

Practical Guidelines for Avoiding Competition Law Violations

Background of Competition Law in Malaysia

Competition Act 2010

- Came into force on 1st January 2012.
- Objectives: To promote economic development, to protect process of competition and consumer interests.
- Governs any commercial activity within Malaysia and/or any commercial activity transacted outside Malaysia which has an effect on competition in any market in Malaysia.
- Consequences of violations include fines up to 10% of the worldwide turnover of an enterprise as well as imprisonment for directors and other parties at fault.

Malaysia Competition Commission ("MyCC")

- Independent body to implement and enforce the Competition Act 2010
- Has issued Guidelines and practical Handbook accessible by the public at <http://www.mycc.gov.my>

2 Prohibitions under Competition Act 2010

Anti-competitive agreements

Abuse of dominant position

Compliance/Responsibility of Employees

- MISC operates in various countries worldwide and each of these jurisdictions poses potential competition risks to MISC as generally domestic competition laws apply to companies doing business in that particular country.
- It is important for every employee to acquire sufficient understanding to the principles of competition laws and to recognize situations that may involve competition law issues to strictly comply with the “dos and don’ts’ of free and fair competition as compliance is the responsibility of every employee.
- Breaches can result in extremely serious financial penalties, criminal sanctions and significant costs and reputational damage associated with competitive investigation.

Dealings with Competitors

- **DO NOT:**



- Enter into any agreements or understandings with competitors concerning prices, production or marketing
- Engage in any discussions at meetings with competitors that do not adhere strictly to the topics on the agenda
- Engage in any casual or social conversation with competitors that even superficially touches upon business topics concerning sensitive issue such as prices, production or marketing.

- **DO:**



- Compete vigorously, independently, and ethically
- Make sure a written agenda is prepared before any meeting that competitors will be attending and that a copy is sent to you before the meeting
- Keep precise minutes of meetings with competitors
- State your objection and leave the room if a prohibited subject is raised
- Make sure all written communications with competitors have a clearly lawful purpose and have been reviewed by the Legal Department

Dealings with Customers

- **DO NOT:**



- Engage in marketing, advertising, or other programs that could be characterized as unfair or deceptive
- Discuss with customers their resale prices
- Discuss with distributors the pricing or marketing activities of another distributor
- Impose or change marketing restrictions on a distributor without consulting the Legal Department
- Place territorial restrictions on a customer without consulting the Legal Department
- Condition the purchase of one product on the purchase of another without first consulting the Legal Department
- Attempt to limit a customer's freedom to buy or sell products from others without first consulting the Legal Department

- **DO:**



- Apply uniform pricing policies and programs to competing customers

Dealings with Suppliers

- **DO NOT:**



- Discuss your resale prices with suppliers for goods obtained from them that you resell
- Enter into an agreement that restricts the right of the Company or a supplier to buy from or sell to others without consulting the Legal Department
- Knowingly induce or receive a discriminatory price from a supplier

- **During Tender/Bidding Process:**

- Keep confidential all bids, quotations, purchase order copies, and other types of correspondence that indicate prices for the goods and services in question
- Only information needed to clarify a specification and/or to prepare a bid may be given out and made available to all bidders
- Do not to give one bidder an advantage by inadvertently sharing another bidder's prices, terms, or other bid information during the course of the bidding process
- Always perform proper evaluation on the bids during the bidding process, in event where a recommended award is made to other than the lowest bidder, proper justification must be provided for not selecting the lower bid(s)
- Upon concluding a bid/releasing a bid result, ensure to only reveal the lowest bidder and its corresponding prices

Other Antitrust Considerations

International Considerations

- **Malaysia Competition Laws Apply:**
 - To activities that take place in Malaysia
 - To activities that take place outside Malaysia that affects competition in Malaysia
- **US Antitrust Laws Apply:**
 - To activities that take place in the US
 - To activities that take place outside the US that have a direct and substantial anticompetitive impact in the US
- **EC Competition Laws Apply:**
 - If there is an unreasonable restraint of trade affecting the EU market
- **Thus all employees, regardless of their place of business, must comply with Malaysian Competition Law, US Antitrust Law, EC Competition Law, and any other applicable local competition laws, if the intended business transaction affects these territories**

Competitive Information

- **Information about competitors' prices, marketing programs, and products may be gathered, but not directly from competitors**
 - Competitive information can strengthen competition
 - But do not seek or obtain such information directly from competitors
 - Nor should such information about the Company be provided directly to competitors

Trade Associations

- **Legitimate and Useful**
 - Participations with trade associations have to be legitimate and useful to the company.
- **Appropriate Anti-Competition Safeguards Are Crucial**
 - Trade association meetings have been the source of many anti-competition investigations
 - Be particularly sensitive to anti-competition dangers when participating in trade association meetings and act with utmost prudence
 - Avoid any conduct that could later be mischaracterized as anticompetitive
 - If possible, have a lawyer attend a meeting that may include sensitive topics
 - Trade associations must not become vehicles for conduct or discussions that are prohibited by the competition laws
- **DO NOT:**
 - Exchange business secrets, including: price lists, customer lists, costs, capacities, current production, sales figures, profits, customer (or supplier) requests

Documents are Critical in Competition Law Cases

- **Relevant authorities and private litigants have the ability to obtain broad categories of hard copy, handwritten, and electronic documents on subjects that might have a bearing on anti-competition issues, e.g.:**
 - “all documents relating to meetings or discussions with competitors”
 - “all documents relating to pricing”
 - desk calendars, appointment books, expense reports, and electronic files, including e-mail and IM
- **Take adequate precautions to minimize harm:**
 - Treat every document you create as if it will be read by a government attorney or opposing attorney in a litigation
 - Assume that electronic versions of documents will exist forever, even after they have been deleted
 - Identify all legally privileged documents as “Privileged & Confidential”
 - Seek legal input on important documents that might have anti-competition significance (including meeting agendas/minutes)

Take Care in Communications

- **Avoid language that could be mischaracterized later**
 - Ex: “we will be the only game in town”
- **Avoid language that could suggest collusion:**
 - Ex: “Competitor X has confirmed that it will raise price” or “we should wait for industry consensus” or “this press release will signal our intentions”
- **Avoid antitrust “buzz words” that could be considered provocative:**
 - Ex: “market power,” “dominant position,” “reduce competitive pressure”
- **Always specify the origin of confidential information**
 - Origin should preferably not be “from a competitor” but “from a customer”
- **Avoid discussions of “market shares”**
- **Avoid language that could suggest illicit practices**
 - Ex: “Destroy after reading,” or “Don’t let the wrong people see this”
- **Do not give the false impression that prices are based on anything other than the Company’s independent judgment**

Ask for Assistance When Unsure

- **Consult with management and/or the Legal Department if you have any question about the legality of any actual or contemplated commercial practice**
- **Many competition questions can only be answered by expert legal counsel on a case-by-case basis after careful analysis of the facts**

