

**Business and Commercial Law
in Malaysia**

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PROF DATO' SRI DR ASHGAR ALI ALI MOHAMED
LLB (Hons) (IIUM), MCL (IIUM),
LLM (Hons) (University of Auckland, New Zealand),
PhD (Law) (UPM)

DR MUHAMAD HASSAN AHMAD
LLB (Hons), MCL (IIUM),
PhD (IIUM)

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LIST OF CONTRIBUTING AUTHORS

Abdulraheem Abdulwahid Yusuph is a PhD candidate at Ahmad Ibrahim Kuliyah of Laws, International Islamic University Malaysia (IIUM). He graduated with Bachelor of Laws (LLB) from Azhar University Cairo Egypt, and Master of Laws (LLM) from University of Ilorin, Nigeria. He was called to the Nigerian Bar as an advocate and solicitor of Supreme Court of Nigeria in 2021. His area of interest a theory of Islamic jurisprudence, Islamic fintech, and Islamic banking and finance law. He has publications in local and international journals. (ayabdulraheem.a@live.iium.edu.my)

A. Vijayalakshmi Venugopal (Dr) is the Deputy Director of the Impact Lab on Peace, Justice and Strong Institutions and Doctor of Philosophy in Law Programme Director in the School of Law and Governance, Faculty of Business and Law, Taylor's University, Malaysia. Over the course of more than 20 years of teaching law, she has taught and written books and articles on various legal subjects, predominantly in contempt of court and intellectual property law. (avijayalakshmi.venugopal@taylors.edu.my)

Alamelmangai Ananthakumar, AFHEA (Associate Fellow of Advance Higher Education, UK) is a lecturer of law at School of Law, University of Reading Malaysia. She graduated with Bachelor of Laws (LLB) (Hons) from Northumbria University, United Kingdom and Master of Laws (LLM) (Hons) from Universiti Malaya, Kuala Lumpur. Her area of interests are Public Law, European Union Law, International Humanitarian Law, International Criminal Law and Tort.

Abdul Rani Kamarudin is a Senior Academic Fellow at Ahmad Ibrahim Kuliyah of Laws, International Islamic University Malaysia (IIUM). He graduated with Bachelor of Laws (LLB) (Hons) and Master of Comparative Laws (MCL) from IIUM, and Doctor of Philosophy (PhD) from the University of Exeter, England. He was admitted to the Malaysian Bar as an advocate and solicitor by the High Court of Malaya in 1990, and Syarie Lawyer of the Federal Territory of Kuala Lumpur and the State of Negeri Sembilan. His area of interest includes Criminal Procedure, Law of Evidence, Evidence and Procedure of Syariah Court and Comparative Penology. He is also an accredited mediator with the Malaysian Mediation Centre of the Malaysian Bar since 2011. (rani@iium.edu.my)

Ahmad Masum (Dr) is currently an Associate Professor and the Dean of the Sultan Haji Hassanal Bolkiah Faculty of Law, Universiti Islam Sultan Sharif Ali (UNISSA), Brunei Darussalam. He obtained his LLB (Hons), Master of Comparative Laws (MCL), and PhD from International Islamic University Malaysia (IIUM). Prior to joining UNISSA, he served at various institutions of higher learning in Malaysia, Singapore and Hong Kong. He has also published extensively in different areas of law, including criminal law, constitutional law, legal methods, and the law of evidence. (ahmad.masum@unissa.edu.bn)

Ashgar Ali Ali Mohamed (Dato' Sri Dr) is a Professor at Ahmad Ibrahim Kuliyah of Laws, International Islamic University Malaysia (IIUM). He graduated with Bachelor of Laws (LLB) (Hons) and Master of Comparative Laws (MCL) from IIUM, Master of Laws (LLM) (Hons) from the University of Auckland, New Zealand, and Doctor of Philosophy (PhD) from the Graduate School of Management, University Putra Malaysia. He was admitted to the Malaysian Bar as an advocate and solicitor by the High Court of Malaya in 1992. His areas of interest include Employment Law, Civil Litigation and Alternative Dispute Resolution. He has authored several books on the above subjects and published numerous articles both in local and international journals/reports. Furthermore, he has presented papers on the abovementioned areas at various international and local conferences. (ashgar@iium.edu.my)

Che Audah Hassan is a senior lecturer at the Faculty of Law, Universiti Teknologi MARA (UiTM). She graduated with Bachelor of Laws (LLB) (Hons) from International Islamic University Malaysia (IIUM), Master of Laws (LLM) (Hons) from Universiti Malaya (UM) and Doctor of Philosophy (PhD) from UiTM. Her areas of interest include Criminal Law and the Criminal Justice System. She has authored several books on those subjects and published numerous articles in local and international journals.

Chithra Latha Ramalingam (Dr) is a Senior Lecturer in the Department of Business, Law and Taxation at the School of Business, Monash University. She holds Bachelor of Laws (LLB) (Hons) from the University of Wolverhampton, Master of Laws (LLM) (Merit) in International Business Laws from Staffordshire University, and Doctor of Philosophy (PhD) from Universiti Malaya. Her research encompasses public law and business-related laws, including corporate governance, business ethics and corporate law. She has authored book chapters on topics such as corporate criminal liability, cybercrimes, equality and equal protection, the right to life and personal liberty, the impact of COVID-19 on selected employment relationship issues, and force majeure clauses in employment contracts, among others. Dr Chithra has also written books on company law and the elements of law and has co-authored 'Law and Technology Management' at Open University

Malaysia. Her expertise was demonstrated through her role as a consultant and training officers from the Malaysian Anti-Corruption Commission (MACC) on the legal complexities of corporate governance. She has published in peer-reviewed journals and presented at international conferences. Her work continues to influence both academic and professional governance and legal education. (chithra.latha@monash.edu)

Gary Lilienthal (Dr) is Professor of the University at Tashkent State University of Law, Uzbekistan. He graduated with a Bachelor of Laws (LLB) from the University of Sydney, Master of Psychoanalytic Studies at the High Distinction level from Deakin University in Melbourne, and Doctor of Philosophy (PhD) in intellectual property tort law from Curtin University in Perth. He was formerly Professor of Human Rights Law at the University of Gondar, Ethiopia, and Associate Professor of Law and Scholar-in-Residence at Symbiosis Law School, Pune, India, where he was awarded the Symbiosis Silver Medal in National Security Law. His areas of interest include doctrinal legal research using psychoanalytic lenses, and he chairs the Carrington Rand confederation of consultant scholars. He is also an experienced mediator, having presided over more than 9,500 international mediations in both New York and San Francisco. (carrington.rand@icloud.com)

Hanna Ambaras Khan (Dr) is a Senior Lecturer and the Assistant Dean (Ethic, Governance and Sustainability) of the School of Business and Economics (SPEUPM), Universiti Putra Malaysia. She graduated with a Bachelor of Laws (LLB) (Hons), Master of Comparative Laws (MCL), and Doctor of Philosophy (PhD) from International Islamic University Malaysia (IIUM). Her area of expertise is Mediation, Business Law, Company Law, Alternative Dispute Resolution and Legal Education. She taught commercial law, business law, company law and international trade law. Hanna has published numerous articles both in local and international journals. Furthermore, she has presented papers on the abovementioned areas at various international and local conferences. (hanna@upm.edu.my)

Ibtisam @ Ilyana Ilias is a Senior Lecturer at the Faculty of Law, Universiti Teknologi MARA, Malaysia. She graduated with Bachelor of Laws (LLB) from International Islamic University Malaysia (IIUM) and Master of Laws (LLM) from Universiti Malaya and Doctor of Philosophy (PhD) from IIUM. She was admitted as an advocate and solicitor of the High Court of Malaya in 2002. Her areas of interest include Consumer Credit, Financial Consumer Protection and Islamic Banking and Finance. She has published numerous articles and book chapters in both local and international journals and reports on the said subjects. Furthermore, she has presented papers on the abovementioned areas at various international and local conferences. (ilyana@uitm.edu.my).

Mahyuddin Daud obtained his PhD in Cyber Law (Internet Content Regulation) from International Islamic University Malaysia (IIUM), LLM from Universiti Teknologi MARA (UiTM) and LLB from IIUM. He actively writes for academic journals and teaches contracts, torts and information technology laws at the Department of Civil Law, Ahmad Ibrahim Kulliyah of Laws, IIUM. He regularly presents and publishes research papers at international conferences and academic journals. He is currently the Director of Sports Development Centre, IIUM. He was a former Deputy Dean (Student Affairs). He is a member of the IIUM UNESCO Chair of Future Studies - Sound Future Legal System. He has been appointed as a consultant in government consultation projects. He holds professional memberships for Inns of Court Malaysia (ICM), Malaysian Consumer and Family Economics Association (MACFEA), Global Internet Governance Academic Network (GigaNet) and various other academic positions such as Editor for IIUM Law Journal. (mahyuddin@iium.edu.my)

Maruf Billah is a Senior Lecturer at the Faculty of Law, Universiti Teknologi MARA (UiTM), Shah Alam, Malaysia. He also serves as the Deputy Managing Editor of the UiTM Review on Human Rights and Sustainability Law. He obtained his PhD and LLM from Nagoya University, Japan, with the Japanese government's specialised research grant 'Leading Daigaku' and completed his LLB at International Islamic University Malaysia with the Malaysian International Scholarship under the Ministry of Higher Education Malaysia. He is a former Visiting Scholar of the Institute of Legal Studies, Chandigarh University, India, and a Shariah Expert in the halal auditing committee of Japan Islamic Trust. Dr Billah's research interests include public and private international laws, and Islamic law and jurisprudence. He has been regularly teaching Malaysian law of contracts and business law at UiTM and has published many peer-reviewed journal articles in his research area and presented several papers at international seminars and conferences worldwide. He is currently working as a regular reviewer of several international law journals. He is also a member of the Asian Society of International Law. (marufium@gmail.com)

Md. Zahurul Haq (Dr.) is a senior lecturer (International) at Universiti Utara Malaysia. He graduated with a Bachelor of Laws (LLB) (Hons) and a Master of Laws (LLM) from the University of Dhaka, Bangladesh. He also holds an LLM in law and information technology from the University of Stockholm, Sweden. His Doctor of Philosophy (PhD) from the University of Wollongong, Australia, was in banking law. His areas of expertise include anti-money laundering and counter-financing terrorism, ICT and Cyberspace Laws and Public International Law. He has taught and published extensively in these specialised areas. Furthermore, he has

published several articles in law journals and presented papers at various conferences (md.zahurul@uum.edu.my)

Mohammad Naqib Eishan Jan (Dr) is a Professor at Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia (IIUM). He graduated with a Bachelor of Laws (LLB) (Hons), Master of Comparative Laws (MCL), and Doctor of Philosophy (PhD) from IIUM. His areas of expertise include Public International Law, International Humanitarian Law, International Human Rights Law, International Dispute Resolution, International Commercial Arbitration, Use of Force in International Relations, Refugee Law and the Law of the United Nations. He has taught and published extensively in these specialised areas. Furthermore, he has published a number of books and numerous articles in refereed law journals and presented papers at various conferences. (naqib@iium.edu.my)

Muhamad Hassan Ahmad (Dr) is an Assistant Professor at the Civil Law Department, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia (IIUM). He served as the External Examiner for the Master of Laws (LLM) (International Business and Trade Law) programme from 2018 to 2022 at Taylor's Law School, Taylor's University, which currently ranks as the Top 1 Private University in Southeast Asia in the QS World University Rankings. He also served as the Adjunct Lecturer for the Master of Laws (LLM) (International Law) programme at the Faculty of Shariah and Law, Universiti Islam Sultan Sharif Ali (UNISSA), Brunei Darussalam. He was a Visiting Fellow at College of Asia & the Pacific, Australian National University (ANU). He graduated with a Bachelor of Laws (LLB) (Hons), Master of Comparative Laws (MCL), and Doctor of Philosophy (PhD) from IIUM. He has a special research interest in Public International Law, Private International Law, Alternative Dispute Resolution, Comparative Law, Jurisprudence and Online Legal Education. He was the Editor-in-Chief of the Journal of Islamic Law Review indexed in Index to Foreign Legal Periodicals (IFLP) produced by the American Association of Law Libraries at the University of California, Berkeley, School of Law, the United States of America. He has published a number of research books, textbooks and research articles in various academic journals, presented several research papers at numerous academic conferences and symposiums, and participated in many public forums. (mdhassan@iium.edu.my)

Nasarudin Abdul Rahman (Dr) is an Associate Professor at Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia (IIUM). He graduated with Bachelor of Laws (LLB) (Hons) and Master of Comparative Laws (MCL) from IIUM, Doctor of Philosophy (PhD) from School of Law, Macquarie University. He was admitted as an advocate and solicitor of the High Court of Malaya in 2002. His areas of interest include

Competition Law, Company Law, and Islamic Banking and Finance. He has authored several books and published numerous articles both in local and international journals and reports in the area of competition law. Furthermore, he has presented at various international and local conferences in the area of competition law. (nasarudin@iium.edu.my)

Prem Kaur A/P Bahal Singh (Dr) is an Academic Department Head, School of Law, University of Wollongong KDU College Malaysia (UOWM). She graduated with a Bachelor of Laws (LLB) (Hons) from the University of London (UOL), Master of Laws (LLM) (Hons) and Doctor of Philosophy (PhD) from International Islamic University Malaysia (IIUM). Her areas of expertise are Commercial Law, Company Law, Law of Contract, Shipping Law, Carriage of Goods by Sea, International Law of the Sea and Law of the United Nations. She has taught, published and presented papers in these specialised areas. Besides that, she produced policy papers on Maritime Law for the government of Malaysia whilst she was attached to Maritime Institute of Malaysia (MIMA). (premkaur.b@uow.edu.my)

Seeni Mohamed Nafees (Dr) holds a Bachelor of Laws (LLB) (Hons) from the University of Colombo, Sri Lanka, and a Master of Comparative Laws and Doctor of Philosophy (PhD) in Law specialising in Islamic Banking from International Islamic University Malaysia (IIUM). In addition, he has degrees in Islamic Law as well as in Economics. He was called to the Bar of Sri Lanka in 2001 and is a life member of the Sri Lanka Bar Association. Currently, Dr Nafees is serving as an Assistant Professor of Law at the Faculty of Shariah and Law, Sultan Sharif Ali Islamic University (UNISSA), Brunei Darussalam. He has published several research papers on Law and Islamic Finance in reputed journals, including journals indexed by Scopus, and presented many research papers at international conferences held in various countries. He has also published a few books and many book chapters on Law and Islamic Finance. Besides, he is serving as an editorial member of several research journals locally and internationally such as *The Journal of Islamic Studies and Arabic Language*, *The Journal of Islamic Law Review*, *The Journal of Islamic Thought*, etc. (drsmmnafees@gmail.com)

Sheila Ainon Yussof (Dr) holds a Bachelor of Social Science (Political Science) from Universiti Sains Malaysia (USM). She read law at the University of Buckingham (UK) and was called to the Malaysian Bar in 1995. She holds a post-graduate Diploma in Shariah Legal Practice and a Master of Comparative Laws from International Islamic University Malaysia (IIUM). In 2015, she was awarded a Doctorate in Islamic Banking and Finance from IIUM Institute of Islamic Banking and Finance (IIBF). She is also embarking on a post-doctoral research of Islamicity of native laws. Currently, she is a partner at law firm Messrs Murali B

Pillai & Associates where she is consulted on Islamic banking and finance matters through her consulting company. Besides, she lectures part-time at Universiti Malaya on Islamic finance law and Shariah governance for the Masters' program for lawyers. She is also a Visiting Professor with Sialkot University, Pakistan, and a partner with crowd funding company Ethis Ventures. She was an Assistant Professor at IIUM. She has produced scholarly work on Islamic banking laws and finance, and participated in several international conferences. (syussof@yahoo.com)

Sodiq Omoola (Dr) is an Assistant Professor at Ahmad Ibrahim Kuliyah of Laws, International Islamic University Malaysia (IIUM). He graduated with Bachelor of Laws (LLB) in Shariah and Common Law at Bayero University Kano, Nigeria, Master of Comparative Laws (MCL) from IIUM and Doctor of Philosophy (PhD) from IIUM. He was called to the Nigerian Bar as an advocate and solicitor of Supreme Court of Nigeria in 2012. His area of interests are Alternative Dispute Resolution, Company Regulations, Islamic Finance Regulations, E-Commerce Law and Digital Estate Law. He has published several articles and book chapters in local and international journals. He is also a board member of INSALF-Journal of Malaysian Bar. (sodiq_omoola@iium.edu.my)

Sonny Zulhuda (Dr) is an Associate Professor at Ahmad Ibrahim Kuliyah of Laws, International Islamic University Malaysia (IIUM). He graduated with a Diploma in Arabic Teaching from Imam University (Chapter Jakarta), Bachelor of Laws (LLB) (Hons), Master of Comparative Laws (MCL) and Doctor of Philosophy (PhD) from IIUM. His areas of interest include cyber law, personal data protection law and cyber security law. He was involved in the consulting and drafting of several legislations on personal data protection, cyber security law as well as data sharing law for public sector agencies. He served as a member of the Personal Data Protection Appeal Tribunal of Malaysia for three years, between 2021 and 2024. He has published several books on the above area including his recent publication on 'Cyber Law in Malaysia: Principles and Practices'. Further, he has also published numerous articles in refereed law journals and presented papers at various conferences.

Syuhada Aeni Mat Ali is a Senior Lecturer at the Faculty of Law, Universiti Teknologi MARA (UiTM). She holds a Bachelor of Laws (LLB) (Hons), Master of Comparative Laws (MCL), and Doctor of Philosophy (PhD) in Law from International Islamic University Malaysia (IIUM). Before joining academia, she practiced in civil litigation for six years. Since joining UiTM in 2007, she has been actively involved in teaching both undergraduate and postgraduate courses. Her areas of expertise include Islamic Banking and Finance, Islamic Capital Market, Takaful and Wakaf, Personal Bankruptcy, Corporate Insolvency and Business Law.

She has published articles in both local and international journals and has presented papers at various conferences, particularly in the field of Islamic banking and finance. (syuha497@uitm.edu.my)

Yusnita binti Mohd Yusof is a Lecturer at the Faculty of Law (FOL), Multimedia University (MMU). She graduated with Bachelor of Laws (LLB) (Hons) from International Islamic University Malaysia (IIUM) and Master of Laws from Universiti Kebangsaan Malaysia (UKM), and currently doing her Doctor of Philosophy (PhD) in IIUM. She was admitted to as an advocate and solicitor of the High Court of Malaya in 2003, and was a Syarie Lawyer of the State of Negeri Sembilan. Her areas of interest include Law of Succession, Probate, Professional Practice, Equity and Trusts, and Law of Evidence. (yusnita.yusof@mmu.edu.my)

Yusuf Ibrahim Arowosaiye (Dr) is currently a senior assistant professor and the head of the graduate programme at the Sultan Haji Hassanah Bolkiah Faculty of Law, Universiti Islam Sultan Sharif Ali (UNISSA), Brunei Darussalam. He obtained his LLB (Hons) from the University of Jos, Nigeria, Master of Laws (LLM) from Obafemi Awolowo University, Ile-Ife, Nigeria, Masters in Industrial and Law Relations (MILR) from the University of Ilorin, PhD from International Islamic University Malaysia (IIUM), and Barrister at Law (BL) from the Nigerian Law School. He was called to the Nigerian Bar as a barrister and solicitor of the Supreme Court of Nigeria. He was a former state counsel (public prosecutor) in the Kwara State Ministry of Justice, Nigeria, and a senior partner in the legal firm of Ayodele Gafar & Co (Kwara State and Abuja, Nigeria). His areas of expertise include cyber law, intellectual property law (IP), constitutional law, the law of evidence, criminal law, and the administration of criminal justice and reform. (yusuf.arowosaiye@unissa.edu.bn, ibrahimyusuff@gmail.com)

FOREWORD

In the dynamic and fast-evolving business environment in Malaysia, understanding the complexities of the legal framework that governs business and commercial activities is increasingly important. Corporate entities must navigate various issues, from corporate structures to trade regulations, consumer protection, and dispute resolution.

With that said, *Business and Commercial Law in Malaysia* provides an excellent reference to the various laws and regulations shaping the business landscape in Malaysia. With its focus on the nuances of Malaysian law, the book is meticulously designed to provide an in-depth analysis of critical areas of business and commercial law.

Comprising 29 chapters, the book covers an extensive range of topics, each of which plays a significant role in the regulation and governance of business and commercial activities in Malaysia. From foundational concepts to highly specialised fields of business and commercial law, the content is structured to provide readers with both theoretical insights and practical applications. The chapters address a broad spectrum of the subject areas, providing a thorough overview of the legal principles and regulations that govern business operations, commercial transactions and dispute resolution.

The general concepts of law and legal systems and the essentials of the Malaysian legal system lay the foundation of the book followed by more specific topics on business and commercial law. Since contracts are fundamental to any business transaction, the book captures the essential components of the law of contract together with the remedies for breach of contract and ways businesses can mitigate risks. Also discussed are the essentials of torts law which deals with civil wrongs outside contract law by offering insights on how businesses can protect themselves from tortious claims. The formation, operation and legal implications of the various business entities are discussed with reference to sole proprietorships, partnerships and company law.

Other interesting chapters include agency law, franchise law, competition law, construction law, insurance law, cyber law, consumer protection law, revenue law, employment law, sale of goods, hire-purchase, bailment, banking and digital banking, and Islamic banking and finance. Further,

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CHAPTER 9

COMPETITION LAW*

1. INTRODUCTION

[9-1] The Malaysian Competition Law was introduced in 2010 through the Competition Act 2010 (Act 712) ('CA 2010'). The primary objective of the Act is to promote and safeguard the competitive process among enterprises in the market. By fostering effective and vigorous competition, firms are encouraged to compete on merit, thereby achieving economic efficiency in their operations. This economic efficiency ultimately benefits consumers through lower prices, improved quality, and increased productivity.

[9-2] It is important to note, however, that competition law is distinct from consumer protection law. While competition law focuses on the supply side — ensuring a level playing field among producers in the market — consumer protection law prioritises the interests of end users. Both competition law and consumer protection law are integral components of a broader competition policy aimed at ensuring proper market functionality and equitable resource allocation within society. Although competition law and consumer protection law share the ultimate goal of promoting consumer welfare, they achieve this objective through different means.

[9-3] The Malaysian Competition Commission ('MyCC') was established in 2011 under the Competition Commission Act 2010 (Act 713). The main function of MyCC is to enforce the competition provisions contained in the CA 2010. The MyCC also has the authority to advocate for competition matters to the government and to issue policy advice on competition-related issues. The MyCC is a quasi-judicial authority with the power to investigate potential breaches, adjudicate or issue decisions, impose remedial actions (including financial penalties), grant exemptions, and more.

[9-4] The CA 2010 encompasses two key prohibitions: the prohibition against anti-competitive agreements (section 4) and the prohibition

* This chapter is contributed by Nasarudin Abdul Rahman.

against the abuse of dominant positions (section 10). However, the CA 2010 does not currently include another critical pillar of competition law: a merger control regime. MyCC is in the process of amending the CA 2010 to empower it to oversee problematic mergers – specifically, those that negatively affect competition in the market. Nevertheless, other sector-specific regulations, such as those governing communications, multimedia, and aviation, already include merger control provisions.

2. THE MAIN PROVISIONS

2.1 Application

[9-5] The Act applies to all enterprises, whether public or private, that engage in commercial activities, regardless of their status, ownership, or how they are financed. This includes companies, partnerships, sole proprietorships, and even individuals involved in commercial activities. The Act adopts a functional approach rather than a form-based one, focusing on 'the nature of the activity carried out by the entity concerned rather than its legal identity activity, not legal entity'.¹ This means that entities such as state-owned enterprises, Government-Linked Companies ('GLCs'), and even government entities or agencies if their activities are subject to the CA 2010 if their activities are commercial in nature. Therefore, it is important to distinguish between the commercial and non-commercial aspects of an activity for the purposes of competition law enforcement. The fact that part of an enterprise's activity is non-commercial does not exempt the commercial portion from the application of the CA 2010.

[9-6] The CA 2010 itself does not define what amounts to 'commercial activity'. In the case of *General Insurance Association of Malaysia (PIAM) & 23 Ors v Competition Commission*, the Competition Appeal Tribunal ('CAT') states that 'the ordinary meaning of the term "commercial activity" simply denotes activities involving buying and selling, in this case buying and selling of goods or services'.² In this case also the CAT decided that a trade association does not fall within the definition of enterprise since THE trade association does not carry commercial activities.³

[9-7] Section 3(4) of the CA 2010 excludes certain activities from the ambit of 'commercial activities':

1 *Competition Commission v General Insurance Association of Malaysia (PIAM) & its 22 Members* (Case No 700-2.1.3.2015) at para 137 https://www.mycc.gov.my/sites/default/files/pdf/decision/Public%20Version%20Decision%20PIAM%20%26%2022%20Members_28.2.2021_2.pdf accessed 13 March 2025.

2 Competition Appeal Tribunal's Decision, para 127.

3 Competition Appeal Tribunal's Decision, para 130.

- (1) Any activity, directly or indirectly in the exercise of governmental authority.

The term 'governmental authority', is not defined in the CA 2010. In the case of *Competition Commission v General Insurance Association of Malaysia (PIAM) & 22 its Members*, the MyCC formed a view that:

it is the Commission's view that to 'satisfy the requirement of the exception provided by section 3(4)(a) of the Act, an entity carrying out any activity, directly or indirectly in the exercise of governmental authority must be part of the machinery of the Government of Malaysia and is acting pursuant to a statutory authority in discharging the function that is entrusted to them'.⁴

For an entity to carry out any activity directly or indirectly in the exercise of governmental authority for the purposes of section 3(4)(a) of the Act, it is the Commission's view that the entity must be an entity that has been exclusively delegated by the Government of Malaysia to carry out certain activities based on public interest or social objectives.⁵

Activities performed by the Federal or State Government, including statutory bodies, in exercising sovereign functions are excluded from the scope of the Act. This ensures that government actions necessary for public policy and administration are not hindered by competition regulations.

- (2) Any activity conducted based on the principle of solidarity. Based on *PIAM's* case, 'an enterprise is said to be operating on the basis of the principle of solidarity when benefits are available to individuals not by reference to their economic contributions but in accordance with their needs'⁶ and 'in deciding whether the degree of solidarity precludes economic activity, the case law considers the freedom of the scheme to determine the level of contribution and benefits payable'.⁷ The 'solidarity' principle sought to exclude entities that fulfil exclusively social functions such as social security, pensions, and health insurance or health care services.

4 *Competition Commission v General Insurance Association of Malaysia (PIAM) & its 22 Members* (Case No 700-2.1.3.2015) at para 236.

5 *Competition Commission v General Insurance Association of Malaysia (PIAM) & its 22 Members* (Case No 700-2.1.3.2015) at para 237.

6 *Competition Commission v General Insurance Association of Malaysia (PIAM) & its 22 Members* (Case No 700-2.1.3.2015) at para 303 https://www.mycc.gov.my/sites/default/files/pdf/decision/Public%20Version%20Decision%20PIAM%20%26%2022%20Members_28.2.2021_2.pdf accessed 13 March 2025.

7 *Competition Commission v General Insurance Association of Malaysia (PIAM) & its 22 Members* (Case No 700-2.1.3.2015) at para 304 https://www.mycc.gov.my/sites/default/files/pdf/decision/Public%20Version%20Decision%20PIAM%20%26%2022%20Members_28.2.2021_2.pdf accessed 13 March 2025.

Factors that may be considered include 'the benefits payable was identical for all recipients, contributions were proportionate to income, the pension rights were not proportionate to the contributions made and schemes that were in surplus helped to finance those which had financial difficulties; the schemes were based on the principle of solidarity'.⁸

- (3) Any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity. Non-economic purchases are intended to exclude government procurement activities that are not aimed at offering goods or services to the market for profit but are meant for the government's own consumption. For example, the purchase of medicines by the government or a government body for supply to public hospitals and free distribution to the public would not be subject to the CA 2010.

2.2 Extra territorial jurisdiction

[9-8] The CA 2010 extends its reach to anti-competitive conduct outside Malaysia if such conduct has an impact on competition within the Malaysian market. This ensures that cross-border activities affecting Malaysia are also subject to scrutiny.⁹

2.3 Anti-competitive agreement

[9-9] Section 4(1) of the CA 2010 prohibits agreements between enterprises that have the object or effect of significantly preventing, restricting, or distorting competition in any market for goods or services. Section 4 applies to both horizontal agreements (agreements between competitors) and vertical agreements (agreements between non-competitors operating at different levels of production and distribution chain).

2.3.1 Agreement

[9-10] An agreement is defined as 'any form of contract, arrangement, or understanding, whether or not legally enforceable, between enterprises, and includes a decision of an association and concerted practices'. The concept of 'agreement' under the CA 2010 is broader than its interpretation

⁸ The Commission refers to the case of *Poucet v Assurance Générales de France* Cases C-159/91 and C-160/91 ECR I-637.

⁹ Competition Act 2010 (Act 712), s 3(2).

under contract law. It is intended to capture various forms of behavior, including collusion and coordination between competitors. An agreement exists 'when parties adhere to a common plan which limit their individual commercial conduct by determining the lines of their joint action or abstention from action on the market'.¹⁰ In establishing an agreement, it is 'sufficient that the undertaking in question should have expressed their joint intention to conduct themselves on the market in a specific way'.¹¹ The concept of agreement under the CA 2010 covers non-binding or non-enforceable agreements, written or oral, such as conditional agreements, guidelines, policies, good neighbour rules, established practices, ethics etc. 'The fact that an enterprise may have played only a limited part in setting up of the agreement, or may not be fully committed to its implementation, or participated only under pressure from other parties does not mean that it is not a party to the agreement'.¹²

2.3.2 Participation in a meeting

[9-11] Anti-competitive strategies or agendas are often discussed among competitors during meetings facilitated by trade associations. Mere participation in such meetings by competitors may also amount to an agreement if they are aware that anti-competitive plans are being discussed. Based on the MyCC's Guidelines:

An agreement *could* also be found whereby 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 when 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.¹³

[9-12] By participating in a meeting, competitors are assumed to have adopted what was discussed to align their commercial policies. Enterprises are unlikely to determine their own commercial policies independently after attending such meetings. Meetings that aim to coordinate commercial strategies, such as pricing, and where sensitive information is shared, can influence the behavior and incentives of the participants. To avoid liability, enterprises attending a meeting where anti-competitive strategies are

¹⁰ *Competition Commission v General Insurance Association of Malaysia (PIAM) & its 22 Members* (Case No 700-2.1.3.2015) at para 150.

¹¹ *Competition Commission v General Insurance Association of Malaysia (PIAM) & its 22 Members* (Case No 700-2.1.3.2015) at para 151.

¹² *Competition Commission v 24 Ice Manufacturers* (No MyCC.700.2.0001.2014) at para 39.

¹³ MyCC, 'Guidelines on Chapter 1 Prohibition' <https://www.myc.gov.my/sites/default/files/pdf/newsroom/chapter%201%20prohibition%20.pdf> accessed 13 March 2025.

discussed must explicitly oppose or publicly distance themselves from the agreements or discussions made during the meeting.

2.3.3 Concerted practice

[9-13] The term 'agreement' under the CA 2010 also covers 'concerted practice'. Concerted practice refers to:

any form of coordination between enterprises which knowingly substitutes practical co-operation between them for the risks of competition, and includes any practice which involves direct or indirect contact or communication between enterprises, the object or effect of which is either —

- (a) to influence the conduct of one or more enterprises in a market; or
- (b) to disclose the course of conduct which an enterprise has decided to adopt or is contemplating to adopt in a market, in circumstances where such disclosure would not have been made under normal conditions of competition.

The concept of concept of concerted practice was adopted to cater for coordination falling short of an agreement through direct and indirect contact or communication. Direct or indirect contact does not mean that there must reciprocal contact. It is sufficient that 'one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least accept it'.¹⁴

[9-14] Concerted practice can exist even if competitors do not enter into a formal agreement. However, competitors may occasionally share commercially sensitive information, such as future pricing, and subsequently implement similar price increases without clear evidence of a price-fixing agreement. The MyCC in the recent case of 5 Chicken Feedmillers stated that:

Conduct may be considered as a concerted practice even when parties had not reached an agreement in advance on a common plan but later adopt or adhere to the collusive device which facilitates the coordination of their behaviour in the market. Direct contact or communication may include the sharing of strategic information and commercial sensitive information.¹⁵

The disclosure and/or exchange of commercial sensitive information, such as future prices can further facilitate price fixing collusion and indicate participation in a concerted practice. A single meeting or isolated exchange of information is sufficient to prove concerted practice.¹⁶

[9-15] Parallel behavior among competitors, such as similarities in rates and timing of price increases, should not automatically be considered a concerted practice, as these similarities may result from competitors' market observance. However, parallel behavior can be a strong indication of concerted practice. For example, if a market leader announces its future prices to the public and other competitors follow suit without any reasonable justification, it may suggest a concerted practice. 'Strategic responses by competitors to each other's public announcements may indicate a strategy to establish a mutual understanding regarding the coordination terms'.¹⁷

2.4 Object or effect

[9-16] The CA 2010 draws a distinction between anti-competitive conduct 'by object' and anti-competitive conduct 'by effect'. A 'by object' restriction refers to anti-competitive conduct that is inherently injurious to competition, without any countervailing benefits (often referred to as hardcore restrictions). Some agreements, such as those restricting key competition parameters like prices and quantities, are highly likely to have anti-competitive effects without the need for the competition authority to conduct a detailed economic analysis to prove an infringement. These agreements are also known as 'naked cartels'.

[9-17] The MyCC's Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements) states the following:

2.13. ... If the 'object' of an agreement is highly likely to have a significant anti-competitive effect, then the MyCC may find the agreement to have an anti-competitive 'object'.

2.14. Once anti-competitive 'object' is shown, then the MyCC does not need to examine the anti-competitive effect of the agreement.

3.25. ... In these situations, the agreements are deemed to 'have the object of significantly, preventing, restricting or distorting competition in any market for goods or services'.

[9-18] The deeming provision can be found in section 4(2) of the CA 2010 which laid down a non-exhaustive list of hardcore restrictive agreements as shown in Table 1:

¹⁴ See *Cimenteries CBR & Ors v Commission*, referred to in the case of *Malaysia Competition Commission v Seven Tuition and Day Care Centres* (No 700-1/1/43. 2017).

¹⁵ *Malaysia Competition Commission vs 5 Chicken Feedmillers* (Case No 700-1/2/1/2021) at para 114 https://www.mccc.gov.my/sites/default/files/pdf/decision/Non%20Confidential_Section%2040%20_Infringement%20Decision_2023_updated.pdf accessed 13 March 2025.

¹⁶ *Malaysia Competition Commission vs 5 Chicken Feedmillers* (Case No 700-1/2/1/2021) at para 115 https://www.mccc.gov.my/sites/default/files/pdf/decision/Non%20Confidential_Section%2040%20_Infringement%20Decision_2023_updated.pdf accessed 13 March 2025.

Confidential_Section%2040%20_Infringement%20Decision_2023_updated.pdf accessed 13 March 2025.

¹⁷ *Malaysia Competition Commission vs 5 Chicken Feedmillers* (Case No 700-1/2/1/2021) at para 119 https://www.mccc.gov.my/sites/default/files/pdf/decision/Non%20Confidential_Section%2040%20_Infringement%20Decision_2023_updated.pdf accessed 13 March 2025.

Table 9.1

No	Hardcore restrictive agreement	Explanation
1	Agreement to fix price and trading conditions (section 4(2)(a))	Agreement to fix price, component of prices, discount rate, purchasing price, range of increase of price, fixing trading terms and conditions.
2	Agreement to share market or source of supply (section 4(2)(b))	Agreement to divide market in term of geographical area, routes, customers, etc or to control supply or to limit buying from certain suppliers.
3	Agreement to limit output, market access, technical and technology development (section 4(2)(c))	Agreement to limit production or to set quota for quantity, to limit the use of technology and innovation.
4	Agreement to perform an act of bid-rigging (section 4(2)(d))	Agreement to manipulate the tender of process, inflicting the price tender and taking turn to win tender.

[9-19] Once it is established that the object of the agreement is to engage in the activities mentioned above, such as price-fixing or market-sharing, the deeming provision can be invoked. This means the agreement is deemed to have infringed section 4 of the CA 2010 and is thus presumed to be illegal. However, this presumption can be rebutted (rebuttable presumption). In the case of *Malaysia Competition Commission v Competition Appeal Tribunal & Ors*, the High Court stated that:

On this issue of deeming provision, sub-s. 4(2) is an express statutory provision and a presumption of law enacted by Parliament to assist the Commission in carrying out its duty to prove an infringement of sub-s. 4(1). It is obligatory to invoke this deeming provision if the prerequisite fact has been established. In the present case, the prerequisite fact is that the agreement has the object to share market.¹⁸

18 *Competition Commission v Competition Appeal Tribunal & Ors* (Application for Judicial Review No: WA-25-82-05/2016) at para 86.

2.5 Significant effect through safe harbour threshold (deminimis)

[9-20] Agreements with negligible effects on competition are generally excluded under the MyCC Guidelines on Market Definition and the De Minimis Market Share Threshold. This applies to agreements between enterprises with a combined market share below the prescribed threshold, provided such agreements do not involve serious anti-competitive practices like price-fixing or bid-rigging. Based on the MyCC Guidelines on Chapter 1 Prohibition:

In general, anti-competitive agreements will not be considered 'significant' if:

- the parties to the agreement are competitors who are in the same market and their combined market share of the relevant market does not exceed 20%;
- the parties to the agreement are not competitors and all of the parties individually has less than 25% in any relevant market. For example, an exclusive distribution agreement between a wholesaler and a retailer neither of whom has more than 25% of the wholesale market or retail market.¹⁹

[9-21] MyCC has so far issued 12 infringement decisions under section 40 of the CA 2010. Most of these cases relate to price-fixing agreements between enterprises, including the fixing of price increases, discounts, and rebates. The list of cases is shown in Table 2 below:

Table 9.2

No	Cases	Date/year	Nature of the anti-competitive agreement
1	Cameron Highland Floriculturist Association ('CHFA') ²⁰	6 December 2012	An agreement between members of CHFA to increase the prices of flowers by 10%, effective 16 March 2012 for its members.

19 MyCC, 'Guidelines on Chapter 1 Prohibition' at para 3.4 <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/chapter%201%20prohibition%20.pdf> accessed 13 March 2025.

20 'Finding of Infringement under section 40 of the Competition Act 2010 – Infringement of Section 4(2)(a) of the Competition Act 2010 by Cameron Highlands Floriculturist Association' <https://www.mycc.gov.my/sites/default/files/pdf/decision/Cameron%20Highlands%20Floriculturist%20Association.pdf> accessed 13 March 2025.

No	Cases	Date/year	Nature of the anti-competitive agreement
2	Malaysia Airlines System Berhad, AirAsia Berhad and AirAsiaX Sdn Bhd ²¹	31 March 2014	An agreement between MAS AirAsia Berhad & AirAsiaX to share and divide market segments.
3	24 Ice Manufacturers ²²	30 January 2015	An agreement 24 ice manufacturers to increase the price of edible tube ice by RM0.50 per bag and the price of block ice by RM2.50 per big block from 1 January 2014.
4	Sibu Confectionary and Bakery Association ('SCBA'). ²³	12 February 2015	An agreement between 14 members of the SCBA to increase the price of confectionary and bakery between 10% and 15% in Sibu, Sarawak, in December 2013.
5	Container Depot Operators ('CDO Penang') ²⁴	1 June 2016	An agreement between CDOs to fix the charges of Depot Gate at RM25 together with fixing rebate at RM15 for prompt payment by hauliers.

21 'Finding of Infringement under section 40 of the Competition Act 2010 – Infringement of Section 4(2)(b) of the Competition Act 2010 by Malaysian Airline System Berhad, AirAsia Berhad and AirAsia X Sdn Bhd' <https://www.mycc.gov.my/sites/default/files/pdf/decision/MAS%20AIRASIA.pdf> accessed 13 March 2025.

22 'Finding of Infringement under section 40 of the Competition Act 2010 – 24 Ice Manufacturers' <https://www.mycc.gov.my/sites/default/files/pdf/decision/24%20Ice%20Manufacturers.pdf> accessed 13 March 2025.

23 'Finding of Infringement under section 40 of the Competition Act 2010 – 15 Members of the Sibu Confectionery and Bakery Association' <https://www.mycc.gov.my/sites/default/files/pdf/decision/15%20members%20of%20SCBA.pdf> accessed 13 March 2025.

24 'Finding of Infringement under Section 40 of the Competition Act 2010 – Infringement of Section 4(1) and Section 4(2)(a) of the Competition Act 2010 by Container Depot Operators' <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/NEWS%20RELEASE%20MyCC%20ISSUE%20FINAL%20DECISION%20AGAINST%20CDO%20.pdf> accessed 13 March 2025.

No	Cases	Date/year	Nature of the anti-competitive agreement
6	General Insurance Association of Malaysia ('PIAM') and its 22 members ²⁵	25 September 2020	An agreement between the insurers through PIAM to fix the trade discount for car parts and labour hourly rate for PIAM Approved Repairers Scheme ('PARS') workshops.
7	Seven Tuition and Daycare Centres ²⁶	26 October 2018	An agreement to fix and standardise the fees charged for the tuition and day care services rendered by their respective centres.
8	Seven Warehouse operators ²⁷	6 August 2021	An agreement to fix charges for handling services for long length and heavy lift of import and export cargoes at Port Klang.

25 'Finding of Infringement under Section 40 of the Competition Act 2010 – Infringement of Section 4(2)(a) of the Competition Act 2010 by the General Insurance Association of Malaysia and its 22 members' https://www.mycc.gov.my/sites/default/files/pdf/decision/Public%20Version%20Decision%20PIAM%20%26%2022%20Members_28.2.2021_2.pdf accessed 13 March 2025.

26 'Finding of Infringement under Section 40 of the Competition Act 2010 – Infringement of Section 4(2)(a) of the Competition Act by 7 Tuition and Daycare Centres' <https://www.mycc.gov.my/sites/default/files/pdf/decision/Final%20Decision%20on%20Seven%20Tuition%20and%20Day%20Care%20Centres.pdf> accessed 13 March 2025.

27 'Finding of Infringement under Section 40 of the Competition Act 2010 – Infringement of Section 4(1) read with Section 4(2)(a) and (4)(3) of the Competition Act 2010 by 7 Warehouse Operators' https://www.mycc.gov.my/sites/default/files/pdf/decision/Public%20Version_REDACTED_Decision%20against%207%20Warehouse%20Operators_26.7.2021.pdf accessed 13 March 2025.

No	Cases	Date/year	Nature of the anti-competitive agreement
9	Akademi Seni Budaya dan Warisan Kebangsaan ('ASWARA') bid rigging case ²⁸	4 March 2019	Bid rigging conducts involving four different IT related projects worth RM1,925,365.90 that were procured by the ASWARA.
10	Langkawi RoRo Ferry operators ²⁹	17 December 2021	An agreement to increase fares for vehicle transportation via Ro-Ro vessels between Langkawi and Kuala Perlis and vice versa.
11	Five Chicken Feed millers ³⁰	11 December 2023	Agreements and/or concerted practices to increase the price quantum of poultry feed that contains soybean meal and maize as its main ingredients, between early 2020 and mid 2022.

28 Finding of Infringement under Section 40 of the Competition Act 2010 – Infringement of Section 4(1) read with section 4(2)(d) and section 4(3) of the Competition Act 2010 by eight Enterprises involving Procurement of IT Services https://www.myc.gov.my/sites/default/files/pdf/decision/Public_5.7.2022_Aswara%20FD.pdf accessed 13 March 2025.

29 'Finding of Infringement under Section 40 of the Competition Act 2010 – Infringement of Section 4(1) read with Section 4(2)(a) and (4)(3) of the Competition Act 2010 by Langkawi Ro-Ro Operators' https://www.myc.gov.my/sites/default/files/pdf/decision/Decision%20against%20Langkawi%20Roro%20Operators%20and%20related%20Enterprises%20pursuant%20to%20Section%2040%20of%20CA%202010_Public%20Version.pdf accessed 13 March 2025.

30 'Finding of Infringement under Section 40 of the Competition Act 2010 – Infringement of Section 4(1) read with Section 4(2)(a) and Section 4(3) of the Competition Act 2010 by 5 Chicken Feedmillers' https://www.myc.gov.my/sites/default/files/pdf/decision/Non%20Confidential_Section%2040%20_Infringement%20Decision_2023_updated.pdf accessed 13 March 2025.

No	Cases	Date/year	Nature of the anti-competitive agreement
12	Seven Enterprises involving Procurement of Life Saving and Safety Equipments ³¹	5 September 2024	Bid rigging conduct involving seven enterprises participating in a bid-rigging cartel involving tenders from the Defence Ministry ('MINDEF') between 2017 and 2020. They worked together in two separate cartels to manipulate tender outcomes by setting coordinated bid prices.

2.6 Recent developments

[9-22] The *MAS/AirAsia's* case is one of the earliest infringement decisions issued by MyCC after the CA 2010 came into force in 2010. In this case, the Commission found that the Collaborative agreement entered between Malaysia Airline System Berhad and AirAsia Berhad and AirAsia X Sdn Bhd infringes section 4 of the CA 2010. The Collaborative Agreement contains provisions which allow the parties to divide the market segment, ie, between low cost and full premium services. However, when the parties appealed to the CAT quashed the MyCC's decision. The High Court however on a judicial review brought by MyCC, confirmed the MyCC's decision and set aside CAT's decision. However, the Court of Appeal and Federal Court reversed the High Court's decision and confirmed the CAT's decision. One of the key grounds of the judgment was that MyCC failed to prove that the Collaborative Agreement had the object of market-sharing. There was no evidence that the parties were sharing markets by carving out routes, which is a prerequisite for invoking the deeming provision under section 4(2). Additionally, MyCC failed to conduct a detailed market analysis by not adequately defining the relevant market.³²

31 'Finding of Infringement under Section 40 of the Competition Act 2010 – Infringement of Section 4(1) read with section 4(2)(d) and section 4(3) of the Competition Act 2010 by 7 Enterprises involving Procurement of Life Saving and Safety Equipments' <https://www.myc.gov.my/sites/default/files/pdf/decision/Public%20Version%20FD%20-%20Case%20No.%2070011172017%20%282%29.pdf> accessed 13 March 2025.

32 *Malaysian Airline System Bhd v Competition Commission and another appeal* [2021] MLJU 2089 (CA).

[9-23] In the case of *General Insurance Association Malaysia (PIAM) & its 22 Members*, MyCC took action against PIAM and its members for fixing the trade discount for car parts and labour hourly rate for PIAM Approved Repairers Scheme ('PARS') workshops during an association meeting in 2011. The parties appealed to the CAT. The CAT quashed the MyCC's decision. The CAT concluded that PIAM Members' Circular No 123 does not constitute an agreement but rather a record of feedback on the outcome agreed between PIAM and FAWOAM. The circular is simply an announcement of the results of a survey conducted by PIAM with its members.³³ Even if an agreement existed between PIAM and its members, its purpose is not to fix prices, as argued by the Commission, and therefore the deeming provision under section 4(2) cannot be applied. The agreement to set a maximum discount rate of 25% for car parts does not amount to price-fixing, as repairers retain the freedom to offer no discount, discounts up to 25%, or any amount within that range.³⁴ Similarly, the agreement to establish a minimum labour rate of RM30 per hour is not a price-fixing agreement because repairers are free to charge more than RM30. This minimum rate benefits repairers, as it ensures the minimum amount insurers are obligated to pay.³⁵

[9-24] The MyCC has imposed a record RM415.5 million fine on five chicken feed manufacturers for engaging in a price-fixing cartel. The companies involved are Leong Hup Feedmill Malaysia Sdn Bhd, FFM Berhad, Gold Coin Feedmills (Malaysia) Sdn Bhd, Dindings Poultry Development Centre Sdn Bhd, and PK Agro-Industrial Products (M) Sdn Bhd. This fine is the largest ever imposed by MyCC in its 12-year history.³⁶ MyCC's investigation revealed that between January 2020 and June 2022, these companies coordinated identical price increases for poultry feed, despite variations in their feed formulations. This alignment in pricing, even when raw material costs decreased, indicated deliberate collective

33 *PIAM & Its 22 Members v Competition Commission*, Competition Appeal Tribunal's decision (2 September 2022) at paras 136–137 <https://www.mccc.gov.my/sites/default/files/pdf/decision/PIAM%20%26%2023%20Ors%20v%20Competition%20Commission%20%28Grounds%20of%20Decision%29.pdf> accessed 13 March 2025.

34 *PIAM & Its 22 Members v Competition Commission*, Competition Appeal Tribunal's decision at para 144 <https://www.mccc.gov.my/sites/default/files/pdf/decision/PIAM%20%26%2023%20Ors%20v%20Competition%20Commission%20%28Grounds%20of%20Decision%29.pdf> accessed 13 March 2025.

35 *PIAM & Its 22 Members v Competition Commission*, Competition Appeal Tribunal's decision at paras 145–146 <https://www.mccc.gov.my/sites/default/files/pdf/decision/PIAM%20%26%2023%20Ors%20v%20Competition%20Commission%20%28Grounds%20of%20Decision%29.pdf> accessed 13 March 2025.

36 Hafiz Yatim, 'Five feedmillers ordered to pay RM415.5m for collusion as tribunal denies stay of MyCC's fine' (*The Edge Malaysia*, 6 December 2024) <https://theedgemalaysia.com/node/736822> accessed 13 March 2025.

action to manipulate market prices.³⁷ Additionally, MyCC found that representatives from these enterprises attended meetings organised by the Malaysian Feedmillers Association ('MFA'). While official meeting minutes did not explicitly record exchanges of sensitive pricing information, personal notes from one representative suggested the presence of an agreement or concerted practices related to poultry feed pricing. Witness statements further confirmed that there were oral exchanges of pricing information before, during, and after MFA meetings.³⁸ In addition to the financial penalties, MyCC has directed the companies to cease their participation in the poultry feed cartel, submit monthly reports on poultry feed prices, enhance their competition law compliance training programs, and include provisions in their codes of conduct recognising involvement in competition law infringements as misconduct.³⁹

[9-25] The MyCC is also focusing its enforcement on bid rigging. There are two major decisions issued by the Commission relating to collusive behavior in the tendering process, contravening section 4(1) read together with section 4(2)(d) of the CA 2010. In 2022, the MyCC issued an infringement decision under section 40 of the CA 2010 against eight enterprises involved in bid-rigging activities for tenders relating to IT services issued by the National Academy of Arts, Culture and Heritage of Malaysia ('ASWARA') worth RM1,925,365.90.⁴⁰ The Commission found various evidence indicating the existence of collusion to rig the tendering process including sharing confidential documents such as letterheads, financial documents, regulatory certificates and company stamps, preparing and submitting tender quotations on behalf of others, using other enterprises' names who are competitors, to participate in the tender, etc.

[9-26] Recently, the MyCC has issued an infringement decision against seven enterprises for participating in a bid-rigging cartel in relation to four tenders awarded by the MINDEF worth around RM20 million in 2017 and 2020.⁴¹ The target enterprises had involved in a cover bid practice where one enterprise set a base bid price, and the other enterprises

37 MyCC News Release, 'RM415 Million Penalty Imposed Against Five Chicken Feed Millers for Price Fixing Cartel' (22 December 2023) <https://www.mccc.gov.my/sites/default/files/pdf/newsroom/%5BFINAL%5D%20Press%20Release%20-%20RM415%20MILLION%20PENALTY%20IMPOSED%20AGAINST%20FIVE%20CHICKEN%20FEED%20MILLERS%20FOR%20PRICE%20FIXI.pdf> accessed 13 March 2025.

38 See n 37.

39 See n 37.

40 *Competition Commission v Tuah Packet & Ors (ASWARA)* (Case No 700-1/1/38/2016) https://www.mccc.gov.my/sites/default/files/pdf/decision/Public_5.7.2022_Aswara%20FD.pdf accessed 13 March 2025.

41 *Competition Commission v Agenda Eksklusif Sdn Bhd & Ors* (Case No 700/1/1/17/2017) <https://www.mccc.gov.my/sites/default/files/pdf/decision/Public%20Version%20FD%20-%20Case%20No.%2070011172017.pdf> accessed 13 March 2025.

submitted a higher price than the base price.⁴² MyCC in this case found that the competitors shared sensitive information relating to bid price, which showed evidence of communication and concerted practice. It is also a common practice that the winner will sub-contract the tender to the losing parties.

2.7 Vertical agreement

[9-27] Vertical agreement is defined as 'an agreement between enterprises each of which operates at a different level in the production or distribution chain' or in other words, an agreement between enterprises competing in different market segments such as an agreement between producer and distributors or agreement between wholesalers and retailers. Examples of vertical agreements that may raise competition issues are depicted in Table 3 below.⁴³

Table 9.3

No	Type of Agreement	Nature of Agreement
1	Resale Price Maintenance ('RPM') ⁴⁴	An upstream seller imposes a minimum price that a downstream buyer must resell. For example, a manufacturer sets the price for which its products are sold at the retail level.
2	Agreements that require a buyer must buy all or most supplies from a supplier (Single Branding Agreement) ⁴⁵	A seller imposes a condition that the buyer must buy (or is induced to buy by way of cumulative discounts) all supplies of a product, or a substantial proportion of supplies from the seller.

⁴² See also Malaysia Competition Commission, 'Help Us Detect Bid Rigging' https://mycc.gov.my/sites/default/files/pdf/newsroom/MYCC_Handbook_HelpUsDetectBidRigging.pdf accessed 13 March 2025.

⁴³ Malaysia Competition Commission, 'Guidelines on Chapter 1 Prohibition' <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/chapter%201%20prohibition%20.pdf> accessed 13 March 2025.

⁴⁴ Malaysia Competition Commission, 'Guidelines on Chapter 1 Prohibition' at para 3.14 <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/chapter%201%20prohibition%20.pdf> accessed 13 March 2025.

⁴⁵ Malaysia Competition Commission, 'Guidelines on Chapter 1 Prohibition' at para 3.16 <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/chapter%201%20prohibition%20.pdf> accessed 13 March 2025.

No	Type of Agreement	Nature of Agreement
3	Exclusive Distribution Agreement Covering a Geographic Territory ⁴⁶	A supplier gives an exclusive geographical territory to a buyer which limits intra-brand competition.
4	Exclusive Customer Allocation Agreement ⁴⁷	The seller agrees to only sell to a distributor for resale to a particular group of customers (by occupation, type of business, etc).
5	Upfront Access Payment ⁴⁸	Suppliers pay distributors to get access to their distribution network. For example, a wholesaler may pay an up-front fee to a retailer to get exclusive access to the best shelf-space in the retail outlet.

[9-28] Generally, vertical agreements are treated as anti-competitive by effect. The deeming provision under section 4(2) does not apply to vertical agreements, meaning the Commission must carry out a comprehensive effect analysis. A vertical agreement is typically problematic when one of the parties to the agreement holds significant market power. 'In that case, a vertical agreement may reduce competition significantly in either the market in which the supplier upstream competes or the market in which the downstream buyer competes'.⁴⁹ In 'determining whether a vertical agreement infringes the CA 2010, 'regard will be given to the market power of the enterprise imposing such vertical restriction, the justification claimed for the restriction and the extent to which a market in the vertical relationship may be foreclosed. Also relevant to examining the anti-competitive effect will be whether there are entry barriers to any relevant market'.⁵⁰

⁴⁶ Malaysia Competition Commission, 'Guidelines on Chapter 1 Prohibition' at para 3.20 <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/chapter%201%20prohibition%20.pdf> accessed 13 March 2025.

⁴⁷ Malaysia Competition Commission, 'Guidelines on Chapter 1 Prohibition' at para 3.22 <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/chapter%201%20prohibition%20.pdf> accessed 13 March 2025.

⁴⁸ Malaysia Competition Commission, 'Guidelines on Chapter 1 Prohibition' at para 3.23 <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/chapter%201%20prohibition%20.pdf> accessed 13 March 2025.

⁴⁹ Malaysia Competition Commission, 'Guidelines on Chapter 1 Prohibition' at para 3.12 <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/chapter%201%20prohibition%20.pdf> accessed 13 March 2025.

⁵⁰ Malaysia Competition Commission, 'Guidelines on Chapter 1 Prohibition' at para 3.13 <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/chapter%201%20prohibition%20.pdf> accessed 13 March 2025.

[9-29] Vertical agreements are generally considered less harmful than horizontal agreements. In terms of enforcement, only one infringement decision has been issued regarding a vertical agreement. MyCC has also issued a non-infringement decision concerning recommended resale prices, as briefly explained in Table 4 below.

Table 9.4

No	Cases	Date/year	Nature of the anti-competitive agreement
1	Containerchain (Malaysia) Sdn Bhd and Container Depot Operators ⁵¹	1 June 2016	An agreement or concerted practice between IT Software provider, Containerchain with Container Depot Operators (Target CDOS) which has the effect of influencing their conduct to increase their depot charge from RM5 to RM25 in the market for the provision of empty container storage, maintenance and handling services within a 5–15km radius of the Penang Port; and An agreement or concerted practice between IT Software provider, Containerchain with the Target CDOS in which it recommended, facilitated, influenced and coordinated their conduct in agreeing to an RM5 rebate to hauliers in respect of the DGC in the market for the provision of empty container storage, maintenance and handling services within a 5–15km radius of the Penang Port.

51 Malaysia Competition Commission, 'Finding of Infringement under Section 40 of the Competition Act 2010 – Infringement of Section 4(1) and Section 4(2)(a) of the Competition Act 2010 by Container Depot Operators' <https://www.mccc.gov.my/case/finding-of-infringement-under-section-40-of-the-competition-act-2010-infringement-of-section-4> accessed 13 March 2025.

No	Cases	Date/year	Nature of the anti-competitive agreement
2	Coca-Cola Bottlers (Malaysia) Sdn Bhd and Coca-Cola Refreshments Malaysia Sdn Bhd ⁵²	23 September 2019	An investigation was launched against Coca-Cola Bottlers (Malaysia) Sdn Bhd and Coca-Cola Refreshments Malaysia Sdn Bhd for issuing a Notice in July 2018 which contained recommended resale prices at which various Coca-Cola beverages were to be sold to retailers and recommended consumer prices to the consumer. Investigation further reveals that there was no evidence to indicate that Coca-Cola had induced the supermarkets and hypermarkets by way of incentives or promotional measures to encourage them to strictly adhere to the recommended resale or consumer price.

2.8 Abuse of dominant position

[9-30] Section 10 of the CA 2010 states: 'An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.'

[9-31] Section 10 does not prohibit an enterprise from being dominant. The CA 2010 applies only when a dominant enterprise abuses its dominant position. A firm holding a dominant position has a special responsibility

52 Malaysia Competition Commission, 'News Release: No Resale Price Maintenance on its Products by Coca-Cola' https://www.mccc.gov.my/sites/default/files/pdf/newsroom/MyCC%20News%20Release_Coca%20Cola%20%28ENG%29_0.pdf accessed 13 March 2025; see also *Malaysia Competition Commission v Coca Cola* (Case No 700-1/3/2/2018); 'Finding of Non-infringement Under Section 39 of the Competition Act 2010' <https://www.mccc.gov.my/sites/default/files/pdf/decision/Final%20Decision%20of%20Coca%20Cola%20-%20Redacted%20Version.pdf> accessed 13 March 2025.

not to hinder or distort competition in the market. This means that certain behaviours permissible for non-dominant enterprises are restricted to dominant ones due to the significant market power they hold. The CA 2010 also emphasises the structure of the market. A contestable market structure, or one with sufficient producers to foster competition, can ultimately benefit consumers through lower prices and greater variety. In the assessment of whether a conduct amounts to abuse of the dominant position, MyCC adopts an effect-based approach. The determination of liability requires three stages of assessment:

- (1) the relevant market definition;
- (2) dominant position; and
- (3) abusive conduct.

2.8.1 Market definition

[9-32] Market is defined 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 or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.'

Market can be further divided into three categories:

- (1) Product market goods or services that are interchangeable or substitutable based on characteristics, price, and intended use.
- (2) Geographical market geographic area where the firm competes under similar conditions of competition.
- (3) Temporal market when competitive conditions vary between one season and another.

[9-33] The main objectives of market definition for the purpose of section 10 of the CA 2010 are: (1) to identify the competitive constraints faced by a business; (2) to determine the scope of the market within which competition is assessed. 'To be dominant in a market requires assessing whether a firm has substantial market power in a market'.⁵³

[9-34] In determining the boundaries of the market, the Commission adopts substitutability concept. According to the MyCC Guidelines on Market Definition, 'defining a "relevant market" means identifying all the close substitutes for the product under investigation. Products can be

substituted both on the demand and on the supply side'.⁵⁴ A key component of market definition and steps in the market definition is summarised in Table 5 and Table 6 below.

Table 9.5

Key Components of Market Definition

Relevant Product Market	<p>Substitutability Test: Examines the degree to which products or services can be substituted from the perspective of consumers and suppliers.</p> <p>(1) Demand-Side Substitution: focuses on whether consumers will switch to alternative products in response to price changes.</p> <p>(2) Supply-Side Substitution: considers whether suppliers can reallocate resources to produce competing products quickly and without significant cost.</p> <p>Hypothetical Monopolist Test ('HMT'): Assesses whether a small but significant and non-transitory increase in price ('SSNIP') would lead consumers to switch to alternatives.</p>
Relevant Geographic Market	<p>(1) Examines the geographic area where businesses compete to supply products or services.</p> <p>(2) Transportation Costs: considers whether costs of transportation would deter consumers from seeking alternatives outside the area.</p> <p>(3) Legal and Regulatory Barriers: Assesses whether laws or regulations restrict cross-border competition.</p>

53 Malaysia Competition Commission, 'Guidelines on Market Definition' at para 1.6 https://www.mccc.gov.my/sites/default/files/pdf/newsroom/MYCC-4-Guidelines-Booklet-BOOK4-10-FA-copy_market-definition.pdf accessed 13 March 2025.

54 Malaysia Competition Commission, 'Guidelines on Market Definition' at para 1.4 https://www.mccc.gov.my/sites/default/files/pdf/newsroom/MYCC-4-Guidelines-Booklet-BOOK4-10-FA-copy_market-definition.pdf accessed 13 March 2025.

Table 9.6

Steps in market definition⁵⁵

Step 1: We start with a hypothetical monopolist of the focal product (ie, the product that is under investigation). We then ask:
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 5–10% above the competitive level?
(a) If the answer is '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 (i.e. could be substituted for the focal product at that price) have been identified. The market definition is completed.
(b) If the answer is 'No' – then this means that other products compete with the focal product. So, the products that next compete with the focal product (the closest substitutes) should be included in the definition of the relevant market. The next step involves asking the same question with a broader product.
Step 3: The question is repeated. Would a hypothetical monopolist of a market for a combined market for the focal product plus the close substitutes identified in Step 2, find it profitable to sustain the price of the focal product 5–10% above the competitive level? If 'Yes', then the relevant market is the market for the focal product plus the close substitutes. If 'No', then we add the next closest substitutes and repeat the question until the point is reached where a hypothetical monopolist could sustainably maintain price 5–10% above the competitive price.

2.8.2 Dominant position

[9-35] Dominant position refers to 'a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors'.

[9-36] In assessing whether an enterprise holds a dominant position, MyCC will consider the competitive constraints faced by the enterprise. These competitive constraints can be further divided into three categories, as illustrated in Table 7.

⁵⁵ Malaysia Competition Commission, 'Guidelines on Market Definition' at para 2.4 https://www.mccc.gov.my/sites/default/files/pdf/newsroom/MYCC-4-Guidelines-Booklet-BOOK4-10-FA-copy_market-definition.pdf accessed 13 March 2025.

Table 9.7

Competition constraints	Indicators
Existing competitors ⁵⁶	'Market shares of competitors provide a starting point for assessing the constraints competitors impose on the alleged dominant enterprise. In General consider a market share above 60% would be indicative that an enterprise is dominant.' ⁵⁷
Potential competitors ⁵⁸	'The possibility that new entrants will come into the market if prices are set high by the alleged dominant enterprise. The possibility of new entrants depends on the barriers to entering the market. For example, a significant barrier is licensing requirements on entry'. Other entry barriers such as the existence of economies of scale and scope, network effect, high sunk costs, etc.
Other constraints ⁵⁹	Other constraints imposed by buyers with significant power or economic regulation imposed by government, such as price regulation.

2.8.3 Abusive conduct

[9-37] The ECJ in Hoffmann-La Roche explains the concept of abuse:

The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question,

⁵⁶ Malaysia Competition Commission, 'Guidelines on Chapter 2 Prohibition' at para 2.9 <https://www.mccc.gov.my/sites/default/files/pdf/newsroom/MYCC%204%20Guidelines%20Booklet%20BOOK2-6%20FA%20copy.pdf> accessed 13 March 2025.

⁵⁷ Malaysia Competition Commission, 'Guidelines on Chapter 2 Prohibition' at para 2.14 <https://www.mccc.gov.my/sites/default/files/pdf/newsroom/MYCC%204%20Guidelines%20Booklet%20BOOK2-6%20FA%20copy.pdf> accessed 13 March 2025.

⁵⁸ Malaysia Competition Commission, 'Guidelines on Chapter 2 Prohibition' at para 2.9 <https://www.mccc.gov.my/sites/default/files/pdf/newsroom/MYCC%204%20Guidelines%20Booklet%20BOOK2-6%20FA%20copy.pdf> accessed 13 March 2025.

⁵⁹ Malaysia Competition Commission, 'Guidelines on Chapter 2 Prohibition' at para 2.9 <https://www.mccc.gov.my/sites/default/files/pdf/newsroom/MYCC%204%20Guidelines%20Booklet%20BOOK2-6%20FA%20copy.pdf> accessed 13 March 2025.

the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in product or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.⁶⁰

[9-38] Section 10(2) of the CA 2010 provides a non-exhaustive list of abusive conduct.

- (1) directly or indirectly imposing an unfair purchase or selling price or other unfair trading condition onto a supplier or customer;
- (2) limiting or controlling: production; market outlets or market access; technical or technological development; or investment, to the prejudice of consumers;
- (3) refusing to supply to particular enterprises or group or category of enterprises;
- (4) 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;
- (5) forcing conditions in a contract which have no connection with the subject matter of the contract (eg making the contract conditional on buying an unrelated product);
- (6) any predatory behaviour towards competitors; or
- (7) buying up scarce supply of inputs (either goods or services) where there is no reasonable commercial justification.⁶¹

[9-39] The abusive conduct can be further divided into two main categories: (1) exploitative conduct; and (2) exclusionary conduct. Exploitative conduct refers unilateral behavior of a dominant enterprise which directly exploits consumers such as setting high price, whereas exclusionary conduct refers 'conduct that prevents equally efficient competitors from competing'.⁶² In assessing whether an exclusionary

60 *Hoffmann-La Roche & Co AG v EC Commission*: 85/76 [1979] ECR 461 (ECJ) at para 91.

61 See also Malaysia Competition Commission, 'Guidelines on Chapter 2 Prohibition' at para 1.3 <https://www.mccc.gov.my/sites/default/files/pdf/newsroom/MYCC%204%20Guidelines%20Booklet%20BOOK2-6%20FA%20copy.pdf> accessed 13 March 2025.

62 Malaysia Competition Commission, 'Guidelines on Chapter 2 Prohibition' at para 3.5 <https://www.mccc.gov.my/sites/default/files/pdf/newsroom/MYCC%204%20Guidelines%20Booklet%20BOOK2-6%20FA%20copy.pdf> accessed 13 March 2025.

conduct infringes section 10 of the CA 2010 'MyCC will use two main tests for assessing anti-competitive effects: firstly, does the conduct adversely affect consumers? secondly, does the conduct exclude a competitor that is just as efficient as the dominant enterprise'?⁶³

[9-40] Other examples of common abusive conduct are summarised in Table 8 below.

Table 9.8

	Abusive conduct	Nature
1	Predatory Pricing	a dominant enterprise sets prices below cost to eliminate competitors, with the intent to raise prices once competition is weakened. Example: A dominant online platform offering unsustainable discounts to undercut smaller rivals.
2	Margin Squeeze	Imposing unfair conditions that make it unprofitable for competitors to operate. Example: A vertically integrated firm setting high wholesale prices while competing in the downstream market.
3	Exclusive Dealing	Forcing or incentivising customers to deal exclusively with the dominant firm. Example: Offering loyalty rebates contingent on customers not purchasing from rivals.
4	Tying and Bundling	Requiring customers to buy additional products or services as a condition for purchasing a desired product. Example: Bundling unrelated services to exploit market power in one segment.
5	Discriminatory Pricing	Charging different prices for the same product to similar customers without valid reasons. Example: Offering preferential pricing to favoured buyers to the detriment of competitors.

63 Malaysia Competition Commission, 'Guidelines on Chapter 2 Prohibition' at para 3.9 <https://www.mccc.gov.my/sites/default/files/pdf/newsroom/MYCC%204%20Guidelines%20Booklet%20BOOK2-6%20FA%20copy.pdf> accessed 13 March 2025.

2.9 Cases

2.9.1 MyEG case

[9-41] MyEG Services Berhad is a leading provider of e-government services, including online applications for renewing foreign workers' permits ('Pas Lawatan Kerja Sementara, PLKS'). MyEG was accused of abusing its dominant position by imposing discriminatory practices in violation of section 10(2)(d)(iii) of the CA 2010. Specifically, MyEG required customers to purchase mandatory insurance policies exclusively through its business affiliate, disadvantaging competitors. MyEG was accused of:

- (1) Abusing its dominant position by mandating customers to purchase insurance products (Foreign Worker Insurance Guarantee) exclusively through its affiliated entity, MyEG Commerce Sdn Bhd.
- (2) Imposing discriminatory conditions that disadvantaged competitors in the insurance market.
- (3) Leveraging its dominant market position in the online renewal of PLKS to distort competition in the associated insurance market.

[9-42] MyCC found that MyEG held a dominant position in the niche market for online PLKS renewals due to its exclusive concession holder granted by the government. MyEG imposed discriminatory practices by making the purchase of insurance through its own business a precondition for completing PLKS renewals, ie for faster and easier renewal of PLKS.⁶⁴ As a result, competitors in the insurance market were effectively excluded, as customers were forced to buy from MyEG's affiliated insurer, MyEG Commerce. Consumers faced reduced options for insurance products and were denied the opportunity to choose competitively priced alternatives. The actions of MyEG distorted competition and entrenched its dominance.

[9-43] The CAT upheld MyCC's decision in December 2017, confirming that MyEG's actions violated section 10(2)(d)(iii) of the CA 2010 (applying dissimilar conditions to equivalent transactions, placing certain trading partners at a competitive disadvantage).⁶⁵ Subsequently, the High Court of Kuala Lumpur dismissed MyEG's judicial review application on

⁶⁴ *Competition Commission v MyEG Services Berhad* (MyCC File Reference: MyCC (ED) 700-1/1/2/2015) <https://www.myc.gov.my/sites/default/files/pdf/decision/Section-40-Notice-of-Finding-of-an-Infringement-by-My-Services-Berhad.pdf> accessed 13 March 2025.

⁶⁵ Allen and Gledhill, 'Malaysia Federal Court affirms Court of Appeal's decision against MYEG' (28 April 2022) <https://www.allenandgledhill.com/sg/publication/articles/21633/federal-court-affirms-court-of-appeal-s-decision-against-mye> accessed 13 March 2025.

22 January 2019, affirming the penalties imposed by MyCC.⁶⁶ The Federal Court further upheld the RM9.33 million fine in April 2022, marking the first abuse of dominance case in Malaysia.⁶⁷

2.9.2 DagangNet case

[9-44] Dagang Net Technologies Sdn Bhd ('DagangNet'), a subsidiary of Dagang NeXchange Berhad ('DNeX'), provides online trade facilitation services under Malaysia's National Single Window ('NSW') system. This system is essential for electronic customs-related transactions, serving as a single access point for trade and logistics services. In February 2021, the MyCC issued an infringement decision against DagangNet for abusing its dominant position under the CA 2010.

[9-45] DagangNet held a dominant position as the sole service provider for NSW, giving it significant market control. Between October 2015 and November 2017, DagangNet required its software providers to agree to exclusivity clauses. These clauses restricted software providers from offering similar services to competitors or end-users, specifically within the upcoming uCustoms system (an alternative to the NSW system). DagangNet's actions prevented other providers from entering the market or competing effectively. This behavior limited innovation and choice in the trade facilitation services market, potentially harming consumers and businesses relying on these services.⁶⁸

2.9.3 Megasteel case

[9-46] The Malaysian Competition Commission initiated enforcement action against Megasteel Sdn Bhd, a leading player in the steel industry, for alleged abuse of its dominant position under section 10 of the CA 2010. Megasteel Sdn Bhd was the sole producer of hot-rolled coils ('HRC') in Malaysia, a critical input for the production of cold-rolled coils ('CRC') and other downstream steel products. The steel industry in Malaysia

⁶⁶ AEGC, 'High Court of Malaya Upheld the Decision of MyCC against MyEG for abusing its dominant position' (2019) <https://asean-competition.org/read-cases-high-court-of-malaysia-upheld-the-decision-of-myc-against-mye-for-abusing-its-dominant-position> accessed 13 March 2025.

⁶⁷ Allen and Gledhill, 'Malaysia Federal Court affirms Court of Appeal's decision against MYEG' (28 April 2022) <https://www.allenandgledhill.com/sg/publication/articles/21633/federal-court-affirms-court-of-appeal-s-decision-against-mye> accessed 13 March 2025.

⁶⁸ *Competition Commission v Dagang Net Technologies Sdn Bhd* (Case No 700-2/2/003/2015) https://www.myc.gov.my/sites/default/files/pdf/decision/Decision%20against%20Dagang%20Net%20Technologies%20Sdn%20Bhd%20pursuant%20to%20Section%2040.%20Dated%2028%20February%202021_Public%20Version.pdf accessed 13 March 2025.

is vertically integrated, and Megasteel also participated in downstream markets. The MyCC alleged that Megasteel had abused its dominant position in the HRC market by engaging in margin squeezing, a form of exclusionary conduct. Specifically, Megasteel was accused of:

- (1) Selling HRC to its downstream competitors (CRC producers) at high prices.
- (2) Selling CRC, its downstream product, at a lower price, making it difficult for other CRC producers to compete profitably.

[9-47] After an oral representation by Megasteel, MyCC found that Megasteel did not abuse its dominant position nor practice margin squeeze in the relevant domestic market.⁶⁹ MyCC had defined the relevant market inaccurately and there is no evidence that Megasteel often undercut its CRC prices

2.9.4 FoodPanda case

[9-48] In this case, MyCC had issued a non-infringement decision pursuant to section 39 of the CA 2010. The alleged abusive conduct in the investigation is 'the imposition of an exclusivity clause in the agreement between Foodpanda and its merchants in the Preferred Partnership Category'. Assuming Foodpanda holds a dominant position in the market, such a clause could harm fair competition by encouraging merchants to join the Preferred Partnership Category to benefit from lower commission rates. This exclusivity arrangement may create lock-in effects for merchants, discouraging them from collaborating with other food delivery platforms. Consequently, it could hinder new entrants or existing competitors from partnering with these merchants, thereby distorting the competitive process. The Commission defined the market as 'intermediary online platforms matching customers, merchants and delivery partners for the provision of food ordering and delivery services'⁷⁰ Based on its investigation and assessment, the Commission cannot establish with certainty that Foodpanda enjoys a dominant enterprise in the relevant market due to various reasons such as fluctuation of market shares, weak direct and indirect effect, no regulatory barriers to entry, the existence of buyer power from franchised restaurant, etc.

⁶⁹ *Malaysia Competition Commission v Megasteel Sdn Bhd* (Case No MyCC/002/2012) at para 51 <https://www.mycc.gov.my/sites/default/files/pdf/decision/Finding%20of%20Non%20Infringement%20under%20Section%2039%20of%20Competition%20Act%202010%20-%20Megasteel%2015.04.2016.pdf> accessed 13 March 2025.

⁷⁰ *Competition Commission v Delivery Hero (Malaysia) Sdn Bhd* (Case No 700/1/3/2/2019) at para 40 <https://www.mycc.gov.my/sites/default/files/pdf/decision/Foodpanda%20FT%20Public%20Non-Confidential.pdf> accessed 13 March 2025.

2.10 Exemption and exclusion

2.10.1 Relief of liability

[9-49] Enterprises may apply to the MyCC for exemptions if their agreements or conduct meet the requirements under section 5 of the CA 2010:

- (1) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement – benefit requirement;
- (2) 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 – indispensability requirement;
- (3) the detrimental effect of the agreement on competition is proportionate to the benefits provided – proportionality requirement;
- (4) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services – elimination of competition requirement.

[9-50] The burden is on enterprises to prove that the agreement fulfills all four cumulative criteria. Efficiency benefits include cost efficiencies, improved product quality, and greater product variety. Cost efficiencies may arise from economies of scale and scope, new production technologies, and synergies resulting from the joint use of assets, among other factors.⁷¹ Social benefits may include the protection of environment, employment, national security, etc. Under the indispensability requirement, the parties to the agreement must prove that there are no other practical alternative or less restrictive means to achieve the objective and that the absence of the anti-competitive agreement 'would eliminate or significantly reduce the efficiencies that flow from the agreement or make it significantly less likely that they will materialise'.⁷² The proportionality criteria requires the balancing of the pro-competitive and anti-competitive effect of the agreement. In the case of *PIAM & its 22 Members*, the Commission states that 'for section 5 to apply, the pro-competitive effects flowing from the agreement must outweigh its anti-competitive effects, thus it is essential to verify what is the causal link or nexus between the agreement and the alleged pro-competitive benefits and what is the value of these benefits.'

⁷¹ Nasarudin Abdul Rahman and Haniff Ahamat, *Competition Law in Malaysia* (2nd edn, Sweet & Maxwell 2021) at 343.

⁷² See, for example, the 'EU Guidelines on the application of Article 81(3) of the Treaty' (2004/C 101/08) Official Journal of the European Union at para 79.

This process requires the balancing of any negative and positive effects of the agreement by conducting a counterfactual assessment to verify the claimed efficiencies by the Parties.⁷³

[9-51] The MyCC has granted a block exemption on shipping liner agreement, in the form of Vessel Sharing Agreement ('VSA') allowing 'the coordination or joint operation of vessel services, and the exchange or charter of vessel space',⁷⁴ as it fulfils all four requirements under section 5 of the CA 2010, especially by reducing cost and to maintain frequency and regularity of line shipping services. 'Furthermore, regular service cannot be provided and maintained at reasonable costs unless there is an agreement between market players'. Therefore, the detrimental effect of the agreement between shipping liner operators is outweighed by the benefits produced by the agreement 'particularly in the maintenance of stability in trade and regular services to meet the demands for services within its connectivity'.⁷⁵ However, to maintain competition, the bloc exemption does not allow any price fixing agreement and discussion on sensitive information which may facilitate collusion.

(a) Sectoral regulation exclusion under section 3 – Schedule 1

[9-52] The CA 2010 does not apply to commercial activities regulated by sector-specific laws that contain competition provisions, namely, the Communications and Multimedia Act 1998 (Act 588) ('CMA 1998') and the Energy Commission Act 2001 (Act 610), the Malaysian Aviation Commission Act 2015 (Act 771) where sector regulators oversee competition-related matters. The CA 2010 does not also apply to commercial activities regulated by the Petroleum Development Act 1974 (Act 144) and Petroleum Regulations 1974 (PU(A) 432/1974) in relation to upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia.

(b) Exclusion under section 13 – Schedule 2

(a) an agreement or conduct to the extent to which it is engaged in an order to comply with a legislative requirement.

73 *Malaysia Competition Commission v PIAM & its 22 Members* (Case No 700-2.1.3.2015) at para 337.

74 Competition (Block Exemption for Vessel Sharing Agreements in Respect of Liner Shipping Services Through Transportation by Sea) Order 2024 <https://www.mycc.gov.my/sites/default/files/PUA%2095.pdf%20Perintah%20Persaingan%20Pengecualian%20Blok.pdf> accessed 13 March 2025.

75 Nasarudin Abdul Rahman and Haniff Ahamat, *Competition Law in Malaysia* (2nd edn. Sweet & Maxwell 2021) at 381.

[9-53] In the case of *PIAM & its 22 members v Malaysia Competition Commission*, The Central Bank of Malaysia and the Appellant submitted that the infringing agreement, ie, the Member's Circular 132, was made pursuant to a directive issued by the Central Bank of Malaysia through an official letter. Therefore, the agreement was made in compliance with a legislative requirement. The Competition Appeal Tribunal formed a view that 'there are two requisitions for the exclusion to apply pertaining to an agreement engaged in an order to comply with a legislative requirement. First, an order has been made. Secondly, the order is made to comply with a legislative requirement'.⁷⁶ The CAT found that the letter issued by the Central Bank 'fall short of precise language to amount to a "direction" or "directive"'.⁷⁷

(b) collective bargaining activities or collective agreements in respect of employment terms and conditions and which are negotiated or concluded between parties which include both employers and employees or organisations established to represent the interests of employers or employees.

[9-54] This exclusion ensures that labour agreements, such as those involving wages and working conditions, are not subject to competition law scrutiny.

(c) an enterprise entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the [application of the competition law] would obstruct the performance, in law or in fact, of the particular tasks assigned to that enterprise.

[9-55] In the absence of clear guidelines on the services of general economic interest ('SGEI'), the Commission makes reference to the Office of Fair Trading Guidelines on Services of General Economic Interest ('the OFT Guidelines') in the case of *DagangNet*.⁷⁸ Based on the OFT Guidelines the SGEI are 'services that public authorities consider should be provided in all cases, whether or not there is an incentive for the private sector to do so' and 'that such services will not be satisfactorily provided by the market'.⁷⁹ Examples of SGEI services include letter and postcard delivery,

76 *PIAM & Its 22 Members v Competition Commission*, Competition Appeal Tribunal's decision (2 September 2022) at para 89 <https://www.mycc.gov.my/sites/default/files/pdf/decision/PIAM%20%26%2023%20Ors%20v%20Competition%20Commission%20%28Grounds%20of%20Decision%29.pdf> accessed 13 March 2025.

77 *PIAM & Its 22 Members v Competition Commission*, Competition Appeal Tribunal's decision (2 September 2022) at para 109 <https://www.mycc.gov.my/sites/default/files/pdf/decision/PIAM%20%26%2023%20Ors%20v%20Competition%20Commission%20%28Grounds%20of%20Decision%29.pdf> accessed 13 March 2025.

78 *Competition Commission v Dagang Net Technologies Sdn Bhd* (Case No 700-2/2/003/2015) at para 322.

79 Office of Fair Trading, 'Services of general economic interest exclusion: Understanding competition law' (2004) at para 2.17 <https://assets.publishing.service.gov.uk/media/5a7c691bed915d696ccfc962/of421.pdf> accessed 13 March 2025.

water and sewerage services, train cargo transport, terminal operations, and scheduled bus services. Enterprises entrusted with providing SGEI are typically shielded from competition because they are required to fulfil universal service obligations across all parts of the market, including unprofitable areas. In the case of *DagangNet*, MyCC referred to the OFT Guidelines on an entity having the character of a revenue-producing monopoly, it must fulfil the following:

- (1) must be an enterprise;
- (2) enterprise must have its principal objective of raising revenue for the state through the provision of a particular service;
- (3) enterprise granted with exclusive rights to provide the service; and
- (4) the enterprise must show that the application of the prohibitions of the Act would obstruct the performance in law or in fact, of the particular task assigned to it.

3. MERGER CONTROL

[9-56] Malaysia's approach to merger control is in its formative stages, as the CA 2010 does not currently include explicit provisions to regulate mergers and acquisitions. However, significant developments, including proposals to introduce a comprehensive merger control regime, are underway. These changes are aimed at enhancing market competitiveness and aligning Malaysia with international best practices.

[9-57] Under the CA 2010, mergers are not directly regulated. Instead, the Act focuses on anti-competitive agreements, abuse of dominant position, and practices that harm competition. However, certain sector-specific regulators, such as the Malaysian Communications and Multimedia Commission ('MCMC') and the Malaysian Aviation Commission ('MAVCOM') have oversight over mergers in industries like telecommunications and aviation sectors.

[9-58] The MAVCOM's merger control framework is governed by Part VII of the Malaysian Aviation Commission Act 2015, which specifically addresses anti-competitive practices, including mergers that may substantially lessening competition ('SLC'). The framework aims to maintain a competitive aviation market, promoting consumer welfare and industry efficiency. The Commission has issued several guidelines to explain how it assesses merger transactions that are notified to it, including Guidelines on Substantive Assessment of Mergers,⁸⁰ and Guidelines on

⁸⁰ Malaysia Aviation Commission, 'Guidelines on Substantive Assessment of Mergers' (2018) <https://www.mavcom.my/wp-content/uploads/2018/04/Guidelines-on-Substantive-Assessment-of-Mergers.pdf> accessed 13 March 2025.

Notification and Application Procedure for an Anticipated Merger or a Merger.⁸¹ The MAVCOM has cleared three merger transactions based on Notification and Application for an Anticipated Merger:

- (1) an anticipated merger between SIA Engineering Company Limited and Pos Aviation Engineering Services Sdn Bhd;⁸²
- (2) an anticipated Merger between Korean Air Lines Co Ltd and Asiana Airlines;⁸³ and
- (3) anticipated merger in relation to proposed privatisation of Malaysia Airports Holding Berhad.⁸⁴

[9-59] The Malaysian Communications and Multimedia Commission relies on general provisions under sections 133 and 139 of the CMA 1998 to oversee merger activities. Section 133 states: 'A licensee shall not engage in any conduct which has the purpose of substantially lessening competition in a communications market'. Section 139 states: 'the Commission may direct a licensee in a dominant position in a communications market to cease a conduct in that communications market which has, or may have, the effect of substantially lessening competition in any communications market, and to implement appropriate remedies'. The MCMC has issued Guidelines on Mergers and Acquisitions to assess merger activities in the sector.⁸⁵ The MCMC has approved the merger between Celcom and

⁸¹ See n 80.

⁸² Malaysia Aviation Commission, 'Decision by the Malaysian Aviation Commission on an Application of an Anticipated Merger under Section 55 of the Malaysian Aviation Commission Act 2015 by SIA Engineering Company Limited and Pos Aviation Engineering Services Sdn Bhd' (29 May 2023) (Case number: MAVCOM/ED/CC/DIV4/2021(2)) <https://www.mavcom.my/wp-content/uploads/2023/06/230616-SIAEC-PAES-Final-Decision-For-Publication.pdf> accessed 13 March 2025.

⁸³ Malaysia Aviation Commission, Final Decision by the Malaysian Aviation Commission on the Voluntary Notification and Application of an Anticipated Merger under Section 55 of the Malaysian Aviation Commission Act 2015 by Korean Air Lines Co Ltd and Asiana Airlines, Inc' (9 September 2021) (Case number: MAVCOM/ED/CC/DIV4/2021(1)) <https://www.mavcom.my/wp-content/uploads/2021/09/20210901-Final-Decision-Anticipated-Merger-Korean-Air-Lines-Co.-Ltd.-and-Asiana-Airlines-Inc..pdf> accessed 13 March 2025.

⁸⁴ Malaysian Aviation Commission, 'Decision by the Malaysian Aviation Commission on the Application of an Anticipated Merger under Section 55 of the Malaysian Aviation Commission Act 2015 by Gateway Development Alliance Sdn Bhd, Pantai Panorama Sdn Bhd, Kwasa Aktif Sdn Bhd, and GIP Aurea Pte Ltd in relation to the Proposed Privatisation of Malaysia Airports Holdings Berhad' (8 November 2024) (Case number: MAVCOM/ED/CC/DIV4/2024(2)) <https://www.mavcom.my/wp-content/uploads/2024/11/GDA-MAHB-Decision-Non-Confidential-For-Publication.pdf> accessed 13 March 2025.

⁸⁵ Malaysian Communications and Multimedia Commission, 'Guidelines on Mergers and Acquisitions' (19 July 2024) https://mcmc.gov.my/skmmgovmy/media/General/pdf/Guidelines-on-Merger-and-Acquisitions_1.pdf accessed 13 March 2025.

Digi (a purchase agreement between Axiata Group Berhad and Digi.com) subject to behavioural and structural remedies.⁸⁶

3.1 Proposed merger control regime under the Competition Act 2010 (Act 712)⁸⁷

[9-60] The MyCC is in the process of amending the CA 2010 to incorporate a merger control regime. Merger under the proposed merger control framework covers:

- (1) two or more previously independent enterprises combine into one single enterprise and cease to exist as separate legal entities;
- (2) the acquisition of direct or indirect control of the whole or part of one or more enterprises;
- (3) the acquisition of assets of one enterprise by another enterprise results in the acquiring enterprise replacing or substantially replacing the enterprise whose assets are being acquired, in the business or the part concerned of the business, in which the acquired enterprise was engaged immediately before the acquisition; or
- (4) the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity.⁸⁸

[9-61] Section 10(A) prohibits mergers or anticipated mergers, if consummated, that may result in a SLC in any market for goods or services.

[9-62] The MAVCOM and MCMC currently implement a voluntary notification system, where parties involved in a merger may choose whether to notify the respective authorities about their transactions. This system typically places the responsibility on the merging entities to assess whether their transaction raises competition concerns.

⁸⁶ Malaysian Communications and Multimedia Commission, 'Undertaking to the Malaysian Communication and multimedia Commission: Pursuant to section 140(3) of the Communication and Multimedia Act 1998' <https://www.mcmc.gov.my/skmmgovmy/media/General/registers/Undertaking-Public-Version.pdf> accessed 13 March 2025.

⁸⁷ Malaysia Competition Commission, 'Salient Points of the Proposed Amendments to the Competition Act 2010 (Act 712)' (25 April 2022) <https://www.myc.gov.my/sites/default/files/Salient%20Points%20of%20the%20Proposed%20Amendments%20of%20Act%20712%20%5B25.4.22%5D.pdf> accessed 13 March 2025.

⁸⁸ See 'Salient Points of The Proposed Amendments To The Competition Act 2010 (Act 712)' section 10B <https://www.myc.gov.my/sites/default/files/Salient%20Points%20of%20the%20Proposed%20Amendments%20of%20Act%20712%20%5B25.4.22%5D.pdf> accessed 13 March 2024.

[9-63] The proposed merger control regime under the CA 2010 adopts a hybrid model, combining both voluntary and mandatory notification systems. When a merger transaction exceeds certain stipulated thresholds, the parties involved in the merger or anticipated merger are required to notify the MyCC. However, parties may also voluntarily notify the Commission about a merger even if the merger activities do not exceed the thresholds. This provides an avenue for enterprises to formally notify the merger which does not exceed the threshold and to enable the Commission to review and assess whether the merger contravenes merger prohibition.⁸⁹ In any case, the MyCC retains the authority to investigate a merger or anticipated merger, even if it does not exceed the thresholds. This is because the primary consideration is whether the merger has resulted, or is likely to result, in a substantial lessening of competition in the market.

[9-64] Any enterprises that fail to notify a merger that exceeds the threshold will be liable for merger violation. Enterprises that are found liable for merger violation will be subjected to a financial liability of up to 10% of the value of the merger transaction or anticipated merger transaction.⁹⁰ And if the MyCC finds that the unnotified anticipated merger results in a substantial lessening of competition, the merger parties will be liable for contravening merger prohibition. Enterprises that are found liable for infringing the merger prohibition will be subjected to a financial penalty that shall not exceed 10% of the worldwide turnover of the enterprise over the period during which the infringement occurred.⁹¹ The merging parties are also prohibited from completing a merger that has been notified until approval is obtained from the Commission (gun jumping).⁹²

⁸⁹ See 'Salient Points of The Proposed Amendments To The Competition Act 2010 (Act 712)' section 10H <https://www.myc.gov.my/sites/default/files/Salient%20Points%20of%20the%20Proposed%20Amendments%20of%20Act%20712%20%5B25.4.22%5D.pdf> accessed 13 March 2024.

⁹⁰ See 'Salient Points of The Proposed Amendments To The Competition Act 2010 (Act 712)' section 43L <https://www.myc.gov.my/sites/default/files/Salient%20Points%20of%20the%20Proposed%20Amendments%20of%20Act%20712%20%5B25.4.22%5D.pdf> accessed 13 March 2024.

⁹¹ See 'Salient Points of The Proposed Amendments To The Competition Act 2010 (Act 712)' section 43G <https://www.myc.gov.my/sites/default/files/Salient%20Points%20of%20the%20Proposed%20Amendments%20of%20Act%20712%20%5B25.4.22%5D.pdf> accessed 13 March 2024.

⁹² See 'Salient Points of The Proposed Amendments To The Competition Act 2010 (Act 712)' section 10(G) <https://www.myc.gov.my/sites/default/files/Salient%20Points%20of%20the%20Proposed%20Amendments%20of%20Act%20712%20%5B25.4.22%5D.pdf> accessed 13 March 2024.

[9-65] The merger notification threshold plays a pivotal role in ensuring the efficiency and effectiveness of a merger control regime. By setting appropriate thresholds, authorities can prevent an overwhelming influx of notifications and focus on transactions that are more likely to have a substantial impact on competition. Different jurisdictions around the world adopt varying thresholds depending on their regulatory objectives and economic landscape. For example, Market Share Threshold. This approach requires notification if the merging entities collectively hold a market share above a certain percentage. While this method aligns directly with competition concerns, it can be complex to implement due to challenges in accurately defining and calculating market share. MAVCOM adopts a turnover-based threshold⁹³ while MCMC uses a dominance-based threshold.⁹⁴ Based on several sources, the proposed merger control is likely to use turnover-based in combination with asset-based threshold, which is practically easier than the market share threshold.⁹⁵

[9-66] In terms of substantive assessment, the proposed merger control adopts 'Substantial Lessening of Competition' ('the SLC Test'). The SLC test focuses on the rate of change in the intensity of the level of competition in the market. Substantial Lessening of Competition prohibits a merger if the merged entity is able to unilaterally increase prices post-merger even if it does not reach the level of dominance. Thus, the SLC captures more merger transactions than the dominance test.⁹⁶

[9-67] Under section 10F, the Commission is required to complete a merger assessment within 120 working days from the date it deems the notification complete. The timeline is divided into two stages: Phase 1 (40 days) and Phase 2 (80 days). During Phase 1, the MyCC will issue a clearance decision if it determines that an SLC is unlikely to result from the proposed merger. However, if the MyCC cannot determine for certain whether the SLC will arise, the assessment will proceed to Phase 2. The proposed merger control regime includes automatic approval if the Commission fails to complete the assessment within 120 days. However,

93 Malaysian Aviation Commission, 'Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger' (20 April 2018) at para 2.7 <https://www.mavcom.my/wp-content/uploads/2018/04/Guidelines-on-Notification-and-Application-Procedure-for-an-Anticipated-Merger-or-a-Merger.pdf> accessed 13 March 2025.

94 See Malaysian Communications and Multimedia Commission, 'Guidelines on Mergers and Acquisitions' (19 July 2024) at para 3.17 https://mcmc.gov.my/skmmgovmy/media/General/pdf/Guidelines-on-Merger-and-Acquisitions_1.pdf accessed 13 March 2025.

95 See Nasarudin Abdul Rahman, M Aidil Tupari and Haniff Ahamat, 'Merger Control Regime in Malaysia: Past, Present and Way Forward' (2024) 32(2) IIUMLJ 118 at 141.

96 See Nasarudin Abdul Rahman, M Aidil Tupari and Haniff Ahamat, 'Merger Control Regime in Malaysia: Past, Present and Way Forward' (2024) 32(2) IIUMLJ 118.

the Commission may suspend the timeline for various reasons, such as if the merging parties fail to respond to the Commission's requests for information within the stipulated time or if commitments are under consideration.

[9-68] Section 10D offers enterprises a pathway to exempt themselves from liability under the section 10A prohibition. This exemption is contingent on demonstrating that the economic efficiencies generated by the merger or proposed merger outweigh the adverse effects of any substantial lessening of competition resulting from it. Enterprises invoking section 10D bear the responsibility of proving the presence of such economic efficiencies.

4. ENFORCEMENT POWER OF THE MALAYSIAN COMPETITION COMMISSION

[9-69] The MyCC's enforcement powers are comprehensive, allowing it to investigate, adjudicate, and penalise anti-competitive conduct effectively.

4.1 Investigation powers

[9-70] The MyCC has broad powers to investigate suspected infringements of the CA 2010. The Commission can act on complaints from the public⁹⁷ or initiate its own investigations based on observed anti-competitive practices.⁹⁸ The MyCC can conduct dawn raids, enter premises, and seize physical or electronic evidence of anti-competitive behavior.⁹⁹ The Commission can compel individuals or entities to provide relevant information or documents during investigations.¹⁰⁰

4.2 Power of adjudication

[9-71] The MyCC has the power to issue both non-infringement or infringement decision based on the findings of its investigations into anti-competitive conduct. If the Commission has reasonable ground to believe that any prohibition in the Act has been infringed, the Commission will issue a Proposed Decision ('PD') setting out the reasons for the decision, and any penalties or remedial action that the Commission proposes to apply.¹⁰¹ Even though the PD is not a final infringement decision, it can still be challenged at the judicial review stage. For example, in the case of *MyTeksi Sdn Bhd & Ors v Competition Commission*, the Court of Appeal

97 Competition Act 2010, s 15.

98 Competition Act 2010, s 14.

99 Competition Act 2010, ss 25 and 26.

100 Competition Act 2010, s 18.

101 Competition Act 2010, s 36.

stated that the fact the PD is not final does not bar the target enterprise from challenging the PD if 'decision affects rights or where through a preliminary step, it is sufficiently connected with a decision that does so'.¹⁰² The Court of Appeal concluded that:

We are of the view that the plain effect of the [P]roposed [D]ecision itself, was indeed a decision in principle. In fact, in its [P]roposed [D]ecision, the respondent inter alia imposed a daily penalty of RM15,000 from the date of service of the [P]roposed [D]ecision in the event the appellants failed to comply with the respondent's directions. The nature of the respondent's determination under s 36 of the Act demonstrates that it was an important step on the path to a decision-making under s 40 of the Act.¹⁰³

[9-72] The target enterprises must be given an opportunity to submit a written representation to the Commission to refute allegations. The target enterprise may request the Commission to have an oral representation.¹⁰⁴ A proper hearing under section 38 may also be conducted but at the discretion of the Commission. After conducting an oral representation, the Commission will issue a final non-infringement or infringement decision based on the merit of the submission of the target enterprises. The decision of the MyCC can be appealed to the CAT. The decision of the CAT is final and binding.¹⁰⁵ As a quasi-judicial body, the Commission cannot challenge the decision of its appellate body. In the case of *Malaysian Airline System Bhd v Competition Commission and another appeal*, the Court of Appeal decided that:

The MyCC, in exercising its quasi-judicial functions of weighing the evidence before it and coming to a decision that is enforceable under the law, takes a neutral and impartial stand before its appellate authority in the CAT and its task is to assist the CAT to arrive at a fair and just decision. It takes no partisan stand and has no personal or official interest in the confirmation or reversal of its order handed down in its quasi-judicial capacity.¹⁰⁶

For the MyCC to ignore or challenge the decision of its own appellate authority would be administrative insubordination of a kind repugnant to the whole statutory scheme of the Act. Parliament may by express provision provide a further avenue for the MyCC to challenge the decision of its own appellate authority but it has not seen to fit to do so in this case.¹⁰⁷

102 *MyTeksi Sdn Bhd & Ors v Competition Commission* [2022] 6 MLJ 767 (CA) at para 43.

103 *MyTeksi Sdn Bhd & Ors v Competition Commission* [2022] 6 MLJ 767 (CA) at para 39.

104 Competition Act 2010, s 37.

105 Competition Act 2010, s 58(3).

106 *Malaysian Airline System Bhd v Competition Commission and another appeal* [2021] MLJU 2089 (CA) at para 45.

107 *Malaysian Airline System Bhd v Competition Commission and another appeal* [2021] MLJU 2089 (CA) at para 44.

4.3 Power to impose remedial measure and financial penalty

[9-73] Under section 40(1) of the CA 2010, MyCC has the power to impose a financial penalty on enterprises that infringe the prohibitions set out in the Act. These include anti-competitive agreements (section 4), and abuse of a dominant position (section 10). The penalty imposed by MyCC can amount to 10% of the enterprise's worldwide turnover for the period during which the infringement occurred. This significant threshold reflects the seriousness with which anti-competitive behaviour is treated and the importance of deterring such practices. The term 'worldwide turnover' includes the turnover of the target enterprise across all product markets in which the enterprise is involved, including the turnover of its subsidiaries forming part of the single economic unit ('SEU'). However, in practice, the Commission only considers the relevant turnover – ie, the turnover generated from the affected market – as the base figure. After considering the aggravating and mitigating factors (which may increase and decrease the base figure),¹⁰⁸ the final amount of the penalty should not exceed 10% of worldwide turnover. The process of calculating the financial penalty is shown in Table 9 below.

Table 9.9

STEP 1	STEP 2	STEP 3	STEP 4
Determine the basic amount of financial penalty.	Increase the financial penalty by considering aggravating factors (if any); and decrease the financial penalty by taking into account mitigating factors (if any).	Enhance the specific and general deterrence effects of the financial penalty by adjusting it further.	Verify that the financial penalty is not more than 10% of the enterprise's worldwide turnover over the period of infringement.

4.4 Power to grant a leniency

[9-74] The MyCC possesses the authority to grant leniency under section 41 of the CA 2010. This leniency regime is designed to incentivise

108 See Malaysia Competition Commission, 'Guidelines on Financial Penalties' at paras 3.4 and 3.5 <https://www.myc.gov.my/sites/default/files/pdf/newsroom/Guideline-on-Financial-Penalties.pdf> accessed 13 March 2025.

cooperation from enterprises involved in anti-competitive practices, particularly those engaged in cartel activities. The Commission may grant a reduction of up to 100% in financial penalties to enterprises that voluntarily admit their participation in a cartel and provide significant information that contributes to the Commission's investigation, ie, information that MyCC has no knowledge.¹⁰⁹ For a reduction of less than 100%, it depends on the stage of the investigation, the nature and the "value-added" of the information and other co-operation to be provided by the applicant which has already been received by the MyCC.¹¹⁰

4.5 Other enforcement powers

[9-75] The CA 2010 grants the MyCC various powers to ensure the effective and efficient enforcement of the Act. These include the authority to accept undertakings, impose interim measures, and conduct market reviews.

[9-76] Section 43 of the CA 2010 empowers the MyCC to accept undertakings from enterprises to cease or dismantle anti-competitive agreements or practices. When the MyCC accepts an undertaking, no infringement decision will be issued. Table 10 below lists the undertakings accepted by the MyCC.¹¹¹

Table 9.10

No	Undertaking	Date
1	Undertaking by the Metrology Corporation Malaysia Sdn Bhd ('MCM')	11 Nov 2021
2	Undertaking by the Federation of Automobile Workshop Owners' Association of Malaysia ('FAWOAM')	2 Nov 2021
3	Undertaking by the Executive Council ('EXCO') of the Sabah Tourist Guides Association	23 Sep 2019
4	Undertaking signed by The Sand Operator of Four Districts in Kelantan	25 Sep 2017

109 Malaysia Competition Commission, 'Guidelines on Leniency Regime' at para 3.4 https://www.mccc.gov.my/sites/default/files/pdf/newsroom/MyCC_Guideline-on-Leniency-Regime.pdf accessed 13 March 2025.

110 Malaysia Competition Commission, 'Guidelines on Leniency Regime' at para 3.9 https://www.mccc.gov.my/sites/default/files/pdf/newsroom/MyCC_Guideline-on-Leniency-Regime.pdf accessed 13 March 2025.

111 Malaysia Competition Commission, 'Undertaking' <https://www.mccc.gov.my/undertaking> accessed 13 March 2025.

5	Undertaking signed between Containerchain Malaysia Sdn Bhd and the Commission	30 Jun 2016
6	Undertaking signed between Malaysia Heavy Construction Equipment Owner's Association ('MHCEO')	12 Oct 2015
7	Undertaking signed between the Giga Shipping Nexus Mega and the Commission	1 Oct 2014
8	Undertaking by Central Committee Members of the Pan Malaysia Lorry Owners' Association ('PMLOA')	7 May 2014
9	Undertaking by the Malaysia Indian Hairdressing Saloon Owner	30 Jan 2014

[9-77] Section 35 empowers the MyCC to impose interim measures on enterprises if the Commission has reasonable grounds to believe that the prohibition under the Act has been or is likely to be infringed based on urgency 'to prevent serious and irreparable damage, economic or otherwise, to particular person or category of persons, or to protect the public interest'. For this purpose, the Commission may issue direction to any person to cease or desist any anti-competitive conduct.

[9-78] Lastly, the MyCC has also the power under section 11 to conduct a market review on any sectors or industries to study the structure of the market such as the number of players in the market, entry barriers or any other features that prevent, restrict, or distort competition including the existence of regulatory barriers imposed by the government. The MyCC had conducted ten market reviews in various sectors including the domestic broiler market, professional bodies, food sub-sectors (namely beef, fisheries — Indian mackerel (ikan kembung), vegetables — mustard leaf (sawi) and round cabbage (kubis bulat) and Infant formula), building material in the construction industry (steel, cement, ready-mixed concrete and sand) the pharmaceutical sector, wholesale and retail for selected products (food and beverages, household cleaning products, personal care and toiletries, and clothing), and transportation sector.¹¹²

112 Malaysia Competition Commission, 'Market Review' <https://www.mccc.gov.my/market-review> accessed 13 March 2025.