



**SURUHANJAYA PERSAINGAN MALAYSIA**  
**MALAYSIA COMPETITION COMMISSION**

**The 1<sup>st</sup> Mooting Contest on Competition Law 2016,  
by Malaysia Competition Commission (MyCC), Malaysia**

**PROPOSITION**

**17-18 October 2016 (Mon-Tues)**

**Moot Court Rooms, Level 13, Menara SSM@Sentral, Kuala Lumpur**

Malaysia enacted its competition law, the Malaysia Competition Act 2010 (the **CA2010**), in 2010. However, the CA2010 was only brought into force in January 2012.

2. The Malaysia Competition Commission (the **MyCC**) was established on 1 April 2011 with the purpose of enforcing the Competition Act 2010 (CA 2010). The MyCC safeguards the process of free and fair competition in commercial markets for the benefit of consumer welfare, efficiency of enterprises and the development of the economy as a whole. The MyCC is empowered by the Competition Commission Act 2010 to ensure compliance with the CA2010, investigates complaints on anti-competition behaviors, carries out market reviews and impose penalties on companies found to infringe the competition law. It also has the authority to impose fees or charges for services provided; cooperate with any corporate body or government agency and request information from enterprises to assist in the performance of its functions; or perform any tasks incidental to its functions and powers.
3. AAA Sdn Bhd (**AAA**) is a prominent multinational company engaged in a variety of manufacturing businesses, including the manufacture of printer, fax and photocopy machines. AAA is also a manufacturer and supplier of office stationery products such as printing papers, toner machines, computer peripherals, telephone instruments and electrical appliances, etc. BBB Sdn Bhd (**BBB**), CCC Sdn Bhd (**CCC**), and DDD Sdn Bhd (**DDD**) are the other three manufacturers and suppliers of office stationery products in Malaysia. All the four players are present and active across Malaysia.
4. AAA has its office stationery manufacturing unit situated in the state of Perak. BBB has its production unit located in the state of Melaka while CCC's manufacturing unit is located in the state of Pahang. DDD has no production units in Malaysia and procures all its supplies from its production unit located in the neighbouring country of Thailand.

5. While all the four office stationery manufacturers and suppliers operate in Malaysia, publicly available data suggest that AAA's shares in the supply of toner for printer, fax and photocopy machines in the state of Perak has increased rapidly since the month of October 2015. The collective market share of the other three companies in the state of Perak this financial year has fallen to twenty one percent. All the manufacturers and suppliers of toner for printer, fax and photocopy machines operate in the market through a channel of distributors who in turn supply stationery to the concerned resellers.
  
6. EEE Sdn Bhd (**EEE**) is the Malaysian unit of the global stationery giant EEE Inc. based in Australia. EEE Inc. deals with all kinds of toner machines and high end toner machines such as Magnetic Ink Character Recognition (MICR). MICR refers to the special numbers at the bottom of cheques that include the account number, a bank's routing number, cheque number, etc. MICR ink or MICR toner is used to print the special numbers, also known as the MICR line on cheques. MICR ink is used for cheque-printing on inkjet printers. MICR toner is used for cheque-printing on laser printers. Assuming the magnetic ink or toner cartridges are originally manufactured (as opposed to refilled or remanufactured), then both kinds of toners should meet standards for cheque printing. EEE's business in Malaysia is limited to making inks and refills for MICR toner. EEE is the only enterprise in Malaysia that offers one (1) month warranty for its inks and refills for MICR toners as well as toner-related technical assistance. One of EEE's large competitors in Malaysia is FFF Sdn Bhd (**FFF**), the MICR toner producing unit of FFF Holdings located in Singapore. FFF's Malaysian operations are primarily based in Perak and it is the preferred supplier for CCC and BBB. EEE currently satisfies most of the requirement of MICR toner for AAA and DDD.
  
7. FFF approached AAA with a proposal to supply MICR toner for AAA products. AAA replied, stating that it was not interested as it has already received supplies from EEE at competitive rates. When FFF offered a further discount, AAA still refused, saying that it had an existing two (2) year exclusive contract with EEE. In addition, AAA added that there is also a clause prohibiting AAA from terminating

the contract with EEE without the consent of EEE. FFF also received the same explanation when they approached DDD.

8. Feeling aggrieved, FFF filed a Complaint under Section 15 of the CA2010 with the MyCC alleging abuse of dominance by EEE by denying FFF access to the market. The MyCC found that there was a likelihood that there is a case of infringement of Section 10 of the CA2010, and directed the Director of Enforcement Division (**ED**) to investigate into the matter.
  
9. The ED sought information and explanations from AAA, FFF, EEE and their competitors regarding such allegation. During the course of the investigation, the ED discovered that the Perak State Government had invited tenders for the supplies of all the stationery to all the Government Offices and organisations in Perak in the month of September 2015. On the basis of the lowest price quotation, AAA was awarded the tender for which supplies were to commence from October 2015. This tender was for all supplies from 2015 to 2018. This explained AAA's increased market share from October 2015 onwards.
  
10. The investigation also revealed that similar tenders for the supply of toner for printer, fax and photocopy machines to Government Offices were invited by the states of Melaka, Pahang and Selangor in the month of September 2015. The tenders in these states were awarded to BBB, CCC and DDD respectively. The ED found that the following prices were quoted by the manufacturers and suppliers of toner for printer, fax and photocopy machines for each year of the state government tenders:

Year 2015:

	<b>Perak</b>	<b>Melaka</b>	<b>Pahang</b>	<b>Selangor</b>
<b>AAA</b>	RM 200,000	RM 220,000	RM 220,000	RM 220,000
<b>BBB</b>	RM 250,000	RM 270,000	RM 250,000	RM 270,000
<b>CCC</b>	RM 300,000	RM 320,000	RM 300,000	RM 320,000
<b>DDD</b>	RM 350,000	RM 370,000	RM 350,000	RM 370,000

Year 2014:

	<b>Perak</b>	<b>Melaka</b>	<b>Pahang</b>	<b>Selangor</b>
<b>AAA</b>	RM 350,000	RM 370,000	RM 350,000	RM 370,000
<b>BBB</b>	RM 200,000	RM 220,000	RM 220,000	RM 220,000
<b>CCC</b>	RM 250,000	RM 270,000	RM 250,000	RM 270,000
<b>DDD</b>	RM 300,000	RM 320,000	RM 300,000	RM 320,000

Year 2013:

	<b>Perak</b>	<b>Melaka</b>	<b>Pahang</b>	<b>Selangor</b>
<b>AAA</b>	RM 300,000	RM 320,000	RM 300,000	RM 320,000
<b>BBB</b>	RM 350,000	RM 370,000	RM 350,000	RM 370,000
<b>CCC</b>	RM 220,000	RM 220,000	RM 200,000	RM 220,000
<b>DDD</b>	RM 250,000	RM 270,000	RM 250,000	RM 270,000

11. The ED looked at this information as an indicator of collusion among competitors and included the other three stationery manufacturers in the ambit of its investigation. The ED's investigation suggested that these quotes could not have been as a result of a difference in costs due to business requirements, as the price differences showed patterns. The ED also discovered that sales by these companies to other purchasers in the same state were lower than their winning prices. However, the ED found no evidence of any meeting between the management of the four companies, or any correspondence in relation to this tender.
12. Based on the data available, the ED in its report made a preliminary finding that the four players had contravened Section 4 (2) (d) of the CA2010 by way of bid rigging.
13. On the question of abuse of dominance by EEE, the ED returned with a finding that, while EEE might be the current biggest manufacturer and supplier of MICR Toner, there was insufficient evidence to suggest an abuse of dominance on the part of EEE as the ED found merit in the commercial justifications put forward by EEE. Amongst the justification given by EEE were:

- (i) Shorter duration of the agreement; and
- (ii) Investment on technical assistance.

14. After thorough investigation, the ED then submitted its report to the MyCC recommending that the four companies i.e. AAA, BBB, CCC and DDD had infringed Section 4 of the CA2010 for bid rigging between 2013 and 2015 for the supply of toner. It also recommended that there was no infringement of Section 10 of the CA2010 against EEE. A proposed decision was therefore issued.
  
15. The MyCC, after hearing all the parties in the matter under Section 37 of the CA2010 issued a final decision under Section 40 of the CA2010 on 15 April 2016 and imposed a penalty on all the contravening parties for the three preceding financial years. The MyCC imposed a total fines of RM1,345,000.00 collectively on the four (4) enterprises. In the course of Section 37 proceedings, the MyCC rejected the request of the parties to hold a separate hearing to allow the four parties to present their own evidence. In its final decision, the MyCC did not list any reasons for its rejection of the hearing request by the parties.
  
16. On the question of abuse of dominance by EEE, FFF disagreed with the findings of the MyCC that there was no evidence to suggest an abuse of dominance by EEE in this case. FFF claimed that the duration of the said agreement has the effect of market foreclosure in which they argued is a clear infringement of Section 10 of the CA2010. Thus FFF appealed to Competition Appeal Tribunal (CAT).
  
17. Feeling aggrieved by the decision of the MyCC, AAA and DDD also appeal to CAT, asking CAT to overturn the decision of the MyCC dated 15 April 2016. Both argued, *inter alia*, that the MyCC denied their rights to a hearing including questioning the standard of proof applied by the MyCC in proving the infringement, thus making the decision by the MyCC against them under Section 4 of the CA2010 to be flawed.

**NOTE:**

**Lawyers representing both sides are required to address the arguments that are specifically mentioned in the Proposition. They are, however, free to make any other arguments that they deem fit. Lawyers for both sides are encouraged to explore additional arguments related to jurisdiction as well as merits.**

**One team shall represent FFF, AAA and DDD in the appeal against the MyCC's decision. Another team shall represent the MyCC.**