

Competition Act 2010: What it means for your business?

ASLI's 1st Forum on Competition Act 2010

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Key takeaways: What does CA 2010 mean for your business?

- ❖ **Going back to basics:** Businesses need to understand the difference between competition policy and competition law.
 - Competition policy is not the same as competition law.
 - Competition law is a subset of competition policy.
 - Different ownership of measures (Ministry and Regulator).
- ❖ **CA 2010 does not operate in vacuum:** Businesses need to understand the linkages between this new law and other government measures.
 - Measures mostly have similar end-goal – to maximise welfare.
 - Measures have different ways to reach the goal.
- ❖ **Inculcate competition (compliance) culture:** Businesses need to understand the risk of non-compliance to their strategies and operations.
 - Negative effects of non-compliance – reputational damage, penalties.
 - Top management must show commitment to compliance – top-down approach.

Key takeaway #1: Going back to basics

- ❖ Competition policy includes all government measures which promote effective competition process in the economy. These measures include those directly affecting the conduct and behaviour of enterprises and the structure of industry.
- ❖ Thus, competition policy has a broad scope encompassing these activities:
 - Innovation
 - Government procurement
 - Trade liberalization
 - Deregulation and privatization
 - Consumer protection
 - Industry development
- ❖ Competition law is only a subset of competition policy, providing the legal instrument to effect the policy.

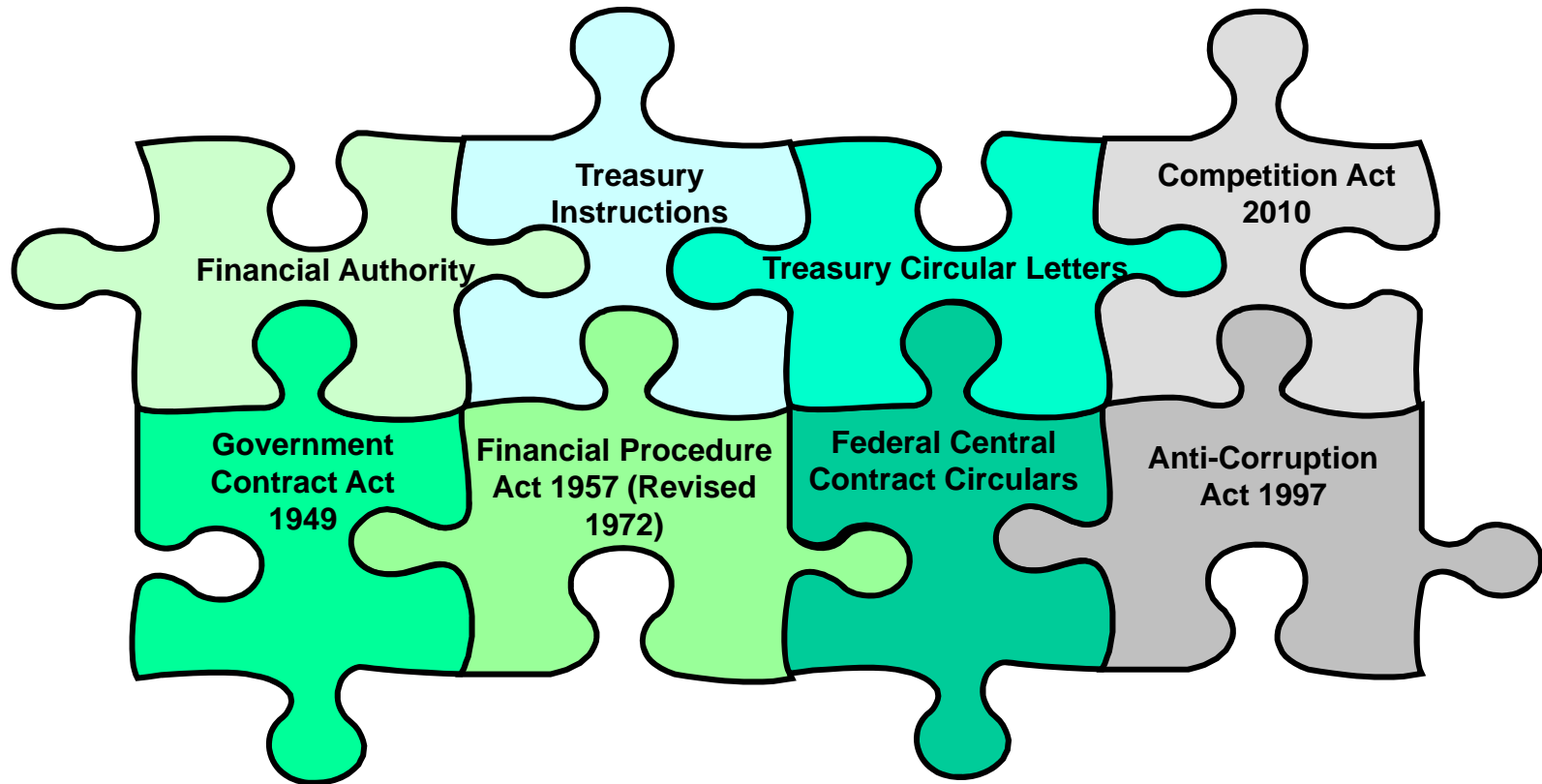
Malaysia's competition policy was approved by the Cabinet in October 2005. Both the Competition Act 2010 (CA 2010) and Competition Commission Act 2010 (CCA 2010) were passed by the Parliament in May and gazetted in June 2010. They will come into force in 2012, after an 18-month moratorium.

Key takeaway #2: CA 2010 does not operate in a vacuum

Government policies	Examples of competition-related issues
Innovation and intellectual property	Compulsory licensing and parallel importing
Government procurement	Bid-riggings in tenders
Trade liberalization	Cross-border cartels
Deregulation and privatization	Access to essential facilities
Consumer protection	Unfair trade practices – e.g. tied selling
Industry development	Abuse of dominance by ‘national champions’

In other jurisdictions, the CPL has wider interactions – for example, in the European Union (EU), the CPL is enforced to attain the objective of single market integration and to regulate state aid (subsidies).

Example: CA 2010 complements procurement laws and regulations in Malaysia



Bid-rigging is expressly prohibited in CA 2010 – Section 4(2)(d) of Chapter 1: Anti-competitive agreement in Part II: Anti-competitive Practices.

Government procurement policy

- ❖ The main objective of the Malaysian government procurement is to support government programmes by obtaining value for money through acquisition of works, supplies and services.
- ❖ Close attention is given to price factors and non-price factors such as whole life cost, quality, quantity, timeliness and warranty.
- ❖ Government procurement is based on these policies:
 - Stimulate growth of local industries through maximum utilization of local materials and resources.
 - Encourage and support the evolvement of Bumiputera entrepreneurs consistent with the nation's aspirations to create Bumiputera Commercial and Industrial Community.
 - Increase and enhance capabilities of local institutions and industries via transfer of technology and expertise.
 - Stimulate and promote service-oriented local industries such as freight and insurance.
 - Accelerate economic growth whereby government procurement is used as a tool to achieve socioeconomic and development objectives.

Bid-rigging: Anti-competitive practice in bidding

- ❖ Bid-rigging refers to a situation in which bidders for a particular contract or tender collude to pre-arrange the outcome of the bid or to pre-determine the winning bidder.
- ❖ Most common forms of bid-rigging include:
 - **Sub-contract bid rigging:** Some of the bidders opt out of bidding process as the pre-determined winner agrees to sub-contract parts of the bid to them.
 - **Complementary bidding:** Some of the bidders submit bids which are either too high or contain unacceptable conditions, defrauding buyers by creating the appearance of genuine competitive bidding.
 - **Bid rotation:** Bidders take turns winning the bid.
 - **Bid suppression:** Some of the bidders opt out of the bid so that the designated or pre-determined winning bid will be accepted.
 - **Market division:** Competing firms allocate specific customers or types of customers, products or territories among themselves and the winning bid is decided in accordance with such allocation.
 - **Common bidding:** Firms agree to submit common bids, thus eliminating price competition.

Bid-rigging is (unsurprisingly) a common anti-competitive conduct

- ❖ The perception that bid-rigging occurs in developing countries is misleading as it is a common anti-competitive conduct in many countries around the world:
 - **Indonesia:** In 2007, the Business Competition Supervisory Commission (KPPU) fined three LCD monitor suppliers a total of US\$39,000 and banned them from participating in government tenders for two years for fixing tender offers to supply almost 270 LCD monitors to the Jakarta regional government in 2006.
 - **Japan:** In March 2010, the Japan Fair Trade Commission (JFTC) fined six Air Force office furniture suppliers US\$4.4mn for bid-rigging in cooperation with the Air Force staff. The JFTC also ordered these companies to adopt a resolution to end the conduct and informed each other when they have done so.
 - **Singapore:** In June 2010, the Competition Commission of Singapore (CCS) fined a cartel of 14 electrical and building works companies a total of US\$190,000 for rigging bids. The companies were found to have colluded on tender bids for ten projects from July 2007 to April 2009. CCS began investigating the cartel after receiving a tip-off from one of the companies concerned, Arisco, which revealed that its previous management had entered into bid-rigging arrangements with other companies to co-ordinate the price of quotations.

Key takeaway #3: Inculcate competition (compliance) culture

- ❖ You do not want to be known for the wrong reasons!
 - Reputational damage and adverse publicity.
 - Sanctions: Criminal penalties, administrative fines, damages from private actions – affecting financial bottom lines.
- ❖ Top-down approach in compliance:
 - Top management (including board of directors) must show commitment to complying with the law.
 - Internal advocacy and education programmes to create awareness on competition-related issues and compliance.
 - Regular evaluation/audit of internal advocacy, education and compliance programmes to keep up with latest development in the law.
- ❖ You must know your rights:
 - Dawn raids, leniency programme.