

Malaysia: Proposed amendments to Competition Act 2010 - Strengthening MyCC's investigation and enforcement powers

In brief

On 25 April 2022, the Malaysia Competition Commission ("**MyCC**") launched an online public consultation on proposed amendments to the Malaysian Competition Act 2010 ("**Act**"). Key amendments include (i) introduction of a merger control regime; and (ii) amendments to increase MyCC's investigation and enforcement powers and enhance its procedures.

This is the **second part of a two-part client alert** on proposed amendments to the Act, and sets out the key proposed amendments intended to strengthen MyCC's investigation and enforcement powers. These amendments are expected to come into force by end of 2022, subject to parliamentary approval by October 2022.

Key Proposed Amendments

(i) Refinements to the Leniency Regime

The current leniency regime under the Act permits a discount of up to 100% of any penalties where an enterprise is the first to admit its involvement in cartels and extends significant cooperation and assistance to the MyCC regarding the same cartel of which MyCC has no knowledge. Lesser forms of leniency and lower percentages of reduction of fines are also available depending on the stage of the investigation, but only if the party in question provides 'value-added' evidence with respect to the evidence already in MyCC's possession. Key points in the revised leniency regime include:

- (a) **full immunity is not available to enterprises which have coerced others to participate in the infringement, even if they are the first applicant.** Coercers will only receive up to 50% reduction in financial penalties. As such, it appears that an enterprise that has acted as the "ringleader" of a cartel (for e.g. instigated or organised the cartel) but has not coerced other enterprises' undertaking may still be eligible for full leniency;
- (b) **leniency is expressed to only be available in respect of cartel conduct**, but MyCC has discretion to extend leniency to vertical agreements and abuse of dominance; and
- (c) **a leniency application can be made even after commencement of investigations by MyCC.** Applicants may still apply for leniency in a cartel that MyCC already has knowledge of, even after the MyCC has commenced investigations or has carried out a dawn raid, in exchange for a lower penalty. The exact penalty reduction will be subject to MyCC's discretion.

(ii) New Settlement Procedure for Cartels and Abusive Conduct

MyCC seeks to introduce a new settlement procedure for cartels and abuses of dominance, whereby infringing enterprises which do not disagree with MyCC's findings and accept liability for their wrongdoing may enter into a settlement with MyCC. A settlement procedure shortens the administrative procedure for MyCC as the infringing enterprises will have to sign an agreed statement of facts in relation to the investigation, admit to its participation in the infringement, accept the remedial action stated in MyCC's proposed decision and waive its right to request an oral representation. In exchange, infringing enterprises will be rewarded with reduction of their financial penalties of up to 20% for expediting the proceedings leading up to the adoption of a final decision by MyCC.

Reductions enjoyed under the settlement procedures are cumulative with the reductions of fines under the leniency programme. As such, a leniency applicant can also explore settlement discussions with MyCC if it wishes to, in particular where the leniency applicant is not eligible for full immunity under the leniency regime and the applicant wishes to obtain additional reduction of fines.



(iii) Whistleblower Regime

MyCC intends to add another instrument to detect antitrust infringements to their enforcement toolkit by offering financial incentives to encourage individuals to come forward and blow the whistle on any potential infringement. Detailed guidelines will be issued at a later stage, and we expect the following areas to be addressed in the amendments or in the guidelines to ensure that the regime is effective: (i) safe avenues of reporting; (ii) level of reward; (iii) protection of the identity of the whistleblower from disclosure and (iv) protection of the whistleblower against dismissal, suspension, demotion or other forms of discrimination.

(iv) Widening the definition of "enterprise"

The current definition of "enterprise" covers only entities that engage in commercial activity relating to goods or services. Amendments are being proposed to widen the definition of "enterprise" such that legal status and the form of the enterprise will not be relevant for the purposes of the Act. Any person whether incorporated or unincorporated, and regardless of the way in which it is funded, will be subject to the Act, as long as the person is engaged in commercial or economic activities in the market.

(v) Removal of "single economic entity" doctrine from definition of "enterprise"

The current definition of "enterprise" carves out parent and subsidiary company which are treated as a single enterprise from the application of the Act (i.e., despite their separate legal entity, they both form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining the actions of the subsidiary in the market). MyCC proposes to remove the carve out from the definition of "enterprise", which has been misused by enterprises to escape scrutiny of the law. Although this will remove the "blanket exclusion", enterprises can still rely on the exclusion provided that they demonstrate to the MyCC why the single economic doctrine should apply on a case-to-case basis. We expect that MyCC will refer to case laws from other jurisdictions, notably the European Union, when making this assessment.

(vi) Limiting exceptions to "commercial activity"

The current definition of "commercial activity" means that any activity that is directly or indirectly in the exercise of the function of a government authority is carved out from the application of the Act. The proposed amendments will remove the words "indirect" and "government authority" to avoid the uncertainty of whether or not a particular activity was carried out in the exercise of governmental authority, thus, further limiting the scope of this exception.

(vii) Additional exclusions to the application of the Act

The proposed amendments add commercial or economic activities regulated under the Gas Supply Act 1993 and Postal Service Act 2012 as exclusions from the application of the prohibitions of anti-competitive agreements and abusive conduct under the Act. The list currently already includes the Communications and Multimedia Act 1998, Energy Commission Act 2001, Petroleum Development Act 1974 (as far the activities are in connection with upstream operations), and Malaysian Aviation Commission Act 2015. It does not mean that anti-competitive practices in these industries will go completely unscrutinised as most of these statutes have their own competition law related prohibitions within it as well as accompanying guidelines which empower the industry-specific regulators to investigate competition law related infringements.

(viii) Additional conditions to obtain relief from liability

Section 5 of the Act allows enterprises to obtain relief from liability if they can prove the following conditions cumulatively:

- a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
- b) 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;
- c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and
- d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services

The proposed amendments will additionally require the enterprises to prove that such benefits are also fairly enjoyed by consumers and not just by the enterprise alone.



(ix) Failure to provide information or documents requested by MyCC for market review will be an offence

Since its establishment, MyCC has issued 7 market review reports, including the construction industry, pharma industry, food sector, wholesale and retail service sector, and most recently, the transportation sector. It is a tool that MyCC commonly employs to identify and diagnose emerging competition issues in a particular market and to make recommendations to mitigate risks and reduce the likelihood of infringement of the Act. As such, it is not surprising that MyCC wishes to strengthen its power to request for information or documents from any person for the purpose of conducting a market review. A failure to do so would amount to an offence under the Act. An offence under the Act attracts:

- (a) if such person is a body corporate, a fine not exceeding five million ringgit; and for a second or subsequent offence, a fine not exceeding ten million ringgit; or
- (b) if such person is not a body corporate, a fine not exceeding one million ringgit or to imprisonment for a term not exceeding five years or to both; and for a second or subsequent offence, a fine not exceeding two million ringgit or to imprisonment for a term not exceeding five years or to both.

(x) Power to conduct an inquiry before commencing an investigation

Currently, MyCC is required to investigate any suspected infringement of the Act on the direction of the Minister of the Ministry of Domestic Trade and Consumer Affairs. The proposed amendments will empower MyCC to conduct an inquiry before any direction of the Minister.

(xi) Power to issue warning letters

The proposed amendments allow MyCC to issue a warning letter to an enterprise upon closure of an inquiry or an investigation by the MyCC. Despite the issuance of a warning letter, the MyCC may recommence or continue its inquiry or investigation if it has reason to suspect that the enterprise has infringed or is infringing any prohibition under the Act. This allows MyCC to allocate its resources to investigations of higher priority while having the power to caution enterprises to comply with the Act.

(xii) Power to challenge claims of privileged communications

Generally, the communications made between an external lawyer and their client are privileged and strictly protected under the law of evidence. An enterprise, through its lawyers, is entitled to refuse to provide privileged communications to MyCC. The proposed amendments empower MyCC to make an application to the High Court to challenge claims of privileged communications.

(xiii) Attempt to destruct records will be an offence

The Act currently prohibits the destruction, concealment, mutilation or alteration of records. The proposed amendments will render any such **attempt** to do the same as an offence under the Act.

(xiv) Additional protection for potential complainants

The Act currently prohibits a person from subjecting another person to any commercial or other disadvantage as a reprisal against the person for making a complaint to MyCC or co-operating with MyCC. The proposed amendments seek to provide more examples to illustrate such disadvantages, to protect anyone who wishes to complain to or cooperate with MyCC, which include,

- (a) a threat of late payment of amounts properly due to the person,
- (b) the unreasonable bringing or conduct of litigation against the person,
- (c) the cancellation of orders with the person,
- (d) the diversion of business from, or refusal to trade with, the person,
- (e) termination of contract with the person,
- (f) withholding payment that is due and payable to the person under a contract,
- (g) refusal to enter into a subsequent contract with the person,
- (h) causing injury, loss or damage to the person,
- (i) intimidation or harassment to the person,



- (j) interference with the lawful employment or livelihood of the person, including discrimination, discharge, demotion, suspension, disadvantage, termination or adverse treatment in relation to the person's employment, career, profession, trade or businesses or the taking of disciplinary action; or
- (k) threat to take any of the acts referred to in paragraphs (a) to (j).

Conclusion

We view these proposed amendments as a welcome addition to the Act as it provide much clarity to the existing provisions and gives MyCC more effective tools to address significant antitrust issues in the country.

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