



**VERTICAL AGREEMENTS -  
IT IS  
ABOUT  
MARKET POWER**

The Chapter 1 draft guidelines that were recently issued for consultation also discussed vertical agreements which are sometimes anti-competitive but could be pro-competition at times. Consumers do benefit from vertical efficiencies which would not be possible if there is a blanket prohibition. The guidelines acknowledge this and indeed give useful threshold guidance.

As a recap, a vertical agreement is one that involves enterprises at different levels of production or distribution. As examples - it can involve a manufacturer and a transportation company that delivers goods to the buyers or between a wholesaler and its retailers.

## **PROHIBITION**

The prohibition is that vertical agreements must not have the object or effect of significantly preventing, restricting or distorting competition in the relevant market. This is the same Section 4 anti-competitive provision applying to horizontal agreement. The underlying mischief that it addresses is therefore the same but the arguments applying for and against vertical agreements are more complex.

## **RESALE PRICE MAINTENANCE & OTHER PRICE RELATED VERTICAL AGREEMENTS**

MyCC views resale price maintenance (RPM) dimly and will take a strong stance against RPM. A manufacturer or wholesaler with enough market power is able to impose such RPM obligation on its distributors and retailers. This will severely affect price competition amongst various retailers to the detriment of consumers.

However, the Act provides for the general reliefs under Section 5 on the basis that there could be significant technological, efficiency or social benefits which may only be reaped if such price maintenance is allowed. The onus will be for the parties to the agreement to demonstrate the benefits in claiming the relief.

## **FRANCHISE AGREEMENTS**

If MyCC plans to be strict with RPM, it has signaled that it will be accommodative of franchise agreements which usually demonstrate enough benefits which come from certain vertical restraints and non-compete clauses. For example, MyCC says an exclusive territory gives the franchisee an incentive to invest in the franchise and maintain high standards.

## **ASSESSMENT FOR OTHER NON-PRICE RESTRICTIONS**

Many vertical agreements involving non-price restrictions are seldom ever presumed to be anti-competitive. It is usually necessary to assess the market power of the parties. Such agreements may not be considered as having a significant anti-competitive effect if the market share of both the seller and buyer is less than 25% of the relevant market. This threshold will be instructive for many businesses which are small or medium size enterprises. They will seldom have the market power to significantly affect competition in their vertical agreements and MyCC is unlikely to pursue them.

## Some Examples of Vertical Agreements Involving Non-Price Restrictions

- Tying involves cases where customers are required to buy a product which they don't want (the tied product) in addition to the product they want. It will be necessary to assess the market power of the enterprise imposing such tying obligations and to see the extent the market share of the tied product is foreclosed to competitors who wish to sell the tied products.
- Single Branding Agreement is alluded to in the guidelines where MyCC refers to agreements requiring a buyer to buy all or most of its up supplies from a supplier. This arrangement affects inter-brand competition if the buyer cannot buy or is not permitted to get enough competing products from other suppliers.
- Up-Front Access Payment may be imposed for shelf space for manufacturers and wholesalers to display their products for sale in retail stores or to plug into a distributor's network. Again the assessment will depend on market power and how much of the market is foreclosed to new entrants to the market.

## EXCLUSIVE DISTRIBUTION AGREEMENT

Exclusive Distribution Agreements are common place and could similarly impact competition. However, MyCC states that it will not normally examine exclusive distribution agreements where both the seller's and buyer's relevant market shares are less than 30% and the exclusivity is for less than 5 years. Examples are:

- Geographical Territory may feature in cases where a manufacturer sells to various retailers with conditions they each do not sell to customers who live in the areas of the other retailers. This reduces intra-brand competition.
- Exclusive Customer Allocation Agreement happens when the supplier agrees to sell to a distributor for re-sale to only a particular group of customers. This may affect intra-brand competition but the extent that this is a concern will obviously depend on the level of intera-brand competition for that product in the relevant market.

## OVERSEAS SUPPLIERS

MyCC mentioned an interesting practical consideration pertaining to overseas suppliers selling to an exclusive Malaysian distributor. MyCC says it will not examine this kind of exclusive agreement 'as practically, the alternative may be no supply at all'. This will be music to exclusive distributors in Malaysia appointed by overseas suppliers.