

Vertical Agreements

Contributing editor
Patrick J Harrison



2018

GETTING THE
DEAL THROUGH 

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Contributing editor
Patrick J Harrison
Sidley Austin LLP

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CONTENTS

Argentina	5	Mozambique	132
Julián Peña Allende & Brea		Fabricia de Almeida Henriques Henriques, Rocha & Associados Pedro de Gouveia e Melo Morais Leitão, Galvão Teles, Soares da Silva & Associados	
Australia	11	Netherlands	138
Charles Coorey and Liana Witt Gilbert + Tobin		Sarah Beeston and Anouk Rutten Van Doorne	
Austria	20	Philippines	146
Guenter Bauer and Robert Wagner Wolf Theiss		Franco Aristotle G Larcina and Arlene M Maneja SyCip Salazar Hernandez & Gatmaitan	
Brazil	27	Russia	153
Alexandre Ditzel Faraco, Ana Paula Martinez and Mariana Tavares de Araujo Levy & Salomão Advogados		Alexander Egorushkin and Igor Panshensky Antitrust Advisory	
Canada	35	Serbia	161
Kevin Ackhurst, Matthew Zedde and Erin Brown Norton Rose Fulbright Canada LLP		Guenter Bauer, Maja Stankovic and Marina Bulatovic Wolf Theiss	
China	43	South Africa	168
Lei Li Sidley Austin LLP		Heather Irvine Falcon & Hume Inc	
European Union	52	Spain	173
Stephen Kinsella OBE, Patrick J Harrison, Rosanna Connolly and Kyle Le Croy Sidley Austin LLP		Pedro Callol, Manuel Cañadas and Laura Moya Callol, Coca & Asociados SLP	
France	65	Sweden	180
Marco Plankensteiner Kramer Levin		Mats Johnsson Hamilton Advokatbyrå	
Germany	73	Switzerland	186
Markus M Wirtz and Silke Möller Glade Michel Wirtz		Franz Hoffet, Marcel Dietrich and Martin Thomann Homburger	
India	84	Thailand	196
Rahul Rai, Rahul Satyan and Aakarsh Narula AZB & Partners		Chotika Lurpongkukana Blumenthal Richter & Sumet	
Indonesia	92	Turkey	202
HMBC Rikrik Rizkiyana, Anastasia Pritahayu R Daniyati and Wisnu Wardhana Assegaf Hamzah & Partners		Gönenç Gürkaynak and Hakan Özgökçen ELIG, Attorneys-at-Law	
Ireland	99	Ukraine	209
Ronan Dunne Philip Lee		Igor Svehkar and Oleksandr Voznyuk Asters	
Japan	106	United Kingdom	217
Nobuaki Mukai Momo-o, Matsuo & Namba		Stephen Kinsella OBE, Patrick J Harrison, Rosanna Connolly and Kyle Le Croy Sidley Austin LLP	
Macedonia	115	United States	229
Vesna Gavriloska CAKMAKOVA Advocates		Joel Mitnick, Peter Huston and Karen Kazmerzak Sidley Austin LLP	
Malaysia	124		
Sharon Tan and Nadarashnaraj Sargunaraj Zaid Ibrahim & Co			

Preface

Vertical Agreements 2018

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Vertical Agreements*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Canada, India, the Netherlands, the Philippines, Russia, South Africa, Spain and Thailand.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Patrick J Harrison of Sidley Austin LLP, for his continued assistance with this volume.

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London
February 2018

Malaysia

Sharon Tan and Nadarashnaraj Sargunraj

Zaid Ibrahim & Co

Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

The Competition Act 2010 (the Act), which came into effect on 1 January 2012, introduced general competition law for all markets in Malaysia except those carved out for sector regulators under the Communications and Multimedia Act 1998 in relation to the network communications and broadcasting sectors, the Energy Commission Act 2001 in relation to the energy sector and the Malaysian Aviation Commission Act 2015 in relation to the aviation services sector. The Malaysian Aviation Commission Act 2015 is the first legislation in Malaysia to introduce a voluntary merger control regime in addition to prohibiting anticompetitive agreements and abuse of dominance in the Malaysian aviation services market. Activities regulated under the Petroleum Development Act 1974 and the Petroleum Regulations 1974, in relation to upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia, are also excluded from the application of the Act.

In addition, the Postal Services Act 2012 introduced general competition law applicable to the postal market, which is also under the purview of the Malaysian Communications and Multimedia Commission.

The Gas Supply (Amendment) Act 2016 has also introduced general competition law provisions to the Gas Supply Act 1993, which is applicable to the Malaysian gas market. Following the amendment to the Gas Supply Act 1993, the Energy Commission has published Guidelines on Competition for the Malaysian Gas Market in relation to Market Definition, Anticompetitive Agreements and Abuse of a Dominant Position.

Following public consultation, the Malaysia Competition Commission (MyCC) issued the following guidelines:

- Guidelines on Market Definition (published on 2 May 2012);
- Guidelines on Anticompetitive Agreements (published on 2 May 2012);
- Guidelines on Complaints Procedures (published on 2 May 2012);
- Guidelines on Abuse of Dominant Position (published on 26 July 2012);
- Guidelines on Leniency Regime (published on 14 October 2014); and
- Guidelines on Financial Penalties (published on 14 October 2014).

Types of vertical restraint

2 List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

Section 4 of the Act expressly prohibits restraints in both horizontal and vertical agreements between enterprises insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.

'Vertical agreement' is defined as an agreement between enterprises each of which operates at a different level in the production or distribution chain. Where an enterprise is dominant in a market, it will also be necessary to consider whether restraints in its vertical agreements constitute an abuse of dominance.

Beyond this, the Act does not define vertical restraints, but the Guidelines on Anticompetitive Agreements and Guidelines on Abuse

of Dominant Position give a non-exhaustive list of anticompetitive vertical restraints, including:

- resale price maintenance;
- agreements that require a buyer to buy all or most supplies from a supplier;
- exclusive distribution agreements covering a geographic territory;
- exclusive customer allocation agreements;
- upfront access payments;
- price discrimination;
- loyalty rebates and discounts; and
 - bundling and tying.

Legal objective

3 Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

The Act has several related objectives. It aims to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers. The rationale is that the process of competition encourages efficiency, innovation and entrepreneurship that promote competitive prices, improvement in the quality of products and services and wider choices for consumers. In order to achieve these benefits, the Act prohibits anticompetitive conduct.

While the Act does not expressly promote other interests, agreements that may on the face of them be anticompetitive under section 4 (see question 2), may nevertheless be relieved of liability where there are significant identifiable technological, efficiency or social benefits directly arising from the agreement, and such restraints are necessary and proportional to the benefits, and do not eliminate competition. In addition, MyCC will also assess whether the benefits are passed on to consumers. As the benefits are widely described, these may well include other interests.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anticompetitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

MyCC, a body corporate established under the Competition Commission Act 2010 and comprising representatives from both the public and private sectors, enforces the Act, which applies across all sectors except sectors excluded from the application of the Act (described in question 1). The Malaysian Communications and Multimedia Commission enforces competition law in the communications sector, while the Energy Commission oversees competition in the energy sector. In addition, the Postal Services Act 2012 introduced general competition law applicable to the postal market, which is also under the purview of the Malaysian Communications and Multimedia Commission. Competition in the aviation services market comes under the purview of the Malaysian Aviation Commission pursuant to the Malaysian Aviation Commission Act 2015.

In order to coordinate the enforcement of competition law between the above regulators, MyCC has established a Special Committee on Competition and inter-working arrangements between them. The Special Committee on Competition comprises representatives from

MyCC, the sector regulators, the Central Bank of Malaysia and the Securities Commission, who together discuss competition issues at the regulatory level. The Special Committee convened its meeting in 2017 with representatives from the Malaysian Communications and Multimedia Commission, the Energy Commission, the National Water Services Commission, the Land Public Transport Commission, the Central Bank of Malaysia, the Securities Commission and the Malaysian Aviation Commission. The Intellectual Property Corporation of Malaysia (MyIPO) was also invited as a new member of the Special Committee.

MyCC advises the Minister charged with the responsibility for matters concerning domestic trade and consumer affairs on all matters concerning competition. While MyCC may initiate investigations as it thinks fit, the Act empowers the Minister to direct MyCC to investigate any suspected infringement of the Act.

Jurisdiction

5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?

The Act applies to any commercial activity both within Malaysia, and outside Malaysia where it has an impact on any market in Malaysia. There is no requirement that any of the parties to the agreement be domiciled in Malaysia.

Extraterritorial enforcement may be more difficult in practice, unless the enterprise has, within its group, a presence in Malaysia. The definition of enterprise incorporates the concept of single economic unit (described further in question 6).

Since the Act came into force in 2012, there has been no extraterritorial application of the Act to vertical restraints or in the context of pure internet commerce.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

The Act applies to the commercial activities of enterprises. 'Enterprise' is defined as any entity carrying on commercial activities relating to goods or services. This would include, for instance, companies, partnerships, businesses and state-owned corporations. The definition expressly recognises the concept of a single economic unit, and thus includes subsidiaries that do not enjoy real autonomy in determining their actions on the market and parent companies.

The application of the Act is determined by the nature of the activity, whether commercial or not, rather than the kind of entity. Commercial activity has been defined to exclude any activity directly or indirectly in the exercise of government authority or activity conducted on the basis of solidarity. Thus, where a public body or government-linked company engages in commercial activity, it will be subject to the Act.

Anticipating issues arising out of the European Court of Justice judgment in *Fenin* (11 July 2006), the Act excludes from commercial activity any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity. Thus, public sector procurement for the provision of goods and services on the basis of solidarity (such as public health services) or services of general economic interests will be excluded.

Sector-specific rules

7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

MyCC issued the Guidelines on Anticompetitive Agreements and Guidelines on Abuse of Dominant Position, which apply generally to all vertical restraints; however, MyCC has indicated in its Guidelines on Anticompetitive Agreements that in the future it intends to issue a separate guideline to address specific issues arising from transfers of intellectual property rights and franchising arrangements.

Sector-specific competition law applies to licensees under the following statutes: the Communications and Multimedia Act 1998 and the Postal Services Act 2012, which are regulated by the Malaysian Communications and Multimedia Commission. The Energy Commission also has powers under the Energy Commission Act 2001 and the Gas Supply Act 1993 to promote and safeguard competition and fair and efficient market conduct or, in the absence of a competitive market, to prevent the misuse of monopoly or market power in respect of the generation, production, transmission, distribution and supply of electricity and the supply of gas through pipelines. The Malaysian Aviation Commission Act 2015, which came into force on 1 March 2016, among other matters, regulates competition in the aviation services market. The Malaysian Aviation Commission Act 2015 prohibits anticompetitive agreements, abuse of dominance and has built-in procedures for voluntary notification for mergers in the aviation service market.

General exceptions

8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

MyCC indicates in its Guidelines on Anticompetitive Agreements that, in general, certain agreements are not likely to be considered to have significant anticompetitive effect. In relation to vertical agreements, these are where the parties to the agreement are not competitors and none of the parties individually has a share exceeding 25 per cent in the relevant market. However, this may not apply to price-fixing agreements.

While the guidelines explicitly indicate safe harbours for non-price restraints for enterprises that are below 25 per cent of their relevant market, this is not similarly provided for in the section of the guidelines relating to price restraints. In the guidelines, MyCC has also emphasised that it will take a strong stance against minimum resale price maintenance and find it anticompetitive, and as such the safe harbour may not apply to price restraints. For more details on resale price maintenance, see question 19.

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

'Agreement' is widely defined in the Act as any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices.

'Concerted practice' means any form of coordination between enterprises that knowingly substitutes practical cooperation between them for the risks of competition and includes any practice that involves direct or indirect contact or communication between enterprises, the object or effect of which is either to:

- influence the conduct of one or more enterprises in a market; or
- disclose the course of conduct that an enterprise has decided to adopt or is contemplating to adopt in a market, in circumstances where such disclosure would not have been made under normal conditions of competition.

10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

No. The definition of agreement encompasses all forms of arrangements, understanding and concerted practices. There has yet to be a local decision on whether unilateral instructions from one party will be construed as part of the vertical agreement or whether acquiescence is required.

Parent and related-company agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

As the prohibition on anticompetitive agreements applies to agreements between two or more enterprises, the prohibition does not apply to agreements within a single economic unit. A parent and its subsidiary companies are regarded as a single enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their actions on the market.

Agent-principal agreements

12 In what circumstances does antitrust law on vertical restraints apply to agent-principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

MyCC has not given guidance on this issue. It is likely to be persuaded by jurisprudence in other countries that consider that genuine agents perform auxiliary functions in the market on behalf of the principal and fall outside the equivalent of section 4. In determining whether the agency is a genuine one, MyCC is likely to consider whether the agent bears any financial or commercial risk. It is likely to consider that risks related to the provision of the agency services in general, such as the dependence of the agent's income on his success as an agent and sales commission will not be relevant to the assessment.

13 Where antitrust rules do not apply (or apply differently) to agent-principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent-principal relationship for these purposes?

There have thus far been no cases or guidance on this issue.

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

MyCC intends to issue a separate guideline for provisions relating to IPRs. Meanwhile the general provisions apply. Where the grant of IPR is used to restrict competition or enforce exclusivity, they would need to be analysed under section 4 in the same way as other vertical restraints.

Analytical framework for assessment

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

Once it is established that there is an agreement between two or more enterprises, one must consider whether the agreement has a significant impact on the market. MyCC generally considers that agreements below the safe harbour threshold (described in question 8) to be insignificant.

In examining restrictions in vertical agreements, MyCC broadly divides these into price restrictions and non-price restrictions. MyCC generally considers price restrictions to be anticompetitive by object, and the safe harbour may not apply (see question 8). If the object of an agreement is highly likely to have a significant anticompetitive effect, then MyCC may find the agreement to have an anticompetitive object. Where an agreement is not anticompetitive by object, MyCC will examine the effects of the restrictions to see if they are significant on the market by comparing the actual effect of the restriction to the 'counterfactual', namely, the levels of competition in the relevant market without the restriction. In relation to non-price restrictions, MyCC generally considers that the anticompetitive impact is not likely to be significant where all the parties to the agreement are within the safe harbour.

Agreements between parties outside the safe harbour threshold will be examined to ascertain whether they have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services in Malaysia (section 4).

No vertical agreements are per se unlawful. Any agreement that is prohibited under section 4 may be relieved of liability if the parties to the agreement can show that there are pro-competitive benefits brought about by the restrictions that outweigh the detriments (section 5). The parties claiming relief must prove that:

- there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
- the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;
- the detrimental effect of the agreement on competition is proportionate to the benefits provided; and
- the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

The Guidelines on Anticompetitive Agreements also indicate that such parties must also prove that these benefits are passed on to consumers.

16 To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

Market shares are relevant but they are not the only consideration. MyCC will have regard to the market power of the enterprise imposing the vertical restriction, the justification claimed for the restriction, and the extent to which a market in the vertical relationship will be foreclosed. Where certain types of restrictions are widely used by suppliers in the market, the cumulative effect will be taken into account. MyCC will also consider barriers to entry and countervailing buyer power.

17 To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely used by buyers in the market?

In addition to the factors in question 16, MyCC will take into account countervailing buyer power, and cumulative effects of widely used buyer restraints. MyCC has indicated that where small and medium-sized enterprises collaborate to gain economies of scale in procurement, this is unlikely to be problematic.

Block exemption and safe harbour

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

MyCC has not issued any block exemptions in relation to vertical restraints. For more details on the safe harbour threshold, please see question 8.

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

As indicated in question 8, the safe harbour thresholds may not apply to price restraints. Generally, MyCC will take a strong stance against vertical price restraints, in particular, resale price maintenance and minimum price restraints, which it considers anticompetitive by object.

Other forms of resale price maintenance, including maximum pricing and recommended retail pricing, that serve as a focal point for downstream collusion, will also be considered anticompetitive. The concern is that the downstream resellers or retailers do not compete on price.

MyCC will consider the price restrictions in the context of the market. For example, where retailers ask a manufacturer to set a certain price as a way of enforcing a cartel between retailers, MyCC considers that this would have the same effect as a horizontal price-fixing agreement between the retailers and will find such agreement to be anticompetitive.

The prohibition on price restraints is likely to include any restriction on components of pricing (for example, margins, bonuses, rebates and discounts), even though these are not explicitly mentioned in the context of vertical price restraints.

20 Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a ‘loss leader’?

No. The Guidelines on Anticompetitive Agreements have not considered these, and there have been no cases thus far.

Where an agreement infringes section 4, the parties may justify their conduct by proving the pro-competitive benefits in section 5 (see question 15). Where resale price maintenance is for a limited period for a new product launch, MyCC is likely to take into account the softening of the approach towards this kind of conduct in the European Union and United States. For example, short-term resale price maintenance may be helpful in the introductory period to induce distributors to promote the product or provide pre-sales services for experience or complex products, which benefit consumers.

In relation to price restrictions to prevent loss leading, there is no guidance or case. MyCC has indicated that it will take a strong stance against fixed or minimum resale price maintenance. Nestlé attempted to apply for an exemption for its pricing policy known as the Brand Equity Protection Policy. This application for exemption was withdrawn when MyCC indicated that the policy had elements of resale price maintenance that prevented resellers from setting their prices independently, potentially leading to increased prices for consumers. MyCC required the dismantling of the policy. It should be noted that the application for exemption was filed very soon after the Act came into effect in January 2012, and MyCC’s efforts were then focused on advocacy. Such conduct is presently unlikely to escape without financial penalty.

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

Horizontal collusion is described in question 19. Apart from this, the guidelines do not make the link.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

No, there have been no decisions or guidelines on this point. This is fact-specific and is open to the parties to the agreement to prove efficiencies, and satisfy the criteria in section 5 (see question 15).

23 Explain how a buyer agreeing to set its retail price for supplier A’s products by reference to its retail price for supplier B’s equivalent products is assessed.

There are no guidelines or cases on ‘price relativity’ agreements. Typically the buyer should be free to determine its retail price for products from both suppliers. MyCC considers price restraints to have greater anticompetitive effects than non-price restraints, and considers resale price maintenance to be anticompetitive. While price relativity agreements have not been discussed by MyCC, this is likely to be compared with the harm of resale price maintenance. MyCC has expressly indicated that it will take a strong stance against resale price maintenance. MyCC has not indicated whether it will characterise price relativity agreements as anticompetitive by object – it should be noted that it is not precluded from doing so. In any event, where there are anticompetitive effects, this will be of interest to MyCC.

Price relativity agreements potentially soften interbrand competition between suppliers who may take less aggressive pricing strategies and are likely to be scrutinised by the MyCC. Intra-brand competition may also be reduced in circumstances where a price reduction would be profitable for one product but unprofitable for another. Such agreements limit the retailers’ ability to use one product as a loss leader. Further, MyCC is likely to query if this arrangement is used to facilitate collusion at the supplier’s level by improving price transparency,

or whether there is resulting market foreclosure if the price relativity applies to new entrants.

However, where it is possible to show pro-competitive benefits, especially where cost savings are passed on to consumers, the parties may consider whether section 5 is satisfied (see question 15).

24 Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier’s most-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

The issue on ‘most favoured nation’ (MFN) clauses has yet to be examined by MyCC. It is thus unclear whether MyCC will adopt the approach in other jurisdictions where MFN is considered akin to resale price maintenance and anticompetitive by object.

Although at first glance an MFN clause appears to give the buyer a most favoured price, as a whole, this discourages discounting as the supplier may not be able to profitably offer such deep discounts across the board. As a supplier enters into more MFN arrangements with its customers, it will be more reluctant to compete on price.

MFN clauses can also be instruments of tacit or explicit collusion where they involve information-sharing about the price that competing suppliers are offering, particularly where the MFN clause is coupled with rights to ensure compliance with the MFN obligation, thus enabling visibility into competitor pricing. Any departure from agreed prices is easier to detect and more costly where a discount to one buyer needs to be offered to other buyers. Where similar MFN clauses are adopted by several players in the market, MyCC will consider the cumulative effect. Sellers entering into MFNs may signal to others its intention not to compete aggressively on price.

MFN clauses are a particular cause for concern where they are used by dominant buyers (firms with a significant market share), as this can have a foreclosure effect shutting out new entrants who have greater difficulty achieving lower input prices and having to offer deeper discounts. However, where it is possible to show pro-competitive benefits that outweigh detriments to competition (eg, assurance of lower prices), especially where cost savings are passed on to consumers, the parties should consider whether section 5 is satisfied (see question 15). Other possible pro-competitive benefits include reducing uncertainty when market prices are in flux or a new product is difficult to price. MFNs can also be used as a means to reduce the risk of opportunism where a buyer or seller has made significant investments related to that transaction then exploits these by selling to others at a lower price. Enterprises intending to use MFN clauses should clearly document the business justification and solid pro-competitive benefits in contemporaneous documentation. This is especially crucial where the expected result of the MFN is higher prices for consumers.

25 Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

There is at present no guidance or precedent for this in Malaysia. MyCC is likely to examine the effects on competition and consider the concerns discussed in question 24: softening on price competition, tacit or explicit collusion and foreclosure. Two separate markets will be relevant: the market for internet platforms and the product market.

On the internet platform market, MyCC will consider whether the arrangement has significantly softened competition between platforms that have less incentive to reduce transaction fees, resulting in increased costs that are passed on to consumers. MyCC will also be keen to determine whether such MFN arrangements facilitate collusion between platforms and improve ability to monitor prices under the guise of auditing compliance. It is possible that such arrangement forecloses effective entry of new platform operators, as suppliers are prevented from reducing prices on competing platforms.

In the product market, retail MFNs reduce intra-brand competition and limit the ability of sellers to have price discrimination across platforms and may be used to facilitate collusion and ease monitoring of horizontal price agreements.

As with wholesale MFNs, where it is possible to show pro-competitive benefits, especially where cost savings are passed on to consumers, the parties may consider whether section 5 is satisfied (see question 15). MyCC is likely to be persuaded by decisions of European competition

authorities in cases typically involving online travel services and market platforms such as Amazon, Expedia and Booking.com, where MFN clauses are considered to have the effect of reducing competition and favouring existing market participants with significant market power.

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer subsequently to offer discounts to its customers) is assessed.

There is no Malaysian guidance or precedent, but, as minimum advertised price policy (MAPP) and internet minimum advertised price (IMAP) clauses are similar to resale price maintenance in that they are minimum price restrictions, MyCC may well consider MAPP and IMAP clauses to be anticompetitive by object. Parties may, however, be relieved of liability if the parties to the agreement can show that there are pro-competitive benefits brought about by the restrictions that outweigh the detriments (section 5).

27 Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier, or that it will not purchase the contract products on more favourable terms from other suppliers, is assessed.

There is no Malaysian guidance or case. Similar to the above, MyCC has yet to characterise this as anticompetitive by object but is not precluded from doing so. If the arrangement is not considered to have the object (purpose) of restricting competition, MyCC would need to assess the effects on competition.

As described in questions 24 and 25, parties to the agreement may argue that there are pro-competitive benefits outweighing the adverse effects of the restraint under section 5 (see question 15).

28 How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

Such non-price restraints are generally not considered anticompetitive by object and MyCC will need to assess the effects on competition. Competition issues may arise if there is no effective competition from other brands (ie, interbrand competition).

Potentially, an exclusive distribution agreement between an overseas supplier and a Malaysian company could impact competition if a sole distributor is appointed in a market where there is no interbrand competition. An exclusive distribution agreement between the sole Malaysian distributor and its downstream resellers will need to be examined to assess whether restrictions have a significant anticompetitive effect. In our view, where the territory is the whole of the Malaysian market, this is lower risk than carving up smaller territories within Malaysia.

MyCC considers that generally, non-price restrictions in agreements that fall within the safe harbour are unlikely to be anticompetitive.

29 Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

Currently, there are no decisions or guidance on vertical restraints that relate specifically to the restrictions on the territory into which a buyer selling via the internet may sell its products. However, the Guidelines on Anticompetitive Agreements state that generally exclusive distribution agreements covering a geographical territory, for example, where a supplier gives an exclusive geographical territory to a buyer which limits intra-brand competition, may raise competition concerns if there is no effective competition from other brands.

30 Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

A vertical restraint on customer allocation is generally not treated to have the object of infringing section 4 and MyCC will need to assess the effects of such restraint. This is more likely to raise concerns where there is low interbrand competition. Parties to the agreement may

argue that there are pro-competitive benefits outweighing the adverse effects of the restraint, under section 5 (see question 15).

31 How is restricting the uses to which a buyer puts the contract products assessed?

MyCC does not address this type of restraint specifically in its Guidelines on Anticompetitive Agreements. As this is a non-price restraint, MyCC will assess the effects of this restraint on competition, and parties can argue that pro-competitive benefits outweigh any anticompetitive effects (see question 15).

32 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

Same as question 31. There is at present no guidance on internet sales.

33 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel? In particular, have there been any developments in relation to 'platform bans'?

No.

34 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Similar to question 31, the guidelines do not address selective distribution systems other than to indicate that MyCC will consider the effects on competition. Cases in other jurisdictions will be persuasive but are not binding. MyCC is likely to take a favourable view of such systems that have objective qualitative criteria relating to the reseller and its staff.

35 Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

There are no guidelines or cases on this issue. MyCC is likely to take into account the need for complex products and branded products to be limited to retailers that meet certain objective qualitative criteria.

36 In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

There are no guidelines on internet sales.

37 Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

No.

38 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

MyCC may assess the possible cumulative restrictive effects of multiple selective distribution systems within the same market if it is a significant feature of the relevant market.

39 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

No.

40 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

It is not generally considered to be anticompetitive by object, and MyCC will consider the effects of such restraint on the market. MyCC's Guidelines on Anticompetitive Agreements indicate that where the seller has a significant part of the downstream market, an exclusive (or close to exclusive) vertical agreement with the buyer can foreclose a

substantial part of the downstream market to other sellers. MyCC will also consider the duration of the agreement, but has not indicated any thresholds.

Anticompetitive non-price vertical agreements may not be considered to have a 'significant' anticompetitive effect if the individual market share of the seller or buyer does not exceed 25 per cent of their relevant market.

41 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

There are no guidelines or cases on this issue, and the effects will need to be assessed in each case taking into account interbrand competition. Precedents in other jurisdictions will be persuasive but are not binding. There are added concerns if the seller is dominant in a market, and the seller should also assess if the restraint constitutes abuse of dominance. Anticompetitive non-price vertical agreements may not be considered to have a 'significant' anticompetitive effect if the individual market share of the seller or buyer does not exceed 25 per cent of their relevant market.

42 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

MyCC's Guidelines on Anticompetitive Agreements do not address this point. MyCC will need to assess whether this restriction forecloses the market to competitors of the supplier.

43 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

It is assessed similarly to the approach in question 40.

44 Explain how restricting the supplier's ability to supply to other buyers is assessed.

There is no guideline or precedent, other than the indication that non-price restraints are generally less detrimental than price restraints.

MyCC would assess the effects on competition, including foreclosure of competing buyers. Parties to the agreement may argue that there are pro-competitive benefits outweighing the adverse effects of the restraint, under section 5 (see question 15). Anticompetitive non-price vertical agreements may not be considered to have a 'significant' anticompetitive effect if the individual market share of the seller or buyer does not exceed 25 per cent of their relevant market.

45 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

It is assessed similarly to the approach in question 44.

46 Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

No. There have been no cases or guidance on this issue thus far.

Notifying agreements

47 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

There is no requirement to notify agreements that contain vertical restraints, and enterprises are encouraged to conduct their own assessment of whether they will be able to claim relief from liability under section 5 (described in question 15).

Where an enterprise desires certainty in respect of a particular agreement, it may apply to the MyCC for an individual exemption. MyCC can only grant such an exemption where all the criteria in section 5 have been satisfied. The individual exemption will be published in the Gazette, and may be subject to conditions and for a limited duration only.

Authority guidance

48 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

MyCC has indicated that it expects businesses to conduct their own assessment of the conduct to determine whether there is an infringement, based on the guidelines and to seek legal advice if necessary.

Complaints procedure for private parties

49 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Yes. MyCC encourages complaints and has issued Guidelines on Complaint Procedures to assist complainants. Complaints must be made in the prescribed form, providing information about the complainant, the parties complained of, a description of the alleged infringing activity and include other relevant information or supporting documents. Anonymous complaints are possible but discouraged, as MyCC will not be able to seek clarification or further information from the complainant. A number of MyCC investigations have been commenced following complaints.

Enforcement

50 How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

MyCC completed its first vertical restraints case in October 2014 relating to exclusivity agreements entered into by two major providers of logistical and shipment services by sea – Giga Shipping Sdn Bhd and Nexus Mega Carriers Sdn Bhd – with their vehicle manufacturers, distributors and retailers. These agreements may have the effect of foreclosing customers to competitors of the enterprises, which, if established, would have the effect of significantly preventing, restricting or distorting competition in the provision of such services. To address these concerns, both parties had to undertake to stop inserting exclusivity clauses in their agreements.

In June 2016, MyCC issued its decision against an information technology service provider to the shipping and logistics industry and four container depot operators for price fixing. The final decision states that Containerchain (M) Sdn Bhd, the information technology service provider, had engaged in concerted practices with the container depot operators, resulting in the operators increasing the depot gate charges from 5 ringgit to 25 ringgit. MyCC also concluded that the concerted practice resulted in the container depot operators offering a rebate of 5 ringgit to hauliers on the agreed depot gate charges.

51 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

The Competition Act does not mention the consequence of infringement of the prohibition on the validity of contracts. However, where the consideration for a contract is unlawful, the contract will be void and unenforceable under the Contracts Act 1950. Therefore, an anti-competitive agreement under the Competition Act will be rendered unenforceable by virtue of the Contracts Act 1950. Typically, parties to an agreement would include a severability clause, which can work to sever the anticompetitive restraint, leaving the remainder of the agreement intact. Even in the absence of a severability clause, parties may argue that they have reciprocally promised to perform obligations which are legal (eg, a distribution contract), and under special circumstances, to do certain things which are anticompetitive, thus illegal. The second set of illegal promises will be void, but the first set will remain enforceable.

Update and trends

Recent developments

MyCC has an impressive track record: it has investigated and taken enforcement action against cases involving cartel conduct, anticompetitive vertical agreements and abuse of dominance.

MyCC completed its first vertical restraints case in October 2014 relating to exclusivity agreements entered into by two major providers of logistical and shipment services by sea. MyCC raised concerns that these agreements might have the effect of foreclosing customers to competitors of the enterprises, which, if established, would have the effect of significantly preventing, restricting or distorting competition in the provision of such services. To address these concerns, both parties had issued separate undertakings to stop inserting exclusivity clauses in their agreements. MyCC accepted the undertakings without imposing any financial penalties or making any finding of infringement.

In June 2016, MyCC issued its decision against an information technology service provider to the shipping and logistics industry

and four container depot operators for price fixing. The final decision states that the information technology service provider had engaged in concerted practices with the container depot operators resulting in the operators increasing the depot gate charges. The final decision also states that the concerted practice resulted in the container depot operators offering a rebate to hauliers on the agreed depot gate charges.

Based on media reports, MyCC has identified the pharmaceutical sector as a priority sector. In addition, MyCC has indicated that it will focus on the logistics, transportation, financial, consumer services and various fast-moving consumer goods sectors.

Anticipated developments

In April 2017, YB Tuan Che Mohamad Zulkifly Jusoh was appointed as the new Chairman of MyCC replacing Tan Sri Dato' Seri Siti Norma Yaakob. It remains to be seen whether this change in leadership would result in increased enforcement action by MyCC.

52 May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

MyCC may impose financial penalties once it makes a finding of infringement without reference to any other entity. Once MyCC makes a finding of infringement of the Act, MyCC:

- must require that the infringement be ceased immediately;
- may specify steps required from the infringing enterprise, which appear to MyCC to be appropriate for bringing the infringement to an end;
- may impose a financial penalty of up to 10 per cent of the worldwide turnover of the infringing enterprise or enterprises over the period during which an infringement occurred; and
- may give any other directions as it deems appropriate.

To date, the financial penalties that have been proposed or imposed by MyCC have ranged from 247,730 ringgit to 213,450,000 ringgit. In relation to non-financial remedies, MyCC also issued directions to cartelists (namely, the floriculturist association and lorry transport enterprises) to refrain from anticompetitive practices. Although not all infringing enterprises have been fined with financial penalties, it appears from recent trend that MyCC is taking a stricter stance in terms of deterrence. The following table is a summary of infringement decisions issued by MyCC to date and the total financial penalties imposed.

Infringing enterprise(s)	Anticompetitive conduct	Financial penalty
Cameron Highlands Floriculturist Association	Price fixing	None
Malaysia Airlines and AirAsia This decision was overturned on appeal by the Competition Appeal Tribunal and the financial penalty has been set aside. MyCC has filed for an application for judicial review to the High Court against the Competition Appeal Tribunal's decision.	Market sharing	20 million ringgit in total
Ice manufacturers (24 enterprises)	Price fixing	252,250 ringgit in total
Sibu Confectionery and Bakery Association (15 enterprises)	Price fixing	247,730 ringgit in total
Containerchain (Malaysia) Sdn Bhd and four other container depot operators	Price fixing	654,774 ringgit in total
My EG Services Berhad*	Abuse of dominance	2,272,200 ringgit in total

*Note: An appeal was filed to the Competition Appeal Tribunal against MyCC's decision. The Competition Appeal Tribunal dismissed the appeal and imposed an additional daily penalty on My EG Services Berhad, resulting in a financial penalty totaling 6,412,200 ringgit.

The financial penalty is potentially higher in Malaysia than that in other jurisdictions where the penalty is limited to a specified number of years, because the penalty imposed may be for the entire duration of an infringement. Even though the magnitude of this may not be felt for a while as the Act does not have retrospective effect and hence relates back only to 1 January 2012 (the date on which the Act came into force), parties to agreements that infringe the Act remain at risk for the continued anticompetitive conduct.

On 14 October 2014, MyCC issued its Guidelines on Financial Penalties, which explain how MyCC determines the appropriate fine and the factors that it may take into account in doing so. In imposing financial penalties, MyCC aims to reflect the seriousness of the infringement and deter future anticompetitive practices. In determining the amount of any financial penalty in a specific case, MyCC may take into account aggravating factors (eg, the seriousness of the infringement, its duration, and recidivism) and mitigating factors (eg, existence of an appropriate corporate compliance programme, cooperation by the enterprise during the investigation and low degree of fault).

Financial penalties imposed by MyCC may be higher post-issuance of the recent financial penalties guidelines, as the guidelines indicate that MyCC may round up the infringement duration, whereby a period of infringement shorter than six months will be counted as half a year and a period between six months and a year will be counted as a full year. In the event that the duration of the infringement is longer than a year, MyCC may take into account a maximum of 10 per cent of the enterprise's worldwide turnover and multiply that by the number of years of infringement. In the market-sharing case involving Malaysia Airlines and AirAsia, MyCC imposed a financial penalty of 10 million ringgit each on MAS and AirAsia, for the four months commencing immediately when the Act came into effect up to the time that the two airlines terminated the collaboration agreement. In future, MyCC may round the infringement period up to six months, resulting in higher financial penalties. Similarly, the 24 ice manufacturers on which financial penalties totalling 252,250 ringgit were imposed for price fixing, may have faced higher penalties had the case been decided today, as their worldwide turnover for six months may have been taken into account despite them infringing the Act for approximately one week only.

Investigative powers of the authority

53 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

MyCC has wide discretion on how it collects evidence and may direct a person (including persons outside of Malaysia) to give MyCC access to his or her books, records, accounts and computerised data. However, these powers are subject to lawyer-client privilege and may, at the request of the person disclosing, be protected by confidentiality. As anticompetitive conduct is not a crime, there is no privilege against self-incrimination.

Information requests

MyCC may, by written notice, require any person (including third parties to the agreement) that MyCC believes to be acquainted with the facts and circumstances of the case to produce relevant information or documents. MyCC may also require the person to provide a written explanation of such information or document. Where the person is not in custody of the document, he or she must, to the best of his or her knowledge and belief, identify the last person who had custody of the document and state where the document may be found. A person required to provide information has the responsibility to ensure that the information is true, accurate and complete, and must provide a declaration that he or she is not aware of any other information that would make the information untrue or misleading.

Dawn raids

MyCC may search premises with a warrant issued by a magistrate, where there is reasonable cause to believe that any premises have been used for infringing the Act or there is relevant evidence of it on such premises. The warrant may authorise the MyCC officer named on the warrant to enter the premises at any time by day or night and by force if necessary. During such searches, MyCC officers may seize any record, book, account, document, computerised data or other evidence of infringement.

The powers extend to the search of persons on the premises, and there is no distinction in the powers for business or residential premises. Where it is impractical to seize the evidence, the MyCC may seal the evidence to safeguard it. Attempts to break or tamper with the seal constitute an offence.

Where the MyCC officer has reasonable cause to believe that any delay in obtaining a warrant would adversely affect the investigation or the evidence will be damaged or destroyed, he or she may enter the premises and exercise the above powers without a warrant.

In addition to powers under the Act, MyCC investigating officers have the powers of a police officer as provided for under the Criminal Procedure Code.

Private enforcement

- 54 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?**

Yes, any person who suffers loss or damage directly as a result of an infringement of the Act may bring a private action against the infringing parties in the civil courts. MyCC cannot award damages, and any follow-on action is intended to enable aggrieved persons to obtain compensation.

Such civil action may be initiated even if MyCC has not conducted or concluded an investigation into the alleged infringement. However, in practice, the evidential burden on private parties makes this unlikely unless MyCC's investigation and adjudication process is slow.

Class actions are not possible in Malaysia. The only form of group litigation possible is representative actions. However, it would be necessary for parties to establish that they have suffered direct loss and a commonality of interest in bringing the claim.

Civil cases can be as quick as 12 months, but this depends on the complexity of the issues, and the successful party can recover costs.

Other issues

- 55 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?**

No.

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