

## CLIENT UPDATE JULY 2015

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### COMPETITION LAW

# Proposed Amendments to the Competition Act 2010 [Act 712] and Competition Commission Act 2010 [Act 713]

## Invitation to submit feedback to proposed amendments

The Malaysia Competition Commission (“the **Commission**”) has recently proposed amendments to the Competition Act 2010 (“the **Act**”) and the Competition Commission Act 2010 (“the **CCA**”). Since the Act came into force on 1 January 2012, it has been amended once by carving out from the application of the Act, upstream petroleum activities in Malaysia: see the *Competition (Amendment of First Schedule) Order 2013*.

The Commission has invited all relevant stakeholders and interested parties to participate in an Online Public Engagement process to the recently proposed legislative amendments to the Act and the CCA. All feedback and comments can be submitted to the Commission on or before 31 July 2015 at <lu@mycc.gov.my> by completing the Online Public Engagement Feedback Form in Appendix II which can be found at the Commission’s website at <http://mycc.gov.my/>.

The proposed amendments have amongst others, extended the scope of the Act so that “enterprises” extend to cover individuals and partnerships and appear to provide consumers with greater economic benefits (e.g. proposed amendments to section 5(a) of the Act). Other than streamlining processes, there are a few significant proposed amendments which appear to provide the Commission with wider powers of enforcement, for example, a proposal to empower the Commission to require persons to attend a private hearing before the Commission and a proposal to make it compulsory for parties to make written representations to the Commission after a proposed decision is issued by the the Commission.

This Update contains a review of the key proposed amendments and hopes that it would assist your business in deciding whether or not immediate feedback should be provided to the Commission by your business on onerous proposals which may impact your business.

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### Proposed Amendments to the Act

**Definition:** The definition of “enterprise” is widened to include the underlined words:

*“enterprise” means any person, being an individual, a body corporate, an unincorporated body of persons or other entity, capable of carrying on commercial or economic activities relating to goods or services and for the purpose of this Act, a parent and subsidiary company shall be regarded as a single enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their actions on the market.”*

With this proposed amendment, the Act will apply to individuals (eg. sole proprietors, partnerships) and not confined to legal entities so long as they are capable of carrying on commercial or economic activities.

**Scope of Act: Amendment to Section 3 to extend application of Act to “commercial and economic” activities**

Section 3 is revised so that the Act is expressed as applying not only to commercial activities but also to economic activities. The purpose of this amendment is to ensure consistency within the Act.

**Relief from liability for anti-competitive Agreements: Amendment to Section 5(a) to ensure anti-competitive agreements must benefit consumers**

The introduction of the proposed underlined words require anti-competitive agreements to benefit consumers before it can enjoy the relief from liability accorded to anti-competitive agreements in Section 5. This in line with the European competition law approach which is principally concerned with passing on benefits to consumers and in turn, society as a whole. This may be contrasted with the approach in Singapore where the requirement is to benefit Singapore as a whole.

*“5. Notwithstanding section 4, an enterprise which is a party to an agreement may relieve its liability for the infringement of the prohibition under section 4 based on the following reasons:*

*(a) there are significant identifiable technological, efficiency or social benefits while allowing consumers of the fair share of the resulting benefit directly arising from the agreement;”*

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#### **Block Exemptions : Amendment to Section 8 to allow the Commission to vary the terms of a block exemption which has been granted and to Section 9 to allow submission to be made before the variation**

The Commission may by Order published in the Gazette vary or impose any condition of a block exemption which has been granted if the Commission is satisfied that there has either been a material change of circumstance since it granted a block exemption or an obligation has been breached. Before such variation is made, the Commission has to publish details and provide at least 30 days to allow submissions to be made by the public and to thereafter give due consideration to any submission made.

To date, there has only been one block exemption granted for Vessel Sharing Agreements and Voluntary Discussion Agreements in respect of Liner Shipping Services.

#### **New power of the Commission to require production of information: New Section 11A**

New Section 11A is very widely drafted and empowers the Commission by written notice to require any person to produce information or documents which the Commission considers relevant for its purposes. As this is very wide and is based on the Commission's (subjective) view as to what it considers relevant or not for its purpose, Section 11A should perhaps be limited to "Market Reviews" since Section 11A is to be inserted after Section 11. Section 11 now allows the Commission either on its own initiative or upon the request of the Minister, to conduct a market review to determine whether any feature or combination of features of the market prevents, restricts or distorts competition in the market.

#### **Investigating officer's powers: Section 17 power now extend to infringements**

This proposed amendment clarifies that a Commission officer which has the same powers of a police officer in seizable cases can exercise such powers in investigating not only offences committed under the Act but also in investigating infringements under the Act (eg. for anti-competitive agreements and abuse of dominance).

#### **Power to require provision of information: New provisions for Section 18**

The proposed new language for Section 18 is more detailed. It grants the Commission officer power to direct any person ("**Directed Person**") whom the officer has reasonable grounds to believe that either possesses relevant information/ documents or is capable of giving relevant evidence to: (i) give the officer such information; (ii) produce to the officer such documents, whether in a physical form or in electronic media; (iii) make copies of such documents and to produce copies to the officer; (iv) to appear, at a private hearing before the officer to give evidence and to produce such documents.

The Directed Person can also be an officer of a body corporate or a public body or a partner in a partnership. The Directed Person shall provide the required information or documents within the requisite timeframe given and ensure that the information or documents provided are true, accurate and complete. Further, the Directed Person shall provide a representation to that effect, including a representation that he is not aware of any other information or document which would make the information or document provided untrue or misleading. A failure to comply with an order under this section results in the commission of an offence, which is not

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the case now. This obligation may be onerous especially for officers of a company who could be liable to fine and jail term if he fails to comply with such order from the Commission's officer.

#### **Proposed decision of the Commission: Section 36(2)(c)**

It is unclear why this sub-Section is proposed to be revised by substituting the word "may" with the word "shall" so that every enterprise who is informed of a proposed decision by the Commission is obliged to submit written representations to the Commission and to indicate whether the enterprise wishes to make an oral representation before the Commission. This amendment appears to be particularly unusual as typically, if a party does not want to react to a proposed infringement decision, the party will allow the representation submission deadline to lapse and allow the final infringement decision to be issued. Time and costs will be incurred by businesses in this case.

#### **Decision of the Competition Appeal Tribunal: New Section 58A**

A new subsection 58A is proposed giving the Competition Appeal Tribunal the power to determine by whom, and to what extent, the costs and expenses are to be paid, against the appellant, if the Competition Appeal Tribunal is satisfied that the appellant had conducted his case in a frivolous or vexatious manner and against any party to the appeal, if the Competition Appeal Tribunal is satisfied that in all circumstances of the case it would be unjust and inequitable not to do so.

### **Proposed amendments to the Competition Commission Act 2010 [Act 713]**

A single amendment has been proposed to the CCA whereby Section 17(2)(ja) will be inserted to empower the Commission to impose fees or related charges for exemption applications granted by the Commission.

The Commission probably wanted this power to be expressed to avoid any challenges to the Commission's current imposition of fees for exemption applications, which are as follows, based on the Commission's Exemption Application Procedure:

(a) for an individual exemption: (i) an application fee of RM50,000 and (ii) an annual fee, payable once the exemption is granted, equal to RM10,000 x the number of years for which the exemption is granted; and

(b) for a block exemption: (i) an application fee of RM50,000 and (ii) an annual fee, payable once the exemption is granted, equal to RM20,000 x the number of years for which the exemption is granted.

### **Concluding Words**

As the proposed amendments to the Act will expand the Commission's powers and contain proposed provisions which could be onerous on businesses and its officers, businesses should take note and if they find it unacceptable, provide immediate feedback to the Commission.

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#### ***ASEAN Economic Community Portal***

Ahead of the launch of the ASEAN Economic Community (“AEC”) in December this year, businesses looking to tap the opportunities presented by the integrated markets of the AEC can now get help a click away. Rajah & Tann Asia, United Overseas Bank and RSM Chio Lim Stone Forest, have teamed up to launch “Business in ASEAN”, a portal that provides companies with a single platform that helps businesses navigate the complexities of setting up operations in ASEAN.

By tapping into the professional knowledge and resources of the three organisations through this portal, small- and medium-sized enterprises across the 10-member economic grouping can equip themselves with the tools and know-how to navigate ASEAN’s business landscape. Of particular interest to businesses is the “Ask a Question” feature of the portal which enables companies to pose questions to the three organisations which have an extensive network in the region. The portal can be accessed at <http://www.businessinasean.com/>.

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