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SURUHANJAYA PERSAINGAN MALAYSIA
MALAYSIA COMPETITION COMMISSION

COMPETITION ACT 2010

A GUIDE FOR BUSINESS

PROMOTING COMPETITION. PROTECTING YOU

Date of Publication: September 2013

A Guide for Business

FOREWORD

The Competition Act 2010 came into force on 1 January 2012, following an 18 month grace period from the time it was gazetted. The grace period was provided to give sufficient time for businesses to take stock of their existing practices as well as to understand the law in more detail.

In passing its competition legislation, Malaysia joined more than 140 countries that have such a law in place. There is no doubt that this law has brought about major changes to the way business has to be conducted. However, this law has an important role to play in enhancing competitiveness and generating higher levels of productivity and moving Malaysia towards a developed country status.

The objective of the law is to advance economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers. It is therefore a vehicle to promote economic efficiency and to maximize consumer welfare.

While there is currently only one Malaysian case to offer guidance and precedent, this handbook cites various cases from other jurisdictions to help businesses understand what the law means and how MyCC is likely to apply the provisions of the Competition Act 2010 to Malaysian businesses. It attempts to explain some of the legal terminology in simple terms and addresses some of the concerns raised by the Malaysian business community. However, it cannot replace the need for businesses to obtain their own independent legal advice.

The law has been in force for over a year now. The MyCC will no longer take a soft approach towards enforcement. Any enterprise found guilty of an infringement will be subject to a fine, which can be as much as 10% of worldwide turnover.

The MyCC hopes this handbook will provide Malaysian businesses with some useful tools to help them move forward in this new dynamic competitive environment.

Siti Norma Yaakob

Tan Sri Dato' Seri Siti Norma Yaakob
Chairman
Malaysia Competition Commission

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INTRODUCTION

The Competition Act 2010 (CA 2010) came into force in Malaysia on 1 January 2012. It applies to any agreement or conduct that commences or continues after that date. Any agreement or conduct that ceased before 1 January 2012 will not be caught.

The Malaysia Competition Commission (MyCC) is an independent body established by the Competition Commission Act 2010. One of its key functions is to implement and enforce the competition law.

The CA 2010 applies to any commercial activity within or, in certain circumstances, outside Malaysia. "Commercial activity" is defined broadly and it is likely that almost all activities of Malaysian businesses will be commercial activities.

THE ACT PROHIBITS:

Anti-competitive agreements

horizontal or vertical agreements between enterprises that have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services; and

Abusive conduct by dominant enterprises

an enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.

THIS GUIDE EXPLAINS:		key terminology used in the CA 2010;	anti-competitive agreements;
abuse of dominant position;	the powers of the MyCC;	the consequences of infringing the CA 2010; and	the rights and responsibilities of your business.

The MyCC has published a number of Guidelines which are intended to assist the public to understand the way in which the MyCC will apply the CA 2010. This Guide should be read together with those Guidelines. Copies of the Guidelines are available at **www.mycc.gov.my.**

DOES THE CA 2010 APPLY TO YOUR BUSINESS?

This section considers what activities are covered by the CA 2010. Your business will not be covered by the CA 2010 if:

(i) it does not undertake commercial activities; or

(ii) its activities are exempted or excluded from the CA 2010.

This is explained in more detail below.

Commercial activity

The CA 2010 applies to any "commercial activity" within, or in certain circumstances, outside Malaysia. "Commercial activity" is defined in section 3(4) CA 2010 as "any activity of a commercial nature." This is a very broad definition and it is likely that almost all activities of Malaysian businesses will be "commercial activities".

If your commercial activities are conducted **within** Malaysia, the CA 2010 will apply.

If your commercial activities are transacted **outside** Malaysia, the CA 2010 will apply (if the activity has an effect on competition in any market in Malaysia). For example, an agreement entered into between a Malaysian business and a non-Malaysian business will not automatically fall outside the CA 2010 simply because the agreement was transacted overseas. The MyCC will need to assess, on a case-by-case basis, the extent to which a particular commercial activity has an "effect" on competition in a market in Malaysia.

Excluded activities

The CA 2010 excludes certain activities from the definition of "commercial activity":

(a) any activity directly or indirectly in the exercise of governmental authority;
(b) any activity conducted based on the principle of solidarity. This covers activities carried out for purely social objectives. The provision of government run medical care or benefits paid by SOCSO will be covered by the principle of solidarity. This is because the benefits payable to an individual are not dependent on the value of the contributions made by that individual. An exclusion will not be available if the services are being carried on as a commercial activity;
(c) any purchase of goods or services as an end user or consumer.

Activities that are ancillary or related to those excluded non-economic activities done will also be excluded.

The MyCC will need to consider, on a case-by-case basis, whether any of the above exclusions apply.

Other exclusions

The CA 2010 excludes activities regulated by the:

- Communications and Multimedia Act 1998; and
- Energy Commission Act 2001,

as these Acts contain specific competition law regimes. It also excludes:

- An agreement or conduct which complies with a legislative requirement;
- Collective bargaining activities or collective agreements in respect of employment terms and conditions;
- An enterprise entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly.

As stated in paragraph 7 of the Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements), the MyCC intends to apply these exclusions narrowly. The burden of proof will be on the enterprise seeking to benefit from the exclusion.

KEY TERMINOLOGY EXPLAINED

ABUSE

"Abuse" is not defined in the CA 2010. However, section 10(2) lists the types of conduct that may be an abuse of a dominant position. This is discussed in detail below.

AGREEMENT

"Agreement" is defined in section 2 of the CA 2010:

"agreement" means any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices.

AN AGREEMENT WILL BE CAUGHT BY THE CA 2010 EVEN IF IT IS:

Not in writing

An agreement could be reached verbally over the phone, at a meeting or at a social function. It may simply be a "gentleman's agreement". For example, managers from two competing banks may meet to play golf once a week. At the end of their game, they discuss interest rates and agree that it would make sense if both banks charged the same interest rate to business customers. This would be an illegal price fixing "agreement" even though nothing has been written down or signed.

An informal agreement

An exchange of emails or letters could be an agreement.

Not legally enforceable

The agreement does not have to be able to be enforced by the parties. Illegal agreements are generally unenforceable but the CA 2010 will still apply.

An agreement is only covered by the CA 2010 if it is **between** enterprises so there must be **at least two enterprises** that are parties to the agreement. Therefore, despite being two separate legal entities, an agreement reached between a parent and a subsidiary that form part of the same single economic unit will not be caught by the CA 2010. Whether a parent and subsidiary truly form part of a single economic unit will need to be determined on a case-by-case basis (see definition of "Enterprise" on page 11).

CONCERTED PRACTICE

The definition of "agreement" includes concerted practices.

"Concerted practice" is a complex legal concept. A concerted practice may arise where parties reach an understanding between them but they have not actually reached an agreement. The understanding arises out of some contact between the parties (it may be direct or through another party) which results in the parties coordinating their activities in a way that substitute practical cooperation at the risks of competition. The object or effect of the contact is either:

(a) to influence the conduct of one or more enterprises in a market; or
(b) to disclose the course of conduct which an enterprise has decided to adopt or is contemplating to adopt in a market, in circumstances where such disclosure would not have been made under normal conditions of competition.

Genuine parallel behaviour, without any direct or indirect contact between the parties concerned, is unlikely to be caught by the CA 2010.

DECISION BY AN ASSOCIATION

The definition of "agreement" includes a "decision by an association".

Decisions of an association may include the constitution or rules of admission, recommendations, codes of conduct, certification schemes or standard terms and conditions. Examples of associations include trade associations, co-operatives, sporting associations or professional associations.

The competition issues that can arise in relation to decisions of associations are considered in detail below.

DOMINANT POSITION

Dominant position is defined in section 2 of the CA 2010:

"dominant position" means a situation in which one or more enterprises possess such significant market power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors.

Paragraph 2.2 of the MyCC Guidelines on Chapter 2 Prohibition (Abuse of Dominant Position) states:

"In general, the MyCC will consider a market share above 60% would be indicative that an enterprise is dominant."

ENTERPRISE

The CA 2010 prohibits certain types of agreements and conduct entered into, or engaged in, by one or more "enterprises".

"Enterprise" is defined in section 2 of the CA 2010:

"enterprise" means any entity carrying on commercial activities relating to goods or services, and for the purposes of this Act, a parent and subsidiary company shall be regarded as a single enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real legal autonomy in determining their actions on the market.

Points to note:

+ Enterprise is a wide concept and will apply to an entity carrying on commercial activities regardless of its legal status or the way it is financed.

+ **Small and medium enterprises** (SMEs) that carry on "commercial activities" will be subject to the CA 2010.

+ **Government linked companies** (GLCs) will also be subject to the CA 2010. GLCs will often carry out commercial activities alongside their governmental activities. It is possible that a GLC could be subject to the CA 2010 in respect of some of its activities (i.e. commercial) and not in respect of others (i.e. governmental).

+ In determining whether **parent and subsidiary** companies will be regarded as a single enterprise, the MyCC will have regard to factors such as the shareholding held by the parent in the subsidiary, the parental control of the board over matters such as investment and marketing decisions of the subsidiary, and the amount of profit the parent takes from the subsidiary. This is

not an exhaustive list and the MyCC will have regard to other factors it considers relevant on a case-by-case basis.

Where a parent and subsidiary form a single enterprise:

- the companies may reach anti-competitive agreements between themselves without infringing the CA 2010;
- the parent company will be liable for the actions of the subsidiary;
- the turnover of the parent company will be relevant for the calculation of penalty under section 40(4) CA 2010.

HORIZONTAL AGREEMENTS

A horizontal agreement means an agreement between enterprises that operate at the same level in the production or distribution chain, for example, an agreement between retailers, or an agreement between wholesalers.

MARKET

"Market" is defined in section 2 of the CA 2010:

"market" means a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

You should refer to the MyCC's separate Guidelines on Market Definition for further information on the concept of "market" and how the MyCC will determine the relevant market under the CA 2010.

OBJECT OR EFFECT

"Object or effect" is not defined in the CA 2010. MyCC's Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements) contain useful guidance on these concepts.

Object

An agreement that has as its object the prevention, restriction or distortion of competition in any market will infringe the CA 2010. There is no need to prove that the agreement actually has an anti-competitive effect. Certain types of horizontal agreements are **deemed** to have the object of significantly preventing, restricting or distorting competition in any market for goods or services. These are listed in GST cut section 4(2) of the CA 2010.

Other types of agreements may also have the object of significantly preventing, restricting or distorting competition, but they are not **deemed** to have this intention.

As stated in its Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements):

"the MyCC will not just examine the actual common intentions of the parties to an agreement, but also assess the aims pursued by the agreement in the light of the agreement's economic context."

Effect

Agreements that have the effect of significantly preventing, restricting or distorting competition will also infringe the CA 2010. In these cases, the MyCC will need to prove the agreement has an anti-competitive effect.

Agreements which may have anti-competitive effects include, but are not limited to:

- exchanges of commercially sensitive information;
- advertising restrictions;
- standardisation agreements;
- joint purchasing or selling;
- exclusive dealing arrangements;
- exclusive purchasing or supply arrangements;
- exclusive distribution/customer arrangements;
- upfront access payments;
- tying;
- franchising.

PRICE

"Price" is defined in section 2 of the CA 2010 as including:

"any form of consideration given in return for any goods or services of any kind, whether such consideration has actually been given or is advertised or stated as being required to be given in exchange for such goods or services."

SIGNIFICANTLY PREVENTING, RESTRICTING OR DISTORTING COMPETITION

"Significantly" is not defined in the CA 2010.

The MyCC will interpret "significantly" to mean that the agreement must have more than a trivial impact in relation to a market. The market shares of the parties to the agreement will provide a good guide as to the likely impact of an agreement on a particular market.

In paragraph 3.4 of its Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements), the MyCC state that:

"In general, anti-competitive agreements will not be considered "significant" if:

+ the parties to the agreement are competitors who are in the same market and their combined market share of the relevant market does not exceed 20%;

+ the parties to the agreement are not competitors and each of the parties individually has less than 25% in any relevant market. For example, an exclusive distribution agreement between a wholesaler and a retailer neither of whom has more than 25% of the wholesale market or retail market."

SUPPLY

"Supply" is defined in section 2 of the CA 2010 as including:

"(a) in relation to goods, the supply and resupply, by way of sale, exchange, lease, hire or hire-purchase of the goods; and

(b) in relation to services, the provision by way of sale, grant or conferment of the services."

VERTICAL AGREEMENTS

A vertical agreement is an agreement between enterprises that operate at a different level in the production or distribution chain, for example, an agreement between a retailer and a wholesaler or between a manufacturer and a wholesaler.

WHAT AGREEMENTS ARE NOT PERMITTED?

INTRODUCTION

Certain agreements are considered to be more serious infringements of competition law than others. These serious infringements, known as "hard-core cartels", are commonly referred to as:

Hard-core cartels are considered serious because they involve agreements between competitors which, by their very nature, distort the competitive conditions existing in a market. For example, an agreement between competitors to fix prices or divide up the market will always distort normal market conditions.

As a result, section 4(2) of the CA 2010 **deems** these types of agreements to have the **object** of significantly preventing, restricting or distorting competition. This means that the MyCC does not have to prove that the agreement has an anti-competitive effect.

MyCC will take a very serious stance against hard-core cartels. Hard-core cartels are prohibited by all countries that have competition law regimes. In many jurisdictions, individuals who agree to form cartels can be punished by individual fines and/or imprisonment.

PRICE FIXING

The fixing of purchase or selling prices or other trading conditions, either directly or indirectly, is prohibited by section 4(2)(a) of the CA 2010.

In an efficient competitive market, the forces of supply and demand will determine issues such as price. Instead, when prices are fixed or maintained at a certain level, prices become artificial and do not truly reflect supply and demand. Artificial prices are normally higher, resulting in harm to consumers.

DIRECT price fixing is likely to occur where parties agree:

+ to increase price to a certain level or by an agreed percentage;
+ to maintain price at a certain level;
+ the components of a price (such as the price of key inputs or the profit margin to be earned);
+ not to price below a minimum level e.g. Recommended Retail Price (RRP);
+ to price within an agreed range;
+ to consult each other before making pricing decisions.

INDIRECT price fixing is likely to occur where parties agree:

+ not to offer discounts, allowances or rebates;
+ trading conditions such as transport charges or credit terms;
+ to impose higher prices, without specifying the exact price.

(These lists are not exhaustive and direct or indirect price fixing may occur in other circumstances.)

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In all these cases, although a specific price may not necessarily be agreed, each of the parties to the price fixing agreement loses the ability to **independently** determine their own price. In addition, each of the parties has knowledge of its competitor's pricing strategy or intentions, thus removing a significant degree of the uncertainty (i.e. competitiveness) in the market. Businesses should **not** share information or discuss with competitors:

- current or future prices;
- pricing policy or rationale for pricing;
- standardisation or stabilisation of prices;
- profit levels;
- possible increases or decreases in price;
- standardisation of credit or trading terms.

All of these decisions should be made **independently**.

CASE EXAMPLE:

In April 2012, British Airways (BA) and Virgin Airlines (VA) were found guilty of price fixing in breach of the UK Competition Act. The case involved an agreement between the airlines in respect of the passenger fuel surcharges payable on long-haul flights to and from the UK. The agreement was in place from August 2004 to January 2006. The parties used the exchange of pricing and other commercially sensitive information to agree on the prices. In its press release, the Office of Fair Trading said that this decision "sends out a strong message that co-ordinating pricing through the exchange of confidential information between competitors is unlawful".

BA was fined £58.5 million; VA blew the whistle and received a 100% reduction in fine under the OFT's leniency policy.

MARKET SHARING

Sharing markets or sources of supply is prohibited by section 4(2)(b) of the CA 2010.

The harm to competition from market sharing is a reduction in choice for consumers, often leading to an increase in price.

Sharing markets or sources of supply could occur either by:

+ dividing up the market. This could relate to either:
  - **the geographic market**
    Company A agrees to operate only in Kuala Lumpur; Company B agrees to operate only in Shah Alam;
  - **the product market**
    Company A agrees to sell sugar and not sell flour; Company B agrees to sell flour and not sell sugar;
  - **the temporal market**
    Company A agrees to operate bus services in the morning only; Company B agrees to operate bus services in the afternoon only;

+ dividing up customers – Company A agrees to supply retailers; Company B agrees to supply wholesalers;

+ agreeing not to sell or supply in areas, or to customers, outside their "allocated" territories.

Businesses should not share information or discuss with competitors:

+ the division of any market;
+ the allocation of customers;
+ exclusive dealing arrangements;
+ a decision to specialise in certain products, ranges of products or particular technologies.

All of these decisions should be made **independently**.

CASE EXAMPLE:

Visy supplied corrugated fibreboard packaging products in Australia. For nearly 5 years, Visy and one of its competitors had an agreement whereby they "maintained" their market shares. They did this by refusing to deal with each other's customers. If one of the customers chose to switch providers, a different customer was "swapped" in return. Together, they held a 90% market share.

Penalties of $36 million were imposed on the company; penalties of $2 million were imposed on two executives.

ACCC v Visy Industries Holdings Pty Ltd (No. 3) [2007] FCA 1617

LIMITING PRODUCTION

Limiting or controlling production, market outlets or market access, technical or technological development or investment is prohibited by section 4(2)(c) of the CA 2010.

The harm to competition from these types of limitations is that supply will be reduced, forcing prices up as demand will outweigh supply.

Businesses should NOT agree:

+ production quotas;
+ not to increase production capacity or utilise available capacity;
+ not to introduce new products;
+ to boycott certain suppliers;
+ technology standards that prevent other competitors from selling their products;
+ location of retail outlets;
+ to restrict access to the market by new entrants;
+ to stay out of each other's markets.

All of these decisions should be made **independently**.

Technological and technical innovation and investments are one of the key concerns of competition authorities as this is the way that production becomes more efficient and products/services are improved. This generates obvious benefits for consumers. Any agreement which limits this sort of investment is therefore considered anti-competitive.

CASE EXAMPLE:

As part of a complex price fixing arrangement, 5 producers of zinc agreed to limit their individual output of zinc so that surplus zinc would not be sold to the London Metal Exchange or other customers, possibly at lower prices. This ensured that their agreed price was not put at risk. The 5 producers also agreed not to build any new zinc production capacity without first obtaining the agreement of the other parties.

The European Commission found a restriction of competition and imposed fines of more than €3 million.

Zinc Producer Group [1984] OJ L220/27

BID RIGGING

Bid rigging is prohibited by section 4(2)(d) of the CA 2010.

Bid rigging occurs when two or more bidders collude to distort the normal conditions of competition in respect of a tender. Bid rigging limits price competition between the parties. Instead of competing to submit the best solution at the lowest possible price, parties agree amongst themselves which of them should win the contract and collude to set tender prices to guarantee the agreed outcome, thereby removing the competitive element of the tender process. For example, bid rigging may be achieved through the use of:

Bid suppression

Bidder A does not bid at all.

Bid rotation

Bidder A and Bidder B take turns at submitting the most competitive tender price (and therefore winning the contract).

Bid withdrawal

Bidder A deliberately withdraws its bid leaving Bidder B as the only bidder and thereby winning the tender.

Cover pricing

This involves Bidder A submitting a bid price that is deliberately higher than Bidder B (and has been determined in coordination with Bidder B).

Non-conforming bids

Bidder A deliberately submits its tender not in accordance with the terms or conditions specified in the tender.

Sometimes the losing bidders may be awarded sub-contracts or may be paid compensatory payments to cover bid costs by the winning bidder.

Bid rigging results in a number of anti-competitive effects on the market:

+ The bidders do not set their tender price independently, thereby removing competitive uncertainty.
+ The contractor that is seeking submission of tenders falsely believes that the bidders are submitting "competitive" bids. The contractor can no longer obtain the best price and the best terms.

+ The collusion often requires the exchange of commercially sensitive information in order to determine the relevant "cover price".
+ Bid rigging is also a form of market sharing as the contracts are "divided up" between the bidders.

Businesses should **not**:

- share bid prices;
- agree to submit "cover" prices that are not intended to win;
- agree not to bid or submit non-conforming bids;
- agree to take turns to submit bids or withdraw bids.

All of these decisions should be made **independently**.

CASE EXAMPLE:

In 2009, the UK Office of Fair Trading imposed fines on 103 construction companies for bid rigging which had taken place over a period of 6 years.

The case involved "cover pricing", a process by which a bidder who did not wish to bid for a particular contract sought a "cover price" from its competitor which was higher than the competitor's price, thus ensuring the competitor would win the contract. In some cases, compensatory payments were paid to the "losing" bidder. The Office of Fair Trading found that both the cover pricing and the compensatory payments were breaches of Chapter 1 of the UK Competition Act. Total fines of £129.2 million were imposed.

Bid rigging in construction industry in England (2009) OFT Decision, Case CE/4327-04

WHAT AGREEMENTS MAY NOT BE PERMITTED?

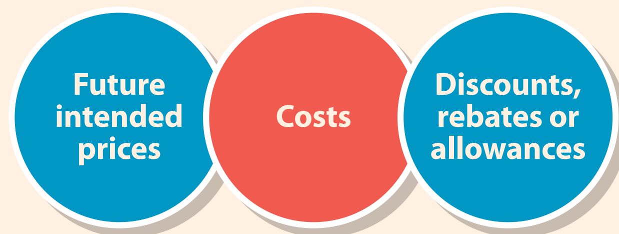
Other types of agreements may not be permitted by the CA 2010 if they have the object or effect of significantly preventing, restricting or distorting competition. Some examples of the types of agreements that may not be permitted are set out below. You should note this is not an exhaustive list.

HORIZONTAL AGREEMENTS

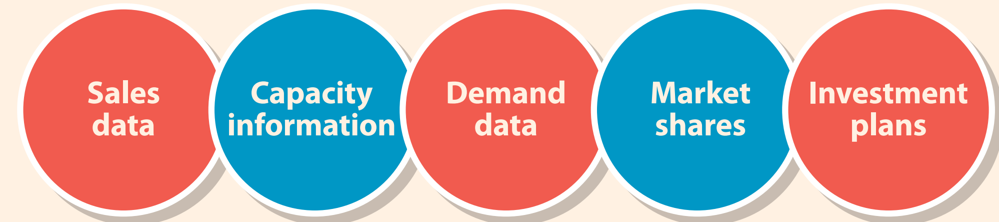
Exchanges of commercially sensitive information

Exchanges of commercially sensitive information between competitors commonly give rise to competition concerns. The exchange of information may take place in many forms and could be communicated directly or indirectly through a third party, such as a trade association or manufacturer. The element of uncertainty that normally exists between competitors may be removed by the exchange of information.

If the information exchanged relates to pricing, it is **likely** to infringe the CA 2010. Examples of the types of pricing information that will infringe the law if exchanged include:



Where the information relates to non-pricing matters, it **may still infringe** the CA 2010. Examples of the types of non-pricing information which may infringe the law if exchanged include:



Information that is **unlikely** to give rise to competition concerns if exchanged includes:

- Historical data (that is no longer relevant);
- Aggregated data (provided it cannot be broken down to identify data belonging to an individual enterprise).

Where the relevant market is concentrated, the risks of an effect on competition arising from the exchange are higher. If the information is generally available to all competitors and customers, it is unlikely to cause a concern.

Exchanges of information in support of horizontal agreements such as research and development agreements, production agreements, commercialisation agreements or joint ventures will need to be considered on a case-by-case basis to determine whether the exchange has an effect on competition or is reasonably necessary to give effect to the horizontal agreement.

CASE EXAMPLE:

50 schools in the UK were found to be in breach of the Competition Act for exchanging commercially sensitive pricing information.

Each year, each school provided details of their current fees and their proposed fee increase (i.e. pricing intentions) to a central point. This information was put into a table and shared with the other participating schools in advance of when the schools needed to finalise their fee schedule. The information that was exchanged was highly confidential and not provided to parents or the general public.

The Office of Fair Trading imposed a fine on each of the schools, reduced for leniency and other special circumstances including that the schools were all not-for-profit organisations.

***Exchange of information on future fees by certain independent fee–paying schools*, CA98/05/2006, OFT Decision, 20 November 2006**

Advertising restrictions

Restrictions on advertising need to be assessed to determine whether there is any harm to competition. There may be practical and financial benefits in a group of producers jointly advertising a product but these benefits would need to be weighed against any potential harm to competition.

Advertising plays an important role in providing customers with adequate information to make an informed choice. Restrictions on a seller's ability to communicate this information can therefore be harmful to competition.

As stated in the Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements):

"Truthful advertising by trade associations which are genuinely meant to inform consumers about the merits and attributes of the products produced by the members are unlikely to have a significantly anti-competitive effect."

Standardisation agreements

The purpose of a standardisation agreement is usually to set technical or quality standards to which products, processes or services should comply.

There are obvious benefits to the setting of these standards (such as ensuring interoperability or quality of products), however, it is also possible that the standards could have anti-competitive effects. Competition concerns will arise where the practical effect of setting the standard is:

- A reduction in price competition facilitated by the standard-setting discussions;
- To reduce the incentive on parties to develop new technologies; or
- To act as a barrier to entry to parties who do not meet the relevant standard.

This is a complex area and any standardisation agreements will need to be carefully considered to determine whether there is any anti-competitive effect.

Joint purchasing or selling

Agreements under which competitors agree to jointly purchase a product may significantly prevent, restrict or distort competition. However, joint purchasing agreements may also produce positive benefits for consumers by way of lower prices if the increased efficiencies are passed through to consumers. These benefits will need to be weighed against any effect on competition in both the purchasing and selling market. One of the relevant factors will be the market shares of the parties on those markets.

Agreements under which competitors agree to jointly sell their products may also significantly prevent, restrict or distort competition, particularly as they may lead to price fixing or market sharing. The market shares of the parties on the relevant markets will need to be considered, together with whether the efficiencies are being passed to consumers.

Exclusive dealing arrangements

Arrangements under which competitors agree to only deal with certain suppliers or customers may significantly prevent, restrict or distort competition, particularly where the market shares of the competitors are high. These types of agreements may force existing suppliers or customers out of the market or act as a barrier to entry for new suppliers or customers. Each arrangement will need to be considered on a case-by-case basis.

Other horizontal agreements

Other types of horizontal agreements that will need careful consideration include research and development agreements, production agreements, commercialisation agreements and joint ventures.

VERTICAL AGREEMENTS

Resale price maintenance

Resale price maintenance (RPM) occurs where the price at which goods are to be re-sold is fixed, or a minimum resale price is imposed by the seller. The MyCC will take a strong stance against these types of RPM agreements.

RPM may also occur where a maximum or recommended price is stated by the seller. If a recommended price is a **genuine** recommendation only, it will be permitted. However, if the maximum or recommended price becomes a focal point for determining the price, it is likely to constitute illegal RPM.

CASE EXAMPLE:

TEAC Australia told its retailer that it would not supply TEAC electronic goods unless the retailer agreed not to advertise the goods at a price less than the "go price" specified by TEAC. TEAC admitted to RPM.

ACCC v TEAC Australia Pty Ltd [2007] FCA 1859

A manufacturer of boats supplied its dealers with a recommended retail price (RRP) list. It also gave dealers a document that said dealers should advertise the boats at the RRP. It made it known that it would not provide any advertising support to dealers that advertised at a lower price. Penalties of $280,000 were imposed on the manufacturer for RPM.

ACCC v. Telwater Pty Ltd [2009] FCA 263

Agreements that Require a Buyer Must Buy All or Most Supplies from the Supplier

Agreements under which a seller imposes a condition that the buyer must buy (or is induced to buy by way of incentives) all, or a substantial proportion of, his supplies of a product from the seller can significantly prevent, restrict or distort competition.

The market shares of the seller and the buyer on their respective markets will need to be considered, together with the duration of the agreement. The main competition risk is the foreclosure of the downstream market to other suppliers.

Agreements that Require a Seller to Sell All or Most Products to one Buyer

Agreements under which a buyer imposes a condition that the seller must sell (or is induced to sell by way of incentives) all, or a substantial proportion of, his products to one buyer can significantly prevent, restrict or distort competition.

The market shares of the seller and the buyer on their respective markets will need to be considered, together with the duration of the agreement. The main competition risk is the foreclosure of other buyers.

Exclusive Distribution Agreement Covering a Geographic Territory

Suppliers often appoint distributors to distribute their products on their behalf. Where a supplier appoints only one distributor in a particular territory (commonly prohibiting active sales outside that territory), *intra-brand competition is limited. The limit on intra-brand competition is a particular concern where there is limited **inter-brand competition. Exclusive distribution agreements need to be reviewed to determine whether they have the effect of significantly preventing, restricting or distorting competition.

*Intra-brand competition is the competition that exists between sellers of the same products.
**Inter-brand competition is the competition that exists between sellers of different products.

Selective distribution agreements are a form of exclusive distribution agreement under which distributors are "selected" because they satisfy the selection criteria. The criteria are designed to ensure that the distributors have the skills to sell the product. These selective distribution agreements also need to be reviewed to determine whether they have the effect of significantly preventing, restricting or distorting competition.

Exclusive Customer Allocation Agreement

Agreements under which a seller agrees to only sell to a distributor on condition that the distributor only sells to a particular class of customers (commonly prohibiting active sales to other classes of customers) also limit intra-brand competition.

These agreements will need to be reviewed to determine whether they have the effect of significantly preventing, restricting or distorting competition. As with exclusive distribution agreements, the limit on intra-brand competition is a particular concern where there is limited inter-brand competition.

Up-Front Access Payments

As stated in paragraphs 3.23-3.24 of the Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements):

"Up-Front Access Payments are payments that suppliers pay to distributors to get access to their distribution network. For example, a wholesaler may pay an up-front fee to a retailer to get exclusive access to the best shelf-space in the retail outlet. This may have the effect of foreclosing that space to other wholesalers.

To assess whether the impact is significant, the MyCC will examine how much of the market share is foreclosed to new entrants and other competitors in the relevant markets."

Tying

Tying occurs when a supplier makes the supply of one product (the tying product i.e. the product the customer wants) conditional on the customer buying a second product (the tied product i.e. a product the customer does not want) either from the supplier or some other specified third party.

The risk to competition is the foreclosure of the market for the tied product. The market shares of the seller(s) and the buyer on all relevant markets will need to be considered.

Franchising

Franchise agreements commonly contain provisions that prevent, restrict or distort competition such as exclusive or selective distribution provisions, non-compete clauses and restrictions on the use of intellectual property that is licensed under the franchise agreement. Usually, these provisions are designed to protect the brand reputation that has been built by the franchisor so that it can be justified, provided they are proportionate. That is, they do not go further than is required to protect the brand reputation.

RELIEF FROM LIABILITY

Agreements that satisfy certain conditions are eligible for relief under section 5 of the CA 2010. The parties to the agreement must be able to show:

- There are significant and identifiable technological, efficiency or social benefits;
- These benefits cannot reasonably be provided without lessening competition;
- The harm to competition is proportionate to the benefits; and
- Competition is not completely eliminated for most of the goods and services.

Unless the parties are seeking an individual or a block exemption, it is not necessary to notify the MyCC of agreements that you believe meet these conditions. The relief from liability can be invoked if any question is raised by the MyCC about the agreement in question and all four conditions must be met.

CONTACT WITH YOUR COMPETITORS

There are many reasons why businesses have contact with their competitors. You may meet as part of a trade association, to discuss research & development and associated commercialisation, a proposed joint venture or even a proposed merger.

You should exercise great caution if any anti-competitive matters, particularly hard-core cartels, resale price maintenance or the exchange of commercially sensitive information, are discussed. Issues may arise as part of a legitimate meeting, in social settings or by virtue of your attendance at association meetings.

MEETINGS WITH COMPETITORS

Many competition authorities worldwide, including the MyCC, consider that merely attending a meeting with competitors during which anti-competitive matters are discussed is sufficient to result in an infringement of competition law by all attendees, regardless of whether anything was “agreed” and regardless of whether it was put into effect.

As stated in the Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements):

“An agreement could also be found where competitors attending a business lunch listen to a proposal for a price increase without objection. On the same note, competitors should avoid meetings or other forms of communication with competitors particularly where price is likely to be discussed. Mere presence with competitors at an industry association meeting where an anti-competitive decision was made may be sufficient to be later implicated as a party to that agreement.”

SOCIAL SETTINGS

Social settings often provide great opportunities to discuss business matters on an informal basis. They also provide an opportunity to discuss matters which should not be discussed. An informal agreement or understanding between you and your competitors will still be illegal, even if reached over dinner, after a round of golf, at a drinks reception or an industry event.

DECISIONS OF ASSOCIATIONS

Merely attending a trade association meeting does not result in a breach of the CA 2010. However, competition concerns will arise where matters are discussed or agreed that should not be discussed or agreed. Serious concerns will arise if:

The members discuss or agree to the fixing of prices, sharing of markets, bid rigging or limiting production in any way (as explained above); or

The members discuss or exchange sensitive commercial information.

You should be concerned if anything discussed at the meeting or any decision of an association restricts your freedom to make your own commercial decisions.

Decisions of associations, which can also give rise to anti-competitive issues, include:

- **constitution/rules of admission**. The members of an association are commonly bound by a written constitution which often contains rules of admission. These rules may relate to, for example, the professional standards that must be met in order to join the association.

You must ensure that any rules of admission can be justified, are available to all potential members and are applied fairly and reasonably. Rules that are overly restrictive or applied unfairly or inconsistently are likely to be anti-competitive as they will have the effect of excluding (and thereby disadvantaging) businesses that do not meet the rules.

- **recommendations**. Even if they are not binding, recommendations may determine members' conduct and therefore remove their ability to act independently.

CASE EXAMPLE:

In its first decision under the Competition Act, the MyCC found that the Cameron Highlands Floriculturist Association (CHFA) had infringed the Competition Act 2010 by engaging in anti-competitive conduct to fix the selling price of their floricultural products. The President of the CHFA issued a statement published in an online portal that the CHFA would increase the price of flowers by 10%.

- **codes of conduct**. Members of associations are commonly subject to a "code of conduct" which states the way the members should conduct their business e.g. by setting out policies or standards. Codes of conduct can be extremely useful but they may also be anti-competitive, for example, if they contain provisions relating to pricing, market sharing or which have the effect of unreasonably excluding members.

- **certification schemes**. Certification schemes are often introduced by associations to ensure that members' products/services meet a minimum standard. Businesses that have not achieved the stated level of certification may not be permitted to join the association. The terms of the certification scheme will need to be reviewed to determine whether it has an anti-competitive effect.

- **standard terms and conditions**. Setting of standard terms and conditions by an association may be anti-competitive especially where members are not permitted to use other terms and conditions or where most members use the standard terms so that there is no real choice for customers.

DISTANCING YOURSELF FROM ANTI-COMPETITIVE DISCUSSIONS

If you find yourself in a situation where anti-competitive matters are being discussed, the MyCC recommends that you publicly distance yourself from these discussions.

In the case of a meeting, this can be achieved by leaving the meeting and asking the minutes to record your objection to the discussion and the fact that you left the meeting. In the case of a social discussion, you should make it clear that it is not appropriate to discuss these matters and end the conversation.

You should report the discussions to the MyCC and obtain your own legal advice.

SPECIAL RULES FOR BIG PLAYERS

Section 10(1) of the CA 2010 prohibits an enterprise from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.

This means that if your business holds a dominant position in any market, you will need to ensure that it does not use that strong market position to damage competition. **Merely holding a dominant position does not infringe the CA 2010**.

DOMINANCE

To determine whether your business is in a dominant position in any market, you will need to start by determining your market share. (You should refer to the MyCC's separate Guidelines on Market Definition for a discussion on how the MyCC will determine the relevant market.)

If your business has a market share of **above 60%**, the MyCC takes the view that this is a strong indicator that your business holds a dominant position. However, the Guidelines on Chapter 2 Prohibition (Abuse of Dominant Position) note that market share alone is not the only indicator of dominance.

Other factors that will be relevant in determining dominance include constraints on the business imposed by:

- your actual competitors;
- potential competitors, including a consideration of barriers to entry or expansion;
- buyer power;
- economic regulation imposed by the government.

It is possible that a business with a market share of 70% **is not** dominant because there is substantial buyer power which prevents the business from acting without constraint. Similarly, it is possible that a business with a market share of 40% is dominant because barriers to entry are high so the risk from potential competitors is low.

If your business is able to behave mostly independently of its competitors or customers (for example, if it is able to increase prices without worrying about losing customers) it is likely to hold a dominant position.

You should refer to the MyCC's separate Guidelines on Chapter 2 Prohibition (Abuse of Dominant Position) for a detailed discussion on the factors the MyCC will consider to determine if your business holds a dominant position.

ABUSIVE CONDUCT

Even if you conclude that your business holds a dominant position in a market, it does not mean your business is infringing the CA 2010. **Your business will only infringe the CA 2010 if it abuses its dominant position**.

SECTION 10(2) SETS OUT THE CONDUCT THAT MAY CONSTITUTE AN ABUSE:

- directly or indirectly imposing unfair purchase or selling price or other trading conditions on suppliers or customers;
- limiting or controlling production, markets or market outlets, technological or technical development or investment to the prejudice of customers;
- refusal to supply;
- applying different conditions to equivalent transactions;
- attaching irrelevant conditions to contract conclusion;
- predatory behaviour;
- buying up scarce supply of intermediate goods or resources without a commercial need.

This list is not exhaustive. Common types of behaviours that have been found to constitute an abuse are given below. In all cases, the MyCC will assess whether the conduct amounts to an abuse of dominant position on a case-by-case basis.

Excessive pricing

Excessive pricing occurs when a dominant enterprise charges a price that has no reasonable relation to the economic value of the product supplied. It may do this simply to exploit its dominant position or to prevent a competitor from competing in the market by charging the competitor an excessive price for an input required from the dominant enterprise.

CASE EXAMPLE:

Napp supplied morphine to private patients at a price ten times higher than it supplied the same product to hospitals. The Office of Fair Trading found that the price charged to private patients was excessive, finding Napp had abused its dominant position.

Napp Pharmaceutical Holdings Ltd [2001] UKCLR 597

Predatory pricing

Predatory pricing involves a dominant enterprise reducing its price below cost in an attempt to drive a new or existing competitor out of the market. Once the competitor has left the market, the dominant enterprise can increase its prices again.

The MyCC will need to determine whether the dominant enterprise has in fact priced below cost. There are a number of different ways of determining "cost". These are set out at paragraph 3.14 of the Guidelines on Chapter 2 Prohibition (Abuse of Dominant Position).

HYPOTHETICAL EXAMPLE:

Bus Company A holds a dominant position in the market for bus services from Kuala Lumpur to Singapore. Bus Company B commences operation on that route. Bus Company A reduces its prices to below cost on that route. Bus Company B cannot afford to match those prices so is forced to stop running its services. Bus Company A can then increase its price again. Bus Company B complains to the MyCC alleging abuse of dominant position by Company A.

Price discrimination

Price discrimination occurs when the same product is sold at different prices without any commercial justification for the difference in price. (A difference in price could be justified if, for example, the transport costs of delivering to customer A were significantly greater than delivering to customer B.)

Price discrimination may also occur when the same product is sold at the same price, in circumstances where there should be a difference in price (e.g. because of the different transport costs).

Conduct of this nature allows the dominant enterprise to charge lower prices in areas where it faces competition and higher prices in areas where it does not face competition. This causes harm to the customers forced to pay the higher price and

could drive competitors out of the market in the areas where the dominant enterprise is able to charge lower prices. (The dominant enterprise normally can only afford to charge these lower prices because it earns additional profits in the other areas.)

HYPOTHETICAL EXAMPLE:

Flour Company A is based in Kuala Lumpur and sells flour to customers in Kuala Lumpur and Penang. It has a 75% market share of the Malaysian flour market. It sells flour to its customers in Penang at the same price as it sells to customers in Kuala Lumpur. This is despite the significantly higher transport costs of supplying to the customers in Penang.

Flour Company B is based in Penang and sells its product mainly to customers in Penang. It has a 5% market share of the Malaysian flour market. Flour Company B believes that Flour Company A is engaging in price discrimination and complains to the MyCC that Flour Company A is abusing its dominant position.

Exclusive dealing

Any arrangement under which a dominant supplier forces a buyer to buy all of their supplies from the dominant supplier can constitute an abuse as it has the effect of preventing anyone else competing with the dominant supplier for that buyer's requirements. It is possible that the exclusivity could arise indirectly, as illustrated in the following example.

HYPOTHETICAL EXAMPLE:

Soft drink Company A (70% market share) supplies free fridges to convenience stores on condition that they only stock Company A's products in those fridges. In most convenience stores, there is only room for one fridge. Soft drink Company B complains to the MyCC because the convenience stores are now not buying any of their products.

Loyalty rebates and discounts

Loyalty rebates and discounts can also result in exclusive dealing. Buyers are required to purchase minimum volumes in order to receive the rebate or discount. Where the result is that they are buying all, or almost all, of their supplies from the dominant enterprise in order to meet the volume requirements, other competitors are prevented from competing with the dominant player for that buyer's requirements.

HYPOTHETICAL EXAMPLE:

Crisp Company A holds 60% of the market for crisps in Malaysia and owns the most popular brand (a "must stock" item). It offers volume rebates to customers that buy a minimum of 10,000 units per month. Most large supermarkets purchase about 12,000 units of crisps per month. Crisp Company B (15% market share) complains to the MyCC as the supermarkets do not purchase any of their products as their volume requirements are met by purchasing from Crisp Company A.

Refusal to supply

As a general principle, businesses are entitled to choose for themselves who they wish to do business with. If a business does not wish to trade with another business, they are generally free to make that decision. However, where an enterprise is dominant, a refusal to supply can constitute an abuse.

Products

The dominant enterprise refuses to supply a product to a buyer. This may prevent the buyer from competing in a downstream market. This commonly happens when the dominant enterprise also competes in the downstream market.

Intellectual property

The dominant enterprise refuses to licence intellectual property.

Essential facilities

The owner of an essential facility (such as a port, a telecoms tower, an airport) refuses to allow access to that essential facility, thereby excluding competitors.

HYPOTHETICAL EXAMPLE:

Company A supplies product X which is a key input for product Y. Company A establishes a subsidiary that will sell product Y. Company A then begins refusing to sell product X to Company B so B cannot complete with A's subsidiary company on the downstream market. Company B complains to the MyCC alleging abuse of dominant position by Company A.

Buying Up Scarce Intermediate Goods and Resources

Buying up scarce goods and resources could drive competitors out of the market, either because they are forced to shut down production or source alternative goods or resources elsewhere at increased cost, thereby increasing their costs of production.

Bundling

Bundling occurs when products are sold together at a lower price than if they were sold separately. Bundling is often used by a dominant enterprise to bundle a popular product with a less popular product. This is known as leveraging market power.

HYPOTHETICAL EXAMPLE:

A dominant software company offers a bundle of two of its products (its most popular computer game and a new game) for RM100. The products would cost RM150 if bought separately. A competitor complains to the MyCC alleging abuse of dominant position by the software company.

Tying

Tying occurs when a product (the "tying" product) is sold on condition that a second product (the "tied" product) is also bought. This practice is commonly used by a dominant enterprise to leverage their market power from the tying product market into the tied product market.

HYPOTHETICAL EXAMPLE:

The manufacturer of a popular brand of photocopiers supplies a 3 year warranty on the photocopier provided the buyer purchases all of their ink cartridges from the manufacturer. This may constitute an illegal tying arrangement unless the manufacturer can show there are technical reasons why other ink cartridges are unsuitable.

Dominance and Abuse in Separate Markets

Abuse in separate markets may occur when a dominant company operates at two levels of the production or distribution chain. If it is dominant in relation to a key input, it can charge a higher price to its downstream competitor which makes it harder for that competitor to compete with it on price in the downstream market (also called a "margin squeeze").

HYPOTHETICAL EXAMPLE:

Company A is dominant in the production of a chemical required to produce a particular type of plastic. Company A's subsidiary competes in the downstream plastic market alongside Company B. Company A charges a high price to Company B for the chemical. Company B complains that it cannot compete alongside Company A's subsidiary because of the input cost of the chemical and alleges an abuse of dominance by Company A.

DEFENCES

It is a defence to an allegation of abuse that your business is taking a step that has a reasonable commercial justification or that you are responding in a reasonable commercial way to the conduct of a competitor.

If relying on this defence, your business will need to prove that the conduct in question could be reasonably justified. As stated in the Guidelines on Chapter 2 Prohibition (Abuse of Dominant Position), some examples of reasonable justification may be:

- Refusing to sell to a buyer who has not paid for past purchases;
- Refusing to grant access to a dominant enterprise's infrastructure that is already being used to capacity;
- Offering a loyalty rebate that is related to the reduced costs of supplying a particular customer; or
- Meeting a competitor's price (e.g. price matching during a sales promotion).

ARE THERE SPECIAL RULES FOR SMALL PLAYERS?

Small and medium enterprises

The CA 2010 applies to all entities that carry on commercial activities, regardless of their size. This means that the law will apply to the smallest SME and the largest Malaysian (or international) companies. However, in some cases, the law will apply differently.

Agreements that have an anti-competitive object will be prohibited for all enterprises, big and small. Price fixing, market sharing, limiting production or supply and bid rigging are deemed by section 4(2) of the CA 2010 to have anti-competitive objects. So SMEs will break the law if they enter into these types of agreements.

However, many other types of agreements will be permitted for SMEs, even if they are competitors, as they are unlikely to have an anti-competitive effect. This is because the combined market share of the parties to the agreement is likely to be below 20% (see paragraph 3.4 of the Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements)). The types of agreements that are likely to be permitted are, for example, joint purchasing, exclusive distribution or tying. These agreements may not be permitted if they are entered into between a large enterprise and an SME as the effect on the market may be greater.

CASE EXAMPLE:

Two ferry operators ran all of the services on two key routes from the Singapore Harbour Front. The parties exchanged commercially sensitive pricing information in relation to the prices they charged corporate clients and travel agents for ferry tickets. The exchanges included copies of quotes for clients.

The Competition Commission of Singapore found that the exchange of the confidential pricing information breached the Competition Act and imposed fines on both ferry operators, Batam Fast and Penguin Ferry. The ferry operators were both SMEs.

Infringement of the Singapore section 34 Prohibition in relation to the price of ferry tickets between Singapore and Batam, Case No. 500/006/09

WHEN CAN MyCC LAUNCH AN INVESTIGATION?

The MyCC may conduct any investigation that it thinks expedient where the MyCC has reason to suspect that any enterprise has infringed or is infringing the CA 2010. The MyCC will also investigate any suspected infringement of the CA 2010 if directed to do so by the Minister. The MyCC may also conduct an investigation following receipt of a complaint.

It will independently determine which matters warrant further investigation based on a range of factors including the seriousness of the alleged infringement, its administrative priorities and available resources. Complaint forms are available for download from the MyCC website, www.mycc.gov.my.

WHAT DO YOU NEED TO DO IF MyCC INVESTIGATES YOUR BUSINESS?

POWERS OF MyCC

The CA 2010 gives the MyCC extensive powers to investigate suspected competition law infringements:

Receive complaints

The MyCC has power to conduct an investigation following receipt of a complaint.

Require information to be provided

The MyCC can issue a written notice to any person requiring that person to either:

Provide or produce any information or document; or	Provide an explanation on any information or document.

Failure to provide any relevant information, evidence or document will constitute an offence under the CA 2010. It is also an offence to provide any information, evidence or document that you know or have reason to believe is false or misleading.

Search and seizure powers with or without a warrant

In certain circumstances, the MyCC can enter premises to conduct a search (either with or without a warrant) and can seize documents or data (including computer data) that is reasonably expected to provide information regarding an infringement. The power also includes power to search a person.

An offence will be committed by any person who:

refuses to give the MyCC officer access to any premises or obstructs or delays entry in any way; or	provides information to any other person regarding a MyCC investigation (a "tip-off") which is likely to prejudice that investigation.

Offences committed under the CA 2010 are liable to fines for body corporates and individuals and imprisonment for individuals.

LEGAL PRIVILEGE

The MyCC cannot require a person to produce documents that benefit from a legal professional privilege.

Legal professional privilege attaches to communications between a solicitor and his client that have been created:

for the purpose of obtaining legal advice (known as advice privilege); and/or	in connection with existing or contemplated litigation (litigation privilege).

You should seek your own independent legal advice in relation to what documents can be withheld from the MyCC on the grounds of legal privilege.

CONFIDENTIALITY

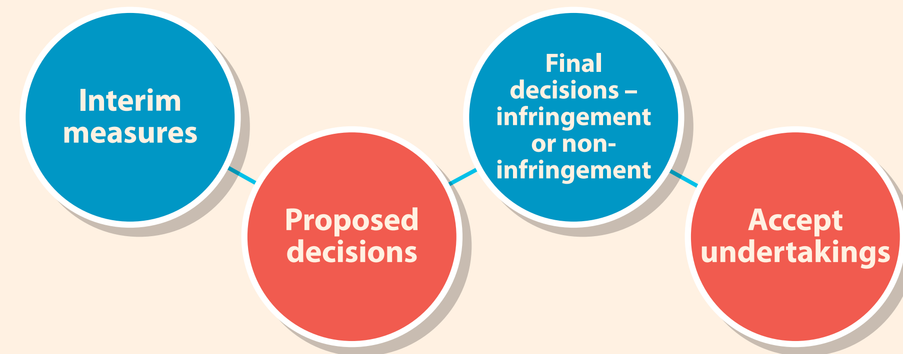
The MyCC recognises that documents or data provided to it either as part of a complaint or as part of an ongoing investigation may be commercially sensitive.

The MyCC will carefully consider any request to keep commercially sensitive information confidential. To assist the MyCC, **businesses should identify any commercially sensitive information at the time the documents or data are provided to the MyCC.**

Where possible, the MyCC will remove commercially sensitive information from any documents that will be publicly available (such as MyCC decisions). Any disclosure that needs to be made by the MyCC will be made in accordance with section 21(2) of the CA 2010.

MyCC'S DECISIONS

The MyCC has the power to make different types of decisions:



An **interim** measure can be taken where the MyCC has commenced an investigation but not completed it. Interim measures can only be taken where the MyCC considers it is necessary to act **as a matter of urgency** either to prevent serious and irreparable damage or to protect the public interest.

Where the MyCC intends to make a decision that there has been an infringement of the CA 2010, the MyCC will issue a **proposed decision** to each enterprise that may be directly affected by the decision. The proposed decision will contain the reasons for the decision, any penalties or other action the MyCC intends to take and inform each enterprise that it is entitled to make written or oral representations to the MyCC.

The MyCC will notify any person affected by a **finding of non-infringement**, stating the facts and the reasons for the decision. The MyCC will publish the reasons for any **finding of infringement**.

The MyCC has power to accept an **undertaking** from an enterprise to do or refrain from doing anything, in which case the MyCC will close the investigation without making a finding of infringement or non-infringement and no penalty will be imposed.

Enforcement

The MyCC may bring proceedings in the High Court to enforce an interim measure, a finding of infringement or the terms of an undertaking accepted by the MyCC.

WHAT ARE THE CONSEQUENCES OF INFRINGEMENT?

PENALTIES

If the MyCC finds an infringement of the CA 2010, it may impose a financial penalty of up to **10% of the worldwide turnover** of the enterprise for the period during which the infringement occurred. This means that if the infringement lasted for 4 years, the worldwide turnover of the enterprise for that 4 year period will be relevant to the calculation.

The MyCC intends to issue separate more detailed guidance on how it will calculate financial penalties.

OTHER CONSEQUENCES

The MyCC has power to specify what steps an enterprise needs to take to bring an infringement to an end. This is a wide power.

An enterprise that is found to have infringed competition law will be subject to substantial negative press. A 2007 study in the UK found that businesses considered the adverse publicity arising out of a competition law infringement to be a greater deterrent than financial penalties.

APPEALS

Any person who is aggrieved or whose interest is affected by a decision of the MyCC may appeal to the Competition Appeal Tribunal in relation to:

- an interim measure
- a finding of infringement; or
- a finding of non-infringement

A notice of appeal must be lodged with the Competition Appeal Tribunal within 30 days of the date of the MyCC's decision. A copy of the notice of appeal must be given to the MyCC.

THIRD PARTY ACTIONS

Section 64(1) of the CA 2010 allows any person who has suffered loss or damage directly as a result of an infringement of the CA 2010 to bring civil proceedings against any enterprise that has been a party to the infringement.

You should seek your own independent legal advice in relation to what rights of action you may have against another enterprise for infringement of the CA 2010.

WHAT SHOULD YOUR BUSINESS DO IF IT IS AWARE OF AN INFRINGEMENT?

LENIENCY

If you are aware of an infringement (or possible infringement) of the CA 2010 by your business, you should seek independent legal advice.

If you think your business may have been involved in a cartel, you may wish to consider making a leniency application under the MyCC's leniency regime. The MyCC will be issuing separate guidelines outlining its leniency regime. The key components will be:

Up to 100% reduction in the financial penalty if:

+ your business admits its involvement in the cartel;
+ your business provides information or otherwise cooperates with the MyCC in a way which significantly assists the MyCC's finding of infringement.

Lower percentage reductions in the financial penalty will be available depending on:

+ Whether your business was the first to bring the infringement to the MyCC's attention;
+ What stage the investigation had reached when the involvement was admitted or the information or cooperation provided;
+ Any other relevant circumstances.

CASE EXAMPLE:

37 of the companies investigated by the Office of Fair Trading in relation to bid rigging in the construction industry in the UK applied for leniency and obtained reductions in fines of 100% in relation to those infringements which the Office of Fair Trading would not have known about "but for" the evidence of the party seeking leniency.

Bid rigging in construction industry in England (2009)
Office of Fair Trading Decision, Case CE/4327-04

COMPLAINT

If your business is aware of an infringement (or possible infringement) of the CA 2010 by another business, you should consider making a complaint to the MyCC. Details of how a complaint can be made are set out in the Guidelines on Complaints Procedures.

WHAT CAN YOUR BUSINESS DO TO HELP PREVENT AN INFRINGEMENT?

COMPLIANCE

All Malaysian businesses should take steps to ensure compliance with the CA 2010. This will require:

- a review of current contractual and non-contractual arrangements and business practices to determine whether there are any existing concerns that need to be addressed;
- the introduction of a tailored compliance programme which includes an ongoing commitment to competition law compliance.

There is no "one size fits all" compliance programme. An effective compliance programme needs to be specific to the particular business. A small business with only a handful of employees will require something very different to that which is required by a large business employing hundreds of employees. Businesses in different industries will face different risks and these will need to be reflected in your compliance programme.

FOR MOST BUSINESSES, A COMPLIANCE PROGRAMME SHOULD INCLUDE:

A compliance policy statement

setting out the policy of the business relating to competition law compliance and evidencing a commitment to compliance by senior management;

A competition law compliance manual

setting out guidelines on the law in simple language for your employees to understand. This manual should address the key areas of risk for your business;

Training

the training should be offered to all employees, particularly those most likely to face competition law risks e.g. sales and procurement employees, personnel that attend trade associations. Senior management should also be trained. The training should include practical examples relevant to your business;

A competition compliance committee

a committee (or individual in smaller businesses) that is responsible for ensuring competition law compliance. This committee (or individual) should also be available to provide guidance to, and answer questions from, your employees;

A periodic audit

to check that the business is maintaining its compliance culture and to identify any new risks that may have arisen;

An annual report to the board (or senior management)

in larger businesses, the board of directors or senior management should receive annual reports on competition law compliance. This will only be necessary in smaller businesses where senior management are not already aware of the compliance issues.

The MyCC intends to issue separate more detailed guidance on compliance.

WHAT GUIDANCE CAN MyCC OFFER?

GUIDELINES

Under the Competition Commission Act 2010, the MyCC is permitted to issue guidelines in relation to the implementation and enforcement of the competition laws and to publish information concerning the competition laws and the manner in which the MyCC will carry out its functions.

To date, the MyCC has issued four Guidelines to assist the public to understand the way in which it intends to apply the CA 2010. It has also issued a Handbook for the General Public. These documents are available on the MyCC website. The MyCC will continue to issue further guidance as it sees appropriate and to amend existing Guidelines as required from time to time.

EXEMPTIONS

An agreement may be exempted from the CA 2010 by the MyCC either because:

- It satisfies the conditions for relief set out in section 5 of the CA 2010 (an **individual exemption**); or
- It belongs to a category of agreements that have been exempted (a **block exemption**).

Individual exemption

To be eligible for an individual exemption, an agreement must satisfy the following conditions:

- There must be significant and identifiable technological, efficiency or social benefits;
- These benefits cannot reasonably be provided without lessening competition;
- The harm to competition is proportionate to the benefits; and
- Competition is not completely eliminated for most of the goods and services.

All four conditions must be satisfied. If you believe that your agreement meets these conditions, you may make an application to the MyCC for an individual exemption to be granted. The application must contain:

- A copy of the agreement;
- An explanation of how the conditions in section 5 of the CA 2010 have been met. The obligation is on you to satisfy the MyCC of this;
- An indication of how long you wish the exemption to last.

If granted, the MyCC may make the exemption subject to a time limit and impose any appropriate conditions or obligations. An exemption may be cancelled or varied if there is a material change of circumstances or there is a breach or non-compliance of an imposed condition.

Block exemption

The MyCC may grant an exemption to a particular **category** of agreements if the MyCC is satisfied that agreements within that category are likely to satisfy the conditions for individual exemption. The MyCC has not yet granted any block exemptions.

As with individual exemptions, the MyCC can impose conditions or obligations which must be satisfied for the block exemption to apply, and it may provide that the block exemption only applies for a certain period of time. An exemption may be cancelled or varied if there is a material change of circumstances or there is a breach or non-compliance of an imposed condition. You should seek your own independent legal advice to determine whether any of your agreements fall within any block exemptions issued by the MyCC.

Before granting a block exemption, the MyCC will publish a draft block exemption order and then conduct a 30 day public consultation. Due consideration will be given to any submissions made.

APPLICATIONS FOR BLOCK OR INDIVIDUAL EXEMPTIONS SHOULD BE SENT TO:

A Guide for Business

DISCLAIMER

This document has been prepared to assist Malaysian businesses to understand how the MyCC intends to apply the CA 2010. It is not a substitute for the Act or any Regulations made pursuant to the Act. The MyCC may revise this document from time to time.

In seeking to explain the law, it has been necessary to make generalisations as it is not possible to consider all the scenarios that may arise. The examples are for illustrative purposes only and do not limit the investigative or enforcement powers of the MyCC in any way.

This document is not intended to provide you with legal advice. Persons in doubt about how they and their commercial activities may be affected by the CA 2010 may wish to seek their own legal advice. The MyCC recommends that businesses conduct a review of their agreements, conduct and procedures for compliance with the CA 2010. Competition compliance procedures should be in place for all employees, including the board of directors.

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