

# Malaysia's Competition Act 2010: What It Means For Your Business

1<sup>st</sup> National Forum on Competition Act 2010

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# Basic Concepts of Malaysian Competition Law

- Making markets work efficiently
  - Economic efficiency
  - Encourage innovation and entrepreneurship
  - Create a “level playing field”
  - Promotes welfare of consumers with competitive prices and consumer choice
- How?
  - Prohibits anti-competitive agreements between business operators
  - Prohibits abusive unilateral behaviour by business operators in a dominant market position

# Basic Concepts of Malaysian Competition Law (cont'd)

- However tensions always exist:
  - IP rights
  - State planning / State Owned Enterprises
  - Government aid (subsidies and equivalents)
  - Wider social, economic or political objectives (e.g. promoting strategic industries, protectionism)

# Scope of the Act

- Scope of application of the Competition Act 2010
  - Covers “enterprises”: Any entity which carries on commercial activities relating to goods and services
  - Therefore covers companies, associations, partnerships and also statutory bodies which carry on a commercial activity
  - Parent and subsidiaries are treated as one entity
  - Applies to commercial activity within and outside Malaysia
  - S. 4(1) of the Act applies to both horizontal and vertical agreements

# Scope of the Act (cont'd)

- Does not apply to:
  - Commercial activity regulated under the Communications and Multimedia Act 1998 and the Energy Commission Act 2001
  - Any activity in the exercise of governmental authority or any purchase of goods/services not for offering as part of an economic activity
  - Any agreement or conduct complying with a legislative requirement
  - Collective bargaining activities
  - Enterprises entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly

# Why comply?

- Why should businesses comply?
  - Potential for large financial penalties capped at 10% of worldwide turnover of an enterprise over the period of infringement
  - Invalid agreements
  - Exposure to private action
  - Bad publicity
  - Intrusive investigations
- Exemptions?
  - Individual and block exemptions
  - Leniency regime provided for infringements of prohibition on anti-competitive agreements

## Why comply? (cont'd)

- Competition Laws are effects based
  - Potential "Effect" is a wide concept
  - Anti-competitive agreements or behaviour will be illegal if it has the actual or *potential* effect on competition
  - Need not show actual harm - just the potential for it

## Prohibition on Anti-competitive Agreements

- S. 4(1) prohibits anti-competitive agreements that have the object or effect of significantly preventing, restricting or distorting competition
- Certain “per se” infringements - horizontal agreements between enterprises which have the object to:
  - fix prices or other trading conditions
  - share markets or sources of supply
  - limit or control production, market outlets/access, technological development, investment
  - perform bid rigging

# Prohibition on abuse of dominant position

- Not abuse unless dominant. Market share, in itself, is not conclusive of dominance. Consider barriers to entry, actual and potential competition, market structures.
- An enterprise cannot engage whether independently or collectively in any conduct amounting to abuse of dominant position.
- Examples of abuse:
  - imposing unfair purchase or selling prices
  - limiting or controlling production, market outlets/access, technological development, investments
  - refusal to supply
  - imposing acceptance of supplementary conditions unrelated to subject matter of contract
  - predatory behaviour
- The Act does not prohibit a dominant firm from taking any step which has a “reasonable commercial justification” or is a “reasonable commercial response” to competition.

# What does it mean to businesses?

Consider existing business practices and norms to determine risks of non-compliance

- ***Review conduct and relationship with competitors***
  - Agreements with competitors - consider hard core anti-competitive agreements
  - Exchange of information with competitors
  - Risks of trade association meetings and industry contacts
  - Gathering market intelligence
- ***Review relationships with dealers, agents and suppliers***
  - No Resale Price Maintenance - Dealers free to set their own price. Recommended resale prices permitted. Maximum resale price generally permitted
  - Exclusive licences / territorial allocation
  - Non-compete
  - Consider implications of joint buying or other supply arrangements with competitors

## What does it mean to businesses? (cont'd)

- ***Review guidelines for document creation and document retention***
  - Set out guidance for creation of documents and retention of documents
  - Consider document protection under legal professional privilege
- ***Adopting compliance as part of business code of conduct***
  - Management commitment
  - Competition law training
  - Institute formal procedures for dealing with compliance risk
  - Disciplinary procedures for employees who breach the policy
  - Conduct regular audits and reviews
- ***Be aware of potential of securing leniency***

# Q&A



Thank You.



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## Contact

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