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THE DOMINANCE  
AND  
MONOPOLIES  
REVIEW

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EDITOR  
MAURITS DOLMANS

LAW BUSINESS RESEARCH

# THE DOMINANCE AND MONOPOLIES REVIEW

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Editor  
MAURITS DOLMANS

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# EDITOR'S PREFACE

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This publication is a testament to the proliferation of abuse of dominance legislation around the world. Its coverage considers legislative provisions that have, in the case of the United States, been in existence since 1890, to some, in jurisdictions such as China and India, that have been introduced in the past few years or, in Malaysia's case, last year. This diversity of jurisdictions has led to a multiplicity of differing approaches and indicates, as underlined by the national and supra-national surveys contained in this book, the real need for greater legal certainty and clarity in both the future drafting and application of laws governing abuse of dominance.

The disparities in the approaches taken by different and even well-established jurisdictions can be significant. As an example, a contrast may be drawn between the law of the United States and the European Union.

In the United States, Section 2 of the Sherman Act<sup>1</sup> is in certain respects being narrowly construed and applied by the courts, the Department of Justice (most notably through its Guidelines) and, to some extent, the Federal Trade Commission ('FTC'). This may be attributed to a wish to reduce the burdens of US litigation, in light of the costs imposed by the discovery system and the risks created by trial by jury, awards of treble damages, as well as the litigation incentives inherent in contingency fees and class actions.

By contrast, the approach taken by the European Union in the application of Article 102 of the Treaty of the Functioning of the European Union ('TFEU') goes too far in the opposite direction. For much of the life of Article 102 TFEU and its predecessors, the European Commission and courts have embraced a form-based rather than effects-based approach. The high-water mark of this may be seen in the

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1 15 USC Section 2.

Commission decisions and subsequent court judgments in *British Airways*<sup>2</sup> and *Tomra*,<sup>3</sup> where it was sufficient to show that the conduct in question was merely liable to affect competition, rather than having to prove actual effects and harm to consumers. This form-based application may stifle pro-competitive conduct, taking into account the essentially political decision-making in large cases, the risk of confirmation bias (where the investigator is the prosecutor, judge and executioner), the slow and therefore costly procedure, the risk of high fines and opportunistic follow-on damage claims, and the marginal judicial review of prohibition decisions by the General Court and the Court of Justice of the European Union. The combination of these factors is a powerful disincentive for a possibly dominant undertaking to engage in any competitive conduct that may be found to constitute abuse.

Given the influence of European Union abuse of dominance law, particularly on emerging jurisdictions such as India and China (where similar factors apply to an even larger extent), the use of a form-based analysis may have a negative impact on the development of the law far beyond Europe's borders.

A happy medium or Mid-Atlantic point needs to be found between these divergent approaches. The law of abuse of dominance in Europe (and all jurisdictions that emulate Europe) needs to move away from the form-based approach that has characterised the analysis of abuse of dominance in favour of an effects-based analysis. The institutional groundwork for a turn towards the application of a more economic analysis may have been put in place by the creation of the office of the Chief Competition Economist in 2003 and the publication of the 'Guidance on the Commission's Enforcement Priorities'.<sup>4</sup> Subsequently, in the decisions of the European Commission and judgments of the courts, there have been signs of an incipient analytic shift; both *Microsoft*<sup>5</sup> and, more recently, *Post Danmark*<sup>6</sup> show a growing acceptance of the need for a more effects-based consideration of the abuse of dominance. As the European Court of Justice commented in *Post Danmark*:

*[...] not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.<sup>7</sup> [...] in order to assess the existence of anti-competitive effects [...] it is necessary to consider whether that pricing policy, without*

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2 Case C-95/04 P, *British Airways plc v. Commission* ('*British Airways*'), judgment of 15 March 2007.

3 Case C-549/10P, *Tomra*, judgment of 19 April 2012.

4 OJ, C45/7, 24 February 2009.

5 Case T-201/04, *Microsoft Corporation v. Commission* ('*Microsoft*'), judgment of 17 September, 2007.

6 Case C-209/10 *Post Danmark v. Konkurrencerådet* ('*Post Danmark*'), judgment of 27 March 2012. Note that this was the Grand Chamber of the Court.

7 *Ibid.*, paragraph 22.

*objective justification, produces an actual or likely exclusionary effect, to the detriment of competition, and, thereby, of consumers' interests.*<sup>8</sup>

It is hoped that the change of tack signalled by *Post Danmark* will be continued in future abuse of dominance cases. The forthcoming decision of the court in *Intel* should act as a marker of the progress of this change, hopefully confirming the growing acceptance and, indeed, necessity of the adoption of an effects-based analysis in the enforcement of European abuse of dominance law. For those jurisdictions that have drawn heavily on the European legal framework in the creation of their own systems for the regulation of abuse of dominance, most notably India and China, further lessons concerning the need to abandon the *per se* approach and adopt an effects-based approach should be taken from the recent European experience.

On both sides of the Atlantic, the European and FTC Commissioners have, when dealing with the practicalities of abuse of dominance enforcement, in some cases shown a laudable willingness to find practical solutions in fast-moving markets. The growth, in particular, of the innovative use of consent decrees in the United States and commitment decisions within the European Union, is to be welcomed. These settlement tools create advantages for both competition authorities and market parties in reducing not only the regulatory and enforcement burden but in cutting the timelines for cases from up to 10 years (resulting in remedies that may be too late to keep pace with developments in the market) to periods of months or a few years. At the same time, we cannot ignore the fact that the use of such settlement procedures also brings some disadvantages for the development of the law; in an area where there are limited numbers of decisions, a lack of new precedents or guidance is of some concern.

As highlighted by the European Court of Justice in *Alrosa*,<sup>9</sup> settlement procedures may afford competition authorities a wide degree of discretion in the resolution of abuse of dominance cases. Especially given the absence of any in-depth judicial analysis of commitments, this discretion must be exercised with care and responsibility. The factors mentioned above may drive the Commission into adopting adventurous and novel interpretations of the law, and compel companies to agree to settlements to refrain from energetic rivalry that could, in fact, harm the interest of consumers.

Despite the scope for a harmonisation of approaches, there will probably never be total convergence between the law and practice governing the regulation of abuse of dominance in the United States and the European Union or, more generally, on a worldwide basis. There are some important differences between the relevant provisions of US and EU law. As can be seen in the different analysis of the *Rambus* 'patent trap', the respective concepts of 'monopolisation' (which does not require a dominant position at the time the offensive conduct occurs) and 'abuse' (which requires a finding of dominance) can lead to very different assessments of the same conduct.<sup>10</sup> The total lack of a concept of an exploitative abuse in US law is another fundamental difference. The purpose of

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8 Ibid., paragraph 45.

9 Case C-441/07P, *Commission v. Alrosa Company Limited* ('*Alrosa*'), judgment of 29 June 2010.

10 *Rambus Inc v. FTC*, 522 F.3d 456 (D.C. Cir 2008) and Case COMP/ 38.636 *Rambus Inc*.

this book, as shown by the contributions it contains, is to allow for the beginning of an understanding of the differences and similarities, and their implications, between laws governing unilateral conduct in some of the major competition jurisdictions of the world.

In the coming year, there are likely to be further interesting case law developments, notably from the technology and energy sectors, areas that have been the subject of increased scrutiny by competition authorities. Of particular note will be the forthcoming decisions from the European General Court in *Intel*<sup>11</sup> and of the European Commission in *Samsung*<sup>12</sup> and *Motorola*.<sup>13</sup> More generally, both patent trolling and privateering are likely to come under increased scrutiny from not only the US and EU competition authorities but, probably, the competition authorities in many of the jurisdictions analysed in this book. Watch this space.

I would like to thank all of the contributors for taking time away from their busy practices to prepare their insightful and informative contributions to the inaugural edition of *The Dominance and Monopolies Review*. I am personally grateful for the invaluable assistance of my colleague Max Kaufman of the Brussels office. I look forward to seeing what 2013 holds for future editions of this work.

**Maurits Dolmans**

Cleary Gottlieb Steen & Hamilton LLP

London

June 2013

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11 T-286/09 *Intel v. Commission*.

12 Case COMP/39.939 *Samsung – Enforcement of UMTS standards essential patents*.

13 Case COMP/39.985 *Motorola – Enforcement of GPRS standard essential patents*.

## Chapter 14

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# MALAYSIA

*Tay Beng Chai and Lynette Yee Eun Ping*<sup>1</sup>

### I INTRODUCTION

The Competition Act 2010 ('the Competition Act') was gazetted on 10 June 2010 and came into force on 1 January 2012. Much of the Malaysian law is modelled on EU competition law. Prior to this, Malaysia did not have a comprehensive set of rules to govern competition across all economic sectors. The Competition Act applies to any commercial activity both within and outside Malaysia provided the commercial activity transacted outside Malaysia has an effect on competition in any market in Malaysia. The Competition Act, however, does not apply to the communications and multimedia sector governed by the Communications and Multimedia Act 1998 and the energy sector governed by the Energy Commission Act 2001.

The Competition Act follows the Malaysian Prime Minister's unveiling of the New Economic Model in 2010, which aims to double Malaysia's *per capita* income through eight Strategic Reform Initiatives, one of which includes promoting a competitive domestic economy.

The Malaysia Competition Commission ('MyCC') is an independent body established under the Competition Act to enforce said Act. Its main role is to protect the competitive process for the benefit of businesses, consumers and the economy.

Part II of the Competition Act prohibits anti-competitive practices such as anti-competitive agreements (Section 4) and abuse of dominant position (Section 10). Malaysia does not currently have merger control provisions.

The following are expressly excluded from the Part II prohibitions:<sup>2</sup>

- a* agreements or conduct that are engaged in so as to comply with a legislative requirement;

---

1 Tay Beng Chai is a managing partner and Lynette Yee Eun Ping is an associate at Tay & Partners.

2 Section 13 and Second Schedule of the Competition Act.

- b* collective bargaining activities or collective agreements in respect of employment terms that are negotiated between parties and include both employers and employees; and
- c* an enterprise entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly insofar as the prohibitions in Part II would obstruct that performance of the particular tasks assigned to it.

There has not been any decision involving the interpretation of the exclusions. It would be interesting to note, for example, whether minimum solicitors' remuneration made pursuant to statutory powers can be defended under the exclusion of 'legislative requirement', or whether a state-created monopoly is allowed to abuse its dominance.

To date, MyCC has published four final guidelines: on market definition, anti-competitive agreements, the complaints procedure, and abuse of dominant position. The guidelines can be found on MyCC's website. MyCC also published a handbook on competition law for the general public.

The Competition Act does not provide for notification for guidance or notification for decisions. Parties entering into anti-competitive agreements may, however, apply for an individual exemption. They will need to show net economic benefit that could not be reasonably achieved without the agreement and that such agreement will not eliminate competition completely in respect of a substantial part of goods or services.

## II YEAR IN REVIEW

The Competition Act has only been in force since 1 January 2012. It is still early days and many resources have been deployed in education, advocacy and awareness programmes. MyCC has, however, publicly said that 2013 will be different. It aims to broaden its focus on bid rigging and trade associations.

In the first six months of 2012, MyCC received seven official complaints in respect of suspected anti-competitive practices by the business sector. Out of the seven, two were from consumer groups while the rest were from enterprises affected by suspected anti-competitive conduct by other businesses.

In December 2012, MyCC issued its first final decision against the Cameron Highlands Floriculturist Association ('CHFA') for contravening Section 4(2) of the Competition Act. CHFA was found to have engaged in an anti-competitive agreement to increase the prices of flowers by 10 per cent. However, no financial penalties were imposed on CHFA's members.

An individual exemption application was made by a multinational food company to exempt its pricing policy called the Brand Equity Protection Policy ('BEPP'). MyCC found elements of resale price maintenance and requested the applicant to remove its pricing policy contained in the BEPP. The application for individual exemption was subsequently withdrawn.

Block exemption applications were made by five trade bodies; the Life Insurance Association of Malaysia ('LIAM'), the Association of Malaysian Hauliers and a joint application by the Malaysia Shipowners Association, the Shipping Association of Malaysia and the Federation of Malaysian Port Operators Council.

At the time of writing, MyCC has announced its plans to issue a proposed block exemption order ('BEO') for liner shipping agreements made within Malaysia or having an effect on the liner shipping services market in Malaysia. This will cover vessel sharing agreements and voluntary discussion agreements. The proposed duration of the BEO is three years and after two years, MyCC may review the exemption should there be a need. Section 10, which prohibits the abuse of dominant position, is not part of the proposed BEO, hence parties to a liner shipping agreement can still be found liable for an infringement if they are found to be abusing their dominant positions in the liner shipping market. The proposed BEO also does not cover inland carriage of goods and warehousing of goods.

MyCC has also looked into the domestic broiler market and after conducting a market review and taking into consideration the views and feedback received, including those derived from its public consultation exercise, MyCC has concluded that there is no conclusive evidence of any forms of anti-competitive conduct in the domestic broiler market for Peninsula Malaysia.

In the aviation sector, MyCC started investigating the Malaysian Airlines-Air Asia share swap, which involved a comprehensive collaborative framework between the airlines. No decision was made because the two airlines have since called off the share swap and collaboration exercise. This reversal was driven by public outcry fuelled by union concerns of job losses. It became a political issue and government-controlled Malaysian Airlines decided to withdraw.

MyCC has also launched an investigation into a steel producer for allegedly engaging in anti-competitive practices in the domestic steel industry. The subject is the only domestic producer of hard rolled coils. It is also engaged in the downstream production of cold roll coils. Its competitors are claiming that the subject's ability to supply its own hot roll coils for production of cold roll coils puts them at an unfair pricing disadvantage. The investigation is ongoing at the time of writing.

### **III MARKET DEFINITION AND MARKET POWER**

MyCC has chosen a market share of 60 per cent as indicative of significant market power suggesting possible dominance.<sup>3</sup> This figure is on the higher end of the scale among jurisdictions around the world given that Malaysia has an economic landscape that is fairly oligopolistic in a number of sectors.

A higher threshold is naturally less disruptive to the status quo and should be welcomed by businesses. This 60 per cent figure is purely indicative as an enterprise with more than a 60 per cent market share may not be considered dominant and conversely an enterprise with a share of less than 60 per cent could be considered dominant. This is because there are myriad factors at play, for example, potential competitors, low barrier of entry into the business and few buyers with economic power equal to the dominant supplier. It would also be possible for an enterprise with a 20 to 30 per cent market share to be considered as dominant if it is protected by a patent or a new technology.

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3 Page 4 of the Guidelines on Chapter 2 Prohibitions.

Section 10 of the Competition Act refers to an enterprise engaging independently or collectively in conduct that amounts to an abuse of dominance. Economic analysis is important in market analysis.

The term ‘market’ has been defined in Section 2 of the Competition Act as ‘a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods and services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.’

MyCC uses the hypothetical monopolist test<sup>4</sup> (‘HMT’), which is also known as the ‘small but significant and non-transitory increase in price’ (‘SSNIP’) test. The conceptual approach of HMT defines the relevant market as ‘the smallest group of products (in a geographical area) that a hypothetical monopolist controlling that product group (in that area) could profitably sustain a price above the ‘competitive price’ (i.e., a price that is at least a small but significant amount above the competitive price).

The MyCC will use a price range of 5 to 10 per cent to represent an SSNIP and it has become the goal of market definition to find the smallest market in which a hypothetical monopolist could impose an SSNIP. Applying the HMT involves the following steps:

- a* Step 1: start with a hypothetical monopolist of the focal product (i.e., the product that is under investigation).
- b* Step 2: would a hypothetical monopolist of a market for the focal product find it profitable to sustain a price for the focal product of 5 to 10 per cent above the competitive level? If yes, then this market definition is the relevant product market for competition purposes because all the products that compete with the focal product around that price have been identified. The market definition is completed. If no, then this means that there are other products that compete with the focal product and these products should be included in the definition of the relevant market.
- c* Step 3: the question for step 2 is repeated and if the answer is yes, then the relevant market is the market for the focal product plus the close substitutes. If no, then add the next closest substitutes and repeat the question until the point is reached where a hypothetical monopolist could sustainably maintain the price at 5 to 10 per cent above the competitive price.

An important issue to consider is whether the hypothetical monopolist could sustain the SSNIP price. This will depend on the relevant nature of market. As a general guide, MyCC will only include products in the relevant market that consumers could switch to within 12 months.

The geographic scope of the market is defined using the same framework used to analyse the product market. Defining the geographic market starts by identifying a relatively narrow geographic area, called the focal area. This is the narrowest area in which the group of products identified in the product market definition compete (e.g., whether in a town or suburb). Then the question is asked: could a hypothetical monopolist of

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4 Page 2 of the Guidelines on Market Definition.

the group of products identified in the relevant product market, operating in that focal area, profitably increase the price by 5 to 10 per cent above the competitive price? If yes, then this is the geographic market because consumers will not buy elsewhere and producers outside the region will not supply the focal area. If no, this means that buyers are able to go to neighbouring areas to buy or sellers would come into the focal area to sell in response to the higher price and these neighbouring areas should be included in the geographic market definition.

## **IV ABUSE**

### **i Overview**

Dominance in itself is benign and an enterprise is not prohibited from being dominant. Economic theories expound efficiency and innovation to benefit consumers and therefore a dominant player who is efficient and innovative is not penalised.

Looking at it another way, Chapter 2 is not about protecting inefficient competitors or competitors in general. It is about protecting the competitive process, which is the cornerstone of competition law. It is therefore always important to ask how a dominant enterprise got to where it is and how it stayed there. Is it through abusive conduct or through efficiency and innovation?

As provided by Section 10 of the Competition Act, a dominant enterprise may abuse its dominant position by:

- a* directly or indirectly imposing an unfair purchase or selling price or other unfair trading conditions on a supplier or customer;
- b* limiting or controlling production, market outlets or markets access, technical or technological development, or investment, to the prejudice of customers;
- c* refusing to supply to particular enterprises or group or category of enterprises;
- d* discriminating by applying different conditions to equivalent transactions that discourages new market entry or market expansion or investment by an existing competitor, seriously damages or forces a competitor that is just as efficient from the market, or harms competition in the market in which the dominant enterprise operates or in any upstream or downstream market;
- e* forcing conditions in a contract that have no connection with the subject matter of the contract;
- f* any predatory behaviour towards competitors; or
- g* buying up scarce supplies of goods or services where there is no reasonable commercial justification.

This, of course, is a non-exhaustive list of actions that may constitute an abuse of dominant position. Abusive conduct can be divided into two categories: exclusionary and exploitative abuses.

### **ii Exclusionary abuses**

Exclusionary abuses are predatory conducts that prevent competitors from competing, which leads, whether directly or indirectly, to higher prices, lower quality products, less innovation, etc. Exclusionary conducts will be assessed in terms of their effects on

competition. This refers to the conducts' impact on the competitive process and not the effects on competitors. It is believed that effective competition drives inefficient enterprises out from the market and this move will benefit consumers. Therefore, dominant enterprises who engage in such competitive conduct will not amount to abusing their dominant position.

MyCC adopts an effect-based approach in assessing a potential abuse of a dominant position. By adopting this approach, MyCC ensures that conducts that will benefit the consumers are not prohibited, which creates a good economic outcome consistent with the aims of the Competition Act. The effects-based approach does not, however, apply to horizontal agreements between enterprises that have the object of undertaking anti-competitive conduct. Malaysia adopts the concept of collective dominance.

In general, MyCC will use two main tests for assessing anti-competitive effects. First, does the conduct adversely affect the consumers? And second, does the conduct exclude a competitor that is just as efficient as the dominant enterprise? Below are some non-exhaustive examples of exclusionary abuses described in MyCC's guidelines.

### *Predatory pricing*

While consumers may benefit from enterprises setting low prices, a dominant enterprise may set prices below cost price to drive other as-efficient competitors out from the market. Consumers will lose out in the longer term when the dominant enterprise subsequently raises the prices back to the original level or to an even higher price. When considering whether a dominant enterprise is charging below cost prices, a number of different costs may be used. From a competition law perspective, the concern is whether a dominant enterprise's price is reasonable across the whole relevant output and not just the last unit of output.

### *Price discrimination*

This has been seen as an exclusionary abuse where the same product is sold at different prices where the difference in price is unrelated to the cost of the products. While there are benefits to charging a particular group of consumers cheaper prices (e.g., a low income group) it can also adversely affect competition where the dominant enterprise will charge low prices in a particular area to drive out its competitors. Charging one buyer more than the other buyer may affect the competition in the downstream market, in particular if the dominant enterprise has a subsidiary downstream.

### *Exclusive dealing*

An exclusive dealing arrangement between a dominant seller and a buyer can foreclose the market where the arrangement is such that other buyers are not able to obtain products from the seller or that competitors of the dominant seller are prevented from supplying to the particular buyer.

### *Loyalty rebates and discounts*

MyCC recognises that loyalty rebates and discounts are generally pro-competitive. However, a dominant enterprise may be able to use loyalty rebates and discounts to foreclose a market to competitors by using selective discounts or rebates.

*Refusing to supply and sharing of essential facilities*

Refusal to supply can cover a number of different kinds of refusal such as a refusal to supply certain products to buyers, a refusal to license intellectual property rights and a refusal to grant access to essential infrastructure that is necessary to supply certain products. The remedy for a refusal to supply is to force the supplier to supply at a reasonable consideration. However, forcing supply may reduce the supplier's incentive in investing in the product and MyCC will have to draw the line as to what extent suppliers can be forced to supply but there is still an incentive for such innovation.

*Buying up scarce intermediate goods or resources*

This abuse happens when a dominant competitor in a downstream market buys all the scarce supplies needed by its competitors. This has the effect of increasing the competitors' cost of production or it may have the effect of preventing them from supplying at all.

*Bundling and tying*

The main issue is the possibility that an enterprise who is dominant in one market will try to leverage its dominance in another market by indulging in this practice. Bundling can also be used as a way of predatory pricing where one of the products in the bundle may be set below cost price to make other producers of that item unable to compete.

**iii Exploitative abuses**

Exploitative conduct is where the enterprise has the ability to maintain price above the competitive level for some time without worrying about whether the consumers will switch to other products or that new competitors will enter the market. MyCC will only be concerned about excessive pricing where there is no likelihood that market forces will reduce dominance in a market.

**V REMEDIES AND SANCTIONS**

**i Sanctions**

Enterprises found to have abused their dominant position may be subjected to a financial penalty of up to 10 per cent of their worldwide turnover over the period during which the infringement occurred.<sup>5</sup>

Bodies corporate that commit an offence under the Competition Act such as destroying documents or tipping off will be subjected to a fine not exceeding 5 million ringgit or in the event it is a subsequent offence, the fine will not exceed 10 million ringgit. Individuals who commit an offence under the Competition Act will be subject to a fine not exceeding 1 million ringgit or imprisonment for a term not exceeding five years, or both. In the event it is a subsequent offence, that individual may be given a fine not exceeding 2 million ringgit or imprisonment for a term not exceeding five years, or both.

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5 Section 40(4) of the Competition Act.

**ii Behavioural remedies**

During the investigation, MyCC may impose interim measures as provided in Section 35 of the Competition Act. These interim measures may be imposed if MyCC reasonably believes that an infringement has occurred or is likely to occur and the measures are necessary as a matter of urgency to prevent serious and irreparable damage or to protect the public's interest.

MyCC may direct the enterprise to suspend the effect of and desist from action in accordance with any agreement that is suspected of infringing the Competition Act, to desist from any conduct that is suspected of infringing the Competition Act, or to do or to refrain from doing any act with the exception of payment of money.

Prior to giving a direction, MyCC will serve a written notice to the enterprise and the enterprise will be given a period of at least seven days to make written representations. Any direction given will cease to have any effect when MyCC completes the investigation and issues a decision or within 12 months from the date of direction, whichever is earlier.

The Competition Act allows the enterprise to propose an undertaking, which may be accepted by MyCC subject to the conditions imposed. Once MyCC accepts the enterprise's undertaking, it will cease its investigation and MyCC has the power to enforce those conditions upon the enterprise.

**VI PROCEDURE**

**i Investigation**

Malaysia's competition regulator will have an inquisitorial role whereby MyCC may conduct any investigation on any enterprise if it has reason to suspect that the enterprise has infringed or is infringing any prohibitions under the Competition Act. MyCC may also investigate any suspected infringement on the direction of the Minister of Domestic Trade and Consumer Affairs or upon complaint by a person. The complaint has to specify the person against whom the complaint is made and details of the alleged infringement or offence.

The Competition Act grants to the MyCC and its officers the same investigatory powers as those of a police officer in relation to police investigations as provided under the Criminal Procedure Code. MyCC has the power to direct any person to provide or produce any information or document that is relevant or to provide a statement to MyCC to explain any document or information requested. In addition to the above, MyCC also has the power to:

- a* retain documents and have access to records, books, accounts or other items for the purposes of carrying out its functions or powers under the Competition Act; and
- b* enter premises under a warrant issued by the magistrate, or in urgent cases the officer may enter the premise without a warrant to search, seize and seal any record, book, account, document, and computerised data including searching the suspicious persons.

**ii Decision**

After the completion of investigation, if MyCC makes a proposed decision that there has been an infringement, it may issue a notice setting out the reasons for its

decision, penalties and informing the enterprise that it may submit written or make oral representations to MyCC.

MyCC may conduct a hearing for the purposes of determining whether the enterprise has infringed the prohibitions under Part II of the Competition Act. The hearing can either be held in public or in a closed session if there is confidential information involved. MyCC may invite the enterprise concerned and other third parties to such a hearing.

If MyCC has made a decision that there is no infringement of the prohibition under Part II, MyCC will issue a notice to any person affected by the decision stating the reasons for the decision. If, however, MyCC comes to a conclusion that there is an infringement, it will:

- a* require the infringement to be ceased immediately;
- b* specify steps that are required to be taken by the infringing enterprise;
- c* impose a financial penalty; or
- d* give any other direction as it deems appropriate.

### **iii Enforcement of decision or direction**

If the enterprise fails to comply with a direction or a decision given by the MyCC, MyCC may bring proceedings before the High Court and the High Court can make orders requiring the enterprise to comply with the direction or decision, which may include interest payments at the normal judgment rate. Any breach of an order of the High Court shall be punishable as contempt of court.

### **iv Leniency regime**

As with the European Union, Malaysia's competition law has a leniency regime of up to 100 per cent immunity from any penalties that would otherwise be imposed on an enterprise. This leniency regime is available for enterprises who admit their involvement in an infringement and provide information or other forms of cooperation to MyCC that significantly assist in the identification or investigation of an infringement of the Competition Act. The different levels of reduction percentages depend on a few factors such as whether the enterprise was the first person to bring the infringement to MyCC's attention, the stage of investigation when the infringement was admitted and when the information was provided.

### **v Appeal**

The Competition Appeal Tribunal has exclusive jurisdiction to review any decision made by MyCC. MyCC's decision on whether there is an infringement and any penalties or interim measures can be reviewed by the Competition Appeal Tribunal, by way of a notice of appeal in writing made by an enterprise who is aggrieved or whose interest is affected by the decision.

Pending a decision of the appeal by the Competition Appeal Tribunal, the decision by MyCC will remain valid, binding and enforceable except where a stay of the decision has been granted by the Tribunal. The Competition Appeal Tribunal decides its own procedure on hearing the appeal and the decision is decided on a majority of members' basis. The Competition Appeal Tribunal will also have the powers of a subordinate court

under the Subordinate Courts Act 1948 [Act 92] with regard to the enforcement of attendance of witnesses, hearing evidence on oath or affirmation and punishment for contempt.

The Competition Appeal Tribunal may confirm or set aside the decision, or any part of it that is the subject of the appeal and may:

- a* remit the matter to MyCC;
- b* impose or revoke, or vary the amount of financial penalty;
- c* give directions or steps that MyCC could itself have given; or
- d* make any decision that MyCC could have made.

A decision of the Competition Appeal Tribunal is final and binding on the parties to the appeal.

## VII PRIVATE ENFORCEMENT

Section 64 of the Competition Act provides that any person who suffers loss or damage directly as a result of an enterprise abusing its dominant position will have a right of action for relief in civil proceedings in a court. This private action may be brought by the person regardless of whether he or she has dealt directly or indirectly with the infringing enterprise. The commencement of such an action is not dependent on successful prosecution or a finding of infringement by MyCC.

## VIII FUTURE DEVELOPMENTS

The Competition Act is fairly new in Malaysia and many businesses and industries are still grappling with the concept and effect. Small and medium-sized enterprises in particular could still be unaware of the dangers of anti-competitive agreements.

MyCC is likely to continue its education and advocacy efforts while increasing its bid-rigging investigations in 2013. In its first year of operations in 2012, it said it will go after low-hanging fruits such as cartels and landed the *CHFA* case. It was an important successful first case but it was not contested. No financial penalty was imposed on CHFA. Apparently CHFA claimed it was unaware that it could not ask its members to raise prices. This was reflected in the very overt way of publicly announcing a 10 per cent price hike.

There have been no discussions on plans to introduce merger control in the near future.

## Appendix 1

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# ABOUT THE AUTHORS

### **TAY BENG CHAI**

*Tay & Partners*

Beng Chai has over 25 years of extensive corporate and commercial experience in Malaysia and Singapore. He has been the managing partner of the firm since inception.

He founded Tay & Partners in 1989 and established both the Johor Bahru and Kuala Lumpur offices. His major professional specialisation includes M&A, equity capital markets, private equity, FDI Malaysia and regional mergers and acquisitions. His other practice areas include competition law, regulatory and commercial agreements. He is also a founding partner of ATMD Bird & Bird LLP, Singapore.

He graduated with a degree of bachelor of laws (LLB (Hon)) (Second Upper) from the National University of Singapore in 1985. He was admitted as an advocate and solicitor to the Singapore Bar in 1986 and as an advocate and solicitor of the High Court of Malaya in 1989. Beng Chai is also a fellow of the Singapore Institute of Arbitrators.

### **LYNETTE YEE EUN PING**

*Tay & Partners*

Lynette graduated from the University of Manchester, United Kingdom with an LLB (Second Upper Class Hons) in 2010 and took the Bar Professional Training Course (BPTC) at Manchester Metropolitan University. She was admitted as a barrister-at-law to the Bar of England and Wales in July 2011 and is a member of the Honourable Society of Lincolns Inn, London. She was admitted as an advocate and solicitor of the High Court of Malaya in 2012.

Lynette practises exclusively in the corporate division where her scope of practice encompasses of corporate, commercial, aviation and competition law. To date, she has experience in mergers and acquisitions and initial public offerings. She has also been exposed to conducting legal due diligence, licensing compliance, general advisory works and has developed in-depth research skills.

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