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A decorative pattern of stylized, dark green leaves is scattered across the cover. The leaves vary in size and orientation, creating a sense of movement and organic growth. They are set against a background of two shades of green: a darker teal at the top and a lighter, brighter green at the bottom.

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Cartels

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SK Chambers is a boutique law firm based in Kuala Lumpur, serving Malaysian, regional and global corporations and regulators. The firm provides advice and counsel in new, evolving and complex areas of law and regulation in competition law, data protection and cybersecurity, and regulations surrounding blockchain technologies. Its goal is to provide specialised knowledge that assists clients with creating and establishing sound policies and practices, so that organisations can embrace and manage new oppor-

tunities and the complex regulations that affect them. The firm sees itself as an extension of clients' in-house teams. Its expertise includes providing expert advice and representation in relation to all types of antitrust investigations, licensing, access regulation, pricing and consumer protection. SK Chambers' assignments in sectors such as insurance, pharmaceutical, communications and aviation have allowed the firm to engage with regulators consistently concerning developments in the sector.

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1. Basic Legal Framework

1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

The primary prohibition against cartel behaviour is set out in Section 4 of the Competition Act 2010 ('CA 2010') which is the cross-sectoral competition legislation in Malaysia. In broad terms, the CA 2010 applies EU principles in prohibiting horizontal agreements between enterprises which have the object or effect of significantly restricting, distorting or preventing competition in the market. To aid enforcement, the prohibition is supplemented by a deeming prohibition, where certain categories of conduct such as price-fixing, market-sharing and bid-rigging are deemed as having the object of significantly preventing, restricting or distorting competition in Malaysia (this is discussed further in **1.4 Definition of 'Cartel Conduct'**, below). This category of by-object restrictions is what is typically associated with the term 'cartels'.

There are several excluded sectors where sectoral regulators also enforce competition rules for their sector. In this connection, there are mirror prohibitions on cartel behaviour in the aviation services and gas supply sectors under the Malaysia Aviation Commission Act 2015 ('MACA 2015') and the Gas Supply Act 1993 ('GSA 1993') respectively.

The Communications and Multimedia Act 1998 ('CMA 1998'), which regulates the communications and multimedia markets, also carries a prohibition against collusive agreements which are behaviours typically referred to as 'cartels' covering the entering into any understanding, agreement or arrangement for rate-fixing, market-sharing, boycott of a supplier of apparatus or boycott of another competitor.

There could be activities by an enterprise in an excluded sector that may fall within the scope of the CA 2010. Therefore, it is necessary to perform an activity-by-activity analysis to determine which law applies.

1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

The Malaysia Competition Commission (MyCC) enforces the CA 2010. It can take direct administrative action (without having to go to court) which includes the ability to impose financial penalties of up to 10% of an enterprise's worldwide turnover during the period of infringement for contravention of the CA 2010. The MyCC may also issue cease-and-desist orders, specify steps to be taken by the infringing enterprise to bring the infringement to an end or give any other direction as it deems appropriate and/or accept undertakings in lieu of a finding of infringement. At present there is no criminal liability for cartel behaviour.

The Malaysian Aviation Commission (MAVCOM) and the Energy Commission (EC) which are the sector regulators

in the aviation services and gas supply market respectively, have similar administrative powers as the MyCC. Additionally, the MAVCOM may also impose a financial penalty of up to MYR1 million against an individual or up to 5% of a body corporate's annual turnover from the preceding financial year for non-compliance of any guidelines issued by the MAVCOM. There is no criminal liability for cartel behaviour in these sectors.

Unlike the foregoing laws, the Malaysian Communications and Multimedia Commission (MCMC) provides for criminal liability for contravention of the prohibition against collusive behaviour. Contravention of the CMA 1998 carries a fine of MYR500,000 or imprisonment for a term of five years, or both.

1.3 Private Challenges of Cartel Behaviour/Effects

The CA 2010, MACA 2015 and the GSA 1993 set out a statutory right of private action which is available to any person who directly suffers loss or damage from any anti-competitive agreement or conduct. The action may be brought regardless of whether the person dealt directly or indirectly with the enterprise in question.

In contrast, the CMA 1998 requires a person to obtain a certificate from the MCMC for leave to proceed to the court for civil enforcement of the competition provisions under the CMA 1998.

1.4 Definition of 'Cartel Conduct'

Section 4(2) of the CA 2010 deems the following as a horizontal agreement with the object of significantly preventing, restricting or distorting competition in Malaysia (ie, cartels) but does not define them:

- directly or indirectly fixing a purchase or selling price or any other trading conditions;
- sharing markets or sources of supply;
- limiting or controlling:
 - (a) production;
 - (b) market outlets or market access;
 - (c) technical or technological developments; or
 - (d) investment; or
- bid-rigging.

This gives the MyCC some latitude to pursue an interpretation that prefers a by-object categorisation – ie, deeming a particular activity to be anti-competitive conduct. The significance of this preference is that the MyCC interprets the deeming provision to mean it can be triggered by mere entry into an agreement to price-fix, share markets, etc. This interpretation is presently being tested through the courts.

This category of by-object restrictions is subject to relief if the cumulative conditions (net benefits test) under Section 5 of the CA 2010 are satisfied.

The CMA 1998 prohibition against cartel behaviour, on the other hand, is strictly per se and does not provide a specific defence against or relief (due to net benefits) for cartels.

Competitor Collaborations

Apart from the by-object restriction for anti-competitive agreements, agreements may be prohibited if they have the effect of significantly preventing, restricting or distorting competition. Such agreements may include information-sharing, agreements that contain advertising restrictions, joint purchasing or selling agreements or standardisation agreements.

The MyCC sets 'safe harbours' for agreements that would otherwise be anti-competitive. Generally, 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 does not exceed 20%.

Legal Cartels

Under the CA 2010, price-fixing endorsed by the state (through legislation) or professional bodies specifically empowered by the legislation is permitted pursuant to Section 13 and paragraph (a) of the Second Schedule of the CA 2010. Section 13 exempts any agreement or conduct the aim of which is to comply with a legislative requirement. For example, several sector participants – such as the legal profession – are governed by respective bodies or associations that are empowered by legislation to regulate the sector, which includes scale fees for members. In the insurance sector, tariff regulations which seek to ensure the affordability of insurance coverage and certainty of terms for Malaysian car owners would fall within the scope of the exemption in Section 13 of the CA 2010.

1.5 Limitation Periods

There is no limitation period prescribed in the CA 2010 for the MyCC to exercise its powers of enforcement against a cartel. As long as the cartel exists or persists after the coming into force of the CA 2010 on 1 January 2012, the MyCC's jurisdiction to enforce is established.

1.6 Extent of Jurisdiction

The CA 2010 applies to any commercial activity both within and outside Malaysia provided that, where it occurs outside Malaysia, it has an effect on competition in any market in Malaysia. Commercial activity does not include activities in the exercise of governmental authority, activities conducted on the principle of solidarity or any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity.

1.7 Principles of Comity

The Reciprocal Enforcement of Judgments Act 1958 and Mutual Assistance in Criminal Matters Act 2002 recognise

the validity of foreign judgments and are examples of the application of the principles of comity in Malaysia.

However, at this juncture there is no specific comity process applicable to competition law enforcement which would oblige the MyCC to respond to another country's request to enforce that other country's competition laws or to avoid clashes caused by extraterritorial application of competition laws.

Within the aviation sector, the MACA 2015 provides that the MAVCOM shall have regard to any international agreement and must not act contrary to international obligations.

2. Procedural Framework for Cartel Enforcement – Initial Steps

2.1 Initial Investigatory Steps

Once an investigation has been initiated, the MyCC will proceed with the information gathering process. In this regard, the MyCC may request for the provision of information or documents from any person acquainted with the facts of the case via a Section 18 notice under the CA 2010. The procedural requirements and the MyCC's powers for obtaining documentary evidence are further explained in **2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**, below.

2.2 Dawn Raids

Dawn raids or surprise visits are possible but uncommon. There are no known dawn raids that have been conducted by the MyCC.

In the event of a dawn raid, enterprises should co-operate with the MyCC as any obstruction, hinderance or delay caused by the enterprise or its employees constitutes an offence and is punishable by imprisonment, a fine or both.

Outside counsel can offer on-site assistance during a raid and in a typical situation a company would make a request to the Commission Officer to delay the raid briefly until arrival of outside counsel. Alternatively, the company should be in contact with legal counsel until the counsel's arrival at the premises. Counsel can provide assistance, for example, in ensuring that the search warrant is valid and observing and documenting what is taken by the Commission Officer.

2.3 Restrictions on Dawn Raids

In essence, the power to conduct raids gives the MyCC the right to search premises without consent. The MyCC counts on the element of surprise to retrieve as much evidence as possible and to minimise the potential for destruction of evidence.

In most instances a judge would have granted to the MyCC the right to search premises in the form of a search warrant. However, as with almost all Malaysian authorities, the MyCC is empowered to conduct searches without a warrant where there is a threat of destruction of evidence.

A Commission Officer has the power to inspect corporate and residential premises and seize any record, book, account, document, computerised data or other things.

The MyCC can also search the enterprise's entire information technology (IT) environment during a raid. In doing so, the Commission Officer may remove computers and hard drives, or image hard drives and servers, or run search words on site and limit seized documents to those that trigger results from the search words. If removal is not practicable, the Commission Officer will seal the item that is intended to be seized.

2.4 Spoliation of Information

Spoliation of potentially relevant information by destroying, concealing, mutilating or altering any potentially relevant information such as records, books, accounts, documents, computerised data or other things with the intent to defraud the MyCC is an offence punishable by fine, imprisonment or both.

2.5 Procedure of Dawn Raids

Refusing to answer questions relating to a raid (eg, location of files, password) may be viewed as an obstruction, which is a criminal offence. However, in general a person is not required to answer questions pertaining to an investigation as dawn raids relate to the power to search premises and seize material and not to interview a person.

When the MyCC intends to interview a person, it issues a Section 18 notice under the CA 2010 to any person who is acquainted with the facts and circumstances of the case to make a statement in relation to any information or document requested pursuant to a Section 18 notice.

Enterprises or persons who have provided any document to the MyCC are entitled to be supplied with certified true copies of the documents retained by the MyCC. Additionally, the Commission Officer must provide a list of all the items seized and the reasons for the seizure as soon as practicable.

2.6 Role of Counsel

The CA 2010 does not expressly prohibit the right to legal representation during an interview. In practice, it may be possible for legal counsel to be present during an interview if requested by the officer or employee of an enterprise. Counsel may not advise the interviewee during the interview. Counsel is, however, permitted to review the statement taken to ensure that it is a proper reflection of what was said by the client during the interview.

2.7 Requirement to Obtain Separate Counsel

It is important to note that the prohibition on cartel conduct is against enterprises and not individuals. Employees are not typically required to have separate counsel unless a conflict of interest situation arises for the enterprise's own legal counsel.

2.8 Initial Steps Taken by Defence Counsel

The role of defence counsel at the initial stage would be to assist the client in responding to the request for information by the MyCC. Once a retainer between defence counsel and an enterprise is in place, all communications between counsel and enterprise would be protected by legal professional privilege.

2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony

The MyCC has a unique power under Section 20 of the CA 2010 to direct a person to allow the MyCC access to his records, books, accounts or other things. There is no requirement for the MyCC to provide a reason for issuing such a direction against the person. Failure to comply with the MyCC's direction is onerous as it would result in the person committing an offence punishable by fine, imprisonment or both.

Following access, the MyCC will issue a Section 18 notice of the CA 2010 to any person acquainted with the facts of the case. This written notice will specify the period and manner in which the document or information should be produced to the MyCC.

In the event that a person is not in custody of the relevant document, the person should state to the best of his or her knowledge where the document may be found and identify the last person who had custody of the document.

2.10 Procedure for Obtaining Other Types of Information

Prior to the commencement of an investigation, the MyCC issues a request for information pursuant to Section 16(h) and Section 17(2)(i) of the Competition Commission Act 2010 ('CCA 2010') which stipulates that the MyCC is empowered to collect information and to require the furnishing of information by enterprises to assist the MyCC in the performance of its functions. This notice may be issued to any person and not just to the enterprise that is the subject of a complaint or potential investigation.

Upon commencement of an investigation, the MyCC generally relies on Section 18 of the CA 2010 to require any person to provide statements or information in connection with the investigation. However, it is noteworthy that the power to examine a person under Section 18 of the CA 2010 is limited to providing an explanation on any document that is required.

2.11 Obligation to Produce Documents/Evidence Located in Other Jurisdictions

As mentioned in **2.10 Procedure for Obtaining Other Types of Information**, above, the MyCC has the authority to request that any person acquainted with the facts of the case produce any document. If an individual does not have custody of the document, he or she should state to the best of his or her knowledge where the document may be found. The MyCC also has the power to direct any person to allow the MyCC to access other things, which may include documents stored in the 'cloud'.

2.12 Attorney-client Privilege

Legally privileged information, views, opinions, advice, statements and/or facts may not be referred to nor relied on for purposes of any case against an enterprise.

Based on Malaysian case law, privileged communication with foreign lawyers is subject to legal professional privilege. It is unlikely that privilege extends to communications with in-house counsel as the law appears to suggest that privilege only applies to persons who are members of the Bar (which in-house counsel are not).

2.13 Other Relevant Privileges

The privilege against self-incrimination is not applicable as cartel behaviour is not a criminal offence under the CA 2010.

2.14 Non-co-operation with Enforcement Agencies

The MyCC has the power to direct anyone to allow the MyCC to access records, books, accounts or other things for the purpose of an investigation or to produce documents or other records. Non-compliance with the MyCC's direction will result in the commission of an offence punishable by fine, imprisonment or both. The ramifications of non-compliance with the MyCC's directions are severe and such requests would therefore not commonly be resisted by enterprises.

2.15 Protection of Confidential/Proprietary Information

Confidential information relating to target enterprises or an individual is protected under the CA 2010. An enterprise may request that the MyCC keep commercially sensitive information confidential. In order to do so, enterprises should identify any commercially sensitive information at the time the documents or data are provided to the MyCC.

Disclosure of confidential information may nevertheless be made in the following instances:

- when it is made with the consent of the person from whom the information was obtained;
- when it is necessary for the performance of the functions or powers of the MyCC;

- when it is reasonably made during any proceedings under the CA 2010, provided that the disclosure is not made against any direction by the MyCC or the CAT before which the proceedings are taking place;
- when it is made in connection with an infringement or an offence under the CA 2010; or
- when it is made with the authorisation of the MyCC to any competition authority of another country in connection with a request by the country's competition authority for assistance.

2.16 Procedure for Defence Counsel to Raise Arguments Against Enforcement

The CA 2010 allows for legal and factual arguments to be raised after a proposed decision is issued. An enterprise will be given an opportunity to make oral representations to the MyCC upon which the MyCC will make a finding of infringement or non-infringement.

In past practice, the MyCC has also entertained legal and factual arguments during the investigation phase for purposes of persuading the MyCC to close an investigation.

2.17 Leniency, Immunity and/or Amnesty Regime

Generally, if an enterprise is first to admit to its involvement in a cartel, and provides information or significantly assists in the identification or investigation of a cartel conduct, it may receive a 100% reduction of the financial penalty imposed by the MyCC. However, an enterprise would not qualify for this reduction in financial penalties if it were the 'ringleader' or took steps to coerce another enterprise to partake in a cartel.

The leniency regime is not only available to the party that is first to seek it. Subsequent applicants can apply for leniency but will be granted different percentages of reductions depending on the stage of the investigation, the nature and the value added by the information and other co-operation to be provided by the applicant which has already been received by the MyCC. It is understood that leniency applications are few and far between.

Enterprises may apply for a 'marker' by contacting MyCC's leniency officer and providing the enterprise's name and the details of the infringement. A marker will then be given to the applicant which is valid for 30 days from the date it is granted. Failure to complete leniency applications over the span of 30 days may result in the loss of a marker.

3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds

3.1 Obtaining Information Directly from Employees

The MyCC may issue a written notice under Section 18 of the CA 2010 requiring any person acquainted with the facts of the case to provide any information or document or to make a statement providing an explanation of any information or document requested by the MyCC.

3.2 Obtaining Documentary Information from Target Company

The MyCC may issue a Section 18 written notice to seek documentary information from any person. This may include target companies as well as other persons. Section 20 of the CA 2010 also provides the MyCC broad powers to issue a direction to any person to allow the MyCC access to records, books, accounts or other things.

3.3 Obtaining Information from Entities Located Outside this Jurisdiction

The MyCC has powers to request for information from any person acquainted with the facts of the case by issuing a Section 18 written notice. This power may extend to companies or individuals located outside Malaysia.

3.4 Inter-Agency Co-operation/Co-ordination

The CCA 2010 envisages interworking arrangements between the MyCC and any other authority in Malaysia. In this regard, the MyCC has signed a Memorandum of Understanding (MoU) with the Central Bank of Malaysia to collaborate and co-operate in areas of common regulatory objectives. The MoU details the investigation and enforcement actions applicable, according to which both parties will notify each other when any infringement is detected and will endeavour to reach a prompt mutual agreement on the course of action.

It has also been reported that the MyCC will provide full co-operation and report to the Malaysian Anti-Corruption Commission (MACC) in order to prevent any corruption and abuse of power in national procurement. This is of particular import for bid-rigging, which may at times exhibit signs of corruption and misconduct.

The MyCC is limited by its obligation not to disclose confidential information with respect to an enterprise unless the disclosure is necessary for the performance of the MyCC's functions or powers or the disclosure is made in connection with an investigation of an infringement under the CA 2010.

3.5 Co-operation with Foreign Enforcement Agencies

The CA 2010 envisages MyCC's co-operation with foreign enforcement agencies. By virtue of Section 21(e) of the CA 2010, the MyCC is authorised to disclose confidential information to any foreign competition authority in response to a request for assistance by the said foreign competition authority. However, there has not been an instance where the MyCC has co-ordinated with foreign competition agencies in cross-border cartel cases.

It is noteworthy that the MyCC is an active participant of the Association of Southeast Asian Nations (ASEAN) Experts Group on Competition (AEGC) which has established the ASEAN Competition Enforcers' Network (ACEN) to facilitate co-operation on competition cases in the region and to serve as a platform to handle cross-border cases. The ACEN aims to enable mutual understanding and encourages information sharing between ASEAN competition authorities.

3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases

Currently, the Criminal Laws of Malaysia do not contain any provision that criminalises cartel conduct, be it the Penal Code or any other act in relation to offences under the criminal law. As such, there are no methods or procedures for the issuance of complaints or indictments.

3.7 Procedure for Issuing Complaints/Indictments in Civil Cases

The MyCC can bring a direct administrative action against an enterprise without having to go to court. The MyCC may decide to launch an investigation pursuant to a complaint, at the request of the Minister for Domestic Trade and Consumer Affairs or where the MyCC has reason to suspect that an infringement has occurred. There are no guidelines on the procedure to be adopted by the MyCC during an investigation.

After the completion of the investigation, if the Commission proposes to make an infringement decision against an enterprise for engaging in a cartel, the Commission will issue a written notice of its proposed decision detailing reasons of the decision and any penalties or other actions that the Commission intends to make. Enterprises are entitled to make written and/or oral representations following the proposed decision issued by the Commission. The Commission may also at any time conduct hearings to determine whether an infringement has occurred.

In keeping with the principles of natural justice, enterprises are given access to documents in connection with an investigation; this includes the MyCC's working files on the matter.

3.8 Enforcement Against Multiple Parties

In cartel cases, enforcement actions are typically brought against multiple parties in a single proceeding.

Pursuant to Section 37 of the CA 2010, enterprises can request an oral representation session and, in practice, they can also request for confidential representation sessions in a multi-party action.

The MyCC can elect to hold a hearing under Section 38 of the CA 2010. The distinction between an oral representation and a hearing is not clear. However, where the Commission decides to hold a hearing, the Commission can also decide whether to hold individual hearings with each enterprise or to hold a single hearing attended by all the enterprises involved.

3.9 Burden of Proof

The MyCC bears the burden of proof in establishing that an infringement has occurred. The standard of proof is on a balance of probabilities (the same evidential standard of proof as in civil proceedings).

3.10 Finders of Fact

In an enforcement proceeding, the MyCC is the finder of fact and applies the law to the facts as well. This is because the MyCC is both the investigator and the decision-maker.

3.11 Use of Evidence Obtained from One Proceeding in Other Proceedings

Any disclosure or use of confidential information obtained by virtue of any provision under the CA 2010 is prohibited. However, this will not prevent the MyCC from disclosing such information where it is in connection with an investigation of an infringement or an offence under the CA 2010. Additionally, with the authorisation of the Commission, disclosure is also possible to any competition authority of another country in connection with a request by that country's competition authority for assistance. The MyCC may also use evidence proffered by a leniency applicant for investigations.

3.12 Rules of Evidence

The rules of evidence which are governed by the Evidence Act 1950 apply to all judicial proceedings. However, it does not appear to extend to hearings or oral representation sessions held by the Commission. In the case of hearings, the CA 2010 provides that hearings shall be governed by and conducted in accordance with the procedural rules published by the MyCC under the CA 2010. However, these rules are yet to be published. With respect to oral representations, the Commission determines the procedure for oral representations.

3.13 Role of Experts

Economists may be engaged to provide their expert opinion on the economic analysis applied by the MyCC in its proposed decision. This may include the MyCC's assessment of the market power, definition of the relevant market and the effects analysis of the anti-competitive agreement.

An economist's expertise may also be engaged in order to provide an in-depth analysis on the net economic benefit argument under Section 5 of the CA 2010 that may be raised by an enterprise as relief from liability.

3.14 Recognition of Privileges

The CA 2010 does not appear to recognise any other privileges apart from legal professional privilege as discussed in 2.12 Attorney-client Privilege, above.

3.15 Possibility for Multiple Proceedings Involving the Same Facts

It may be possible to have multiple or simultaneous enforcement proceedings involving the same or related facts. For example, the MyCC and the MACC may take action against an enterprise for engaging in a bid-rigging cartel where the possibility of corruption exists.

4. Sanctions and Remedies in Government Cartel Enforcement

4.1 Imposition of Sanctions

The MyCC may impose administrative sanctions directly on an infringing enterprise. The administrative sanctions that may be imposed are as follows:

- directions to cease the infringing conduct immediately;
- specifying appropriate steps to be taken by the infringing enterprise to bring the infringement to an end;
- financial penalties; and
- any other direction that the MyCC deems appropriate.

The financial penalty that the MyCC may impose shall not exceed 10% of the worldwide turnover of an enterprise over the period during which an infringement occurred. There is no minimum financial penalty which the MyCC may impose under the CA 2010.

4.2 Procedure for Plea Bargaining or Settlement

The concept of plea bargaining or settlement is not applicable under Malaysian competition law. However, the MyCC may accept an undertaking from an enterprise to take remedial actions subject to conditions that the MyCC impose. Where the MyCC accepts an undertaking, the MyCC shall then close the investigation without making any finding of infringement, and it shall not impose a penalty on the enterprise. The undertaking shall be a document which will be

made available for public inspection. To date, there are six undertakings signed between enterprises and the MyCC.

The MyCC may bring proceedings before the High Court against any enterprise that fails to comply with the terms of the undertaking and the High Court may then make an order requiring the enterprise to comply with the terms of the undertaking. A breach of the High Court order may be punishable as a contempt of court.

4.3 Collateral Effects of Establishing Liability/Responsibility

Any finding of infringement by the MyCC may be used as evidence in civil litigation proceedings. The CA 2010 does not provide for any other form of collateral liability or responsibility, such as debarment or disqualification of directors.

4.4 Sanctions and Penalties Available in Criminal Proceedings

There is no criminal liability for an enterprise involved in a cartel conduct under Malaysian competition law. However, any person or body corporate that obstructs the MyCC's investigations commits an offence. For a body corporate, the offence is punishable by a fine of up to MYR5 million and for, subsequent offences, up to MYR10 million. For an individual, a fine of up to MYR1 million, imprisonment for a term not exceeding five years or both; and for subsequent offences, a fine of up to MYR2 million, imprisonment for a term not exceeding five years or both.

4.5 Sanctions and Penalties Available in Civil Proceedings

The MyCC will bring a direct administrative action against an infringing enterprise and not through the court. As such, it is the MyCC that imposes sanctions and penalties in an administrative action. As mentioned in **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**, above, the MyCC may impose a financial penalty up to 10% of an enterprise's worldwide turnover during the period of infringement for contravention of the CA 2010. The MyCC may also issue cease-and-desist orders, specify steps to be taken by the infringing enterprise to bring the infringement to an end or give any other direction, as it deems appropriate.

4.6 Relevance of 'Effective Compliance Programmes'

In determining the amount of financial penalty to be imposed on an infringing enterprise, the MyCC takes into consideration a number of mitigating factors, one of which is the existence of a corporate compliance programme that is appropriate to the nature and size of the enterprise's business.

4.7 Mandatory Consumer Redress

Sanctions imposed by the MyCC do not extend to mandatory consumer redress. Any consumer seeking redress would have to pursue private civil action for loss of damage directly as a result of an infringement under the CA 2010.

4.8 Available Forms of Judicial Review or Appeal

A decision made by the MyCC can be appealed to the Competition Appeal Tribunal (CAT). The CAT has exclusive jurisdiction to review decisions made by the MyCC.

Section 58(3) of the CA 2010 provides that the decisions of the CAT are final and binding. However, aggrieved parties can apply for judicial review. To date, there have been two instances in which the parties have applied for judicial review, namely:

- Malaysian Airlines System Berhad, AirAsia Berhad and AirAsia X Sdn Bhd (<https://www.mycc.gov.my/sites/default/files/MAS%20AIRASIA.pdf>); and
- My E.G. Services Bhd & My E.G. Commerce Sdn Bhd (<https://www.mycc.gov.my/sites/default/files/Section-40-Notice-of-Finding-of-an-Infringement-by-My-Services-Berhad.pdf>).

These cases both adopt the same standard of review where the merits of the case are not looked at, but rather whether or not the decision is grounded on illegality or irrationality.

5. Private Civil Litigation Involving Alleged Cartels

5.1 Private Right of Action

Private firms or individuals have a private right of action to seek relief, by way of civil proceedings, under Section 64 of the CA 2010. To bring a private action, a private firm or individual must have legal capacity and standing to sue. A private firm or individual will have standing to sue if they have suffered damage or loss as a direct result of the cartel behaviour.

A private right of action will be brought in the civil courts. The standard of proof in private civil actions is on a balance of probabilities, which is similar to the standard of proof in proceedings before the MyCC.

Damages and injunctive relief are the most commonly sought-after reliefs in civil courts.

5.2 Collective Action

Malaysian law does not recognise 'class actions'. However, Malaysian law does recognise that an action can be brought in a representative capacity, by way of a representative action, where one person represents an entire group of persons. This is permissible if all the persons have common interest and

common grievance and the relief sought must be beneficial to all.

Consumer associations or public interest groups may have a private right of action if they have legal capacity to sue and have suffered damage or loss directly as a result of the cartel behaviour.

5.3 Indirect Purchasers and ‘Passing-on’ Defences

The issue of indirect purchasers and ‘passing-on’ defences have not been raised in the Malaysian jurisdiction.

5.4 Admissibility of Evidence Obtained from Governmental Investigations/Proceedings

Evidence obtained from governmental investigations or proceedings is admissible in court, if relevant and material, unless expressly prohibited.

5.5 Frequency of Completion of Litigation

No private right of action under Section 64 of the CA 2010 has been brought to date. However, the typical timeframe for the completion of civil proceedings is nine to 12 months, depending on the complexity of the case.

5.6 Compensation of Legal Representatives

The court will generally require the unsuccessful party to pay the successful party’s legal costs. In assessing the amount to be awarded, the court will consider factors such as the complexity of the case, the amount of time and labour expended on the case by the lawyer, the amount or value at stake and the importance of the case to the client.

Costs will rarely be awarded on a solicitor-client basis (ie, on a full indemnity basis) and will typically be awarded on a party-party basis.

5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

The court will generally require the unsuccessful party to pay the successful party’s legal costs. (see **5.6 Compensation of Legal Representatives**, above).

If multiple persons are represented by the same solicitors, the successful persons are entitled to the costs awarded on a proportionate basis.

5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

There is no right to review judicially decisions involving private civil litigation. Judicial review is available for decisions made by the CAT arising from an appeal against the MyCC’s decision.

For private civil litigation claims exceeding MYR1 million, the action will be commenced in the High Court. Any party dissatisfied with the High Court’s decision has an automatic right of appeal to the Court of Appeal.

Thereafter, any party dissatisfied with the Court of Appeal decision may appeal to the Federal Court with leave.

An appeal is by way of re-hearing. However, an appellate court will not likely interfere with findings of fact by the trial court, to which the law entrusts the primary task of evaluating the evidence. The appellate court will nevertheless have a duty to intervene when the trial court is plainly wrong.

6. Supplementary Information

6.1 Other Pertinent Information

Under the CA 2010, the MyCC is simultaneously the investigator, prosecutor and judge in all matters it decides. As all decisions taken by the MyCC will be subject to rules of natural justice, the MyCC must be extra vigilant to ensure that the process of investigation, prosecution and decision is fair, rational and properly reasoned.

6.2 Guides Published by Governmental Authorities

MyCC issues guidelines which act as reference to the public on how the MyCC interprets the CA 2010. The available guidelines relating to cartel conduct and enforcement issued by the MyCC are:

- Guidelines on Complaint Procedures (https://www.mycc.gov.my/sites/default/files/handbook/MYCC-4-Guidelines-Booklet-BOOK3-6-FA-copy_complaint-procedures.pdf);
- Guidelines on Market Definition (https://www.mycc.gov.my/sites/default/files/handbook/MYCC-4-Guidelines-Booklet-BOOK4-10-FA-copy_market-defination_01.pdf);
- Guidelines on Chapter 1 Prohibition – Anti-competitive Agreements (https://www.mycc.gov.my/sites/default/files/handbook/MYCC-4-Guidelines-Booklet-BOOK1-10-FA-copy_chapter-1-prohibition.pdf);
- Guidelines on Financial Penalties (<https://www.mycc.gov.my/sites/default/files/handbook/Guidline-on-Financial-Penalties.pdf>);
- Guidelines on Leniency Regime (https://www.mycc.gov.my/sites/default/files/handbook/MyCC_Guidline-on-Leniency-Regime.pdf);

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- Compliance Guidelines (https://www.mycc.gov.my/sites/default/files/handbook/Compliance_Guidelines_MyCC.pdf);
- Competition Act 2010: A Guide for Business (<https://www.mycc.gov.my/sites/default/files/handbook/Competition-Act-2010-A-Guide-For-Business.pdf>); and
- Competition Act 2010: Handbook for General Public (English) (<https://www.mycc.gov.my/sites/default/files/handbook/competition-act-2010-bi.pdf>).