Information Exchange 2018

Malaysia

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GCR Know-how

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1 Describe the principal competition rules governing information exchange in your jurisdiction.

The Competition Act 2010 (Competition 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 including 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 (Malaysian Aviation Commission Act) in relation to the aviation services sector. 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. 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 Competition 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 Competition Act is enforced by the Malaysia Competition Commission (MyCC).

There is no express provision on "information exchanges" in the Competition Act. Information exchanges are assessed under section 4 in relation to anticompetitive agreements between enterprises (Chapter One Prohibition), which is to a large extent similar to article 101 of the Treaty on the Functioning of the European Union (TFEU).

The Chapter One Prohibition prohibits horizontal or vertical agreements between enterprises that have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services. "Agreement" is defined widely to mean any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices. With this wide definition, the Chapter One Prohibition would apply to oral and written contracts, regardless of whether they are legally enforceable (eg, tacit understanding between parties or gentlemen's agreement).

Section 4(2) of the Competition Act deems certain agreements between competing enterprises as having the object of significantly preventing, restricting or distorting competition. This means that the MyCC need not examine the anticompetitive effect of horizontal agreements that:

- fix, directly or indirectly, a purchase or selling price or any other trading conditions;
- share markets or sources of supply;
- limit or control production, market outlets or market access, technical or technological development or investment; or
- constitute bid rigging.

Anticompetitive information exchanges would be dealt with similarly in the sector regulations.

2 Which bodies are responsible for enforcing competition rules on information exchange in your jurisdiction?

The MyCC, a body corporate established under the Competition Commission Act 2010, enforces the Competition Act, which applies across all sectors except sectors excluded from the application of the Competition Act (see question 1). The Malaysian Communications and Multimedia Commission enforces competition law in the communications sector, while the Energy Commission oversees competition in the energy and gas sectors. 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.

3 Describe the types of information exchanges that may be caught under the competition rules in your jurisdiction.

Information exchanges would be assessed under the Chapter One Prohibition (ie, in relation to anticompetitive agreements and concerted practices between enterprises) whether they are competitors (horizontal) or non-competitors (vertical).

In its Guidelines on Chapter One Prohibition, the MyCC has explained that information sharing can reduce the uncertainty that competitors will face and therefore reduces competition significantly. Sharing of price information could fall within the conduct deemed to have the object of "significantly preventing, restricting or distorting competition in the market" as stated in section 4(2) of the Competition Act.

Strategic information on price may include information about actual, recent or future prices (for example, discounts and rebates), production costs, quantities, turnover, sales, capacity and investment.

The Guidelines further state that non-price information-sharing will be assessed on a case-by-case basis. In general, the frequent exchange of confidential information in a market with fewer competitors is more likely to have a significant effect on competition. In addition, the exchange of information between competitors that is not provided to consumers is also likely to have a significant adverse effect on competition.

Information that is genuinely public, aggregated or historical is less likely to pose a competition law risk. While the frequency of information exchange can be an important consideration, a single exchange information may still be anticompetitive under the Chapter One Prohibition.

4 Are some information exchanges regarded as more serious breaches of the competition rules than others?

The nature of the information exchanged would be important for the analysis. In general, the MyCC has stated in its Guidelines on Chapter One Prohibition that exchanging current price information may facilitate price fixing and may be deemed to be significantly anticompetitive and in breach of the Chapter One Prohibition. Exchange of other strategic information that is likely to have an impact on pricing such as quantities, capacities, cost and demand may also be deemed to be significantly anticompetitive.

5 To what extent is it necessary for an information exchange to have a negative effect on competition to prove a competition infringement in your jurisdiction?

If the object of the information exchange is highly likely to have a significant anticompetitive effect, then the MyCC may find the agreement to have an anticompetitive object. Once an anticompetitive object is shown, the MyCC does not need to examine the anticompetitive effect of the agreement. However, if the anticompetitive object is not found, the agreement may still infringe the Competition Act if there is an anticompetitive effect.

6 What types of information exchanges are not caught by the competition laws in your jurisdiction? For example, are certain types of information exchanges viewed as pro-competitive?

There is no presumption or guideline specifically on information exchange being viewed as pro-competitive.

The MyCC indicates in its Guidelines on Chapter One Prohibition that in general, certain agreements are unlikely to be considered to have significant anticompetitive effect. For horizontal agreements, these are where the parties are competitors, a combined market share (of both competitiors) of less than 20 per cent is unlikely to significantly affect competition. For vertical agreements, these are where the parties are non-competitors and none of the parties individually has a share exceeding 25 per cent in the relevant market. However, these safe harbour provisions may not apply to hardcore infringements.

Any agreement that raises competition law issues can nevertheless be relieved from liability where the criteria in section 5 are proven. In principle, no activity is precluded from the application of section 5, which allows parties to an agreement that restricts competition to defend the restriction based on pro-competitive grounds.

Section 5 provides that an anticompetitive agreement prohibited under the Chapter One Prohibition may be relieved from liability where all of the following criteria are proven by the parties to the agreement:

- there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
- the benefits could not reasonably have been provided without the agreement having the anticompetitive effect;
- the detriment to competition is proportionate to the benefits provided; and
- the agreement does not eliminate competition in respect of a substantial part of the goods or services.

All four criteria must be met and the parties claiming this relief have the onus of proving that the benefits gained are passed on to the consumers.

In practice, it is unlikely for hardcore cartels (such as price fixing) to be able to satisfy the relief of liability criteria under section 5.

7 To what extent can public information be caught under the competition rules governing information exchange in your jurisdiction?

In general, the exchange of genuinely public information is unlikely to infringe the Chapter One Prohibition. Public information must be equally accessible to all competitors and customers and thus will be non-strategic for competition law purposes.

However, publication of simultaneous price movements may be indicative of cartel conduct. In the Container Depot Operator's case (see question 13), the publication of similar depot gate charges by the container depot operators at the same time raised alarm bells.

8 Are there any specific competition rules in place for certain types of information exchange or certain sectors?

See question 1. The general principles on anticompetitive conduct are broadly similar except that sector regulations are administered by the relevant sector regulators. There are no prescribed safe harbours or block exemptions specifically for information exchange.

The Malaysian Aviation Commission's Guidelines on Anti-Competitive Agreements (MAVCOM's Guidelines) define concerted practice to include exchange of information between competing enterprises relating to their respective pricing practices or output plans where there is an understanding that such an exchange would reduce strategic uncertainties in the market and facilitate collusion between these enterprises.

Several categories of agreements between competitors may be deemed to have the object of significantly preventing, restricting or distorting competition in any aviation service market. This includes an agreement with the object to directly or indirectly fix a purchase or selling price or any other trading conditions in connection with aviation services.

Indirect price-fixing may occur through, among other things:

- sharing of price lists before prices are increased, either directly or indirectly, through an association;
- requiring competitors to consult each other before setting their respective prices to be imposed on buyers; or
- sharing of information on demand forecast or factors to be considered in setting prices in the future.

MAVCOM's Guidelines set out several non-exhaustive examples of information sharing that may have the effect of significantly preventing, restricting or distorting competition in an aviation service market, including:

- sharing of information regarding price particularly if it involves prospective or real-time information; and
- sharing of non-price information, if it could inform competitors of each other's strategies which may significantly prevent, restrict or distort competition in an aviation service market.

The sharing of information is more likely to have a significant anticompetitive effect if the number of competitors in a relevant aviation service market is small and these competitors frequently exchange confidential information amongst themselves.

In determining whether or not information sharing falls within the prohibition on anticompetitive agreements, several factors such as the type of information shared, whether the information is prospective or historical, the frequency of the information shared and the level of detail of the information, among others, will be considered by MAVCOM.

9 Have public bodies in your jurisdiction published any guidance on the competition rules governing information exchange?

See question 3. The MyCC's Guidelines on Chapter One Prohibition provides guidance on information exchange under the Competition Act.

In addition, the MAVCOM's Guidelines on Anti-Competitive Agreements provide guidance on information exchange under the Malaysian Aviation Commission Act. See question 8.

10 What defences are available for information exchanges caught by the competition laws in your jurisdiction.

Any agreement that is in breach of the Chapter One Prohibition 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 of the Competition Act). See question 6.

Although theoretically any Chapter One Prohibition may be capable of relief from liability under section 5, in practice it is unlikely that hardcore cartels will be able to fulfil the conditions in section 5.

In an information exchange scenario, these criteria may be met where the information shared is non-price information on standards, new technologies, etc, that can improve competition in the market and where the information shared does not reduce uncertainty in the market.

11 What is the standard of proof and on whom does the burden of proof fall in information exchange cases? Are there any scenarios in which the burden of proof is or could be reversed?

The burden of proof is on the MyCC to establish by evidence, on a balance of probabilities, that the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.

The term "object" is not defined in the Competition Act. According to the MyCC's Guidelines on the Chapter One Prohibition, the MyCC in general will not just examine the actual common intention of the parties to an agreement, but also assess the aims pursued by the agreement in the light of the agreement's economic context. If the object of an agreement is highly likely to have a significant anticompetitive effect, then the MyCC may find the agreement to have an anticompetitive object.

Section 4(2) of the Competition Act deems certain agreements between competing enterprises as having the object of significantly restricting competition. This means that the MyCC need not examine the anticompetitive effect of certain categories of horizontal agreements, including agreements to:

- fix a purchase or selling price or any other trading conditions;
- share markets or sources of supply;
- limit or control production, market outlets or market access, technical or technological development or investment; or
- constitute bid rigging.

If an anticompetitive object is proven (or deemed), then the MyCC does not need to examine the anticompetitive effect of the agreement, and thus can make a finding of infringement even before the anticompetitive effect manifests. However, if an anticompetitive object is not found, the agreement may still breach the Competition Act if the MyCC can establish that there is an anticompetitive effect.

No anticompetitive agreement is 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 (see question 6).

The Guidelines on Chapter One Prohibition provide that the sharing of price information in particular may be deemed to have the object of significantly preventing, restricting or distorting competition as provided under section 4(2) of the Competition Act. In such cases, the MyCC would not have to prove that the information exchange has anticompetitive effects in the relevant market for goods or services.

12 What are the sanctions for anticompetitive information exchanges in your jurisdiction?

Upon finding an infringement of the Chapter One Prohibition, the MyCC:

- must require that the infringement cease immediately;
- may specify steps that are required to be taken by the infringing enterprise, which appear to the 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.

13 Describe any recent cases in the area of information exchange of note in your jurisdiction and how they were decided.

Although there has not been a case where a finding of infringement has been issued solely based on information sharing between competitors, there have been cases where the MyCC has relied on information sharing as evidence of anticompetitive collusion.

In the Container Depot Operator's case (1 June 2016, MyCC File Reference 700.2.005.2013) the 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 (Containerchain), the information technology service provider, had engaged in concerted practices with several container depot operators (CDO) resulting in the operators increasing the depot gate charges from MYR5 to MYR25. The MyCC also alleged that the concerted practice resulted in the CDOs offering a rebate of MYR5 to hauliers on the agreed depot gate charges.

Although Containerchain did not operate in the same level of the supply chain with the CDOs, Containerchain was nonetheless found to have entered into vertical agreements by way of concerted practices, when it coordinated the exchange of information between the CDOs on their revisions to depot gate charges and rebates to hauliers.

The MyCC held that Containerchain had influenced the behaviour of the CDOs by bringing the CDOs together in meetings, disseminating and sharing information about their revised depot gate charges and coordinating the implementation of the revised depot gate changes (among other matters).

In the Malaysian Airline System Berhad, AirAsia Berhad and AirAsia X Sdn Bhd's case (31 March 2014, MyCC Reference No: MyCC.0001.2012), the MyCC found that the parties had infringed the Chapter One Prohibition by entering into an agreement with the object of sharing of markets within the air transport services sector in Malaysia. In 2011, parties entered into a collaboration agreement which involved a share swap and an agreement that Malaysian Airline System Berhad (MAS) was to be only a full-service premium carrier, while AirAsia Berhad and AirAsia X Sdn Bhd (AirAsia) will be regional low-cost and medium to long haul cost carriers. The evidence relied on by the MyCC includes the setting-up of a joint collaboration committee that had access to both parties' information and management to ensure that the collaboration is implemented.

In the Sibu Confectionery and Bakery Association's case (12 February 2015, MyCC.0045.2013), the MyCC found 15 members of the Sibu Confectionery Bakery Association liable for agreeing to increase the price of confectionery and bakery products. The MyCC had relied on evidence that the enterprises had agreed during the association's annual general meeting to increase the prices of the products due to the increase in the prices of flour, sugar, red beans, green beans, diesel, electricity, rental rates of the shops and the implementation of the minimum wage policy.

From its enforcement track record, the MyCC has been vigilant against competitors who use trade associations as a platform for cartel conduct (including exchanging sensitive information and price fixing).

14 Describe any recent changes to legislation in your jurisdiction that may have an impact on information exchanges.

There have been no recent changes to the Competition Act that may impact information exchanges.

15 Are there any proposals to reform the rules governing information exchange in your jurisdiction?

No.

16 Are there any other noteworthy characteristics or practical examples specific to your jurisdiction?

In the Container Depot Operator's case, Containerchain was not a CDO. However, the MyCC found that there was concerted practice where information was exchanged via Containerchain as a conduit. This case shows that there is an "agreement" even if a third party, not involved in the market as a competitor, facilitated the anticompetitive agreement. This is a departure from the usual cases of information exchange involving coordination between competitors.

Although the MyCC did not refer to AC Treuhand v Commission, the Container Depot Operator's case confirms that a third-party intermediary can be held liable for facilitating a cartel.

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Zaid Ibrahim & Co (ZICO) is Malaysia's leading regional law firm and one of the most highly regarded. Always committed to provide high quality legal service to its clients, ZICO has earned a reputation for its ability to devise innovative and workable solutions to satisfy the complex needs of its clients. By being a member of ZICOlaw network, we provide our clients direct access to a powerhouse of 300 lawyers in all 10 ASEAN countries.

ZICO is in a unique position having advised the government on the drafting of the Competition Act 2010 and the Competition Commission Act 2010. We have been advising on competition issues since 1999, when competition law was introduced in the communications sector.

The firm's competition law practice advises clients on the full range of competition law, from advisory and compliance to investigations and defence in infringement proceedings. We regularly advise on enforceability of agreements and the possible justifications for restraints applying a pro-business approach. We advised the national airline in its defence against allegations of market sharing, and other notable cases. Our multinational and local clients benefit from our experience across various sectors including oil and gas, industrial chemicals, pharmaceutical products, aviation, automotive and auto finance, financial services, fast-moving consumer goods and airlines.

Since the Competition Act came into force, there has been much uncertainty on the interpretation of the law. We have successfully combined in-depth local expertise with a working knowledge of competition law in foreign jurisdictions, which – though not binding – is persuasive in Malaysia

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Sharon Tan heads the competition law practice in Zaid Ibrahim & Co and is a partner in the firm's corporate commercial practice. Sharon is in a unique position to advise on competition law matters, as she was engaged by the Ministry of Domestic Trade, Co-operatives and Consumerism to draft the Competition Act 2010 and the Competition Commission Act 2010.

Sharon has advised on the first major case in Malaysia involving alleged market sharing by two airlines, and advises enterprises under investigation by the Competition Commission. Sharon also advises on a wide range of competition issues across multiple industries covering a variety of issues, including alliances and joint ventures, exclusivity and non-compete restraints, distribution and licensing, resale price maintenance, tying and bundling arrangements as well as cartels and abuse of dominance. Sharon has conducted competition law compliance audits and her advice on remedial action takes into account pro-business considerations. She also helps client formulate possible arguments for relief from liability and reasonable commercial justification, assisting clients to conduct self-assessment of the competition law risks and feasible defences. In terms of operational compliance, Sharon prepares customised compliance manuals and conducts dawn raid preparation and training. She has clients from various sectors, including financial institutions, insurance, automotive, manufacturing, fast moving consumer goods, pharmaceuticals, industrial chemicals, oil and gas, oil terminals, transport and logistics and luxury brands.

Completion of her EU competition law postgraduate studies at King's College London has given her a competitive edge and good understanding of the practical aspects of competition law in other jurisdictions. Sharon is also able to coordinate competition compliance across ASEAN countries, through ZICOlaw offices in the ASEAN region.

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Raj is a partner in Zaid Ibrahim & Co's corporate commercial practice. He advises on a wide range of competition issues, including resale price maintenance, price relationship agreements, cartels, abuse of dominance, distribution, retail, joint ventures, exclusivity and non-compete restraints.

Raj has also advised in an investigation by the Malaysia Competition Commission on price fixing and appeared before the Commission to present oral submissions.

Raj has assisted clients to implement competition law compliance programmes, preparing for dawn raid and conducted competition law awareness training and audit.

He also has in-house corporate experience, where he was responsible for the company's competition compliance initiatives and advised on competition issues relating to the company's day-to-day business and strategic business plans.

Raj also has corporate commercial litigation experience and has regularly appeared at the High Court in relation to corporate commercial disputes

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