

The New Competition Act: Towards a Competitive Market

More Competition for All

The introduction of the Competition Act 2010, which comes into force in 2012, is likely to have a significant impact on how commercial practices are structured and implemented. The CA embodies two key prohibitions which are broad and far-reaching, although there are some general exceptions provided in the CA, possibly to avoid prosecution that may not seem warranted from a commercial viewpoint. We believe that the eventual introduction of guidelines by the Competition Commission (once it is established under the Competition Commission Act to enforce competitions laws in Malaysia) will provide further insights on the extent of these prohibitions.

This article is meant as a general introduction to the two main prohibitions to illustrate some of the commercial implications that businesses should be aware of.

1st Prohibition - Anti-Competitive Agreements

Under the CA, there will be a blanket prohibition on all agreements between entities having the object / effect of preventing, restricting or distorting competition. This prohibition applies to **horizontal agreements** (agreements entered into between fellow competitors) as well as **vertical agreements** (agreements entered into between entities at different levels in the production or distribution chain (for instance, a *manufacturer* of furniture and a furniture *distributor*)).

An example of a prohibited **horizontal agreement** is where two furniture companies agree to fix / attune the price of their respective furniture, or where competitors agree to divide markets where they operate, e.g. Company X covenants not to operate in Selangor, whilst Company Y undertakes not to operate in Penang.

In respect of **vertical agreements**, a prohibited arrangement would be price-fixing, i.e. where a furniture manufacturer compels its distributor to sell its products at a specific price.

Rules against price-fixing in vertical agreements may pose a concern for franchises. However, it is not uncommon for franchise owners, for example, to have a “recommended price” in the sale of the franchised goods or services. In European Union (“EU”) countries, certain franchises have “block exemptions” (i.e. exemptions granted to particular categories of agreements). Since the CA also provides for “block exemptions”, it remains to be seen whether the Competition Commission will exempt (certain) franchises from the CA.

2nd Prohibition - Abuse of Dominant Position

The other main prohibition applies to entities that have significant power / influence over the market in which they operate. These “dominant” entities will be precluded from engaging in activities that control or limit pricing, production, development or investment on products or services to the prejudice of consumers. It is important to note that, to fall afoul of this prohibition: (i) there must be an **abuse** of one’s position in the market (i.e. engaging in the above activities); and (ii) the “abuse” is only prohibited if the entity occupies a **dominant position** in the market.

Therefore, it will arguably be unlawful under the CA for a dominant entity to introduce unreasonably high discounts for the purposes of obtaining a higher market share. Conversely, similar discounts could probably be given by a company that does not hold a “dominant position” in the market.

Penalties

The CA has not imposed penal sanctions on either of the prohibitions discussed above. Instead, Parliament has seen fit to hit conglomerates where it hurts most; their pockets, by imposing a financial penalty up to a maximum of 10% of the **worldwide turnover** of an entity over the period during which the breach of the CA occurred. This sanction is far stiffer than most other jurisdictions, and appears to follow the EU.

Exceptions

Competition laws are designed to protect consumers and smaller enterprises. Nonetheless, in a developing nation there is a risk that such laws, if taken too far, may stifle economic growth.

Unsurprisingly, therefore, no requirements have (for now) been introduced to regulate mergers and acquisitions of corporations that may have anti-competitive effects. Similarly, (a) entities regulated by the Communications and Multimedia Act and the Energy Commission Act, and (b) collective (employment) agreements and enterprises entrusted with general economic interests, are also exempted from the CA.

This could be the Government's olive branch to appease those who generally prefer a *laissez-faire* economy, and to spur local entities to enter the global market. A balance between such interests is always important where competition laws are concerned.

Conclusion

As this area of law develops, the CA is intended to create a level playing field for all businesses, thereby inspiring confidence in foreign investors, whilst improving competitiveness of goods and services in Malaysia.

To quote former US President Herbert Hoover, "competition is not only the basis of protection to the consumer, but is the incentive to progress."

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