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Dominant Businesses Beware

- MyCC Imposes RM10.3 million Fine Against National Single Window Monopoly, Dagang Net, for Abuse of Dominance

The Malaysia Competition Commission ("**MyCC**") recently issued a decision imposing a fine of RM10.3 million against Dagang Net Technologies Sdn Bhd ("**Dagang Net**") for abuse of dominance.

Some points of interest arising from this decision:

1. Sole government service provider/concession holder is dominant

- (a) Similar to MyEG Berhad ("**MyEG**") (which MyCC successfully found in 2016 to have infringed Section 10 of the Competition Act 2010 ("**Competition Act**") for abuse of dominance), Dagang Net is the Government's sole service provider of online trade facilitation services for *Sistem Maklumat Kastam* ("**SMK**") under the National Single Window ("**NSW**") system.
- (b) While MyCC has in its guidelines stated that, in general, it will consider a market share above 60% to be indicative that an enterprise is dominant, market share alone is not conclusive. Dominance is to be assessed in terms of an enterprise's ability to act without concern about its competitors' responses or ability to dictate the terms of competition in a market in Malaysia.
- (c) While Dagang Net had asserted that it is not dominant as it is a monopolist without competitors in the relevant market, MyCC relied on well-established EU decisions which held that an enterprise vested with a legal monopoly may be regarded as occupying a dominant position, as well as the Malaysian High Court's decision regarding MyEG (which had affirmed both MyCC's as well as the Competition Appeal Tribunal's findings) that a concession holder is in a dominant position.
- (d) All businesses that hold sole rights or concessions granted by the Government for the provision of any services should conduct a self-assessment to determine if they are dominant in their market, and if so, to cease all abuse of dominance behaviour immediately or risk being fined up to 10% of their worldwide turnover¹ during the duration of their abuse.

¹ Not profits

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2. "Relevant Market" could include a new market where there is as yet no commercial activity

- (a) MyCC defined the "relevant market" as the market for the "*provision of trade facilitation services in Malaysia*" which included not only the NSW-SMK market which Dagang Net was operating in, but also the uCustoms system market which was not yet in operation and which Dagang Net had not conducted any commercial activity in.
- (b) Dagang Net's argument that the uCustoms system market was a "hypothetical market" since the system had yet to be implemented and should not therefore be included as part of the relevant market was rejected by MyCC.
- (c) MyCC decided that the uCustoms market is not a hypothetical market as documentary evidence showed that the NWS-SMK system would be replaced by the uCustoms system in the near future. Both systems serve as platforms for end users to submit trade declarations to the Royal Malaysian Customs, and therefore can be said to be of the same market, namely, the market for the provision of trade facilitation services.
- (d) Businesses should note that it is possible to infringe the Competition Act even if they have not conducted commercial activities in the upcoming market.

3. Your supplier/partner and customers are likely to be your complainants to MyCC

- (a) Following many other similar MyCC cases, MyCC had investigated the matter following complaints by Dagang Net's suppliers and customers.
- (b) The first complainant, Rank Alpha Technologies Sdn Bhd ("**Rank Alpha**") is a software service provider. Dagang Net had invited several software providers (including Rank Alpha) to participate in a new partner programme which required the partners to sign an agreement containing an exclusivity clause which Rank Alpha refused to do and thereafter proceeded to lodge a complaint with MyCC in December 2015.
- (c) Separately, the second complainant, Titimas Logistics Sdn Bhd, a forwarding and cargo handling services provider, lodged a second complaint in January 2017 against Dagang Net for Dagang Net's refusal to supply electronic mailboxes to end users of the SMK.
- (d) Businesses should note that under the Competition Act, following a complaint by a person, MyCC is empowered by the Competition Act to conduct an investigation on any enterprise. MyCC's website simplifies this process with its "e-Complaint" service.

4. List of abusive conduct in Section 10(2) of the Competition Act is not exhaustive

- (a) Dagang Net tried in vain to argue that exclusivity is not an abusive conduct since it is not specifically listed in Section 10(2) of the Competition Act.

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- (b) MyCC made clear that Section 10(2) merely sets out a non-exhaustive list of examples of abusive conduct.

5. A very important point: Exclusivity clauses imposed on your supplier may be an abuse of dominance

- (a) MyCC concluded that Dagang Net had abused its dominance by imposing an exclusivity clause which had the effect of preventing software providers from providing similar services to another service provider for the upcoming uCustoms system, *i.e.* a future competitor to Dagang Net. A refusal by the software providers to this exclusive arrangement would result in these software providers' end users not being supplied with the requisite electronic mailboxes by Dagang Net for the purposes of trade facilitation on the NSW-SMK system.
- (b) MyCC's position on exclusivity clause in Dagang Net is in fact consistent with MyCC's position since 2014 in the Giga Shipping Sdn. Bhd. ("**Giga Shipping**") and Nexus Mega Carriers Sdn. Bhd. ("**Nexus Mega**") investigation by MyCC under (i) the Section 4 prohibition on anti-competitive agreements; and/or (ii) the Section 10 prohibition on abuse of dominance. Here, MyCC agreed to cease investigations when Giga Shipping and Nexus Mega reached a settlement with MyCC by undertaking to cease the inclusion of exclusivity clauses in agreements with their customers, unless the agreements were entered into following open tenders and the exclusivity clauses were for a duration of two years or less ("**Permitted Exclusivity Conditions**").
- (c) Businesses should be mindful when structuring their agreements containing exclusive dealing clauses, to take into account the Permitted Exclusivity Conditions, although it must be noted that this is not a one size fits all solution. Businesses should also note that MyCC may investigate exclusivity clauses from both a Section 4 matter (prohibition on anti-competitive agreements) or a Section 10 matter (prohibition on abuse of dominance).

6. Refusal to supply may be an abuse of dominance

- (a) The second complaint made against Dagang Net was that it had refused to supply electronic mailboxes to end users of unauthorised software providers. MyCC however concluded in its final decision that Dagang Net's refusal to supply electronic mailboxes to end users of the SMK did not constitute an abuse of its dominance due to the insignificant effect on the relevant market.
- (b) Businesses should be aware that although MyCC did not find Dagang Net's refusal to supply electronic mailboxes as constituting an abuse of its dominance, this does not mean that such conduct will not raise competition concerns. A refusal to supply by a dominant enterprise to another enterprise is expressly listed in Section 10(2)(c) of the Competition Act as an example of abusive conduct.

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- (c) While MyCC (in its Guidelines on Chapter 2 Prohibition) recognises that, generally speaking, enterprises (whether dominant or not) should have the right to choose their trading partners, there are circumstances in which a refusal to supply by a dominant enterprise may amount to an abuse.
- (d) The concept of refusal to supply covers a broad range of practices, such as refusal to supply products to existing or new customers, refusal to license intellectual property rights and refusal to grant access to an essential facility or a network. MyCC will take into account the difficult trade-off involved in forcing supply, which leads to a short-term increase in competition but may harm longer term incentives for innovation and investment.

7. No need for MyCC to show effect of abuse on relevant market

- (a) For the purposes of establishing an abuse of dominance infringement, it is not necessary for MyCC to demonstrate that the abuse in question had a concrete effect on the markets concerned.
- (b) It is sufficient for MyCC to demonstrate only that the abusive conduct of the dominant enterprise tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect.

8. Financial penalty can be significantly reduced if infringing behaviour is terminated during investigation by MyCC or due to pandemic

- (a) MyCC granted a hefty 25% discount from the base penalty figure as a mitigating factor, as Dagang Net had removed the exclusivity clause in contention during the course of MyCC's investigation.
- (b) MyCC also granted a further 20% reduction off the financial penalty due to the COVID-19 pandemic. This is similar to MyCC's 2020 decision against the General Insurance Association of Malaysia (PIAM) and the 22 general insurers where the original largest ever fine imposed by MyCC of approximately RM213.45 million (in the aggregate) was reduced by 25% to RM173 million in aggregate due to COVID-19, as MyCC considered the COVID-19 pandemic as an unprecedented challenge with very severe socioeconomic consequences that may impair sustainability of businesses, notwithstanding MyCC's decision which determined that the insurers had fixed prices in relation to an arrangement between PIAM and the Federation of Automobile Workshop Owners' Association of Malaysia (FAWOAM).

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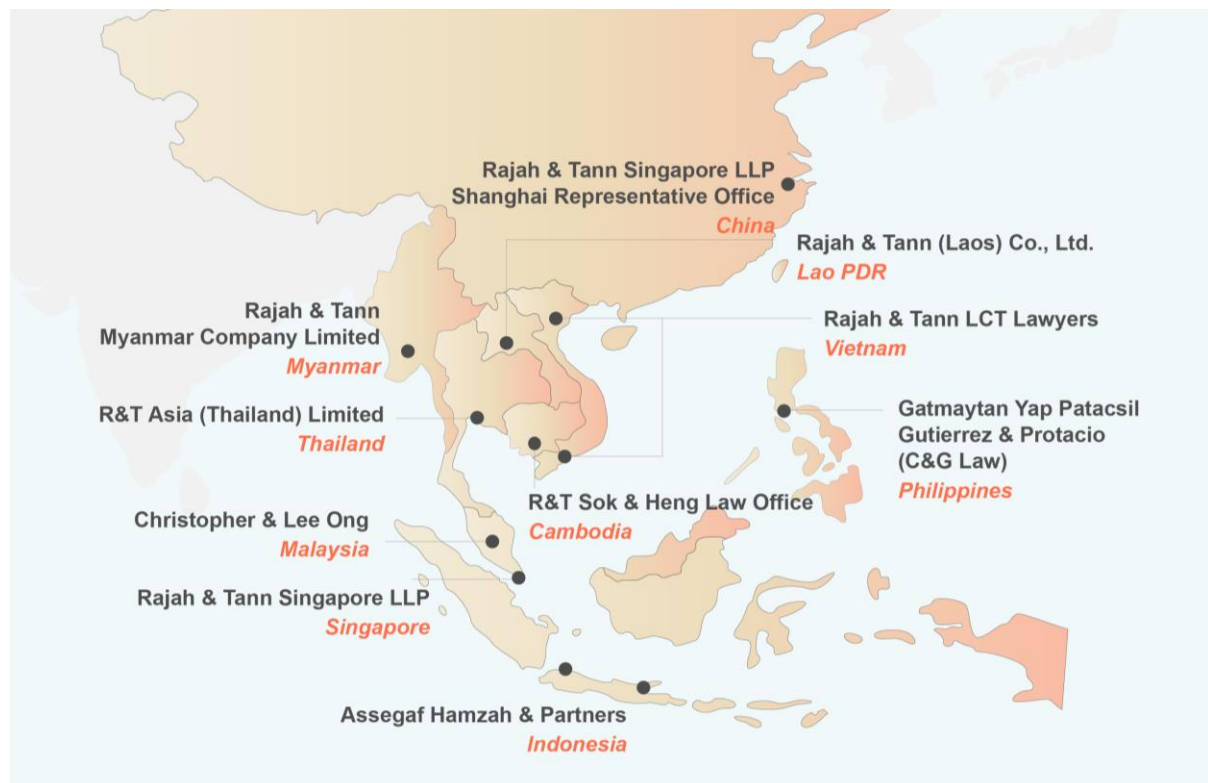
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