

An agency under



MDTCC

Ministry of Domestic Trade,
Co-operatives and Consumerism



GUIDELINES ON

FINANCIAL PENALTIES

Malaysia Competition Commission



These Guidelines are not a substitute for the **Competition Act 2010 ("the Act")** or any Regulations made under thereto. These Guidelines may be revised should the need arises. The examples given in these Guidelines are for illustrative purposes only. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the MyCC. In applying these Guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

The MyCC would advise enterprises to conduct a self-assessment exercise of their businesses in respect of their conduct, procedures, management and control. They should also have competition compliance procedures in place for all their employees at all levels, including the Board of Directors.

1.

INTRODUCTION

- 1.1.** Under section 40 of the Act where the MyCC decides that there is an infringement of a prohibition under Part II, the MyCC shall require the infringement to be ceased immediately (**Section 40(1)(a)**).
- 1.2.** These Guidelines deal with how the MyCC determines the appropriate financial penalty under **Section 40(1)(c)** of the Act.

2.

STATUTORY FRAMEWORK FOR IMPOSITION OF FINANCIAL PENALTY

- 2.1.** These Guidelines are based on the statutory framework of the Act and the Competition Commission Act 2010.
- 2.2.** **Section 17(2)(b)** of the Competition Commission Act 2010 grants MyCC powers to impose remedial relief including a financial penalty if it finds that there is an infringement of a prohibition in Part II of the Act. **Section 17** of the Competition Commission Act 2010 grants the MyCC broad powers to carry out the performance of its functions under the Act and a specific power to impose a financial penalty for any infringement of the Act.
- 2.3.** **Section 17** of the Competition Commission Act 2010 provides:
- 17. (1)** The Commission shall have the power to do all things necessary or expedient for or in connection with the performance of its functions under the competition laws.

- (2) Without prejudice to the generality of the **Subsection (1)**, the powers of the Commission shall include the power -

 (b) to impose a financial penalty for the infringement of the provisions of the competition laws.

2.4. The remedial powers granted to the MyCC under the Competition Commission Act 2010 are reinforced by **Section 40** of the Act which provides:

- 40. (1)** If the Commission determines that there is an infringement of a prohibition under Part II, it—
- (a) shall require that the infringement to be ceased immediately;
 - (b) may specify steps which are required to be taken by the infringing enterprise, which appear to the Commission to be appropriate for bringing the infringement to an end;
 - (c) may impose a financial penalty; or
 - (d) may give any other direction as it deems appropriate.
- (2) The Commission shall, within fourteen days of its making a decision under this Part, notify any person affected by the decision.
- (3) The Commission shall prepare and publish reasons for each decision it makes under this section.
- (4) A financial penalty shall not exceed ten percent of the worldwide turnover of an enterprise over the period during which an infringement occurred.

2.5. As noted above, any financial penalty imposed by the MyCC shall not exceed the statutory maximum established by **Subsection 40(4)**.

2.6. In addition, the MyCC has discretion to impose any other remedial relief. The MyCC may provide directions to the infringing enterprise on the appropriate steps to bring the infringement to an end (**Section 40(1)(b)**), impose a financial penalty (**Section 40(1)(c)**) or “*give any other directions as it deems appropriate*” (**Section 40(1)(d)**).

3.

DETERMINING THE AMOUNT OF A FINANCIAL PENALTY

3.1. MyCC in imposing the financial penalty has the following objectives:

- to reflect the seriousness of the infringement; and
- to deter anti-competitive practices leading to an infringement of a prohibition under the Act.

Factors to Be Considered

3.2. In determining the amount of any financial penalty in a specific case, the MyCC may take into account some or all of the following factors:

- a.** seriousness (gravity) of the infringement
- b.** turnover of the market involved – whereby turnover refers to turnover of the enterprise during the period of infringement or, if figures are not available for that business year, the one immediately preceding it
- c.** duration of the infringement - whereby a period of infringement is less than six months, such a period will be counted as half a year and for a period longer than six months but shorter than a year, such a period will be counted as a full year. In the event that the duration of the infringement is more than a year, the formulae to be adopted is as follows:

Maximum 10% of the worldwide turnover x number of years of infringement

- d.** impact of the infringement,
- e.** degree of fault (negligence or intention),
- f.** role of the enterprise in the infringement,
- g.** recidivism,
- h.** existence of a compliance programme, and
- i.** level of financial penalties imposed in similar cases.

3.3. How the MyCC takes into account any of these factors in determining the amount of any financial penalty in a specific case is described below.

Aggravating Factors

3.4. The aggravating factors may include but not limited to:

- a.** the role of the enterprise as an instigator or leader or having engaged in coercive behaviour with others;
- b.** obstruction of or lack of co-operation in the investigation;
- c.** the enterprise has a record of committing similar infringements or other infringements of a Part II prohibition (recidivism)
- d.** continuance of the infringement after the start of investigation; and
- e.** involvement of board members or senior management in the infringement.

Mitigating Factors

3.5. Meanwhile, the following non-exhaustive list of mitigating factors may also be taken into consideration:

- a.** low degree of fault;
- b.** relatively minor role in the infringement especially if involvement is secured by threats or coercion;
- c.** co-operation by the enterprise in the investigation;
- d.** existence of a corporate compliance programme that is appropriate having regard to the nature and size of the business of the enterprise; and
- e.** any compensation made to victims of the infringements.

Leniency

3.6. If the enterprise has received leniency, then the amount of the financial penalty as determined above, including any reduction to comply with the legal maximum requirement, will be reduced by the amount stipulated in the grant of leniency.

Please refer to the Guidelines on Leniency Regime issued by the MyCC.

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