Chapter 1 Guidelines

Malaysia Competition Commission

The Chapter 1 Prohibition

- Prohibits anti-competitive agreements between competitors and buyers and sellers
- Chapter 1 of the Competition Act ("the Act") prohibits:
  - Anti-competitive agreements
  - Agreements include any form of contract, arrangement or understanding (including a concerted practice) between enterprises and decisions of trade associations whether legally enforceable or not).
  - Anti-competitive means the agreement, understanding, concerted practice or association decision has the object or effect of significantly preventing, restricting or distorting competition for goods or services in any market in Malaysia or market in part of Malaysia.
  - However, if there are significant technological, efficiency or social benefits directly arising from the anti-competitive agreement, arrangement or understanding or the anti-competitive decision by an association, then the anti-competitive conduct may be given legal relief.

Exemptions

- **Exemptions**

  A number of exemptions apply – including:

  – Commercial activity regulated under legislation in the First Schedule of the Act

  – Commercial activity does not include:

    - any activity, directly or indirectly in the exercise of governmental authority;
    - any activity conducted based on the principle of solidarity; and
    - any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity.

The Difference Between Horizontal and Vertical Agreements

- A horizontal agreement means an agreement between enterprises which operate at the same level in the production or distribution chain. This could be an agreement between competitors in the same market between manufacturers or between retailers etc
- A vertical agreement means an agreement between buyers and sellers at different stages of the production and distribution chain e.g. between manufacturer and wholesaler or between a wholesaler and retailer.

Horizontal Agreements Deemed Anti-Competitive (*Market Share Irrelevant*)

- Certain kinds of **horizontal** agreements between enterprises or a decision of an association are **deemed** to "have the object of significantly, preventing, restricting or distorting competition in any market for goods or services." (Section 4 (2). Some examples of agreements deemed to be anti-competitive include:

  - price-fixing in the market in which the enterprises compete. For example,
    - competitors getting together to set the sale price in a market
    - it could also includes price-fixing agreement between competitors that sets the price in a downstream or upstream market. For example, it is deemed to be anti-competitive if competitors collectively set the price they will pay for an input to their own production

  - 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

Horizontal Agreements Deemed Anti-Competitive (*Market Share Irrelevant*)

- Agreements that limit or control:
  - Production: for example agreeing to set production quotas during an economic downturn – this has the same effect as setting a higher price – like the OPEC oil cartel
  - Market outlets or market access; this could include competitors agreeing on where each other's retail outlets are to be located, or agreeing to stay out of each others geographic market or agreeing to stop new firms from entering the market
  - Technical or technological development: for example, competitors agreeing not to introduce new products or setting technology standards collectively that prevent other competitors from selling. Or competitors agreeing not to buy technology from certain suppliers (a boycott) etc
  - Investment: for example, agreeing to not add to production capacity

Horizontal Agreements Deemed Anti-Competitive (*Market Share Irrelevant*)

- Bid rigging - where firms agree not to submit bids, or to submit bid they know will not be successful as part of an agreement to take it in turns to win contracts. This could include:
  - **Bid suppression** - where where some of the conspirators agree not to submit a bid so that another conspirator can successfully win the contract
  - **Cover bidding** - where some of the bidders bid an amount knowing that it is too high or contains conditions that they know will be unacceptable
  - **Bid rotation** - where the bidders take turns being the designated successful bidder, for example, each conspirator is designated to be the successful bidder on certain contracts, with conspirators designated to win other contracts.

Significant Effect on Competition

- Other agreements are prohibited only if they **significantly** prevent , restrict or distort competition in any market for goods or services in Malaysia.

Significant Effect on Competition

- To provide greater certainty, the MyCC will set the following 'safe harbours' in determining whether an otherwise anti-competitive agreement or association decision has a **significant effect on competition**
- Anti-competitive agreements or association decisions will not be considered 'significant' if:

  - **For competitors** – if the combined market share of the parties to the agreement is less than **20% of the relevant market**

  - **For non-competitors** - if their combined market shares in any **relevant market is not more than 25%.** Parties here could include enterprises at the same level of production (for example, retailers selling in two different geographic markets) or could include parties to a **vertical agreement**.

Examples of Horizontal Agreements that the MyCC will Assess for Significant Anti-Competitive Effect

Information Sharing Agreements:

- 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, the sharing of price information could fall within the conduct deemed to have the object of "significantly preventing, restricting or distorting competition in Section 4(2).
- Exchanging price information is likely to lead to some kind of price-co-ordination and so would be deemed to be significantly anti-competitive. The exchange of non-price information could also have a significant anti-competitive impact. For example, competitors could share statistical data, market research which could reduce the likelihood that they will compete.

Examples of Horizontal Agreements that the MyCC will Assess for Significant Anti-Competitive Effect

Restrictions on advertising

- Restricting advertising can restrict competition on the merits – for example the rules of a trade association could restrict the ability of members to advertise their price or product quality
- Truthful advertising by trade associations which is genuinely meant to inform consumers about the merits and attributes of member products are unlikely to have a significantly anti-competitive effect.

Vertical Agreements

- Vertical agreements between buyers and sellers are, in general, less harmful to competition than horizontal agreements
- But vertical agreements can be anti-competitive if the vertical agreement significantly reduces competition in the either the upstream or downstream market
- The MyCC will assess the anti-competitive effect on a case by case basis

Resale Price Maintenance

- Resale price maintenance ("RPM") occurs when an upstream enterprise sets the price that a downstream enterprise must charge.
  - For example, a manufacturer sets the price at which its products are sold at the retail level.
  - This is usually a condition of sale so if the retailer refuses to sell at that price the upstream firm will not supply the product. The result is that the retailers do not compete on price
- In general, the **MyCC will take a strong stance against RPM and find that RPM has the object of "significantly preventing, restricting or distorting competition"**
- Parties to a vertical agreement can obtain relief of liability if they can demonstrate:
  - that there are "significant identifiable technological, efficiency or social benefits directly arising from the agreement" in accordance with Section 5 of the Act
  - This could include, for example, a demonstration that the price is maintained to enable retailers to provide pre or after-sales services that customers actually want such as expert technical advice (paid for by the retailers) before purchase

Franchise Agreements

- Franchise or franchise like agreements normally include the licence of intellectual property rights in relation to trade-marks, signs and know-how for the sale of goods and services. Franchise agreements usually contain a number of vertical restraints including exclusive distribution and non-compete clauses.
- Many of the restrictions in a franchise or franchise like agreements are included to protect the value of the intellectual property rights, ensure uniform standard products across the franchise chain to maintain reputation, which benefit consumers. For example, an exclusive territory gives the franchisee an incentive to invest in the franchise and maintain high standards. Intra-brand competition is limited to some degree but inter-brand competition is likely to be enhanced provided there are competitors to the franchised products.
- The MyCC will assess franchise or franchise like agreements on the extent to which the agreement significantly forecloses competition in the relevant market. For most franchises the relevant market will be wider than the franchise products and so unlikely to lead to any significant foreclosure to the market.

Relief of Liability

- Relief from liability for a significant anti-competitive agreement can claimed in any one of three ways. These are:
  - argued **as a defence** in legal proceedings taken against the parties to an alleged anti-competitive agreement either by the MyCC or by a private party.
  - by seeking an **Individual Exemption** (Section 6) or
  - where the agreement is subject to **Block Exemption** for a category of agreements (Section 8). A distribution block exemption may be sought, for example, by a Trade Association behalf of it members.
- The onus of proving the identified technological, efficiency or social benefits etc is on the parties to the agreement.