Get Acquainted With The Competition Act 2010

Managing Partner of Tay & Partners and head of its competition practice, Mr Tay Beng Chai together with senior associate Ms Nicole Leong spent an afternoon with MIIP members to share their knowledge on the CA 2010. Members were encouraged to get well acquainted with the Malaysian Competition law to safeguard the interest of their business.

The process of competition encourages efficiency, innovation and entrepreneurship, which promotes competitive prices, improvement in the quality of products and services and wider choices for consumers. In passing its competition legislation, Malaysia joined more than 140 countries that have such a law in place. There is no doubt that this law has brought about major changes to the way business has to be conducted. However, this law has an important role to play in enhancing competitiveness and generating higher levels of productivity and moving Malaysia towards a developed country status. However, as Tay explained to MIIP members not many business owners and entrepreneurs are aware of the intricacies of the CA 2010 and what it entails. So, is your business protected and is it law abiding? Let's find out.

The CA 2010 applies to any "commercial activity" within, or in certain circumstances, outside Malaysia. "Commercial activity" is defined in section 3(4) CA 2010 as "any activity of a commercial nature." This is a very broad definition and it is likely that almost all activities of Malaysian businesses will be "commercial activities". If your commercial activities are conducted within Malaysia, the CA 2010 will apply. If your commercial activities are transacted outside Malaysia, the CA 2010 will apply (if the activity has an effect on competition in any market in Malaysia). For example, an agreement entered into between a Malaysian business and a non-Malaysian business will not automatically fall outside the CA 2010 simply because the agreement was transacted overseas. The MyCC will need to assess, on a case-by-case basis, the extent to which a particular commercial activity has an "effect" on competition in a market in Malaysia.

Some agreements are considered to be more serious infringements of competition law compared to others. These serious infringements known as 'hard core cartels' are commonly referred to as :

PRICE FIXING The fixing of purchase or selling prices or other trading conditions, either directly or indirectly, is prohibited by

"Agreement" is defined in section 2 of the CA 2010: "Agreement" means any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an associationand concerted practices.

WHAT IS THE COMPETITION ACT 2010?

An Act to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith. This act came into force on 1 January 2012.

WHAT IS THE MYCC?

The Malaysia Competition Commission (MyCC) was established on 1 April 2011 with the purpose of enforcing the Competition Act 2010 (CA 2010). The MyCC safeguards the process of free and fair competition in commercial markets for the benefit of consumer welfare, efficiency of enterprises and the development of the economy as a whole.

The MyCC empowered by the Competition Commission Act 2010 to ensure compliance to the CA 2010, investigate complaints on anti-competition behaviours, carry out market reviews and impose penalties on companies found to infringe the competition law. It also has the authority to impose fees or charges for services provided; grant loans, scholarships and advances to its employees; cooperate with any corporate body or government agency and request information from enterprises to assist in the performance of its functions; or perform any tasks incidental to its functions and powers.

Source: www.mycc.gov.my

section 4(2)(a) of the CA 2010. Businesses should not share information or discuss with competitors: • current or future prices • profit levels • pricing policy or rationale for pricing • possible increases or decreases in price • standardisation or stabilisation • standardisation of credit or trading terms of prices.

MARKET SHARING Sharing markets or sources of supply is prohibited by section 4(2)(b) of the CA 2010. The harm to competition from market sharing is a reduction in choice for consumers, often leading to an increase in price. Businesses should not share information or share with competitors : • the division of any market • the allocation of customers • exclusive dealing arrangements • a decision to specialise in certain products, ranges of products or particular technologies.

LIMITING PRODUCTION OR SUPPLY Limiting or controlling production, market outlets or market access, technical or technological development or investment is prohibited by section 4(2)(c) of the CA 2010.

The harm to competition from these types of limitations is that supply will be reduced, forcing prices up as demand will outweigh supply. Businesses should not agree: • production quotas • not to increase production capacity or utilise available capacity • not to introduce new products • to boycott certain suppliers • technology standards that prevent other competitors from selling their products • location of retail outlets • to restrict access to the market by new entrants • to stay out of each other's markets.

BID RIGGING Bid rigging is prohibited by section 4(2)(d) of the CA 2010. Bid rigging occurs when two or more bidders collude to distort the normal conditions of competition in respect of a tender. Bid rigging limits price competition between the parties. Instead of competing to submit the best solution at the lowest possible price, parties agree amongst themselves which of them should win the contract and collude to set tender prices to guarantee the agreed outcome, thereby removing the competitive element of the tender process. Businesses should not: • share bid prices • agree to submit "cover" prices that are not intended to win • agree not to bid or submit non-conforming bids • agree to take turns to submit bids or withdraw bids.

Hard-core cartels are considered serious because they involve agreements between competitors which, by their very nature, distort the competitive conditions existing in a market. For example, an agreement between competitors to fix prices or divide up the market will always distort normal market conditions.

As a result, section 4(2) of the CA 2010 deems these types of agreements to have the object of significantly preventing, restricting or distorting competition. This means that the MyCC does not have to prove that the agreement has an anti-competitive effect. MyCC will take a very serious stance against hard-core cartels. Hard-core cartels are prohibited by all countries that have competition law regimes. In many jurisdictions, individuals who agree to form cartels can be punished by individual fines and/or imprisonment.

CONTACT WITH YOUR COMPETITORS

Here are many reasons why businesses have contact with their competitors. You may meet as part of a trade association, to discuss research & development and associated commercialisation, a proposed joint venture or even a proposed merger. You should exercise great caution if any anti-competitive matters, particularly hard-core cartels, resale price maintenance or the exchange of commercially sensitive information, are discussed. Issues may arise as part of a legitimate meeting, in social settings or by virtue of your attendance at association meetings.

MEETING Many competition authorities worldwide, including the MyCC, consider that merely attending a meeting with competitors during which anti-competitivematters are discussed is sufficient to result in an infringement of competition law by all attendees, regardless of whether anything was "agreed" and regardless of whether it was put into effect. As stated in the Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements):

"An agreement could also be found where competitors attending a business lunch listen to a proposal for a price increase without objection. On the same note, competitors should avoid meetings or other forms of communication with competitors particularly where price is likely to be discussed. Mere presence with competitors at an industry association meeting where an anti-competitive decision was made may be sufficient to be later implicated as a party to that agreement."

SOCIAL SETTINGS
Social settings often provide great opportunities to discuss business matters on an informal basis. They also provide an opportunity to discuss matters which should not be discussed. An informal agreement or understanding between you and your competitors will still be illegal, even if reached over dinner, after a round of golf, at a drinks reception or an industry event.

DECISIONS OF ASSOCIATIONS
Merely attending a trade association meeting does not result in a breach of the CA 2010. However, competition concerns will arise where matters are discussed or agreed that should not be discussed or agreed. Serious concerns will arise if:

You should be concerned if anything discussed at the meeting or any decision of an association restricts your freedom to make your own commercial decisions.

Decisions of associations, which can also give rise to anti-competitive issues, include:

• **Constitution/rules of admission.** The members of an association are commonly bound by a written constitution which often contains rules of admission. These rules may relate to, for example, the professional standards that must be met in order to join the association. You must ensure that any rules of admission can be justified, are available to all potential members and are applied fairly and reasonably. Rules that are overly restrictive or applied unfairly or inconsistently are likely to be anti-competitive as they will have the effect of excluding (and thereby disadvantaging) businesses that do not meet the rules.

• **Recommendations.** Even if they are not binding, recommendations may determine members' conduct and therefore remove their ability to act independently.

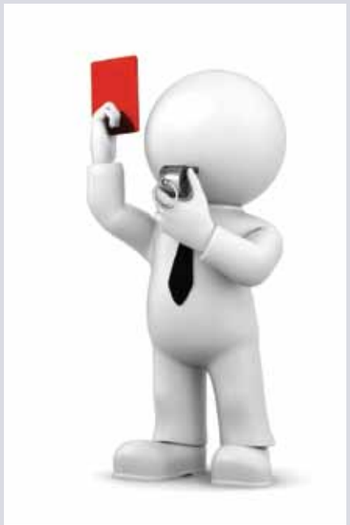
• **Codes of conduct.** Members of associations are commonly subject to a "code of conduct" which states the way the members should conduct their business e.g. by setting out policies or standards. Codes of conduct can be extremely useful but they may also be anti-competitive, for example, if they contain provisions relating to pricing, market sharing or which have the effect of unreasonably excluding members. The members discuss or agree to the fixing of prices, sharing of markets, bid rigging or limiting production in any way (as explained above); or The members discuss or exchange sensitive commercial information.

SMALL AND MEDIUM ENTERPRISES: HOW WILL CA 2010 AFFECT YOUR BUSINESS?
The CA 2010 applies to all entities that carry on commercial activities, regardless of their size. This means that the law will apply to the smallest SME and the largest Malaysian (or international) companies. However, in some cases, the law will apply differently. Agreements that have an anti-competitive object will be prohibited for all enterprises, big and small. Price fixing, market sharing, limiting production or supply and bid rigging are deemed by section 4(2) of the CA 2010 to have anti-competitive objects. So SMEs will break the law if they enter into these types of agreements. However, many other types of agreements will be permitted for SMEs, even if they are competitors, as they are unlikely to have an anti-competitive effect. This is because the combined market share of the parties to the agreement is likely to be below 20% (see paragraph 3.4 of the Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements)). The types of agreements that are likely to be permitted are, for example, joint purchasing, exclusive distribution or tying. These agreements may not be permitted if they are entered into between a large enterprise and an SME as the effect on the market may be greater.

WHEN CAN THE MYCC START AN INVESTIGATION?
The MyCC may conduct any investigation that it thinks expedient where the MyCC has reason to suspect that any enterprise has infringed or is infringing the CA 2010. The MyCC will also investigate any suspected infringement of the CA 2010 if directed to do so by the Minister. The MyCC may also conduct an investigation following receipt of a complaint. It will independently determine which matters warrant further investigation based on a range of factors including the seriousness of the alleged infringement, its administrative priorities and available resources. Complaint forms are available for download from the MyCC website.

For more detailed Information on CA 2010 please visit www.mycc.gov.my

*All information above sourced from Malaysia Competition Commission : Competition Act 2010, A Guide for Business available online at www.mycc.gov.my



CASE STUDY:

AIRASIA AND MAS

The Case: Malaysia's two biggest carriers MAS and AirAsia, entered into a Collaboration Agreement together with AirAsia X Bhd as part of a short-lived share swap deal involving their major shareholders, Khazanah Nasional Bhd and Tune Air in 2011. The share swap was unwound in 2012. On March 31 2014, the MyCC ruled that MAS and AirAsia's Collaboration Agreement had violated the prohibition against market-sharing agreement under section 4(2)(b) of the Competition Act 2010 (CA 2010) and imposed financial penalties of RM10 million each.

How it unfolded: The Competition Appeal Tribunal (CAT) dealt with several grounds of appeals in its final decision.

1 Misinterpretation of the collaboration agreement

• The CAT agrees that a Collaboration Agreement is a framework conditional agreement subject to detailed antitrust analysis and subsequent approval. A plain reading of the terms of the Collaboration Agreement did not warrant a finding of restriction by object within the meaning of section 4(2)(b) of the CA 2010. MyCC did not give any reason or analysis for its decision that the purported object of the Collaboration Agreement was one of market sharing.

2 MyCC cannot rely totally on the deeming provision

• MyCC contended that section 4(2)(b) can be triggered by the mere entry into the Collaboration Agreement. The CAT held that MyCC is required to establish the object of the Collaboration

Agreement was to share market to succeed under the aforesaid provision. MyCC's attempt to rely totally on the deeming provision does not absolve itself from the duty to prove restriction by object under section 4(2)(b) which reads:

• Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to share market or sources of supply is deemed to have the object of significantly preventing, restricting or distorting competition in any market for goods or services.

3 MAS did not cede routes

MyCC also relied on the withdrawal of Firefly from East Malaysian routes, arguing that this ceded those routes to AirAsia. However, CAT agreed that MAS, as parent company of Firefly, made the route withdrawals independently and outside the scope of the Collaboration Agreement, merely taking back the routes from Firefly. MyCC failed to establish the causal link between the Collaboration Agreement and the route withdrawal.

4 Deeming provision not a short cut

• CAT's decision will force the competition authority to address the cardinal issue whether there is an object to share market before attempting to rely on section 4(2)'s deeming provision.

5 Restriction by object test

"[r]egard must be had inter alia to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms part".

Based on the aforementioned test, the onus is on MyCC to prove an alleged anti- competitive object based on interpretation of the agreement in question. Words and expressions used by the parties will be construed and given effect accordingly to ascertain the intention of the parties.

6 Definition of relevant market

• MyCC failed to define relevant market. As it is an integral part, this observation of the CAT is in line with the approach taken by other jurisdictions which also recognises that definition of the relevant market is the key aspect of any competition inquiry. It is only after having defined the relevant market that the MyCC can assess whether a particular conduct is anti-competitive in nature.

7 Definition of Collaborations & Mergers

• The CAT also cautioned that a simplistic use of the deeming provision of section 4(2) of the CA 2010 on airlines business may not be proper. This decision acknowledges that alliances between airlines could enhance efficiency and service quality, and it would be wrong to assume that collaboration between two airliners is per se illegal.

THE FINAL DECISION: On February 4 2016, the five members of the Competition Appeal Tribunal (CAT), unanimously decided that the MyCC misinterpreted the Collaboration Agreement and failed to show there was a market sharing object.

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Beng Chai founded Tay & Partners in 1989. It has offices in KL and Johor Bahru, and an associated office in Singapore under the name of Bird & Bird ATMD LLP of which he is also a founding partner. He has led the firm's growth and is closely involved in its overall client business. His personal professional specialisation is in corporate work i.e. M&A, equity capital markets, private equity and competition law. He has also been involved in international trade issues, regional investment work, and general regulatory and commercial practice. Beng Chai is also a Fellow of the Singapore Institute of Arbitrators.

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Nicole is a corporate and commercial lawyer focusing on competition law. She has been involved in highly contentious market sharing and abuse of dominance decisions by the Malaysia Competition Commission and major investigations up to the appeal to the Competition Appeal Tribunal. Nicole works with clients on competition law issues, including reviewing distribution agreements, complex rebates and marketing strategy from competition law perspective, advising on compliance programmes and conducting compliance training. Nicole's other areas include corporate and commercial transactions. Throughout her diverse practice, she has gained extensive experience both in dispute resolutions and corporate and commercial transactions, mergers & acquisitions work, corporate finance, commercial drafting, property matters, retail and corporate loan matters.