



**SECTION 4 PROVISIONS
EXPLAINED BY DRAFT
CHAPTER 1 GUIDELINES**

MyCC has publicly declared that it will go after low-hanging fruits when it starts enforcing the Act come 1 January 2011. MyCC will prioritise its work plan as it has limited resources when it starts enforcement operations. Anti-competitive agreements under Section 4 of the Competition Act will be its immediate target.

SECTION 4, COMPETITION ACT

This section prohibits anti-competitive agreements. Any agreement that has either the object or effect of significantly preventing, restricting or distorting competition will be an infringement of the Act. Such an agreement will be illegal, unenforceable and will attract heavy penalties. In addition, it exposes the offender to civil actions. For the purpose of the Act, 'agreement' has the widest meaning possible and includes any form of contract, arrangement or understanding, decision by associations and concerted practice. Such agreements need not be legally enforceable to fall within the ambit of the Act.

Anti-competitive conduct can be of a horizontal or vertical nature. The simplest form are horizontal agreements which are practised by cartels. This is the Section 4 (2) prohibitions.

SECTION 4 (2) HORIZONTAL AGREEMENTS

The low hanging fruits referred to is Section 4 (2) and is directed at cartel – like conduct. The sub-section also incorporates a deeming mechanism. It provides that a horizontal agreement between enterprises which has the object to (a) fix purchase or selling prices or other trading conditions (b) share market or sources of supply (c) limit or control production, market outlets or access, technical or technological development or investment, or (d) perform an act of bid rigging *will be deemed to have the object of significantly preventing, restricting or distorting competition in any market for goods or services.*

The guidelines confirm that MyCC will view the Section 4 (2) agreements as anti-competitive and it will not assess such agreements for their anti-competitive effect. In other words, MyCC will not assess if the conduct produced any significant impact on competition in the relevant market. It will rely on the deeming effect of Section 4 (2) to prosecute an infringement of Section 4.

PRICING

The guidelines discuss pricing in some detail. It urges enterprises to be careful about price saying that pricing and marketing decisions should be made independently. The basis of these independent decisions should be documented and that sales and marketing people in the field should not talk to competitors about price either directly or through trade associations.

Pricing is not always about the price itself. It could be an element of the price eg the discount, the credit term, credit interest rate, any surcharge eg fuel surcharge or transport costs. It went on to point out that sharing of a price list between competitors or through a trade association, or the recommendation by a trade association of a price or method of setting price may be considered as price fixing.

HORIZONTAL AGREEMENTS REQUIRING ASSESSMENT

As for other horizontal conduct not falling within Section 4 (2), MyCC indicates it will assess if the agreement has a trivial or significant impact. MyCC proceeded to prescribe safe harbours stating that anti-competitive agreements or decisions will not be considered as 'significant' if –

- The combined market share of the parties to the agreement is less than 20% of the relevant market; or
- If the parties to the agreement are not competitors, their individual market shares in any relevant market is not more than 25%.

WHAT THIS MEANS FOR ENTERPRISES?

The Malaysian public in general has not come to terms with the wide-ranging impact of competition law. However, many businesses particularly those which are subsidiaries of multi-national corporations have been reviewing their business in Malaysia to be ready for this law when it comes into effect on 1 January 2012.

For the general public, the first and foremost action it has to take is to cease any cartel conduct. Such conduct will be

the immediate focus of MyCC and will also very likely constitute the initial bulk of complaints from the public to MyCC.

For businesses which has been preparing to be compliant come 1 January 2012, the safe harbor guideline is an excellent starting point to review again their agreements. The threshold figures will be useful in sharpening that review.