An agency under

MINISTRY OF DOMESTIC TRADE AND CONSUMER AFFAIRS

GUIDELINES ON

CHAPTER 1 PROHIBITION

Anti-competitive Agreements

Malaysia Competition Commission

CONTENTS

These Guidelines are not a substitute for the Act or any Regulations that are made pursuant to the Act. These Guidelines may be revised should the need arises. The examples given in these Guidelines are for illustrative purposes only and are not exhaustive. They do not set a limit on the investigation and enforcement activities of the Malaysia Competition Commission ("MyCC"). In applying these Guidelines, the facts and circumstances of each case will be considered in totality. 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 self-assessment of their businesses in respect to 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. Chapter 1 of the Competition Act 2010 ("the Act") prohibits anti-competitive agreements between enterprises and anti-competitive decisions by associations. Agreements for the purposes of the Act shall include any form of contract, arrangement or understanding between enterprises, whether legally enforceable or not, and includes decisions by associations (such as trade and industry associations) and concerted practices. This is defined under Section 2 of the Act.

1.2. Anti-competitive means the agreement which has the **object or effect** of significantly preventing, restricting or distorting competition in any market for goods or services in Malaysia or in any part of Malaysia.

1.3. These Guidelines set out a non-exhaustive list of factors and circumstances that the Malaysia Competition Commission ("MyCC") may consider in deciding whether an agreement is anti-competitive.

2. SOME IMPORTANT TERMS USED IN THE CHAPTER 1 PROHIBITION

Section 2 of the Act provides guidance by defining some important terms as follows:

"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.

2.1. The term "agreement" is very wide and includes both written and oral agreements. In this regard, competitors should be careful in communicating with each other, either in person or by telephone, letters, e-mail or through any other means. For example, any form of communication about price between competitors might constitute "an agreement."

2.2. An agreement *could* also be found whereby 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 when 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.

2.3. Associations should also consider informing their members not to discuss the prohibited agreements stipulated in Section 4(2) of the Act i.e. price fixing, sharing markets, etc. as a way of avoiding liability. A decision by an association includes a decision by a trade association, but the provisions are not limited to any particular kind of association. Trade and other associations generally carry out legitimate functions intended to promote the competitiveness of their industry sectors. However, enterprises participating in such associations may in some instances collude and coordinate their actions which could infringe the Act.

2.4. Similarly, any buyers and sellers should avoid vertical restrictions in a sales contract that could be anti-competitive. Contractual restrictions could apply at any stage of the production chain, including between manufacturer and wholesaler or wholesaler and retailer. Vertical restrictions, could be either on price or non-price. Examples include:

- a seller imposing a fixed price or a minimum price at which the product must be resold (Resale Price Maintenance or "RPM").

- a buyer or seller asking for an exclusive agreement with a seller or buyer who controls a certain geographic area.

2.5. However, any form of RPM which serves as a focal point could be deemed anti-competitive.

"Concerted Practice" means any form of coordination between enterprises which knowingly substitutes practical co-operation between them for the risks of competition, and includes any practice which involves direct or indirect contact or communication between enterprises, the object or effect of which 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.

2.6. Concerted practices usually involve some form of informal co-operation. A concerted practice could arise whereby parties knowingly enter into an informal arrangement involving some practical co-operation or where their conduct is influenced in some way following contact or communication between them. This could involve, for example, an informal arrangement where one competitor sets the price and other competitors follow without any reasonable justification. Competitors should be wary of simply following the prices of competitors unless the decision was made completely independently from all other competitors and there is a reasonable explanation for following each other, such as an increase in price of an important input.

"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 autonomy in determining their actions on the market.

"Horizontal Agreement" means an agreement between enterprises, each of which operates at the same level in the production or distribution chain.

2.7. Therefore, a horizontal agreement would include an agreement at any stage of the production and distribution chain, including an agreement between input producers (e.g. suppliers of agricultural products) and between manufacturers, wholesalers or retailers.

"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.

2.8. A separate Guideline dealing with the way the MyCC will define a market is available. Enterprises should become familiar with the way the MyCC defines a market, as the *relevant market for competition law purposes* adopts a market definition, that may not be the way a market is defined in normal commercial practice in an industry. For competition law purposes, market definition is about identifying all the suppliers of products that compete with the product under investigation. This means identifying those products that consumers see as substitutes (i.e. consumers would switch to) if the price of the product under investigation goes up by 5-10% above the competitive price.

2.9. Note that the geographic market could be either the whole of Malaysia or a particular area within Malaysia. Local geographic markets are more likely to be narrowly defined where the value of a product is low and the transport costs are high making long-distance supply unprofitable. The nature of the product may also be important. For example, ready-mix concrete has a limited life and therefore can only be delivered within a relatively small area. So, the geographic area for ready-mix concrete is quite small because ready-mix concrete produced at one location does not compete with ready-mix concrete produced 100 kilometres away.

2.10. Sometimes, relevant economic markets can extend beyond a single country. For example, there is likely to be a regional market for many fruits and vegetables. In this case, the market will be defined as a Malaysian market but competition from outside Malaysia via imports will be considered as a factor in determining market power rather than as a factor to be considered in market definition.

Object

2.11. Section 4(2) of the Act states that certain horizontal agreements with the "object" of engaging in cartel practices are "deemed to have the object of significantly preventing, restricting or distorting competition."

2.12. The term "object" is not defined in the Act. In order to be consistent with the Act's economic goal "to promote economic development by promoting and protecting the process of competition", the MyCC will take the following approach in examining the following kinds of agreement for anti-competitive "object." These are:

(a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;

(b) share market or sources of supply;

(c) limit or control –
    (i) production;
    (ii) market outlets or market access;
    (iii) technical or technological development; or
    (iv) investment; or

(d) perform an act of bid rigging.

2.13. In general, 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 light of the agreement's economic context. If the "object" of an agreement is highly likely to have a significant anti-competitive effect, then the MyCC may find the agreement to have an anti-competitive "object."

2.14. Once anti-competitive "object" is shown, then the MyCC does not need to examine the anti-competitive effect of the agreement.

2.15. If an anti-competitive "object" is not found, the agreement may still breach the Act if there is an anti-competitive effect.

"Price" includes 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.

"Supply" includes —

(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 Agreement" means an agreement between enterprises, each of which operates at a different level in the production or distribution chain.

Extra Territorial Application

"Section 3 (1) This Act applies to any commercial activity, both within and subject to Subsection (2), outside Malaysia.

(2) In relation to the application of this Act outside Malaysia, this Act applies to any commercial activity transacted outside Malaysia, which has an effect on competition in any market in Malaysia."

3. PROHIBITED HORIZONTAL AND VERTICAL AGREEMENTS

3.1. Section 4 of the Act sets out the prohibited agreements as follows (emphasis added):

Section 4(1) of the Act

"Section 4 (1) A horizontal **or** vertical agreement between enterprises is prohibited insofar as the agreement has the **object or effect** of **significantly** preventing, restricting or distorting competition in any market for goods or services."

3.2. So both **horizontal agreements** (between enterprises at the same level of production, which normally means competitors in the same market) and **vertical agreements** (between buyers and sellers at different stages of the production and distribution chain) are prohibited if they have an anti-competitive object or effect which is significant on the market.

3.3. Agreements are prohibited only if they significantly prevent, restrict or distort competition in any market for goods or services in Malaysia. How the MyCC will interpret "significantly preventing, restricting or distorting competition" will be discussed further in the next page.

3.4. In general, "significant" means the agreements must have more than a trivial impact. It should be noted that impact would be assessed in relation to the identified relevant market. A good guide to the trivial impact of an anti-competitive agreement might be the combined market share of those participating in such an agreement. As a starting point and to provide greater certainty, the MyCC may use the following basis in assessing whether an anti-competitive effect is "significant." This approach sets "safe harbours" for otherwise anti-competitive agreements or association decisions. 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 all 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.

Horizontal Agreements That Require An Assessment That There is A Significant Anti-Competitive Effect

3.5. The following gives a non-exhaustive set of examples of other situations in which the MyCC will investigate potentially anti-competitive agreements. These agreements will only be prohibited if they have the "object or effect of significantly preventing, restricting or distorting competition."

Information Sharing

3.6. In general, the better informed consumers are, the more competitive the market as enterprises will have to compete on the merits of their products. Sometimes competitors may share non-price information on standards, new technologies etc. that can improve competition in the market. However, sharing of price information could fall within the conduct deemed to have the object of "significantly preventing, restricting or distorting competition in the market" as stated in Section 4(2) of the Act.

3.7. Healthy competition means competitors are striving to better serve customers than their rivals. As a result, competitors are never sure what their competitors will do next in trying to gain a competitive advantage. Information sharing can reduce the uncertainty that competitors will face and therefore reduces competition significantly. Whether non-price information-sharing significantly reduces competition needs to be assessed on a case-by-case basis. In general, the frequent exchange of confidential information among all competitors in a market with few competitors is more likely to have a significant effect on competition. In addition, the exchange of information between competitors that is not provided to consumers is also likely to have a significant adverse effect on competition.

3.8. Exchanging current price information may facilitate price fixing and thus would be deemed to be significantly anti-competitive.

Restrictions on Advertising

3.9. Restrictions on advertising can restrict competition on merits. 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

3.10. A standardisation agreement may significantly affect competition if it limits the ability of enterprises to set new standards or to sell new products or serves as a barrier to new entrants.

Vertical Agreements That Require An Assessment That There is A Significant Anti-Competitive Effect

3.11. Vertical agreements, in general, are less harmful to competition than horizontal agreements. A vertical agreement usually involves one enterprise at the upstream level supplying an input to an enterprise downstream. While competitors in a horizontal agreement compete with each other, enterprises in a vertical agreement usually have a joint interest in ensuring the final product or service is competitive.

3.12. Anti-competitive vertical agreement usually exists where one of the parties (either the buyer or seller at different stages of the production and distribution chain) has enough market power to have some influence over the other party to the contract (which falls short of the significant market power required for the Chapter 2 Prohibition). In that case, a vertical agreement may reduce competition significantly in either the market in which the supplier upstream competes or the market in which the downstream buyer competes. This section describes how the MyCC will treat different kinds of vertical agreements. The vertical agreements considered are not exhaustive but provide a guide to the kinds of vertical agreements that the MyCC will initially consider as its enforcement priorities.

3.13. As with horizontal price fixing, vertical price fixing is likely to be more anti-competitive than non-price vertical agreements. Vertical price restrictions limit the ability of those reselling to compete on price. Vertical non-price restrictions may be anti-competitive because they foreclose part of the market to competitors. In determining whether a vertical agreement significantly prevents, restricts or distorts competition, regard will be given to the market power of the enterprise imposing such vertical restriction, the justification claimed for the restriction and the extent to which a market in the vertical relationship may be foreclosed. Also relevant to examining the anti-competitive effect will be whether there are entry barriers to any relevant market. For example, entry barriers mean any foreclosure occurring as a result of a vertical restriction will persist (i.e. zoning laws may limit retail outlets). Another factor that will be considered is whether there is countervailing buyer power, which means that buyers will not be dictated to by suppliers.

Vertical Agreements Involving Price Restrictions

Resale Price Maintenance (RPM)

3.14. In general, the MyCC will take a strong stance against minimum RPM and find it anti-competitive.

3.15. Any other form of RPM including maximum pricing or recommended retail pricing, which serves as a focal point for downstream collusion would also be deemed as anti-competitive. RPM generally occurs when an upstream seller imposes a fixed or

a minimum price that a downstream buyer must resell. For example, a manufacturer sets the price for which its products are sold at the retail level. This may be a minimum resale price or in certain circumstances maximum resale price. The result is that resellers (e.g. retailers) do not compete on price. This is considered to be anti-competitive.

3.16. The impact of RPM may differ in different situations. For example, retailers could ask the manufacturer to set a certain price as a way of enforcing a cartel between the retailers. If so, then the RPM requirement would have the same impact as a horizontal price fixing agreement. The MyCC may find such an agreement to be anti-competitive.

Vertical Agreement Involving Non-Price Restrictions

3.17. Anti-competitive non-price vertical agreements may not be considered to have a "significant" anti-competitive effect if the individual market share of the seller or buyer does not exceed 25% of their relevant market (as described in Section 3.4 earlier).

3.18. For example, tying occurs when customers buy a product they want (the tying product) but are required (forced) to buy a product (the tied product) from a different market that they may not want. Tying would be anti-competitive as it would restrict access to the tied product market by competitors. Bundling could be distinguished from tying, as bundling would normally involve products from the same market which consumers generally would buy together. For example, a car which is sold (bundled) together with tyres.

Agreements That Require A Buyer Must Buy All or Most Supplies from the Supplier

3.19. Here the seller imposes a condition that the buyer must buy (or is induced to buy by way of cumulative discounts) all supplies of a product, or a substantial proportion of supplies from the seller. If the seller has a significant part of the downstream market, then an exclusive (or close to exclusive) vertical agreement with the buyer can foreclose a substantial part of the downstream market to other sellers.

Exclusive Distribution Agreement Covering A Geographic Territory

3.20. This situation can arise if for example, a supplier gives an exclusive geographical territory to a buyer which limits intra-brand competition. This may raise competition concerns if there is no effective competition from other brands (i.e. inter-brand competition).

3.21. Exclusive distribution agreements can be either at the wholesale or retail level. Potentially, an exclusive distribution agreement between an overseas supplier and a Malaysian company could impact competition in Malaysia significantly if a sole distributor was appointed without the existence of any inter-brand competition. An exclusive distribution agreement between the sole Malaysian distributor to other downstream distributors may be examined to assess whether restrictions have a significant anti-competitive effect.

Exclusive Customer Allocation Agreement

3.22. Here the seller agrees to only sell to a distributor for resale to a particular group of customers (by occupation, type of business, etc.). It could be anti-competitive if there is no significant inter-brand competition.

Up-Front Access Payments

3.23. 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.

3.24. 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.

Section 4(2) of the Act – Deemed Prohibited Horizontal Agreements

3.25. It is important to note that Section 4(2) of the Act treats certain kinds of

horizontal agreements between enterprises as anti-competitive. In these situations, the agreements are deemed to "have the object of significantly, preventing, restricting or distorting competition in any market for goods or services." This means for these horizontal agreements, the MyCC will not need to examine any anti-competitive effect of such agreements. The agreements which are deemed to be anti-competitive include:

(a) Fix, directly or indirectly, a purchase or selling price or any other trading conditions;

(b) Share market or sources of supply;

(c) Limit or control –
  (i) production;
  (ii) market outlets or market access;
  (iii) technical or technological development; or
  (iv) investment; or

(d) Perform an act of bid rigging.

3.26. Section 4(2) of the Act also means that enterprises should avoid communicating with competitors about price or engaging in any kind of joint conduct that could restrict competition between them. Enterprises should ensure their pricing and marketing decisions are made independently. To avoid possible future liability, enterprises should ensure that those making decisions on pricing, record the basis on which they make their decisions. Enterprises should ensure that sales and marketing people in the field understand that they should not talk to competitors about price, etc. at association meetings or in the market.

Horizontal Agreements Deemed to Be Anti-Competitive

3.27. The agreements which are deemed to be anti-competitive include:

3.27.1 Price fixing in the market in which the enterprises compete

This could also include a horizontal price fixing agreement that sets the price in a downstream or upstream market.

Price fixing includes fixing the price itself or fixing an element of the price, such as fixing a discount, setting a percentage price increase or setting the permitted range of prices between competitors. It could also include setting the price of transport charges (such as fuel charges), credit interest rate terms, etc.

Price fixing could also include an agreement or arrangement to indirectly restrict price competition in some way, such as recommended pricing. This could also include agreeing to share price lists before prices are increased either directly or indirectly through an industry or trade association or to require competitors to consult each other before making a pricing decision.

3.27.2. Sharing markets or sources of supply

This could include competitors agreeing to allocate customers between themselves or agreeing to stay out of each other's geographic territory or customer base. Agreeing to buy only from certain suppliers could also be deemed to be anti-competitive.

Competitors agreeing to specialise in certain products, ranges of products or in particular technologies could also be deemed to be anti-competitive.

3.27.3. Limiting or controlling:

- **Production:** For example, agreeing on production quotas during an economic downturn – this has the same effect as setting a higher price.

- **Market outlets or market access:** This could include competitors agreeing on where retail outlets are to be located, agreeing to "stay out of each others' markets" or restricting access to the market by new entrants.

- **Technical or technological development:** For example, competitors agreeing not to introduce new products or setting technology standards collectively that prevents other competitors

from selling. Another example would be competitors agreeing not to buy technology from certain suppliers (a boycott) etc.

- **Investment:** For example, agreeing not to add production capacity.

3.27.4. Bid-rigging:

Taking turns to win competitive tender contracts is an example of bid-rigging. This could include:

- parties agreeing to submit cover bids (high) that are intended not to be successful – where the unsuccessful bidders may get kick-backs;
- bid suppression where parties agree that only one of them will submit a bid for the contract;
- bid rotation where the parties to the agreement take turns to win contracts.

More than one of these bid-rigging practices can occur at the same time. For example, if one party to the agreement is designated to win a particular contract, the other parties could avoid winning either by not bidding ("bid suppression") or by submitting a high bid ("cover bidding").

4. OTHER AGREEMENTS

Intellectual Property Rights and Franchise Agreements

The MyCC will issue a separate Guideline to address both Intellectual Property Rights and issues dealing with Franchise Agreements.

5. RELIEF OF LIABILITY UNDER SECTION 5 OF THE ACT

5.1. While parties should not agree to enter into any anti-competitive agreement, they may do so even if there is any anti-competitive effect, provided that, "there are significant identifiable technological, efficiency or social benefits directly arising from the agreement" as stated under Section 5 of the Act. These factors are discussed below.

5.2. The onus of proving the identified technological, efficiency or social benefits lies on the parties to the agreement. The parties claiming for this relief are required to prove that the benefits gained are passed onto the consumers. The following requirements stipulated under Section 5 must be cumulatively met:

(a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;

(b) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;

(c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and

(d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

5.3. Relief of liability under Section 5 can be granted independently in three ways to an otherwise a breach of the Act i.e.:

5.3.1. Individual exemption under Section 6 of the Act; or
5.3.2. Block exemption under Section 8 of the Act; or
5.3.3. By invoking Section 5 of the Act.

Individual Exemption

5.4. Enterprises can apply to the MyCC for an individual exemption which may be granted subject to conditions, obligations and for a limited duration. It is up to the parties to demonstrate the claimed benefits according to the criteria set out in Section 5 of the Act.

5.5. An individual exemption can be cancelled or varied if there is a material change of circumstances or there is a breach or non-compliance of an imposed condition.

5.6. An individual exemption can be obtained by applying to the MyCC on the prescribed form and after payment of the prescribed fee.

Block Exemption

5.7. The MyCC may grant a block exemption to a particular category of agreements. For example, this could be a distribution agreement in a particular industry. The advantage of a block exemption is that similar agreements can be examined at the same time, which will allow the MyCC to provide a better overall assessment of anti-competitive impact and an assessment of the claimed benefits, and will also relieve enterprises of having to submit separate applications.

5.8. As with an individual exemption, a block exemption can be cancelled or varied if there is a material change of circumstances or there is a breach or non-compliance of an imposed condition.

5.9. For a block exemption, the MyCC will publish details of the application to allow submissions to be made by members of the public.

Invoking Section 5 of the Act

5.10. Pursuant to an investigation for breach under Section 4 of the Act, parties being investigated may rely on relief of liability under Section 5 of the Act.

5.11. Similarly, these benefits can also be claimed in litigation by private parties for a breach of Section 4 of the Act.

6. NOTIFICATIONS FOR GUIDANCE

The MyCC shall not entertain any application for guidance or approval of any potentially anti-competitive agreements unless it is specifically provided for under the Act. Parties are advised to seek independent legal advice.

7. NON-APPLICATION AND EXCLUSIONS UNDER THE ACT

Section 3(3), Section 3(4) and Section 13 of the Act stipulate the non-application and the exclusions.

The MyCC intends to apply these exclusions narrowly. The onus is on the enterprise seeking to benefit from these sections to demonstrate that all the requirements of the provisions of the sections are satisfied.

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Date of Publication: January 2022