

Dominance

Contributing editors

Patrick Bock, Kenneth Reinker and David R Little



2018

GETTING THE
DEAL THROUGH

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Dominance 2018

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Patrick Bock, Kenneth Reinker and David R Little
Cleary Gottlieb Steen & Hamilton LLP

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Preface

Dominance 2018

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Dominance*, 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 Austria, Belgium, Saudi Arabia, Sweden and Taiwan.

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 editors, Patrick Bock, Kenneth Reinker and David R Little of Cleary Gottlieb, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
March 2018

Malaysia

Sharon Tan Suyin and Nadarashnaraj Sargunraj

Zaid Ibrahim & Co

General questions

1 Legal framework

What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

The behaviour of dominant firms in Malaysia is regulated by the Competition Act 2010 (Competition Act). Section 10 of the Competition Act (Chapter 2 prohibition) prohibits an enterprise, whether independently or collectively, from engaging in any conduct that amounts to an abuse of its dominant position in any market for goods or services. The Competition Act governs the behaviour of dominant firms for all markets in Malaysia, except for specific sectoral activities that have been excluded under the Competition Act such as the networked communications and broadcast sectors, which are governed under the Communications and Multimedia Act 1998 (Communications and Multimedia Act) and enforced by the Malaysian Communications and Multimedia Commission (MCMC), the energy sector, which is governed under the Energy Commission Act 2001 and enforced by the Energy Commission, as well as the aviation sector, which is governed under the Malaysian Aviation Commission Act 2015 that came into force on 1 March 2016 (Malaysian Aviation Commission Act) and enforced by the Malaysian Aviation Commission.

There has also been a further exclusion for upstream oil and gas activities, in the Petroleum Development Act 1974 and Petroleum Regulations 1974, as described in question 5.

In addition, although not expressly carved out from the application of the Competition Act, the Postal Services Act 2012 also introduced general competition law applicable to the postal market, which is also under the purview of MCMC.

The Gas Supply (Amendment) Act 2016 has also introduced general competition law provisions to the Gas Supply Act 1993 that are 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.

The Competition Act is enforced by the Malaysia Competition Commission (MyCC). MyCC has issued its dominance guidelines (published on 26 July 2012) (MyCC Dominance Guidelines), which aim to offer guidance to businesses on the application of competition law with respect to the Chapter 2 prohibition.

MyCC notes that effective competition drives inefficient enterprises out of the market and emphasises that the Competition Act protects competition and not competitors. As a result, it has incorporated the European concept that only competitors that are 'as efficient' as the dominant enterprise should benefit from the rules on exclusionary abuse and MyCC expressly states this in paragraphs 3.5 to 3.6 of the MyCC Dominance Guidelines.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Dominance is defined as a situation in which one or more enterprises possess such significant power in a market as to be able to adjust prices

or outputs or trading terms without effective constraint from competitors or potential competitors. MyCC considers that the ability of an enterprise to price well above the competitive level for a sustained period or the ability to actually drive an equally efficient competitor out of business as evidence that the enterprise is dominant.

Other factors such as barriers to entry and countervailing buyer power may also be used in the assessment of dominance. Further information is set out in the MyCC Dominance Guidelines. The legislation and Guidelines do not expressly set out relative dominance and heightened market power.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The Competition Act, and by extension the Chapter 2 prohibition, has several related objects. It aims to promote economic development and protect the process of competition to encourage efficiency, innovation and entrepreneurship to promote competitive prices, better quality of products and services for the ultimate benefit of consumers.

Recognising the need for certain social or welfare activities, the Competition Act does not apply to any activity based on the principle of solidarity or to any enterprise entrusted with the operation of services of general economic interest.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

The Competition Act introduces general competition law for all markets in Malaysia except those carved out for sector regulators. These exceptions are provided in the First Schedule to the Competition Act which include the Communications and Multimedia Act in relation to networked communications and broadcast sectors, the Energy Commission Act 2001 in relation to the energy sector and the Malaysian Aviation Commission Act in relation to the aviation services sector. The First Schedule to the Competition Act also excludes any activities regulated under the Petroleum Development Act 1974 and the Petroleum Regulations 1974 directly in connection with upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia. Although not expressly excluded in the Competition Act, the Postal Services Act 2012 and the Gas Supply Act also contain competition law provisions addressing abuse of dominance. The Postal Services Act 2012 is applicable to the postal market, which is under the purview of MCMC. The Gas Supply Act is under the purview of the Energy Commission and applies to the gas market and in relation to facilities or services related to gas, includes a market for such facilities or services and other facilities or services that are substitutable for, or otherwise competitive with, the first-mentioned facilities or services.

The Communications and Multimedia Act, regulated by MCMC, applies to networked communications but not the postal sector, which is also regulated by MCMC under a separate legislation (ie, the Postal Services Act 2012). Under the Communications and Multimedia Act, where a licensee is determined to be in a dominant position by MCMC,

it may be directed by MCMC to cease conduct that has the effect of substantially lessening competition in a communications market and to implement appropriate remedies. The communications sector is subject to economic regulation through licensing, the prohibition of anti-competitive conduct and frameworks on access.

MCMC's Guideline on Dominant Position (published on 24 September 2014 (MCMC Dominant Position Guideline)) outlines the general approach taken by MCMC in determining whether a licensee is in a dominant position in a communications market. MCMC will take a flexible approach when determining whether a licensee is dominant, and this determination can be made at any time during the course of examining the licensee's conduct. The MCMC Dominant Position Guideline states that MCMC will adopt a two-step approach when assessing dominance. MCMC will first define the boundaries of the relevant communications market and then determine whether the licensee is dominant in the relevant communications market.

MCMC's approach to market definition is similar to MyCC's in that it applies the concept of substitutability or the hypothetical monopolist test. When defining the relevant communications market for purposes of assessing dominance, MCMC will typically focus on the identification of the product and the geographical dimensions of the market. However, in certain situations, the nature of the communications market may require an additional consideration of time dimension (which refers to the time characteristics of the market, for example, cyclical patterns of demand or innovation or inter-generational products) and functional dimension. These additional dimensions may be considered separately or as part of the analysis of the relevant product dimension.

MCMC may determine the existence of a dominant position from a single factor or from a number of factors that are not of themselves determinative. When assessing whether a licensee is in a dominant position, MCMC will consider the following factors, which are not meant to be exhaustive:

- the structure of the market and the nature of competition in that market, including market shares;
- the barriers to entry and expansion;
- the countervailing power of buyers; and
- the nature and effectiveness of economic regulation (if any).

Apart from the MCMC Dominant Position Guideline, MCMC has issued the following guidelines:

- Market Definition Analysis (published on 24 September 2014); and
- Guideline on Substantial Lessening of Competition (published on 24 September 2014).

The Energy Commission published its Guidelines on Competition for the Malaysian Gas Market in relation to Market Definition, Anticompetitive Agreements and Abuse of Dominant Position (Guidelines on Competition for the Gas Market) in 2017. In assessing whether a person has engaged in any conduct that amounts to an abuse of dominant position in the gas market, the Energy Commission will use a three-step test. First, the Energy Commission will define the relevant market; secondly, it will determine if the relevant person is in a dominant position in the relevant market; and lastly, it will assess whether there is any abuse of dominance.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

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

The application of the Competition Act is determined by the nature of the activity, namely, whether it is 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 a government-linked company engages in commercial activity, it will be subject to the Competition Act.

Anticipating issues arising from the European Court of Justice judgment in *Fenin* (11 July 2006), the Competition Act does not apply to any purchase of goods or services for non-economic activities. 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 interest will be excluded.

In a public consultation paper on proposed amendments to the Competition Act, MyCC has proposed to expressly describe the type of entity or person that falls under the scope of 'enterprise' (ie, an individual, a body corporate, an unincorporated body of persons or other entity). MyCC has also proposed to expand the scope of an enterprise's activities to which the Competition Act would apply, to cover not only enterprises that carry on commercial activities but also to economic activities.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The Chapter 2 prohibition only applies to dominant enterprises. Merely being in a dominant position is not prohibited as long as there is no abuse of such position.

Monopolising practices, where a non-dominant firm attains a dominant position through acquisition, are not caught by the Chapter 2 prohibition. The Competition Act does not have a merger control regime (only the Malaysian Aviation Commission Act has merger control provisions) and thus the inorganic acquisition of another business to achieve a dominant position is not subject to regulation under the Competition Act. However, where there are concerns that a merger or acquisition may result in an infringement of the Competition Act, the parties to the transaction can either conduct a self-assessment to ensure that the benefits to competition outweigh the detriments or apply for an individual exemption.

7 Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Competition Act

The Chapter 2 prohibition applies to collective dominance. The MyCC Dominance Guidelines describe collective dominance as enterprises exercising significant market power together. MyCC will examine each case on the merits and determine whether two or more enterprises with significant market power act similarly in a market and that conduct excludes equally efficient competitors.

Communications and Multimedia Act

The Communications and Multimedia Act does not directly contemplate the existence of joint or collective dominance. However, MCMC may determine that a licensee is dominant in a communications market exhibiting oligopolistic characteristics.

Gas Supply Act

The prohibition in the Gas Supply Act on abuse of dominance applies to collective dominance. The Guidelines on Competition for Gas Market issued by the Energy Commission Act states that dominance is not simply a conduct by a single person but can also include conduct of persons exercising significant market power together. The Energy Commission will examine each case on its merits but in general there may be a breach if two or more separate persons that have significant market power act similarly in a market and that conduct excludes equally efficient competitors.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The Chapter 2 prohibition applies to dominant purchasers. Section 10(2)(a) of the Competition Act provides that an abuse of dominant position may include, among other matters, the imposition of an unfair purchase price or other unfair trading condition on any supplier. Here,

dominance is determined by reference to supply side substitutability, namely, suppliers switching to other buyers.

However, the purchase of goods and services for non-economic activities will not be considered to be economic and will fall outside the application of the Competition Act. For example, government procurement for public healthcare will not be subject to the Competition Act, as the provision of public healthcare is not an economic activity. See also question 5.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined?

Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Market definition involves the identification of close substitutes for the product under investigation. Under the Competition Act, 'market' is defined as a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the original goods or services.

Similar to the MCMC's approach as outlined in question 4, MyCC applies the hypothetical monopolist test, which sees the relevant market as the smallest group of products (in a geographical area) that a hypothetical monopolist controlling that product group (in that area) could profitably sustain a price above the competitive price, namely, a price that is at least a small but significant amount above the competitive price, and MyCC will apply a price range of 5 to 10 per cent. This is further described in the Guidelines on Market Definition (published on 2 May 2012).

In dominance cases, it must be borne in mind that the prices charged by a dominant entity may already be raised above the competitive level, and adopting this approach results in a wider market definition that would otherwise have been the case if a competitive price was used (this is known as the 'Cellophane fallacy'). However, understanding the degree of substitution even at prevailing prices provides useful information about substitution and competitive constraints.

Competition Act

Section 10(4) of the Competition Act specifically provides that market share alone is not determinative of a dominant position.

Nonetheless, according to the MyCC Dominance Guidelines, MyCC will generally consider a market share that exceeds 60 per cent of the relevant market to be indicative of dominance. However, given the text of section 10(4), there may well be findings of dominance below this threshold. The MyCC Dominance Guidelines indicate, for example, that a new product with patented features may be considered dominant even though its market share is only 20 to 30 per cent of the market, but rapidly growing as consumers switch to this product.

Communications and Multimedia Act

In relation to the communications market, the MCMC Dominant Position Guideline states that in general, a 'high' market share will be considered to be a market share of more than 40 per cent in a communications market, however, this does not preclude a licensee with a market share of less than 40 per cent from being found to be dominant in a market if it is not subject to effective competitive constraints. When analysing market share data, the MCMC Dominant Position Guideline states that it will consider the current market share of the licensee against the market shares of its competitors in the relevant communications market and the changes in the licensee's market share over time.

MCMC, on 3 October 2014, made a determination of dominance (Commission Determination on Dominant Position in a Communications Market (Determination No. 1 of 2014)) that sets out MCMC's findings on which licensees are dominant. This determination was issued following a public inquiry.

Gas Supply Act

In relation to the gas market, the Guidelines on Competition for Gas Market states that market share is a good starting point to assess dominance, but it is not the sole indicator. The Energy Commission considers a market share of above 60 per cent as strong indication of a dominant position and that it is unlikely that a person will be individually dominant if its market share is below 40 per cent. Evidence on market share

may come from a number of sources including data provided by persons in the relevant market, data provided by trade associations, market research reports, or market review by the Energy Commission.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The concept of abuse is not specifically defined in the Competition Act. However, section 10(2) of the Competition Act provides a non-exhaustive list of conduct that may constitute abuse of a dominant position:

- directly or indirectly imposing an unfair purchase or selling price or other unfair trading condition on any supplier or customer;
- limiting or controlling production, market outlets or market access, technical or technological development or investment, to the prejudice of consumers;
- refusing to supply to a particular enterprise or group or category of enterprises;
- discriminating by applying different conditions to equivalent transactions with other trading parties;
- forcing conditions in a contract that have no connection with the subject matter;
- predatory behaviour towards competitors; and
- buying up a scarce supply of resources where there is no reasonable commercial justification.

MyCC has indicated in its MyCC Dominance Guidelines that it will use an effects-based approach to assess exclusionary practices (see question 11).

The Competition Act does not prohibit a dominant enterprise from engaging in conduct that is a reasonable commercial response to market entry or conduct by a competitor.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes. The Chapter 2 prohibition covers both exploitative practices (eg, unfair prices or trading terms) and exclusionary conduct (eg, predatory conduct, refusal to supply or exclusive dealing).

According to the MyCC Dominance Guidelines, MyCC is only concerned with exploitative or excessive pricing if there is unlikely to be competition in the market to constrain the dominant enterprise (see question 22).

Exclusionary conduct is conduct that prevents equally efficient competitors from competing and will be assessed in terms of its effects on the competitive process and not its effects on competitors.

So, even if an enterprise is dominant it should not be stopped from engaging in competitive conduct that benefits consumers even if inefficient competitors are harmed. MyCC will use an effects-based approach as used elsewhere in assessing a potential abuse of a dominant position. By adopting this approach, MyCC shall ensure that conduct that benefits consumers will not be prohibited and therefore ensure that enterprises have the incentives to compete on merits. Adopting an effects-based approach ensures good economic outcome consistent with the aims of the Competition Act. In any event, it is very unlikely that dominant enterprises would not know the likely effect on competition from their actions.

In general, in assessing whether the effect of exclusionary conduct is an abuse or not, MyCC will use two main tests for assessing anti-competitive effects: first, whether the conduct adversely affects consumers and second, whether the conduct excludes a competitor that is just as efficient as the dominant enterprise.

12 Link between dominance and abuse

What link must be shown between dominance and abuse?

May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

In order to constitute an infringement of the Chapter 2 prohibition, the enterprise must be in a dominant position. There can be abuse even where there is no causal link between the dominant position and

Update and trends

MyCC's success at the Competition Appeal Tribunal against MyEG's appeal would increase its confidence in dealing with abuse of dominance cases. This may translate to increased enforcement.

In December 2017, MyCC's Chief Executive Officer said in a press release that MyCC has been working on the draft Guidelines on Intellectual Property and Competition and is working to publish the final guidelines in 2018. The Malaysian Aviation Commission is also expected to issue its guidelines for the aviation services sector.

After several rounds of consultation with the public and the stakeholders, MyCC has issued its market review reports on the pharmaceutical sector and building materials in the construction sector. The reports are available on MyCC's official website.

conduct in question. MyCC is likely to follow jurisprudence in other countries where it is not necessary that the dominant position, the abuse and the effects occur in the same market, as indicated in the MyCC Dominance Guidelines. For example, a dominant enterprise that sells an essential input to buyers in a downstream market refuses to supply those buyers when it establishes a subsidiary in the downstream market to compete with them. See also question 18.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

In contrast to the Chapter 1 prohibition (similar to article 101 of the Treaty on the Functioning of the European Union), the Chapter 2 prohibition does not allow a defence based on efficiency gains. There is also no power to grant an exemption from abuse of dominance.

However, similar to the position in the EU, a dominant enterprise can protect its own commercial interest in the face of competition from existing competitors and new entrants. Section 10(3) of the Competition Act allows a dominant enterprise to take any step that has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor. For example, a dominant enterprise may meet a competitor's price even though the price may be below cost (in the short term).

Specific forms of abuse

14 Rebate schemes

Generally, rebates and discounts can be pro-competitive. However, where they are exclusionary, that is, where they are used to foreclose the market, they are prohibited.

Discounts related to costs may be justifiable. However, non-cost-related discounts can be structured to effectively lock in customers and make them unavailable to competitors. How much of the market is foreclosed will be a relevant factor for MyCC's consideration. As indicated above, MyCC will consider the anticompetitive effect of the scheme on the market.

15 Tying and bundling

Section 10(2)(e) of the Competition Act prohibits making the conclusion of a contract subject to acceptance by other parties of supplementary conditions, which by their nature or according to commercial usage have no connection with the subject matter of the contract.

MyCC will be concerned where a dominant enterprise is leveraging its dominance in one market to obtain market power in another market.

16 Exclusive dealing

Where the exclusive dealing, non-compete and single branding have exclusionary or foreclosing effects on the market, MyCC will consider this to infringe the Chapter 2 prohibition. Section 10(2)(b) of the Competition Act prohibits agreements that limit or control, *inter alia*, market outlets or market access to the prejudice of consumers.

17 Predatory pricing

Predatory behaviour is prohibited by section 10(2)(f) of the Competition Act, but this is not defined. The MyCC Dominance Guidelines describe

this in terms of below-cost pricing designed to force a competitor out of the market. This is to be distinguished from genuine price competition in response to competitors and new entrants, which is a reasonable commercial response and, hence, permissible.

In determining whether a dominant enterprise is charging below cost, MyCC will consider whether the dominant enterprise's price is reasonable across the whole relevant output, and not merely the last unit of output. Several cost concepts are identified in the MyCC Dominance Guidelines, including average variable costs, average avoidable costs, long-run incremental costs and average total costs.

In the determination, MyCC will investigate whether a competitor that is as efficient as the dominant enterprise will be excluded from the market.

18 Price or margin squeezes

Price squeezes are not on the list of abuses in section 10(2) of the Competition Act, which is a non-exhaustive list. Price squeezing is likely to be considered as, effectively, a refusal to supply, which is discussed below.

Case law in the EU indicates that price squeezes are distinguishable from refusal to supply.

In April 2016, MyCC made a finding of non-infringement against Megasteel Sdn Bhd. The complainant alleged that Megasteel as the sole supplier of hot rolled coil, an essential material to produce cold rolled coil, is charging higher than the international price of hot rolled coil. The complainant also alleged that Megasteel is competing in the cold rolled coil market and often undercuts its price. In its proposed decision, MyCC stated that Megasteel had abused its dominant position by charging or imposing a price for its hot-rolled coil that amounts to a margin squeeze that has an actual or potential effect of constraining the ability of reasonably efficient competitors in the downstream market to earn a sufficient margin. However, in its final decision (after assessing submissions from Megasteel and further analysis), MyCC held that Megasteel did not infringe the Chapter 2 prohibition. MyCC held that owing to certain external factors the steel industry market is heavily distorted. Although Megasteel was the sole producer and supplier of hot-rolled coil, hot-rolled coil can be imported subject to certain conditions. Further, MyCC found that the downstream market has been liberalised and the competitors in the downstream market, including Megasteel are competing in the market with competitive selling prices.

In the communications sector, MCMC has determined mandatory standards for access and access pricing for certain facilities and services.

19 Refusals to deal and denied access to essential facilities

Section 10(2)(c) of the Competition Act lists refusal to supply to a particular enterprise or group of enterprises as an abuse of dominance. Although enterprises are generally free to deal with whomever they choose, a dominant enterprise's refusal to supply an essential input may constitute an abuse of dominance where it has an exclusionary effect.

The MyCC Dominance Guidelines cite the following examples:

- refusal to supply an essential input to a downstream buyer where the dominant enterprise also competes with that buyer in that downstream market;
- refusal to licence intellectual property rights; and
- refusal to grant access to infrastructure that is a necessary or essential facility to supply certain products.

Refusal to supply may, in some circumstances, be founded on reasonable commercial justification. For example, refusal to supply to a buyer who has not paid for past purchases or refusal to grant access to infrastructure where there is no spare capacity.

MyCC has indicated that the remedy for a refusal to supply is to require the supplier to supply at a reasonable consideration, taking into account the need to balance incentives to invest in innovation.

20 Predatory product design or a failure to disclose new technology

According to section 10(2)(b) of the Competition Act, limiting or controlling production, market outlets or market access, technical or technological development or investment to the prejudice of consumers can constitute abusive conduct.

As indicated in question 19, the MyCC Dominance Guidelines indicate that a refusal to license intellectual property rights may constitute an abuse of dominance.

21 Price discrimination

Section 10(2)(d) of the Competition Act prohibits the application of different conditions to equivalent transactions to an extent that may:

- discourage new market entry or expansion or investment by an existing competitor;
- force from the market or otherwise seriously damage an existing competitor that is no less efficient than the dominant enterprise; or
- harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market.

Price discrimination occurs where the same product is sold at different prices and such a price difference is unrelated to the cost of supplying the products. This includes selling the same product to different customers at different prices and selling the same product to the same customer at different prices.

Price discrimination can have adverse effects on consumers. For example, where the dominant enterprise charges a low price for a product where there is stiff competition and cross-subsidises the lower margins from areas where there is lack of competition and by doing so forces smaller enterprises out of the competitive market.

MyCC will examine price and other forms of discrimination on a case-by-case basis. MyCC acknowledges that price discrimination is not always abusive and can be beneficial in some instances. By charging more to groups who can better afford it, price discrimination can lead to higher output by charging less to lower income groups, which can be welfare-enhancing.

As indicated in question 13, discrimination can be commercially justified. For example, volume discounts can reflect savings and economies of scale and better prices may be offered for early payment.

22 Exploitative prices or terms of supply

Exploitative prices or terms of supply are regarded to be abusive by section 10(2)(a) of the Competition Act where a dominant enterprise directly or indirectly imposes an unfair purchase or selling price or other unfair trading condition on any supplier or customer.

Exploitative prices may result from structural conditions in the market. Where there are high barriers to entry, a dominant enterprise can command excessive profits. MyCC will only be concerned with excessive pricing where there is no likelihood that market forces will reduce dominance in a market. In determining whether pricing is excessive, MyCC will consider the actual price against the costs of supply and other factors such as the profitability of the dominant enterprise.

23 Abuse of administrative or government process

The Competition Act and the MyCC Dominance Guidelines do not address this specific form of abuse. The general principles on exclusionary conduct apply (see question 11) as the Act and Guidelines do not purport to exhaustively list all forms of abuse.

24 Mergers and acquisitions as exclusionary practices

The Competition Act and the MyCC Dominance Guidelines do not address this specific form of abuse (see question 6). This, however, does not preclude the application of the general principles on exclusionary conduct (see question 11).

25 Other abuses

There is no exhaustive list of forms of conduct that may infringe the Chapter 2 prohibition.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The Competition Act is enforced by MyCC, a body corporate established under the Competition Commission Act 2010, comprising

representatives from both the public and private sectors. Competition law in the communications and broadcast sector is enforced by the MCMC, while the Malaysian Aviation Commission and the Energy Commission oversee competition in the aviation and energy sectors respectively.

MyCC officers have all of the powers of investigation and enforcement under the Competition Act. They have the power to require any person to produce documents and information and to conduct unannounced searches (dawn raids). In addition, the Competition Act declares that MyCC officers investigating the commission of an offence under the Competition Act shall have any or all of the powers of a police officer under the Criminal Procedure Code.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Upon finding an infringement of the Chapter 2 prohibition, MyCC:

- must require that the infringement cease immediately;
- may specify steps that are required to be taken by 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 enterprise's worldwide turnover over the period during which the infringement occurred; or
- may give any other direction it deems appropriate.

The highest fine imposed by MyCC thus far for infringement of the Chapter 2 prohibition is against MyEG Services Sdn Bhd (MyEG) where MyCC imposed a financial penalty of 2.27 million ringgit. On appeal, the Competition Appeal Tribunal imposed an additional daily penalty from June 2016 to December 2017, bringing the total financial penalty imposed on MyEG to 6,412,200 ringgit.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The Competition Act empowers MyCC to impose sanctions directly on the infringing enterprise without petitioning a court or other authority. Similarly, the Malaysian Aviation Commission and the MCMC are empowered to impose sanctions directly on the infringing enterprise under the Malaysian Aviation Commission Act and the Communications and Multimedia Act respectively.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

Since the Competition Act came into effect on 1 January 2012, there have been only two cases on abuse of dominance.

In November 2013, MyCC proposed a 4.5 million ringgit fine on Megasteel for abusing its dominant position. MyCC alleged that Megasteel's practice of charging or imposing a price for its hot-rolled coil is disproportionate to the artificially low selling price of its cold-rolled coil and amounts to a margin squeeze that has the effect of preventing competition in the downstream market, making it a serious breach of competition law. In determining the basic amount of the proposed fine, MyCC said that it took into account the nature of the product, the structure of the market, the market share of the enterprise, entry barriers and the effects of Megasteel's margin squeeze on its downstream competitors as well as the seriousness of the infringement. On 18 April 2016, MyCC finalised the decision and made a finding of non-infringement against Megasteel. In its final decision (after assessing submissions from Megasteel and further analysis), MyCC held that Megasteel did not infringe the Chapter 2 prohibition. MyCC held that due to certain external factors the steel industry market is heavily distorted. Although Megasteel was the sole producer and supplier of hot-rolled coil, hot-rolled coil can be imported subject to certain conditions. Further, MyCC found that the downstream market has been liberalised and the competitors in the downstream market, including Megasteel, are competing in the market with competitive selling prices.

On 6 October 2015, MyCC issued a proposed decision against MyEG Services Sdn Bhd (MyEG) stating that the company had abused

its dominant position in the provision and management of online foreign workers permit renewals by not ensuring a level playing field or by applying different conditions to equivalent transactions with other trading parties to the extent that it has harmed competition in the downstream market. In June 2016, MyCC issued its final decision and imposed a 2.27 million ringgit fine on MyEG. MyEG's appeal to the Competition Appeal Tribunal was dismissed in December 2017 and the Tribunal imposed an additional daily penalty from June 2016 to December 2017, bringing the total financial penalty imposed on MyEG to 6,412,200 ringgit.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

The Competition Act does not mention the consequence of infringement of the Chapter 2 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, a contractual term that amounts to an abuse of dominance under the Competition Act will be rendered unenforceable by virtue of the Contracts Act 1950.

The precise consequences will depend on the specific facts of the case.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Any person who suffers loss or damage directly as a result of an infringement of the Chapter 2 prohibition may bring a private action against the infringing parties in the civil courts.

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.

MyCC has powers to give the infringing enterprise any direction it deems appropriate. This may include ordering a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract. For example, in the MyCC Dominance Guidelines, MyCC indicates that the remedy for a refusal to supply that infringes the Chapter 2 prohibition is to direct the supplier to supply at a reasonable consideration.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Yes (see question 31). An aggrieved person may file a private action in court to claim for damages for losses suffered as a result of the infringement.

MyCC has no power to award damages to an aggrieved person.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

The decision of the MyCC is appealable by any person who is aggrieved or whose interest is affected by that decision, to the Competition Appeal Tribunal. The Competition Appeal Tribunal's decision is final and binding on the parties to the appeal. However, its decision, and any other administrative decision of the MyCC, may be subject to judicial review by the High Court.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

The Chapter 2 prohibition only applies to dominant firms.

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