories of agreements. These are:

- **HORIZONTAL AGREEMENTS**, i.e. agreements entered into by enterprises that are in the same level in the production chain; and
- **VERTICAL AGREEMENTS**, i.e. agreements entered into by enterprises that are at different levels of the production chain.

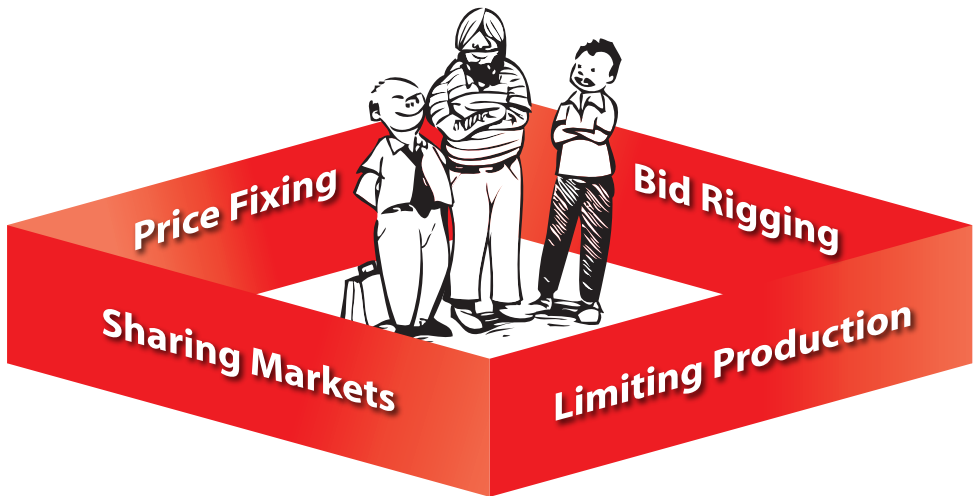


Agreements Deemed Anti-Competitive by CA 2010

Any agreement, be it horizontal or vertical, that has the object or the effect of significantly preventing, restricting or distorting competition is an infringement of the CA 2010

There are some agreements that the CA 2010 regards as more serious. The following horizontal agreements are in every instance deemed to have the object of significantly reducing competition and are therefore prohibited:

ANTI-COMPETITIVE AGREEMENTS



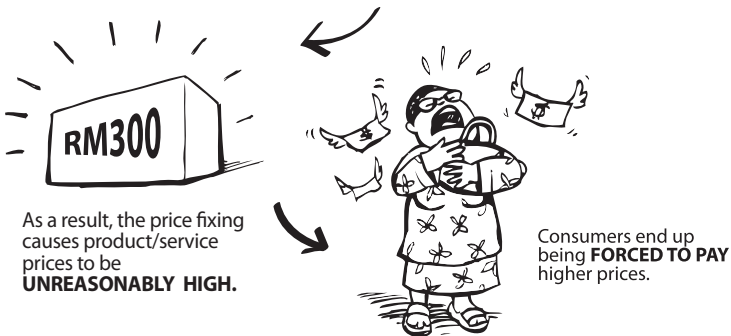
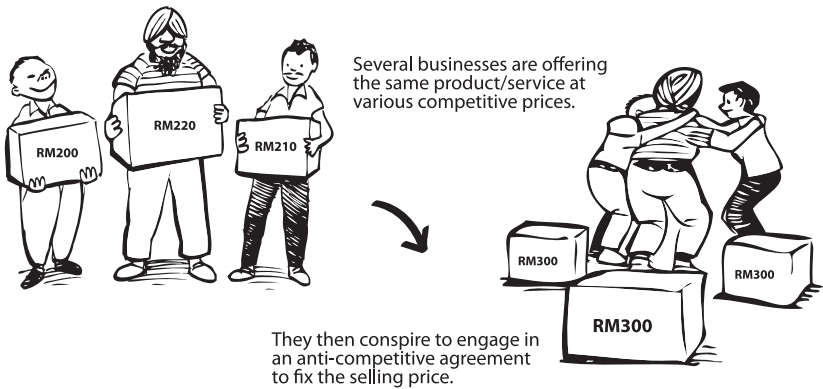
1. Price Fixing

Under the CA 2010 it is prohibited to collectively agree to fix, directly or indirectly, the purchase or selling price or any other trading conditions.

Price fixing, for instance, can be done “directly” or “indirectly”:

- A direct way would be to agree to increase or maintain the price at a certain level; or
- An indirect way would be for enterprises to agree to offer or not to offer the same discounts or credit terms.

Prices (and other trading conditions) should rightly be determined by the market forces of demand and supply. When prices are fixed or maintained at a high level, it is unfair to consumers.



2. Sharing Markets or Sources of Supply

Under the CA 2010 it is illegal for enterprises to share markets or sources of supply. Enterprises can do this by:

- Dividing amongst themselves the market either geographically or by customer types.
- Operating only in areas they have been assigned to.

The objective is to make sure that there is no competition for their products or services in a particular area or for a customer type. When this happens, consumers are prevented from shopping around for the best deal and will have no choice but to buy from the enterprise that has been assigned to their area or customer type.



Dividing the market either geographically or by customer types.



Only operating in areas they have been assigned to.



3. Limiting or Controlling Production

Under the CA 2010, it is illegal for enterprises to collectively agree to limit or control production, market outlets or market access, technical or technological development or investment. When production, market outlets or market access are limited or controlled, supply will be reduced and prices will go up because there will not be enough supply to meet demand. Moreover, by reducing spending on technical or technological development and investment, cost of production goes down. All these measures ensure that prices are artificially manipulated in order to maximise profits. Enterprises engaging in such unfair practices make large profits without being efficient and innovative.



4. Bid Rigging

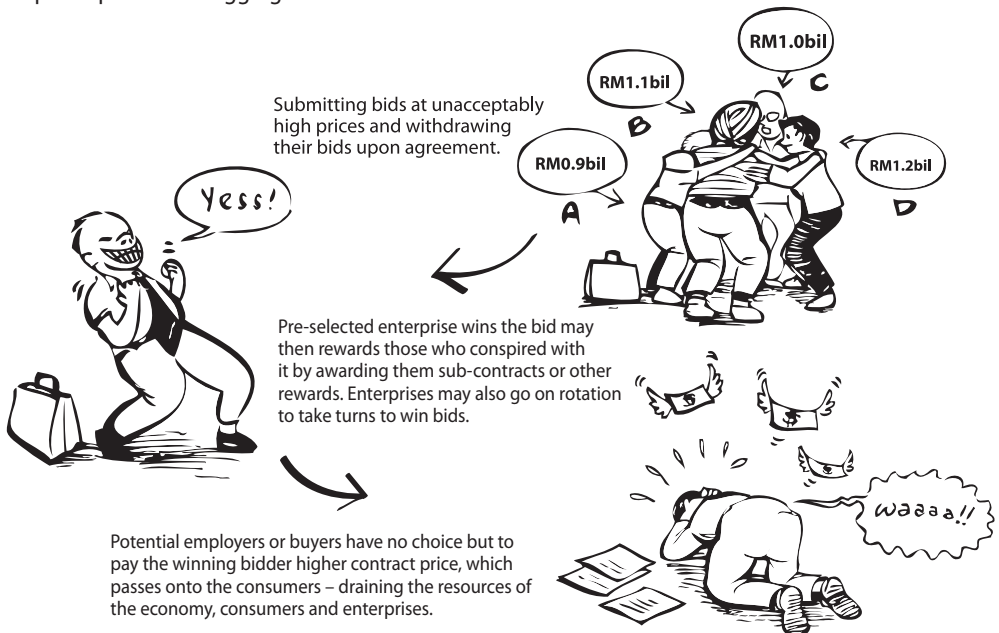
Under the CA 2010, it is illegal for enterprises to engage in bid rigging.

The purpose of the tender process is to select from among a range of bidders, a competent enterprise that offers the best price on the most attractive terms. Bid rigging defeats this purpose.

Enterprises take part in bid rigging by first agreeing as to which amongst them is to win the bid. The other enterprises will then:

- submit bids at unacceptably high prices, or
- withdraw their bids, or
- refrain from bidding to enable the pre-selected enterprise to win the bid.

The winning bidder then may reward those who conspired with it by awarding them sub-contracts or other rewards. Enterprises may also go on rotation to take turns to win bids. Bid rigging results in the most cost efficient enterprise not winning the bid. It thereby drains the resources of the economy, consumers and enterprises that do not participate in bid rigging.



CARTELS = ANTI-COMPETITION

The term **CARTEL** is used to refer to a combination of enterprises formed to regulate production, pricing, and marketing of goods by the members. Cartels typically operate in secret. Because of their secretive operations, it is difficult to obtain evidence of the existence of a cartel unless one or more of their members come forward to inform the authorities about their acts. Any member of a cartel who wishes to stop being a cartel member and provides information of the activities of the cartel can apply for leniency under the CA 2010. The applicant may be exempted from liability provided he/she cooperates in the investigation and assists with obtaining evidence.



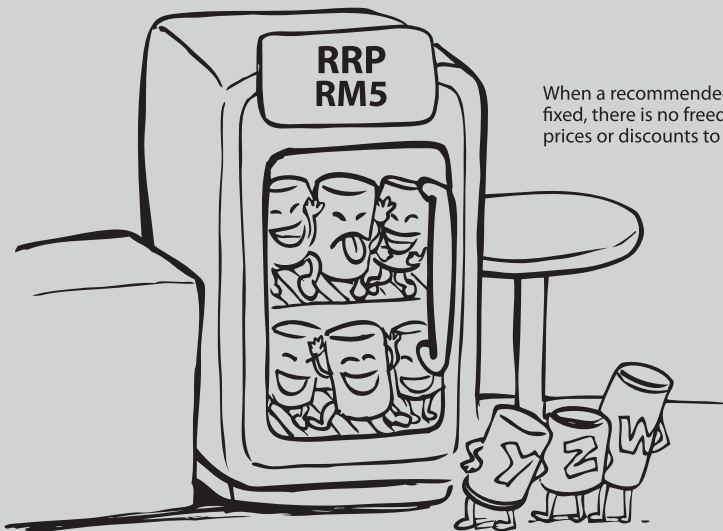
RESALE PRICE MAINTENANCE

The CA 2010 prohibits price fixing. One way in which prices are fixed is when manufacturers dictate the price of goods and services that their suppliers' down the line can re-sell at. Retailers will then not have the freedom to vary prices or offer their own discounts to their customers. This is referred to as **RESALE PRICE MAINTENANCE**.

Resale price maintenance is done in several ways. These include specifying either:

- a minimum retail price, or
- a recommended retail price, or
- even a maximum selling price.

It is not the name that is used that is important but rather whether the practice has an anti-competitive effect. If it has an anti-competitive effect, it will be an infringement of the CA2010.



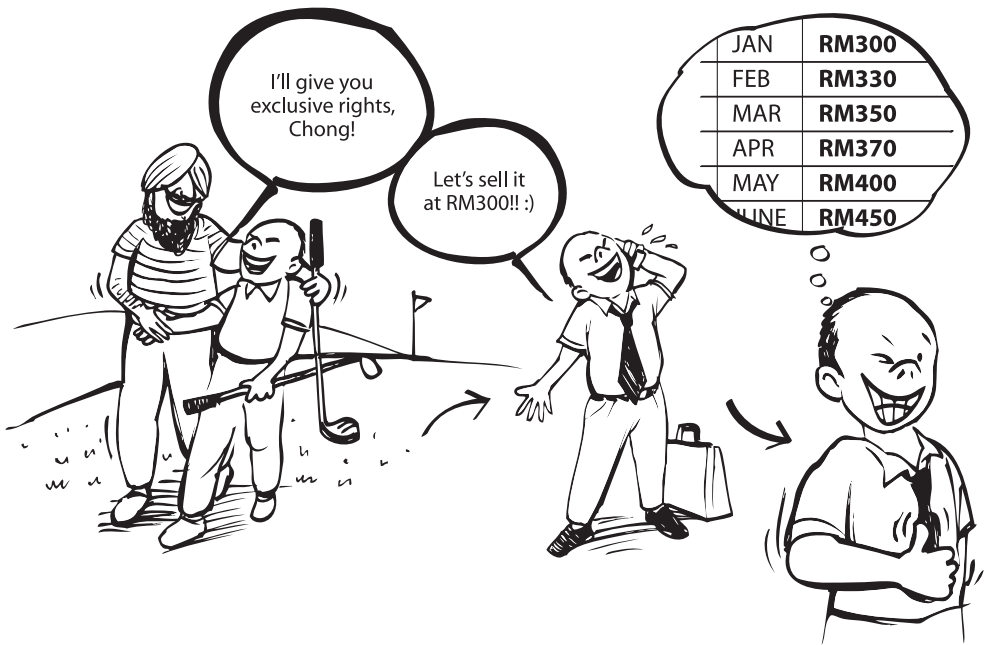
When a recommended retail price (RRP) is fixed, there is no freedom for retailers to vary prices or discounts to their consumers.

WHAT IS ABUSE OF DOMINANT POSITION?

The CA 2010 also addresses the conduct of dominant enterprises. An enterprise may through the process of competition become the industry leader with the largest market share or even a monopoly. The CA2010 does not penalise an enterprise because of its dominance. It only prohibits any enterprise, independently or collectively with other enterprises, from engaging in any conduct that amounts to an abuse of dominance.

Abuse of dominant position usually occurs within the same industry, between the dominant enterprise and its distributors, suppliers or retailers.

The CA 2010 sets out examples of the kind of conduct that may amount to an abuse of dominance and are therefore prohibited.



Examples of Abuse of Dominance

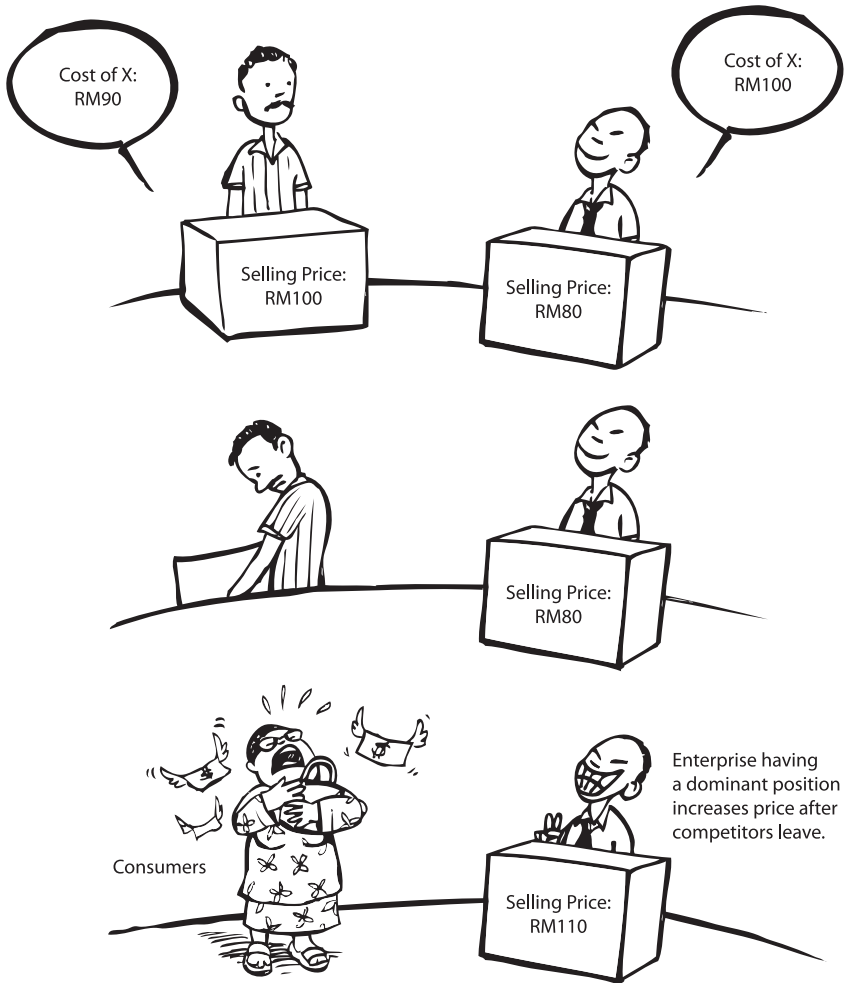
1. Price Discrimination

Price differences may be necessary, for example because of remoteness of markets resulting in higher cost of transport or due to bulk purchase by a purchaser enabling lower cost of supply. However, it becomes an abuse of dominance when price discrimination is not due to any economic reason and is unfair.



2. Predatory Behaviour

Predatory behaviour towards competitors includes using below cost pricing to eliminate competition. In predatory pricing, an enterprise sells below cost to eliminate competitors from the market and then increases prices to gain huge profits. Consumers may enjoy low prices for a short time but eventually will have to pay higher prices when other competitors leave the market.



A dominant enterprise eliminates its competitors by selling or providing services at prices lower than aggregate costs.

3. Refusing to Supply

Refusing to supply means that the dominant enterprise takes advantage of its position and refuses to supply to a particular enterprise or group or category of enterprises. This is done in order to damage their businesses.



4. Tied Selling

Tied selling is where a supplier of one product (the tying product) requires a customer to also buy a second product (the tied product). Where there are no other suppliers for the tying product, customers are left with no choice but to buy both products.



5. Buying Up Scarce Goods or Resources

Buying up scarce goods or resources required by a competitor but not needed for its own use.



All these practices are deliberately targeted at forcing competitors out of the market so that the dominant enterprise can continue to control the market with a few dealers and suppliers. In this manner, the dominant enterprise will be free to fix prices and terms and conditions of distribution and sale.

FIGHTING ANTI-COMPETITIVE PRACTICES

Action by MyCC

The CA2010 empowers the MyCC to investigate and take action against enterprises that engage in anti-competitive conduct. An investigation may be initiated by:

- Direction of the Minister.
- The MyCC.
- Complaint lodged with the MyCC.

Investigation

- The MyCC may commence an investigation where there is an infringement or suspicion of an infringement.
- In conducting investigations, MyCC officers have wide powers to search and seize files, documents, accounts, computerised data, etc.; and require any person to provide information, documents or make a statement.
- The MyCC may accept an **UNDERTAKING** from an enterprise to do or refrain from doing anything, subject to conditions imposed by the MyCC.
- If the MyCC accepts the undertaking, the investigation will be closed without any finding of infringement and no financial penalty will be imposed.

Interim Measure - Direction

The MyCC may issue a direction as an interim measure, while an investigation is still ongoing, in cases where it needs to take urgent action to prevent serious or irreparable damage to any person or to protect the public interest.

Decision

If the MyCC finds that there is an infringement of the CA 2010 at the completion of an investigation, it will:

- issue a written notice to the enterprise concerned, informing it of its proposed decision,
- provide details of the reasons for its decision, and
- inform the enterprise of the penalties and remedies they are proposing to impose onto the infringing enterprise.

The enterprise concerned may elect to make a written or oral representation to the MyCC before the MyCC makes a final decision.

If there is a finding of non-infringement, then the person affected by the decision will be notified.

Hearing

- The MyCC may, at its sole discretion, convene a hearing of the enterprise against which it proposes to take action and invite interested parties to be present at the hearing.
- There may be separate hearings to hear the enterprise and interested third parties or they may all be heard in one hearing.
- The MyCC may also decide whether to conduct an open public hearing or a closed hearing.

PENALTIES

If the MyCC makes a finding that an enterprise has engaged in anti-competitive conduct prohibited by the CA 2010, the enterprise can be fined up to a maximum of **10%** of its worldwide turnover.

THE COMPETITION APPEAL TRIBUNAL

The Competition Appeal Tribunal (CAT) is established to hear appeals against a decision made by the MyCC under sections 35 (direction), 39 (finding of non-infringement) and 40 (decision of infringement) of the CA 2010. Any enterprise or person whose interests are directly or indirectly affected by any of these decisions of the MyCC can file a notice of appeal to the CAT. The appeal must be filed within 30 days of the date of such decision.

PROTECT YOUR INTERESTS!

As a member of the public, you may be directly or indirectly affected by the anti-competitive acts of certain enterprises. If you are indeed affected, there are options for you to take action:

- Right of private action.
- Submit complaint to MyCC.

The Right of Private Action

The right to take private action in a court of law is provided for under Section 64 of the CA 2010. This right is available to consumers as well as enterprises whose interests are directly or indirectly affected by the enterprises that have engaged in the prohibited anti-competitive practices. This means that even consumers who did not directly purchase the products or services can bring an action, as long as their interests are affected in some way. This section empowers not just individual consumers but also consumers' associations and trade or professional associations to bring a civil action on behalf of their members.

Submit Complaints to MyCC

As the agency that is enforcing the CA2010, the MyCC not only carries out investigations on its own accord, it also relies on information received from the public. Any person who believes that an enterprise is engaging in any of the prohibited anti-competitive practices may lodge a complaint to the MyCC for further investigation. By doing so, you are assisting the MyCC to weed out the anti-competitive conduct of enterprises that are infringing the CA2010. In addition, you will also be helping to create a market place that is pro-competition, which will ultimately benefit consumers, businesses and the economy.

HOW TO SUBMIT COMPLAINTS

The MyCC has issued a **Complaint Form** that the public can use to file a complaint. The **Complaint Form** should contain:

1. Information about the complainant;
2. Information about the party or parties complained of;
3. A brief description of the alleged infringement that is the subject matter of the complaint; and
4. Any other relevant information and supporting documents.

The **Complaint Form** can be downloaded from the MyCC website at **www.mycc.gov.my**. The completed **Complaint Form** may be submitted to the MyCC in any of the following ways:

By E-mail:
complaints@mycc.gov.my

By Post:
Address mail to:
**Level 15, Menara SSM@Sentral,
No.7, Jalan Stesen Sentral 5,
Kuala Lumpur Sentral,
50623 Kuala Lumpur.**

By Fax:
Address to CEO and fax to +603-2272 2293 / +603-2272 1692

In Person:
Complainants may also call in person at the MyCC office to fill in and submit the **Complaint Form**.

For assistance regarding complaints, please contact MyCC at **+603-2273 2277** or by e-mail at **enquiries@mycc.gov.my**.

For more information, visit our website : **www.mycc.gov.my**

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