

NAVIGATING MALAYSIA'S COMPETITION LAWS LANDSCAPE: A BEGINNER'S GUIDE TO UNDERSTANDING ANTI-COMPETITIVE CONDUCTS

Competition between businesses encourages efficiency, innovation and entrepreneurship, which promotes competitive prices, improvement in the quality of products and services and wider choices for consumers. For such benefits to be achieved, competition laws are designed to promote and protect the process of competition thereby protecting the interests of consumers. Generally, below are the main objectives of competition laws:

(a) Ensuring 'Fair Play'

Competition laws prohibit business from making secret deals to fix prices or share the market with the intention to eliminate or reduce competitors; and

(b) Preventing 'Bullies'

If a business becomes too powerful and starts to abuse its powers to unfairly dominate the market and to eliminate other competitors, the competition laws will step in to stop such abuse.

Key Legislations

In Malaysia, the key legislations for competition laws are:

(a) Competition Act 2010 (Act 712) ("**Competition Act**").

The Competition Act aims to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers. The Competition Act applies to anyone involved in any commercial activity within Malaysia. It also applies to any commercial activity transacted outside Malaysia, which has an effect on competition in any market in Malaysia.

However, the Competition Act does not apply to commercial activities governed under the following legislations:

- (i) Communications and Multimedia Act 1998;
- (ii) Energy Commission Act 2001;
- (iii) Petroleum Development Act 1974 and the Petroleum Regulations 1974 (in so far as the commercial activities regulated under these regulations are directly in connection with upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia); and
- (iv) Malaysian Aviation Commission Act 2015.

(b) Competition Commission Act 2010 (Act 713) (“CCA”).

The Malaysian Competition Commission (“**MyCC**”) is the ‘guardian’ of competition whose task is to ensure a fair playing field for the market players by regulating their conducts and prohibiting anti-competitive behaviours.

In general, MyCC is the responsible authority who will investigate any prohibited conduct under the Competition Act and thereafter decides whether an infringement can be established.

Under the CCA, MyCC has various functions including:

- (i) implementing and enforcing competition laws including issuance of guidelines;
- (ii) advising the Minister in charge of domestic trade and consumer affairs, or any other public or regulatory authority on all matters concerning competition;
- (iii) carrying out general studies in relation to issues connected with competition in the Malaysian economy or particular sectors of the Malaysian economy; and
- (iv) publishing, and otherwise raising awareness among persons engaged in commerce or trade and among the public of, information concerning the competition laws and the manner in which the MyCC will carry out its functions under the competition laws.

Prohibited Conducts under the Competition Act

There are two main prohibitions under the Competition Act:

(a) Anti-competitive Agreements

Any agreements or concerted practices which prevent, restrict or distort competition within the relevant market in Malaysia are prohibited. Agreements for the purposes of the Competition Act shall include any form of contract, arrangement or understanding between enterprises, whether legally enforceable or not, and include decisions by associations (such as trade and industry associations).

The following are the kinds of agreement that are considered anti-competitive, i.e., agreement entered into between the parties to:

- (i) fix, directly or indirectly, a purchase or selling price or any other trading conditions;
- (ii) share market or sources of supply;
- (iii) limit or control:
 - (aa) production;
 - (bb) market outlets or market access;
 - (cc) technical or technological development; or
 - (dd) investment; or
- (iv) perform an act of bid rigging.

(b) Abuse of Dominant Position

The Competition Act prohibits an enterprise from engaging (whether independently or collectively with other enterprises) in any conduct which amounts to an abuse of a dominant position in any market for goods or services in Malaysia.

In assessing whether there has been a breach of a dominant position, MyCC will conduct a two-stage assessment:

- (i) firstly, the MyCC will assess whether the alleged enterprise is dominant in a relevant market in Malaysia; and
- (ii) secondly, if the enterprise is dominant then MyCC will assess whether the enterprise is abusing its dominant position.

A dominant enterprise may abuse its position by:

- (i) directly or indirectly imposing an unfair purchase or selling price or other unfair trading condition onto a supplier or customer;
- (ii) limiting or controlling production, market outlets or market access, technical or technological development, or investment, to the prejudice of consumers;
- (iii) refusing to supply to particular enterprises or group or category of enterprises;
- (iv) discriminating by applying different conditions to equivalent transactions that discourages new market entry or market expansion or investment by an existing competitor;
- (v) forcing conditions in a contract which have no connection with the subject matter of the contract (e.g. making the contract conditional on buying an unrelated product);
- (vi) any predatory behaviour towards competitors; or
- (vii) buying up scarce supply of inputs (either goods or services) where there is no reasonable commercial justification.

Proposed Merger Control

It is worth noting that the absence of the merger control provisions is a lacuna in the Competition Act. At the moment, MyCC is unable to intervene in any merger transactions that result in a substantial lessening of competition in the market prior to the completion of the merger transactions. MyCC has embarked on an amendment exercise for the Competition Act to include the merger control provisions. If such amendment is passed by the Malaysian Parliament, the authority of MyCC will be expanded to mergers and acquisitions (M&A) between businesses.

(For more information on the proposed merger control, kindly refer to <https://www.azmilaw.com/insights/preparing-for-the-sea-change-in-the-mergers-acquisitions-scene/>)

Financial Penalty

If an enterprise is found to be infringing the Competition Act, MyCC may impose a financial penalty not exceeding ten percent of the worldwide turnover of an enterprise over the period during which an infringement occurred.

Takeaway Message

Businesses tend to collaborate with each other to leverage their respective strengths. Although business collaborations may enhance efficiency, such collaborations may also lead to collusion and raise competition concerns. Therefore, it is important for business to be ensure that their intended collaboration is within the boundaries of competition laws, prior to entering into any agreement or act of collaboration.

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