

## PROHIBITED CONDUCT UNDER THE COMPETITION ACT 2010 - ABUSE OF DOMINANT POSITION

### Introduction

In general, there are two (2) types of prohibited conducts under the Competition Act 2010 (“**CA 2010**”): (i) anti-competitive agreement; and (ii) abuse of dominant position. This article will focus on the latter, specifically the abuse of a dominant position. An enterprise is considered dominant if it has a significant market power to adjust prices, outputs or trading terms, without effective constraint from competitors or potential competitors.[1] Simply holding a dominant position in the market is not a prohibited conduct under the CA 2010. The CA 2010 only prohibits a dominant enterprise from abusing its dominant position.

Under Section 10 of the **CA 2010**, a dominant 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.

Section 2 of the CA 2010 interprets “dominant position” as “*a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors*”.

### Determining Abuse of Dominant Position

In assessing whether an enterprise has breached the prohibition against the abuse of dominant position under the CA 2010, there are two (2) stages of analysis that will be undertaken by the Malaysia Competition Commission (“**MyCC**”) according to the guideline issued by MyCC:

#### **(a) First Stage – Is the Enterprise Dominant?**

The MyCC will first analyse whether the enterprise being complained about is dominant in a relevant market in Malaysia. The relevant market must be defined in accordance with the MyCC’s Guidelines on Market Definition which involves determining both:

- (i) the relevant product market; and
- (ii) the relevant geographic market.

In general, based on the guidelines issued by the MyCC, it is noted that a market share above sixty percent (60%) is indicative that an enterprise is dominant. However, Section 10(4) of the CA 2010 provides as follows:

*“(4) The fact that the market share of any enterprise is above or below any particular level shall not in itself be regarded as conclusive as to whether that enterprise occupies, or does not occupy, a dominant position in that market.”*

Hence, other factors and criteria will also be taken into account in assessing dominance including whether there is an easy entry into the market.

If the MyCC establishes that the enterprise is dominant based on the abovementioned analysis, then the MyCC will proceed to the second stage.

### **(b) Second Stage – Is the Dominant Enterprise Abusing Its Dominant Position?**

MyCC will then assess whether a dominant enterprise is abusing its dominant position by determining whether the dominant enterprise has carried out the conducts as listed under Section 10(2) of the CA 2010, among others, as follows:

- (i) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer;
- (ii) limiting or controlling:
  - (aa) production;
  - (bb) market outlets or market access;
  - (cc) technical or technological development; or
  - (dd) investment,to the prejudice of consumers;
- (iii) refusing to supply to a particular enterprise or group or category of enterprises;
- (iv) applying different conditions to equivalent transactions with other trading parties to an extent that may:
  - (aa) discourage new market entry or expansion or investment by an existing competitor;
  - (bb) force from the market or otherwise seriously damage an existing competitor which is no less efficient than the enterprise in a dominant position; or

(cc) harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market;

(v) making the conclusion of contract subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contract;

(vi) any predatory behaviour towards competitors; or

(vii) buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification for buying up the intermediate goods or resources to meet its own needs.

### **Example of Abuse of Dominant Position**

An example of an abuse of dominant position is 'bundling and tying' which falls under the conducts prohibited under Section 10(2)(e) of the CA 2010. Bundling refers to the practice of selling same type of products together at a lower price than if they were purchased separately. Tying, on the other hand, occurs when a seller forces a buyer to purchase main product only if the buyer also buys the supplementary product. The main and supplementary products are distinct and not of the same type.

### **Reasonable Commercial Justifications**

It is worth noting that the CA 2010 does not prohibit an enterprise in a dominant position from taking any step that have reasonable commercial justification or represent a reasonable commercial response to the market entry or market conduct of a competitor. The MyCC's guidelines provides a non-exhaustive list of reasonable commercial justifications, for example:

(a) refusing to sell to a buyer who has not paid for past purchases;

(b) refusing to grant access to a dominant enterprise's infrastructure that is already being used to capacity;

(c) offering a loyalty rebate that is related to the reduced costs of supplying a particular customer; and

(d) meeting a competitor's price even though the price may be below cost (in the short term).

As such, commercial justifications raised by an enterprise will be assessed by the MyCC on a case-by-case basis.[2]

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1. Definition of “dominant position” under Section 2 of the Competition Act 2010  
[https://www.mycc.gov.my/sites/default/files/Competition Act 2010 - 22092020.pdf](https://www.mycc.gov.my/sites/default/files/Competition%20Act%202010%20-%2022092020.pdf).
2. Malaysian Competition Commission (MyCC), Guidelines on Chapter 2 Prohibition (MyCC 2020) 20.

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