



Malaysia Competition Commission

INVESTIGATION AND ENFORCEMENT PROCEDURES UNDER THE COMPETITION ACT 2010

28 OCTOBER 2014, ILKAP

ISKANDAR ISMAIL

**Director of Investigation & Enforcement
Malaysia Competition Commission**

BRIEFING OVERVIEW

- **Investigation and Enforcement Powers of the Commission**
- **Overview of Investigation Procedures**
- **Decision by the Commission**
- **Criminal Offences**
- **Snapshots of Recent Cases**
- **Publications by the Commission**

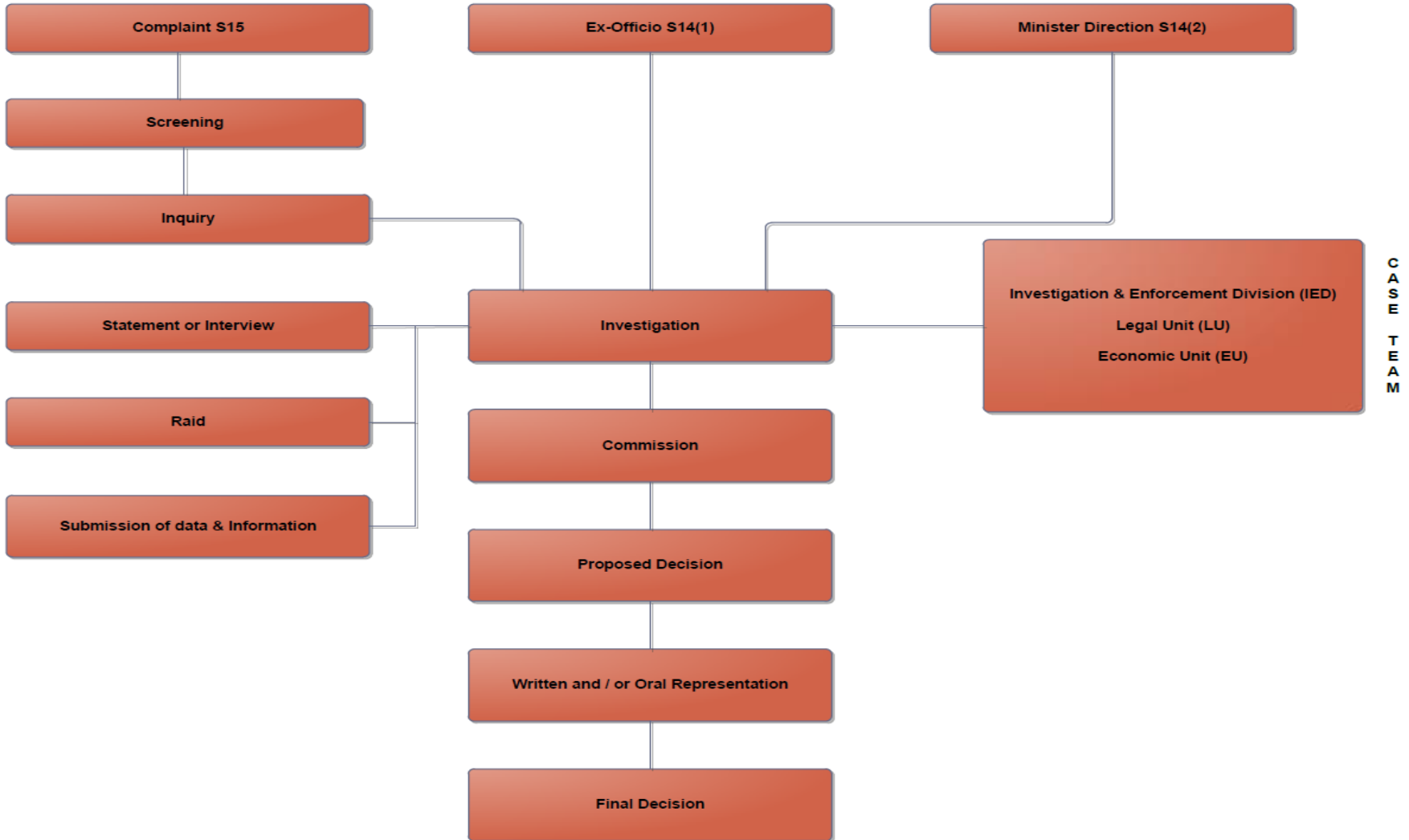
INVESTIGATION AND ENFORCEMENT POWERS OF THE COMMISSION

INVESTIGATION AND ENFORCEMENT POWERS

Investigation	Enforcement
Section 16(d) of CCA 2010	Section 16(d) of CCA 2010
Section 16(h) of CCA 2010	Section 16(e) of CCA 2010
Section 17(2)(i) of CCA 2010	Section 17(2)(b) of CCA 2010
Section 38 of CCA 2010	Section 17 of CA 2010
Sections 14 to 22 of CA 2010	Sections 23 to 24 of CA 2010
Sections 25 to 31 of CA 2010	Sections 32 to 34 of CA 2010
Section 35 of CA 2010	Sections 36 to 40 of CA 2010
Section 41 of CA 2010	Section 42 of CA 2010
Section 43 of CA 2010	Section 43 of CA 2010
	Sections 61 to 63 of CA 2010

OVERVIEW OF INVESTIGATION PROCEDURES

OVERVIEW OF INVESTIGATION PROCESS



C
A
S
E

T
E
A
M

WHETHER TO INVESTIGATE OR NOT?

- ❑ The discretion lies within the Commission
- ❑ The Commission is guided by its strategic priorities
- ❑ Section 16(3) of CA 2010 states that after deciding to investigate the complaints, the Commission may close an investigation if the Commission is of the opinion that-
 - It would be inappropriate to continue the investigation in view of the provision of an undertaking pursuant to Section 43; or
 - In all circumstances the continuation of the investigation would not constitute the making of the best use of the Commission's resources.

INVESTIGATION AND ENFORCEMENT POWERS

Section 2 of CCA 2010

- ‘Commission Officer’**: a person appointed or authorized by the Chief Executive Officer in writing under the competition laws for the purpose of carrying out investigation of any offence or infringement of the competition laws (CA 2010 adopted the same definition).

Section 38 of CCA 2010

- Appointment and power of Commission Officers.**

INVESTIGATION AND ENFORCEMENT POWERS

Section 17 of CA 2010

- A Commission Officer shall have all the powers of investigation and enforcement

- A Commission officer investigating any commission of an offence under this Act shall have all or any of the powers of a police officer in relation to police investigation in seizable cases as provided under the Malaysia Criminal Procedure Code [Act 593]

SOURCES OF INFORMATION FOR INVESTIGATION

- ❑ A preliminary assessment may be conducted based on information obtained from various sources including, but not limited to the following;
 - Media;
 - Anonymous Complaints/Informants;
 - Government Sources;
 - Industry Regulators;
 - Public Sources;
 - Leniency Applicants; etc.

TYPES OF INVESTIGATION

- Complaint (Section 15 of CA 2010).
- Ex-Officio/Own Initiative (Section 14(1) of CA 2010).
- Direction of the Minister (Section 14(2) of CA 2010).

SCREENING OF AND INQUIRY INTO ALLEGED INFRINGEMENT

- It is best practice to first screen the complaints.
- Under Section 16 of CA 2010, the Commission is allowed to make an inquiry for the purpose of deciding whether the Commission should, in its discretion, investigate the matter.
- There is no legal requirement to carry out screening and/or inquiry when the Commission wants to open an investigation under Section 14 of CA 2010.
- If the complaint comes from anonymous source, the Commission may open an investigation under Section 14(1) of CA 2010.

FULL INVESTIGATION

- Request of information and/or document (Section 18(1)(a) of CA 2010).
- Statement of parties in relation to the requested information and/or document (Section 18(1)(b) of CA 2010).
- Access to Records (Section 20 of CA 2010).
- Raid with or without warrant including accessing computerized data (Section 25 to 27 of CA 2010).

Note : In carrying out the above, the Commission has to protect the confidentiality (Section 21 of CA 2010) of the information and/or data and not to request or seize any privileged communication (Section 22 of CA 2010).

POWER TO REQUIRE PROVISION OF INFORMATION (SECTION 18 OF CA 2010)

- The Commission may, by notice in writing require any person it believes to be acquainted with the facts/circumstances of the case to-
 - provide or produce within the period specified in the notice any information or document.
 - to make a statement providing an explanation on any information or document specified in the notice.

POWER TO REQUIRE PROVISION OF INFORMATION (SECTION 18 OF CA 2010)

- If the person is not in custody of the document, that person shall-**
 - state to the best of his knowledge and belief, where the document may be found; and
 - identify to the best of his knowledge and belief, the last person who had custody of that information and where the last mentioned person may be found.

ACCESS TO RECORDS (SECTION 20 OF CA 2010)

- A person shall, at any time directed by the Commission, allow the Commission access to his records, books, accounts, or other things.**

- Any person who fails to comply will be committing an offence.**

SEARCH & SEIZURE (SECTION 25 TO 27 OF CA 2010)

- May conduct search & seizure at any reasonable time by day or night and with or without assistance, to enter the premises and if need be by force.
- Search & Seize any records, books, account, document, computerized data or other thing which is reasonably suspected to contain information.
- Search any person who is in or on the premise.
- May seal such records, books, account, document, computerized data if it is not practicable to remove such items.

ENGAGEMENT WITH ENTERPRISE(S)

- The Commission will collate and analyze evidence gathered.**
- Thereafter, engage with parties to provide them with their rights to respond and clarify issues.**
- Onus is on the Commission or Complainant or Plaintiff to show or establish an infringement of the prohibited practices under CA 2010.**
- If the investigation involves possible infringement under Section 4 of CA 2010, the parties are allowed to defend themselves by relying on Section 5 of CA 2010.**
- If the investigation involves possible infringement under Section 10 of CA 2010, the parties will be required to present their commercial justification in accordance with Section 10(3) of the Act.**

INTERIM MEASURES (SECTION 35 OF CA 2010)

- An interim measure can be taken where the Commission has commenced an investigation under Section 14 of CA 2010 but not completed it. Interim measures can only be taken where the Commission considers it necessary to act as a matter of urgency either to prevent serious and irreparable damage or to protect the public interest.

INTERIM MEASURES (SECTION 35 OF CA 2010)

- An interim measure may contain direction(s) requiring or causing any person-**
 - to suspend the effect of, and desist from acting in accordance with, any agreement;
 - to desist from any conduct which is suspected of infringing any prohibition; or
 - to do, or refrain from doing, any act, but which shall not require the payment of money.

- Such direction given shall cease to have effect upon completion of the investigation or 12 months from the date the direction was given.**

LENIENCY REGIME (SECTION 41)

- This regime provides reduction up to a maximum of 100% of any penalties which would otherwise have been imposed. To qualify, an applicant-**
 - Must admit to an infringement of subsection 4(2); and
 - Must provide co-operation which significantly assists the investigation of infringement by other enterprise(s).
- Percentage of reductions depends on-**
 - Whether the enterprise is the first to disclose to the Commission the infringement.
 - The stage in the investigation at which the involvement was admitted or any information/co-operation provided.

Note : See Guidelines on Leniency Regime published on 14 October 2014;
<http://mycc.gov.my/wp-content/uploads/2014/10/Guidelines-on-Leniency-Regime.pdf>

UNDERTAKING (SECTION 43)

- Section 43 of CA 2010 allows an enterprise to make a legally binding undertaking to the Commission. If the Commission accepts an undertaking under subsection (1), the Commission shall, in relation to an infringement, close the investigation without making any finding of infringement and shall not impose a penalty on the enterprise.
- The Commission has the discretion whether to accept the proposed undertaking.
- In determining to accept the proposed undertaking, the Commission will look at, amongst others, the level of genuine cooperation, the numbers of enterprises involved, the strength and importance of the case and whether accepting the Undertakings will efficiently and effectively address the competition concerns.

PRIVATE RIGHTS (SECTION 64)

Do parties have rights of private action?

- YES!** Any person who suffers loss or damage directly as a result of the infringement of any prohibition under Part II.
- Regardless of whether you have dealt directly or indirectly with the enterprise.
- When is the best time to file the suit?
The discretion of the party!!

DECISION BY THE COMMISSION

PROPOSED DECISION

- Section 36 of CA 2010: If, after the completion of the investigation, the Commission proposes to make a decision to the effect that one of the prohibitions under Part II has been or is being infringed, the Commission shall give written notice of its proposed decision to each enterprise that may directly affected by the decision.**

- The Proposed Decision shall contain the following:-**
 - The reasons for the proposed decision;
 - Proposed penalties or remedial action; and
 - A choice to the Enterprise on whether they may choose to submit a written representation or written and oral representation within a reasonable period.

ORAL REPRESENTATION

- Governed by Section 37 of CA 2010
- Must submit written representation as required by Section 36 of CA 2010
- Presence of the enterprise concerned, complainant and any other person considered necessary by the Commission are allowed

HEARING

- Governed by Section 38 of CA 2010
- Can be held in public or in a closed session
- Individual hearing for each enterprises and any other interested third parties or a single hearing for all parties

FINAL DECISIONS (SECTIONS 39 & 40)

- ❑ After completing the processes under Section 36 to 38 of CA 2010, should the Commission finds that there is an infringement, the Commission, in accordance with Section 40 of CA 2010:
 - Shall issue cease and desist order
 - May specify steps to bring an end to the infringement
 - May impose financial penalty
 - May give any other direction

- ❑ Section 39 of CA 2010: Finding of non-infringement to any person who is affected by the decision

Note: The Commission shall prepare and publish reasons for each decision

DETERMINATION OF PENALTY

- Section 40(4) of CA 2010: shall not exceed 10% of worldwide turnover.

3. Determining the Amount of a Financial Penalty

3.1. MyCC in imposing the financial penalty has the following objectives:

- to reflect the seriousness of the infringement; and
- to deter anti-competitive practices leading to an infringement of a prohibition under the Act.

Factors to be considered

3.2. In determining the amount of any financial penalty in a specific case, the MyCC may take into account some or all of the following factors:

- a. seriousness (gravity) of the infringement
- b. turnover of the market involved – whereby *turnover refers to turnover of the enterprise during the period of infringement or, if figures are not available*

DETERMINATION OF PENALTY

- for that business year, the one immediately preceding it*
- c. duration of the infringement - *whereby a period of infringement is less than six months, such a period will be counted as half a year and for a period longer than six months but shorter than a year, such a period will be counted as a full year. In the event that the duration of the infringement is more than a year, the formulae to be adopted is as follows:*

Maximum 10% of the worldwide turnover x number of years of infringement

- d. impact of the infringement,
e. degree of fault (negligence or intention),
f. role of the enterprise in the infringement,
g. recidivism,
h. existence of a compliance programme, and
i. level of financial penalties imposed in similar cases.

DETERMINATION OF PENALTY

3.3 How the MyCC takes into account any of these factors in determining the amount of any financial penalty in a specific case is described below.

Aggravating Factors

3.4. The aggravating factors may include but not limited to:

- a. the role of the enterprise as an instigator or leader or having engaged in coercive behaviour with others;
- b. obstruction of or lack of co-operation in the investigation;
- c. the enterprise has a record of committing similar infringements or other infringements of a Part II prohibition (recidivism)
- d. continuance of the infringement after the start of investigation; and
- e. involvement of board members or senior management in the infringement.

Mitigating Factors

3.5. Meanwhile, the following non-exhaustive list of mitigating factors may also be taken into consideration:

- a. low degree of fault;
- b. relatively minor role in the infringement especially if involvement is secured by threats or coercion;
- c. co-operation by the enterprise in the investigation;
- d. existence of a corporate compliance programme that is appropriate having regard to the nature and size of the business of the enterprise; and
- e. any compensation made to victims of the infringements.

For more information, please refer to <http://mycc.gov.my/wp-content/uploads/2014/10/Guidelines-on-Financial-Penalties.pdf>

ENFORCEMENT OF DIRECTION OR DECISION (SECTION 42 OF CA 2010)

- The Commission may bring proceedings before the High Court against any person who fails to comply with a direction under Section 35 of CA 2010 or a decision under Section 40 of CA 2010.**

- The High Court will issue an order to the person to comply.**

- Failure to comply will lead to contempt of court.**

COMPETITION APPEAL TRIBUNAL

- Section 51 of CA 2010: A person who is aggrieved or whose interest is affected by a decision of the Commission under Section 35, 39 or 40 may appeal to the Tribunal.**

- Section 40 of CA 2010: Establishment of the Tribunal.**

- Section 57 of CA 2010: Powers of the Tribunal.**

CRIMINAL OFFENCES

COMMITTING AN OFFENCE

- ❑ Circumstances where a person will be committing an offence;
 - Section 23 of CA 2010: Giving false or misleading information, evidence or document.
 - Section 24 of CA 2010: Destruction, concealment, mutilation or alteration or records; etc.
 - Section 32 of CA 2010: Obstruction (refusal of entry for search & seizure operations).
 - Section 33 of CA 2010: Tipping off.
 - Section 34 of CA 2010: Threatening Commission officers or co-operating parties.

INSTITUTION OF PROSECUTION

- ❑ **Section of CCA 2010**: No prosecution shall be instituted for any offence under the competition laws without the consent in writing of the Public Prosecutor.
- ❑ **Section 17(2) of CA 2010**: Investigation of criminal offence under competition laws will be carried out by the Commission Officer. The Officer shall have all or any of the powers of a police officer in relation to police investigation in seizable cases as provided by CPC.
- ❑ **Section 62 of CA 2010**: However, with the consent in writing of the Public Prosecutor, the Commission may compound any offence committed by any person under CA 2010.

GENERAL PENALTY (SECTION 61)

Body Corporate

- **First Offence:** RM 5 million
- **Subsequent Offence:** RM10 million

Individual

- **First Offence:** RM 1 million or 5 years imprisonment
- **Subsequent Offence:** RM 2 million or 5 years imprisonment

SNAPSHOT OF RECENT CASES

RECENT CASES

Completed Investigation				
Proposed Decision	Final Decision	Appeal	Undertaking	Policy Advice
1) MAS & AirAsia 2) Megasteel 3) 26 Ice Manufacturers 4) Sibu Confectionary and Bakery Association)	1) MAS & AirAsia	1) MAS & AirAsia	1) Barbers Association 2) Pan Malaysia Lorry Owners Association 3) Giga Shipping Sdn Bhd & Nexus Mega Carriers Sdn Bhd)	1) EMGS

RECENT CASES

Megasteel Sdn Bhd

- ❑ Allegation of the Complaint: Megasteel abused its dominant position by selling its HRC product to its subsidiary at lower prices.
- ❑ 1 November 2013: The MyCC issued its Proposed Decision against Megasteel Steel Sdn Bhd.
- ❑ A financial penalty amounting RM4,500,000.00 is being proposed.
- ❑ An oral representation was held on 20 July 2014

Note : Section 10(1), 15, 16, 18, 36 and 37 of CA 2010

RECENT CASES

26 Tube Ice Manufacturers

- ❑ 26 December 2013: 26 Ice Manufacturers in Selangor, Kuala Lumpur and Putrajaya published an advertisement announcing price hikes of tube ice and block ice.
- ❑ 21 January 2014: The Commission has issued its proposed interim measures against the 26 tube ice manufacturers.
- ❑ 20 February 2014: The Commission has issued a proposed decision to 26 tube ice manufacturers.
- ❑ The proposed financial penalties on all the parties involved is RM283,600.
- ❑ An Oral Representation was held for 17 October 2014.

Note : Section 4(2)(a), 14(1), 18, 35, 36 and 37 of CA 2010

RECENT CASES

Pan Malaysia Lorry Owners Association (PMLOA)

- ❑ 11 September 2013: Press statement by PMLOA President was released in the Star Newspaper titled “Lorry owners increase fees by 15%”. MyCC initiated investigation on the same day.

- ❑ 20 September 2013: the Commission took proactive measures by issuing proposed interim measures to PMLOA, its members and related enterprises.

RECENT CASES

Pan Malaysia Lorry Owners Association (PMLOA)

- ❑ 23 October 2013: MyCC issued final directions to the interim measures against the same parties to carry out certain measures.

- ❑ On 7 May 2014, the Commission ('MyCC') accepted an Undertaking from the Central Committee Members of the Pan-Malaysia Lorry Owners Association ('PMLOA').

Note : Section 4(2)(a), 15, 16, 18, 35 and 43 of CA 2010

RECENT CASES

Education Malaysia Group Services (EMGS)

- ❑ 22 February 2013: The Commission received a complaint which was filed alleging that EMGS had breached the Competition Act 2010 by signing an exclusive agreement with AXA to provide medical insurance to foreign students.
- ❑ The Commission took steps to engage the relevant parties involved, including the MOE and EMGS.
- ❑ The MOE stated in its recent Guideline on Health Examinations and Insurance Coverage (to be effective from 1 June 2014) that private learning institutions are free to appoint any insurance firms, and or agents of their choice to provide insurance coverage for its foreign students.

Note : Section 15, 16 of CA 2010 and 16(a) of CCA 2010

RECENT CASES

24 members of Sibu Confectionary and Bakery Association

- ❑ 20 November 2013: First became aware of the infringement through an article titled “Announcement of price hike draws attention of MyCC” published by Borneo Post Online.
- ❑ 30 September 2014: Proposed Decision in relation to a price fixing agreement between 24 enterprises who are members of the SCBA.
- ❑ total financial penalty of RM 439,000.00 on the enterprises.
- ❑ Others members were not found to infringe Section 4(2)(a) of CA 2010 because they were not part of the horizontal agreement and/or absent from the meeting.

Note : Section 4(2)(a), 14(1), 18 and 36 of CA 2010

RECENT CASES

Giga Shipping Sdn Bhd & Nexus Mega Carriers

- ❑ 7 October 2013: A complaint against Giga and Nexus filed by a competitor. Giga and Nexus are major providers of logistic and shipment services (the ‘services’) by sea for motor vehicles from ports in Peninsular Malaysia to East Malaysia.
- ❑ The Commission investigated suspected infringements of Sections 4(1) and 10(1) of CA 2010.
- ❑ 1 October 2014: The Commission has accepted Undertakings from Giga Shipping Sdn Bhd and Nexus Mega Carriers Sdn Bhd. The Undertakings are in relation to exclusive agreements between the two enterprises with vehicle manufacturers, distributors and retailers.

Note : Section 4(1), 10(1), 15, 16, 18, and 35 of CA 2010

PUBLICATIONS BY THE COMMISSION



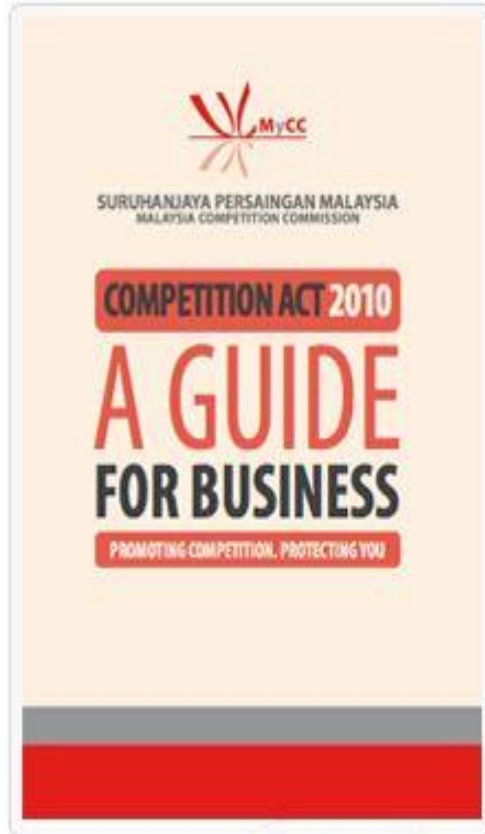
Final Guidelines

Guidelines are issued by the MyCC to act as reference to the public on how the MyCC interprets the Competition Act 2010. These Guidelines however are not a substitute for the Competition Act 2010 or any Regulations made under thereto and may be revised should the need arises.

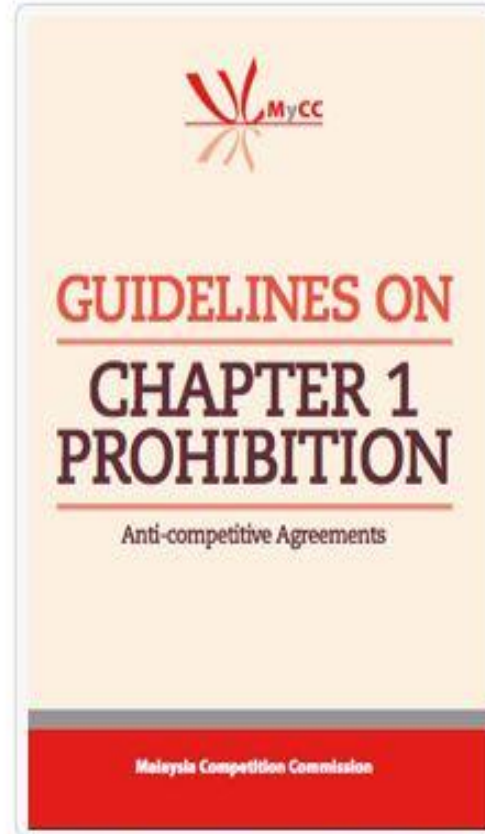
The MyCC would advise enterprises to read these Guidelines and conduct a self assessment exercise of their businesses in respect of their conduct, procedures, management and control.

Please click on the title below to download the PDF documents respectively:

- [Guidelines on Leniency Regime](#)
(Date Published: 14 October 2014)
- [Guidelines on Financial Penalties](#)
(Date Published: 14 October 2014)
- [Guidelines on Market Definition](#)
(Date Published: 2 May 2012)
- [Guidelines on Anti-competitive Agreements](#)
(Date Published: 2 May 2012)
- [Guidelines on Complaints Procedures](#)
(Date Published: 2 May 2012)
- [Guidelines on Abuse of Dominant Position](#)
(Date Published: 26 July 2012)



Competition Act 2010 : A Guide For Business



Guidelines on Chapter 1 Prohibition (Anti-competitive Agreements)



Guidelines on Complaint Procedures

Handbook



Garis Panduan Menentang Tipuan Bida Dalam Perolehan Awam



MYCC Handbook Help Us Detect Bid Rigging

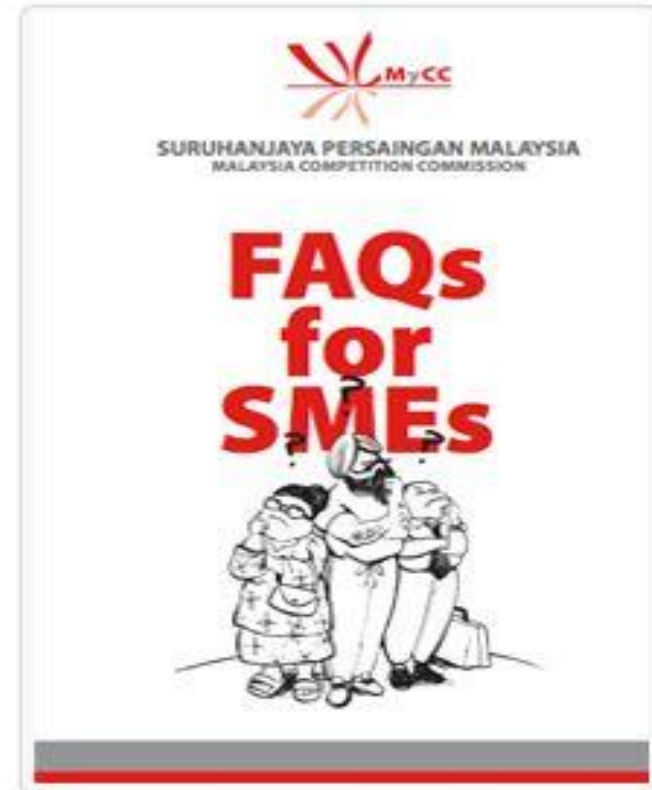


Buku Panduan Bantu Kami Kenal Pasti Tipuan Bida

Brochures



10 SOALAN LAZIM (FAQ)



FAQs For SMEs

THANK YOU



www.mycc.gov.my