Case Study Manual for ASEAN Competition Agencies

Prepared by the Competition Law Implementation Program (CLIP) team with assistance from competition agencies in the member states of the Association of Southeast Asian Nations (ASEAN)

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Introduction

Objective

This Case Study Manual (**Manual**) was written for officials who work in competition agencies in the Association of Southeast Asian Nations (**ASEAN**) Member States (**AMS**). The Manual seeks to support officials working in the area of competition law and policy in the ASEAN region.

Competition law and policy is relatively new to the region and the subject matter is technical, combining law and economics. The literature is vast and can be overwhelming for those who are new to the area. The Manual has been written in plain English and includes simple explanations of competition law and economic concepts. The aim is to make these concepts easily understood by readers of the Manual.

AMS competition agencies tend to experience high staff turnover. In some AMS jurisdictions, staff are temporarily on secondment from the mainstream civil service, have short tenures, and are replaced when their secondment is over. Commissioners or Members of competition agencies also have fixed tenures and are replaced after a period of time.

The Manual is both a practical guide for AMS officials as well as an advocacy tool. It will help develop understanding of the application of competition law and economics, specifically how different competition regulators approach interpreting and applying competition laws in making a decision. It can also be used to support advocacy activities as it demonstrates how competition policy can contribute to a healthy market environment. AMS officials can use these case examples to explain competition law and policy to businesses, consumers and other government departments.

Structure

The Manual is structured in three parts. **Part I** briefly outlines the state of competition laws in the ASEAN region and each competition agency's institutional design.

Part II contains 10 case studies, selected in consultation with the AMS. The case studies have been drawn from the final decisions of the ASEAN jurisdictions (where available) and cover the following anti-competitive practices: cartels, anti-competitive horizontal and vertical agreements, abuse of dominance, and anti-competitive mergers. Each case study describes the conduct investigated, relevant legal and economic analysis, and learning points for competition agencies arising from the case.

Part III contains the sources and references used in preparing the Manual. AMS officials may find it helpful to read further about a particular topic or case study. Part III also contains a list of abbreviations used in the Manual as a quick reference guide, and each competition agency's organisation structure.

Acknowledgements

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1. Competition law and policy

1.1. Development of competition laws and agencies

The competition landscape in the ASEAN region is broadly divided into 3 groups:

1. AMS who introduced competition laws more than 10 years ago
2. those who introduced competition laws more than five (and less than 10) years ago, and
3. those who introduced their laws within the last five years.

With expanding markets and cross border issues both within and across the AMS, several jurisdictions are reviewing their competition laws and guidelines. The revised laws will likely both enhance the investigation and enforcement powers of competition agencies and provide greater guidance to businesses and practitioners.

The table below shows the status of AMS competition laws and the development of their respective competition agencies.

Table 1. Status of competition laws and agency development[1]

Jurisdiction	Current law and year started	Competition agency
Brunei Darussalam	Competition Act, Chapter 253[2]	Competition Commission Brunei Darussalam (CCBD) Established in 2017. Enforcement activity commenced.
Cambodia	Law on Competition 2021	Competition Commission of Cambodia (CCC) Established in 2022. Enforcement activity commenced.
Indonesia	Law Number 5 Year 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition 2000	Indonesia Competition Commission (ICC) / Komisi Pengawas Persaingan Usaha (KPPU) Established in 2000. Enforcement activity commenced.
Lao People's Democratic Republic (Lao PDR)	Law on Competition (No. 60/NA) 2015	Lao Competition Commission (LCC) Established in 2018. Enforcement activity has not commenced.
Malaysia	Competition Act 2010 2012	Malaysia Competition Commission (MyCC) Established in 2011. Enforcement activity commenced.

[1] ASEAN Secretariat, Commonalities and Differences across Competition Laws in ASEAN and Areas Feasible for Regional Convergence, Second Edition, July 2022.

[2] Section 11 on anti-competitive agreements started in 2020.

Jurisdiction	Current law and year started	Competition agency
Myanmar	Pyidaungsu Hluttaw Law No.9/2015 / The Competition Law No. 9.2015 2017	Myanmar Competition Commission (MMCC) Established in 2018. Enforcement activity commenced.
Philippines	Philippine Competition Act (Republic Act 10667) 2015[3]	Philippine Competition Commission (PCC) Established in 2016. Enforcement activity commenced.
Singapore	Competition Act 2004	Competition and Consumer Commission of Singapore (CCCS) Established in 2005.[4] Enforcement activity commenced.
Thailand	Trade Competition Act B.E. 2560 2017	Trade Competition Commission of Thailand (TCCT) Established in 2019.[5] Enforcement activity commenced.
Vietnam	Competition Law No. 23/2018/QH14 2019	Vietnam Competition Commission (VCC) Established in 2023.[6] Enforcement activity commenced.

1.2. Institutional design of competition agencies

Competition agencies in ASEAN have different institutional designs. There is no "one size fits all" or an "optimal" design. Competition agencies are ultimately designed to be both effective and fair.

Generally, there are several possible structural options available based on the functions a competition agency is responsible for and its investigation and decision-making powers.[7]

Functions

There are two types of designs based on the functions which competition agencies in the ASEAN region are responsible for.

1. **Single function agencies**

   Single function agencies are those that have been given the function of implementing and enforcing the competition laws of their country. They work closely with other regulatory bodies to ensure the market functions well and that consumer interests are prioritised.

   Brunei, Cambodia, Malaysia and the Philippines are agencies which have been given the sole mandate to enforce a competition law.

3 With a 2-year transition period for businesses.

4 Consumer protection functions included in 2018.

5 Previously the Office of Trade Competition Commission established in 1999.

6 Previously the Vietnam Competition and Consumer Authority established in 2005.

7 OECD, Key points of the Roundtables on Changes in Institutional Design, June 2015.

2. **Multifunctional agencies**

   Multifunctional agencies are not only responsible for the healthy functioning of markets by enforcing competition laws, they are also given other economic policy functions such as consumer protection and unfair competition laws, and sectoral regulation. This integration can provide both challenges and opportunities.

   Indonesia, Myanmar, and Singapore, Thailand provide examples of the AMS that have been given additional roles other than the enforcement of competition law and policy.

Investigation and decision-making powers

Depending on factors such as the legal and constitutional context in which the ASEAN competition agencies operate, jurisdictions have adopted either the administrative or prosecutorial enforcement model. Besides these differences in agency models, there are also other differences in the way investigative and decision-making functions are performed.

1. **Administrative model**

   The administrative model is one where the competition agency both investigates a potential breach of law and performs the decision-making function.

2. **Prosecutorial model**

   In the prosecutorial model, the competition agency investigates a potential breach of law and prosecutes the case before a separate, independent institution such as a court or tribunal.

The table below summarises the different institutional designs of the various ASEAN competition agencies with reference to the different structural options outlined above.

Table 2. Institutional design of ASEAN competition agencies

Jurisdiction & agency	Function	Powers
Brunei Darussalam Competition Commission Brunei Darussalam (CCBD)	Single - Competition law enforcement	Administrative
Cambodia Competition Commission of Cambodia (CCC)	Single - Competition law enforcement	Administrative
Indonesia Indonesia Competition Commission (ICC) / Komisi Pengawas Persaingan Usaha (KPPU)	Multi - Competition and unfair business competition	Administrative
Lao People's Democratic Republic (Lao PDR) Lao Competition Commission (LCC)	Multi – Competition and unfair business competition	Administrative
Malaysia Malaysia Competition Commission (MyCC)	Single – Competition law enforcement	Administrative

Jurisdiction & agency	Function	Powers
Myanmar Myanmar Competition Commission (MMCC)	Multi - Competition and unfair trade practices	Administrative[8] / Prosecutorial
Philippines Philippine Competition Commission (PCC)	Multi - Competition Law enforcement	Administrative
Singapore Competition and Consumer Commission of Singapore (CCCS)	Multi – Competition and consumer protection	Administrative
Thailand Trade Competition Commission of Thailand (TCCT)	Multi – Competition and unfair trade practices	Administrative and prosecutorial[9]
Vietnam Vietnam Competition Commission (VCC)	Multi - Competition, protection of consumer interests and management of multi-level marketing	Administrative

To see the organisation structure of each AMS competition agency, see part 3.2 belowon page 65.

[8] For unfair trade practices.

[9] Prosecutorial for hardcore horizontal arrangements or abuses of dominant position.

2. Case studies

The following case studies are based on the final decisions of the ASEAN competition agencies, where available. Each case study describes the conduct investigated, the relevant legal and economic analysis, and policy considerations. Investigators may find these case studies useful when considering their own investigations.

2.1. Price fixing cartel

Table 3. Price fixing cartel case overview

Agency	Competition and Consumer Commission of Singapore (CCCS)
Summary	Price fixing and market sharing arrangements between 13 fresh chicken distributors about the sale and distribution of fresh chicken products in Singapore
Decision date	12 September 2018[10]
Outcome	The parties infringed the Singapore Competition Act, from at least September 2007 to August 2014, by: • participating in anti-competitive agreements and/or concerted practices to not compete for one another's customers, and • coordinating the amount and timing of price changes of the supply of fresh chicken products. CCCS imposed penalties totalling S$26.9 million, based on turnovers of S$26,948,639.
Learning points	Price fixing cartels Trade associations facilitating the sharing of sensitive information Discussions at social gatherings can be enough to breach competition law

What is a cartel?

A cartel (or cartel agreement) exists when competitors (who can be individuals or businesses) agree to act together instead of competing with each other. A cartel:

- is made up of independent competitors
- attempts to increase members' profits while maintaining the illusion of competition
- can involve businesses of any size
- can be local, national or international.[11]

There are four types of cartel activity: price fixing cartels, market sharing cartels, controlling output cartels, and bid rigging cartels.

[10] CCCS, Public Register, CCCS Penalises Fresh Chicken Distributors for Price-fixing and Non-compete Agreements, 12 September 2018.

[11] CCCS, Anti-Competitive Agreements. For more information on hard core cartels see OECD Report, Hard Core Cartels, 2000

What is a price fixing cartel?

A price fixing cartel occurs where two or more competitors agree on what prices they will charge, and thus avoid having to compete. It is not limited to agreements between competitors setting a specific price for a good or service – it also includes competitors agreeing to fix any part of a price (for example, discounts), or to set the price according to a specific formula.

Parties

The conduct involved the following businesses who traded in or distributed fresh chicken products in Singapore and who at the time had a combined annual turnover of over S$500 million:

- Gold Chic Poultry Supply Pte. Ltd. and its related company Hua Kun Food Industry Pte. Ltd.
- Hy-fresh Industries (S) Pte. Ltd.
- Kee Song Food Corporation (S) Pte. Ltd. (**Kee Song**)
- Lee Say Group Pte. Ltd. (**Lee Say Group**) and its subsidiaries Hup Heng Poultry Industries Pte. Ltd., Prestige Fortune (S) Pte. Ltd., Leong Hup Food Pte.Ltd.
- Ng Ai Food Industries Pte. Ltd.
- Sinmah Poultry Processing (S) Pte. Ltd. (**Sinmah**)
- Toh Thye San Farm
- Tong Huat Poultry Processing Factory Pte. Ltd. and its wholly-owned subsidiary Ban Hong Poultry Pte. Ltd.

Background

The fresh chicken industry in Singapore is divided into two segments:

1. slaughtering live chickens imported from Malaysia, and
2. distribution.

Some fresh chicken distributors also provide slaughtering facilities and may also provide services such as cutting and marinating.

Fresh chicken products (whole fresh chickens, chicken parts and processed chickens) are distributed to restaurants, supermarkets, hotels, and wet markets including hawker stalls.

Chicken is the most consumed meat in Singapore, where more than 30kg of chicken is consumed per person annually. The Parties supply more than 90% of fresh chicken in Singapore and their total combined annual turnover is about SGD$500 million.

Some of the distributors, such as Lee Say Group, are vertically integrated as they own chicken farms in Malaysia as well as slaughtering, processing, and distribution facilities in Singapore.

The Parties are all members of The Poultry Merchants' Association, Singapore (**Association**), which shares the same registered address as Sinmah, one of the Parties. The

Association's object is to promote friendly relationships, goodwill, mutual help, and common welfare among poultry merchants in Singapore.

Starting the investigation

In November 2013, a whistle blower (an ex-employee of Lee Say), approached the CCCS with information of alleged anti-competitive conduct.

Conduct investigated

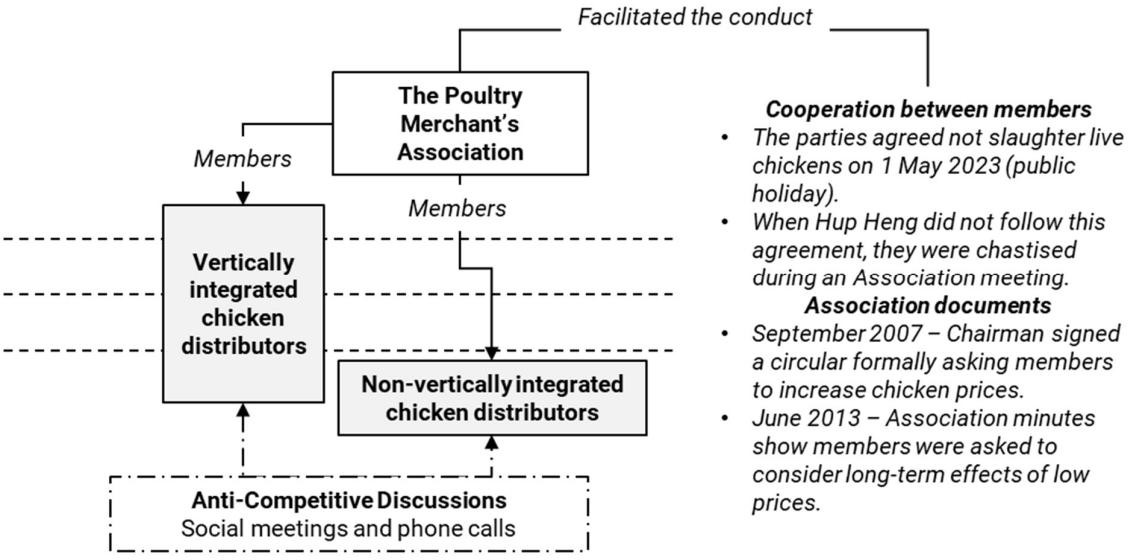
CCCS investigated whether, for at least 7 years (between September 2007 to August 2014), the Parties had engaged in the following conduct (referred to collectively as **Anti-Competitive Discussions**):

- discussions coordinating the amount and timing of price changes (the **Price Discussions**) – the Price Discussions included exchanging information about prices and future pricing intentions; and
- agreeing not to compete for each other's customers (the **Non-Aggression Pact**).

The Parties, whose representatives had known each other for decades, generally met in social settings such as bars, eating places, coffee houses in hotels, and karaoke lounges. As these were social meetings, there was no documentary evidence of the Anti-Competitive Discussions that took place.

In general, the Price Discussions took place during phone calls. It was not necessary for all the Parties to attend every Anti-Competitive Discussion because they would inform each other of the discussed price increases via phone calls.

To ensure compliance, the Parties' engaged in pressure tactics (calling each other to either demand the return of customers or increase selling prices) and implemented policies not to actively compete for customers belonging to other distributors.



Legal provisions

Section 34 of the Singapore Competition Act

1) *Subject to section 35, agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited unless they are exempt in accordance with the provisions of this Part.*
2) *For the purposes of subsection (1), agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they —*
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development or investment;
   (c) share markets or sources of supply; …

CCCS considered the following elements:

(a) whether the Parties were "undertakings" and whether any of the Parties were a single economic entity

(b) whether there was an agreement or concerted practice

(c) whether the object or the effect of such an agreement or concerted practice was the prevention, restriction, or distortion of competition within Singapore; and

(d) whether the Parties were part of the agreement and/or concerted practice.

There was no need to determine a distinct market definition as this case involved an agreement/concerted practice that involved market sharing and price fixing. These types of cartels are prohibited *per se*, which means there is no need to evaluate the effect on competition. Understanding the relevant product and geographical market was needed only to determine the total fines.

Analysis

a) Undertaking and single economic entity

Section 2(1) of the Singapore Competition Act

In this Act, unless the context otherwise requires — …

"undertaking" means any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services.

'Carrying on' just means 'engaging in' or 'conducting'. Each of the Parties carried on commercial or economic activities relating to, among other things, the distribution of fresh chicken products and therefore was an "undertaking" under the Singapore Competition Act.

In addition, for the section 34 prohibition to apply, there has to be an agreement *between undertakings* which requires more than one 'undertaking' to have made the agreement. That means that the businesses involved must be separate from each other in a business and economic sense, not just in a legal sense. It is not enough that the businesses be officially registered as separate legal entities; they must be considered as independent in a practical

business sense. If they are not truly independent in this way, they are considered a 'single economic entity'.

Therefore, CCCS also needed to identify whether some of the Parties, who were each separate *legal* entities, were really part of a single economic entity. The CCCS *Guidelines on Section 34 Prohibition* say that two entities – a parent and its subsidiary company[12] or two companies which are under the control of a third company - form a single economic entity if the subsidiary has no real freedom to determine its course of action in the market and, although having a separate legal personality, enjoys no economic independence. This will be dependent on the circumstances of each case.

In this case, some of the parties were in fact considered a single economic entity because of their economic, legal and organisational links e.g. common directorships and common shareholdings. These links can be seen in the addressees of CCCS' infringement decision. Other factors to consider include a company's reporting structure, any profit-sharing arrangements, the right to nominate directors, and influence on commercial policies.

b) Agreement or concerted practice

The CCCS found that:

- the Parties have participated in agreements and/or concerted practices relating to not competing for each other's customers (the Non-Aggression Pact) evidenced by documents and statements from customers and sales staff of the Parties
- the quantum and timing of price movements in relation to the sale and distribution of fresh chickens in Singapore (the Price Discussions, which include the exchange of price information and future pricing intentions) took place and were likely to have been implemented in at least three instances (September 2007 to October 2007, between June 2013 to November 2013, and between February 2014 to March 2014).

Some of the relevant principles considered by the CCCS included the following:

- An agreement is formed when parties come to a decision together on the actions each party will, or will not, take. An agreement may be reached through a physical meeting or an exchange of letters or telephone calls or any other means of communication.
- Section 34 prohibits not only anti-competitive agreements, but also *concerted practices*. A concerted practice means that the businesses cooperate or collaborate rather than compete – but without ever having made an actual agreement to do this cooperation or collaboration (not even an *implied* agreement). As put in the decision, it is when parties "*knowingly substitute for the risks of competition, practical cooperation between them*."
- It was not necessary for the purposes of finding an infringement for CCCS to decide whether the conduct was an agreement or a concerted practice – it can be **both**.

c) Object or effect of preventing, restricting, or distorting competition

The Parties' conduct, in entering into market-sharing agreements (the Non-Aggression Pact) and price-fixing agreements (the Price Discussions) were considered as 'by object' breaches because they were, by their very nature, restrictive of competition to an appreciable extent.

Some of the relevant principles considered by the CCCS included the following:

[12] To clarify, if there is a company that is owned or controlled by another company, the first company is called a 'subsidiary company', and its owning/controlling company is called the 'parent company'.

- CCCS only needed to establish either an anti-competitive "object" or "effect", not both.
- Some types of anti-competitive conduct, such as price-fixing and market-sharing, are considered to have the "object" of restricting competition because they will always have an appreciable adverse effect on competition. It is not necessary for the competition agency to go on to prove the agreement or conduct had an "effect" on the market.

See also **Object or effect of preventing, restricting, or distorting competition** from case study 2.5 on page 34 below.

d) Parties were part of the agreement and/or concerted practice

Anti-competitive discussions involve multiple people or entities who may participate in the discussions differently. They may suggest the anti-competitive behaviour, agree, disagree, or saying nothing. While the participation of entities suggesting the anti-competitive behaviour or agreeing with the suggestion is straightforward, it is less clear when an entity disagrees or says nothing.

In this case, CCCS considered the following principles in finding all the Parties had participated in the conduct:

- Simply attending a meeting with an anti-competitive purpose without obviously disagreeing with, or publicly distancing from, the anti-competitive purpose, is implied approval. The reason underlying this principle is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants a reason to believe that it subscribed to what was decided there and would comply with it.
- Silence at a meeting or disagreeing with the substance of what was proposed is not an obvious communication that the entity disagrees with the unlawful anti-competitive conduct.
- Entities may have participated in anti-competitive conduct even if:
  - they only had a limited role in setting up the agreement
  - they are not fully committed to the implementation of the agreement, or
  - they only participated under pressure from others.
- An entity that "cheats" and does not follow the agreement may still infringe competition laws even if it never intended to follow the agreement.

Decision

CCCS issued an infringement decision[13] against the Parties for their participation in anti-competitive agreements and/or concerted practices:

- not to compete for one another's customers (a market sharing cartel agreement), and
- to coordinate the amount and timing of price movements (a price fixing cartel agreement)

in relation to the supply of fresh chicken products in Singapore, in contravention of section 34 of the Singapore Competition Act. The CCCS found the actions of the Parties to be a single continuous infringement.

[13] CCCS, Media Releases & Announcements, CCCS Penalises Fresh Chicken Distributors for Price-fixing and Non-compete Agreements, 12 September 2018

CCCS fined the parties a total of S$26,948,639 on the 13 cartel participants.

Learning points

Trade associations facilitating the sharing of sensitive information

Trade associations (also called industry associations) bring together businesses within an industry who have common goals and interests to discuss current issues, develop standards, and establish rules for best practice within their industry. This is often legitimate commercial behaviour that benefits businesses and consumers.[14]

However, some behaviour may infringe competition laws because trade associations are a convenient place for competitors to share sensitive or confidential commercial information (such as prices and production levels). Sharing competitively sensitive information is against competition law. It is important trade associations understand obligations under competition laws for both the association and its members, communicate these obligations, and support compliance by members.

In this case, the Parties were all members of the Poultry Merchants' Association, Singapore. The Association, in particular, had 'facilitated' the conduct through various means such as issuance of various circulars and minutes which contained discussions on price implications and to ensure members were all at a level playing field. See **Conduct investigated** on page 11 above).

The Parties engaged in the Anti-Competitive Discussions even though the Association had prohibitions in its constitution against any recommendation or arrangement "*which has the purpose or is likely to have the effect of fixing or controlling the price or any discount*". The words in the constitution were not enough to prevent the Anti-Competitive Discussions.

Competition agencies can proactively work with trade associations to assist them in understanding their rights and obligations under competition policy and law, such as by:

- Providing general guidelines to trade associations about what kinds of behaviour may be likely or unlikely to infringe competition laws. See for example the Australian Competition and Consumer Commission's guidance for industry associations which includes guidelines about what association rules/codes of conduct can and can't do, membership criteria, advertising restrictions, information sharing, and pricing.
- When there are public decisions about infringements of competition law, competition sharing this news with trade associations to remind them of their obligations.
- Working closely with trade associations to conduct advocacy awareness campaigns.

[14] ACCC, Industry associations

2.2. Market sharing cartel

Table 4. Market sharing cartel case overview

Agency	Competition Commission (Hong Kong)
Summary	Investigation into an alleged agreement or concerted practice between 10 decorator contractors in 2016: ▪ allocating floors in buildings to carry out decoration work for individual tenants, and ▪ jointly producing a promotional flyer setting out price packages.
Decision date	17 May 2019[15]
Outcome	The court held that all respondents contravened the competition laws. Fines ranged from HKD $132,000 to HKD $740,000.
Learning points	Market sharing cartel Price fixing cartel Sub-contractors Witness statements Rules restricting competition

What is market sharing?

Market sharing is a type of cartel agreement where two or more competitors divide up markets in various ways (such as geographical area, size, or customers) and agree to sell only to their allotted segment of the market. As a result, they do not compete for each other's allotted market and do not make independent decisions about conducting their business. This prevents customers from being able to shop around for the best deals.

Parties

The conduct involved the following decorator contractors who were companies, partnerships, or individual traders (the **Parties**):

1. **W. Hing** Construction Company Limited (company)
2. **Sun Spark** Construction Limited (company)
3. **Mau Hang** Painting & Decoration Co (partnership)
4. **Tai Dou** Building Contractor (partnership)
5. **Kam Kee** Machine Electrical Iron Works Company Limited (company)
6. **Hip Yick** Construction Company (partnership)
7. **Tai Wah** Civil Engineering (sole proprietor)

[15] Competition Tribunal of the Hong Kong Special Administrative Region, Judgment in *Competition Commission and W. Hing Construction Company Pty Ltd and others*, 17 May 2019.

8. **Wai Sun** Iron & Decoration Co (partnership)
9. **Wide Project** Engineering & Construction Co (sole proprietor)
10. **Luen Hop** Decoration Engineering Co Limited (company)

Background

The case relates to interior decoration services at On Tat Estate (the **Estate**), a public rental housing estate developed by the Hong Kong Housing Authority comprising 11 residential blocks.

Since 1982, the Housing Authority has operated a Decoration Contractor System. Under the system:

- The Housing Authority maintains a "Reference List of Decoration Contractors" (**Reference List**). To be on the list, contractors must satisfy several conditions including having at least $2.4 million available, at least 5 years' experience in decoration works, and a shop of a reasonable size.
- When a new public housing estate is ready, the Housing Authority grants "licenses" to a number of contractors on the Reference List to undertake decoration works for tenants. The number of contractors appointed (**Appointed Decoration Contractors**) is based on a ratio of one contractor to every 250 flats.
- Tenants are free to decide whether they want to have their units decorated. If they do, they are free to decide whether to engage an Appointed Decoration Contractor or any other contractor (**Outside Contractors**) or decorate their units themselves.

On 3 August 2015, the Housing Authority sent a letter to each of the Parties advising them that they had been selected to be Appointed Decoration Contractors and inviting them to attend a briefing session on 20 August 2015.

On 20 August 2015, the Housing Authority held a briefing session attended by representatives of the Parties. This included informing the Appointed Decoration Contractors that, among other things, they should not "agree among themselves to allocate flats to a certain contractor, commonly referred to as 'pie-sharing', but should allow the tenants to choose freely".

On 16 June 2016, a joint site office for the Parties was completed on the Estate (**Site Office**) and the parties drew lots to allocate the seats in the Site Office. There were 10 desks, each occupied by one Appointed Decoration Contractor with its business name displayed on the wall behind the desk. There was evidence that the lots drawn determined not only the Site Office seating but also the floors in each building allocated to each of the parties.[16]

Starting the investigation

The investigation started after the Hong Kong Competition Commission received a complaint from a tenant.[17]

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[16] Using a joint site office was not in any way criticised by the Hong Kong Competition Commission in these proceedings.

[17] Hong Kong Competition Commission, Competition Case Series, 'On Tat Estate decoration contractors convicted of market sharing and price fixing (CTEA2/2017).

Conduct investigated

Floor Allocation Arrangement

The Competition Commission alleged that from around June to November 2016, the Parties made and/or gave effect to an agreement and/or engaged in a concerted practice, whereby the Parties were each allocated 4 floors in a pattern (set out below) and they:

(a) would not actively seek business from tenants on floors allocated to other parties;

(b) would not accept business from those tenants; and

(c) would direct those tenants to the parties who had been allocated their floors (the **Floor Allocation Arrangement**).

Between June and November 2016, out of the 2,582 flats in the 3 buildings, the Parties carried out decoration works for 867 flats. It is unclear how many tenants moved in without decoration, decorated the flats themselves, or engaged Outside Contractors.

The distribution of most of the flats decorated by the Parties fell into a strikingly regular pattern. According to the pattern, each party worked on 4 floors in each of the buildings. The 4 floors each respondent worked on were 10 floors apart, shown in the following table:

Appointed Decoration Contractor	Floors worked in Chun Tat House	Floors worked in Oi Tat House	Floors worked in Shing Tat House
W Hing (R1)	1, 11, 21, 31	4, 14, 24, 34	8, 18, 28, 38
Sun Spark (R2)	2, 12 , 22, 32	5, 15, 25, 35	9, 19, 29, 39
Mau Hang (R3)	3, 13, 23, 33	6, 16, 26, 36	10, 20, 30, 40
Tai Dou (R4)	4, 14, 24, 34	7, 17, 27, 37	1, 11, 21, 31
Kam Kee (R5)	5, 15, 25, 35	8, 18, 28, 38	2, 12 , 22, 32
Hip Yick (R6)	6, 16, 26, 36	9, 19, 29, 39	3, 13, 23, 33
Tai Wah (R7)	7, 17, 27, 37	10, 20, 30, 40	4, 14, 24, 34
Wai Sun (R8)	8, 18, 28, 38	1, 11, 21, 31	5, 15, 25, 35
Wide Project (R9)	9, 19, 29, 39	2, 12 , 22, 32	6, 16, 26, 36
Luen Hop (R10)	10, 20, 30, 40	3, 13, 23, 33	7, 17, 27, 37

Of the 867 flats decorated by the Parties, 832 (over 95%) followed this pattern.

Package Prices Arrangement

The Parties produced a joint flyer for the purposes of the decoration works in Phase One of the Estate (**Flyer**). It listed items of works typically desired by tenants and set out service packages and prices for the 4 different types of flats (**Packages** and **Package Prices**).

The Competition Commission also alleged that from around June to November 2016, the Parties made and gave effect to an agreement, or engaged in a concerted practice, whereby:

(a) the Parties would jointly produce the Flyer where the Package Prices would be printed and which would be used by the Parties to advertise to the tenants; and

(b) the Package Prices would be used or offered by the Parties for the Packages in the first instance (the **Package Prices Arrangement**).

Legal provisions

Section 6 of the Ordinance

1) An undertaking must not –

a) make or give effect to an agreement;

b) engage in a concerted practice; or

c) as a member of an association of undertakings, make or give effect to a decision of the association,

if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.

2) Unless the context otherwise requires, a provision of this Ordinance which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice and a decision by an association of undertakings (but with any necessary modifications).

3) The prohibition imposed by subsection (1) is referred to in this Ordinance as the "first conduct rule".

The decision considered the following elements:

(a) whether there was an agreement

(b) whether the agreement had the object of preventing, restricting, or distorting competition in Hong Kong

(c) whether any exceptions or defences apply.

Analysis

a) Agreement

Section 2(1) of the Ordinance

In this Ordinance –

"agreement" includes any agreement, arrangement, understanding, promise or undertaking, whether express or implied, written or oral, and whether or not enforceable or intended to be enforceable by legal proceedings;

The Competition Tribunal was satisfied that both the Floor Allocation Arrangement and Package Prices Arrangement were agreements.

Floor Allocation Arrangement

The stark pattern of the flats decorated by the Parties was strong evidence that there had been deliberate coordination rather than free and normal competition. Less than 5% of the flats decorated by the Parties fell outside the pattern and could be explained by the evidence that where the tenants insisted, the Parties could take on work for floors not allocated to them.

The Competition Commission presented evidence from 8 tenants which was largely unchallenged by the Parties. The tenants had similar experiences:

- When some of the tenants visited the Estate or Site Office and saw a group of representatives from the Appointed Decoration Contractors, only one representative would approach them and the others would not even try to approach.
- Some of the tenants told the representative their flat number, and were told by the representative to engage a different representative.

Package Prices Arrangement

There was evidence from 6 of the Parties that the Parties all agreed the Flyer would be produced jointly for use by all of them. The words on the Flyer represented that it was published by all of them.

The Competition Commission identified a number of orders in which the Parties applied the exact Package Prices to the Package items in the Flyer, strongly suggesting the Flyer was used in these orders.

b) Object of preventing, restricting, or distorting competition

Section 7 of the Ordinance

1) *If an agreement, concerted practice or decision has more than one object, it has the object of preventing, restricting or distorting competition under this Ordinance if one of its objects is to prevent, restrict or distort competition.*
2) *An undertaking may be taken to have made or given effect to an agreement or decision or to have engaged in a concerted practice that has as its object the prevention, restriction or distortion of competition even if that object can be ascertained only by inference.*

The Competition Commission's case focused on the object of the agreements, and therefore it was unnecessary to investigate their effects. The Competition Tribunal concluded that both the Floor Allocation Arrangement and the Package Prices Arrangement had the object of preventing, restricting, or distorting competition in Hong Kong.

Floor Allocation Arrangement

The terms of this agreement directly prevented competition between the Parties (each floor was allocated to one and only one Party). The aim of the agreement was clearly to prevent competition.

Package Prices Arrangement

By adopting the Flyer with the Package Prices, the Parties had plainly "made" an agreement to fix prices. Even where the contract prices were different from the Packages, the Flyer still

acted as a starting or reference point for negotiations, especially as the Packages included basic items desired by many customers.

The experts agreed the Flyer was a supportive mechanism for the Floor Allocation Agreement. If the Parties had used individual flyers with different prices, they would not be able to maintain the Floor Allocation Arrangement.

c) Exceptions and defences

Efficiency defence

A number of the Parties argued the Floor Allocation Arrangement was economically efficient.

Section 1 of Schedule 1 to the Ordinance

The first conduct rule does not apply to any agreement that—

(a) contributes to—

(i) improving production or distribution; or

(ii) promoting technical or economic progress,

while allowing consumers a fair share of the resulting benefit;

(b) does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives stated in paragraph (a); and

(c) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

Each of the above conditions must be satisfied for the defence to apply.

The Tribunal noted the Parties' positions were inconsistent factually. On the one hand, they deny the existence of any of the alleged agreements. On the other hand, they argue that the agreements were necessary to deliver efficiencies which benefitted their customers.

The Parties had difficulties explaining the counterfactual and providing evidence of these efficiencies. The Tribunal concluded the conditions of the efficiency defence were far from being satisfied.

Sub-contractor defence

W Hing and Wide Project argued they were not liable because sub-contractors carried out the renovation works under their names, these sub-contractors were separate undertakings, and had entered into the agreements without W Hing's and Wide Project's knowledge.

The Competition Tribunal concluded that in order to undertake and deliver the commercial provision of decoration services to tenants in the Estate, W Hing and its sub-contractor (and Wide Project and its sub-contractor) had to act together. W Hing (and Wide Project) brought its status as an Appointed Decoration Contractor, whilst the sub-contractor brought in workers, raw materials, site supervision, and mangement.

Therefore, the sub-contractor defence also failed.

Decision

The Hong Kong Competition Tribunal concluded that between June and November 2016, the Parties made and gave effect to the following agreements:

- the Floor Allocation Arrangement, whereby:
  - they were each allocated 4 floors in each of the 3 buildings for the purposes of taking up decoration business;
  - they agreed not to actively seek business from tenants on floors allocated to others;
  - if approached by those tenants they would direct them to the party who had been allocated the floors; and
  - they would decline business from them unless the tenants insisted; and
- the Package Prices Arrangement, whereby:
  - they agreed on the prices of Packages to be put on a joint Flyer;
  - they agreed to contribute financially to printing the Flyers;
  - the prices in the Flyer were a starting point for negotiations with many, if not all, customers whose requirements included the Package items; and
  - in a number of contracts, the prices in the Flyer were or were near the final prices.

The above agreements were implemented and consisted of allocating the market for the supply of services and fixing the price for supply of services, each constituting serious anti-competitive conduct.

Following a further hearing on penalties, the Competition Tribunal imposed pecuniary penalties on the 10 Parties ranging from HKD $132,000 to HKD $740,000.[18]

Learning points

Sub-contractors

If an entity uses a sub-contractor, they may still be responsible for potentially anti-competitive conduct engaged in by the sub-contractor. This is even the case when the entity does not consider itself as having any authority or responsibility over the actions of their sub-contractor.

Competition agencies should consider whether the entities they are investigating might form part of a larger undertaking, and whether that larger undertaking may be held responsible for the potentially anti-competitive conduct (e.g. suppliers and distributors, principals and agents, parties and subsidiary companies).

Witness statements

In this case, the Tribunal put little weight on several of the respondents' witness accounts because it was obvious that parts of the respondents' expert report had been copied and pasted into the witness statements. In cross-examination, the witnesses did not understand those copy and pasted parts of their statements.

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[18] *Competition Commission v W. Hing Construction Company Limited and Others* [2020] HKCT 1.

Competition agencies should ensure that when they are obtaining statements from witnesses, they use the witness' own words and do not put words in the witness' mouth.

Rules restricting competition

In this case, the Housing Authority required contractors to satisfy several conditions to be on their list of approved contractors (including having at least $2.4 million available, at least 5 years' experience in decoration works, and a shop of a reasonable size).

Rules (or criteria) such as this may be permissible under competition laws if they are clearly defined, transparent, non-discriminatory, and proportionate. If they are not, they may be considered anti-competitive as they may unfairly restrict players from the market.

2.3. Bid rigging cartel

Table 5. Bid rigging cartel case overview

Agency	Indonesia Competition Commission (ICC) / Komisi Pengawas Persaingan Usaha (KPPU)
Summary	The case involved a conspiracy in the process of a tender: i) between bidding businesses, and ii) between the tendering committee and the bidding business actors. They were alleged to have manipulated the auction or colluded in the procurement process for goods and services (Medium Bus, Single Bus, and Articulated Bus) in the 2013 fiscal year.
Decision Date	4 August 2015
Outcome	The Transjakarta Bus procurement process was found to have involved a horizontal and vertical conspiracy related to bid-rigging whereby the collusion was manipulated between businesses, between the owner of the work as well as between the two parties. The ICC imposed total penalties of IDR 69,587,000,000 on the parties.
Learning points	Bid rigging cartel Horizontal and vertical conspiracy in a tender process

What is bid rigging?

Bid rigging, also known as collusive tendering, is a type of cartel agreement where two or more competitors secretly agree to raise prices or lower the quality of goods or services for purchasers acquiring products or services through a bidding process. There are different types of bid rigging schemes, which can be implemented alone or together.

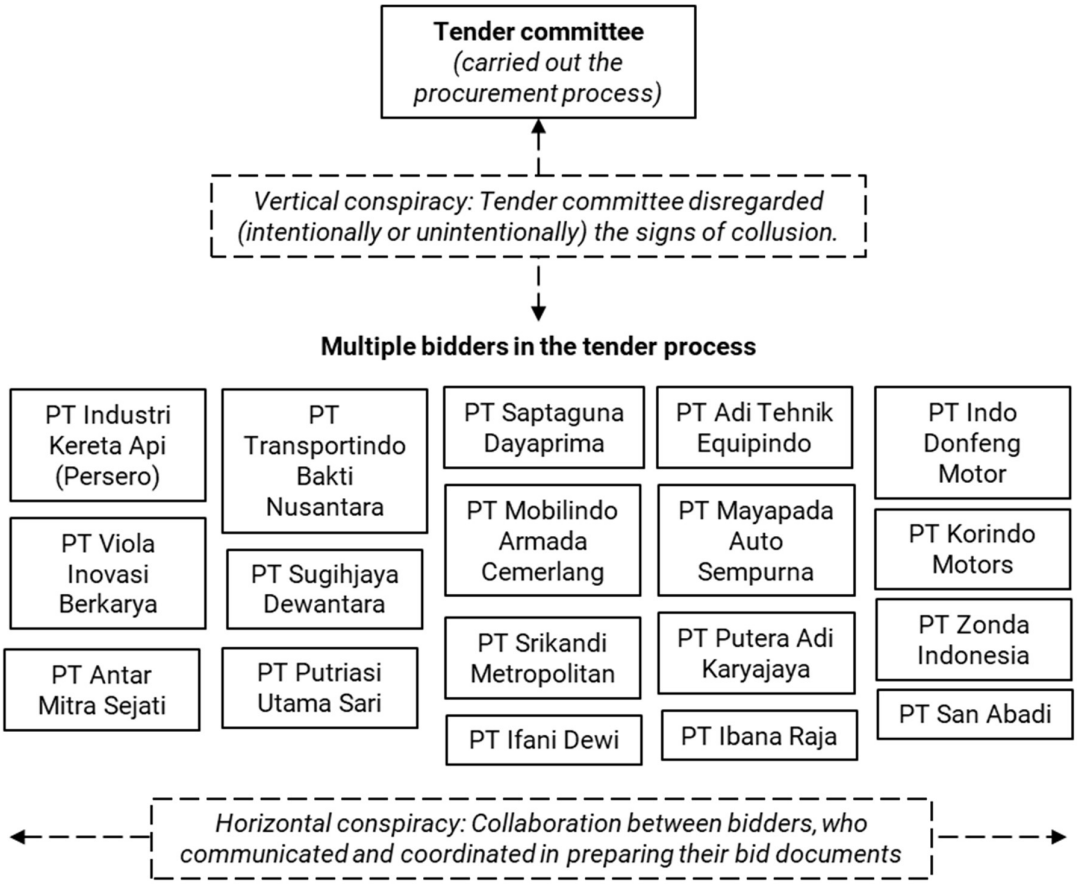
Common types of bid rigging include:

- **cover bidding** where parties agree to bid an artificially high price
- **bid suppression** where one or more parties agree not to bid
- **bid rotation** where parties may agree to bid or bid only at an artificially high price.

Details and examples of different types of bid rigging can be found in the OECD Guidelines for Fighting Bid Rigging in Public Procurement.[19]

Parties

The conduct involved several business actors who were bidders in the tender process. The conduct also involved the tender committee, the Committee for Procurement of Goods/Services in the Field of Construction Work 1, Department of Transportation DKI Jakarta Province (**Tender Committee**). The figure below shows the parties involved.



Background

Transjakarta is the first Bus Rapid Transit (BRT) transportation system in the Southeast and South Asia with the longest track in the world at 208 km. It operates in Jakarta, Indonesia and commenced operation on 15 January 2004 to provide a fast public transport system to reduce the traffic problems in Jakarta.

There are 5 different types of Transjakarta Bus and 11 types of services.

[19] OECD, Guidelines for Fighting Bid Rigging in Public Procurement.

Transjakarta became Transjakarta Public Service Agency which is the Technical Implementing Unit under the Jakarta Provincial Transportation Agency.

Some of the buses were found to be damaged and corroded and some specifications as required by the tender were not met. The faulty Transjakarta buses were found to be worth IDR 1 trillion (USD$88 million).

The procurement/rejuvenation of the busway buses, carried out by the DKI Jakarta Provincial Transportation Agency for the 2013 fiscal year, consisted of 14 packages with details of:

1. single bus type (5 packages)
2. articulated bus type (up to 5 packages)
3. medium bus type (4 packages).

Starting the investigation

The investigation started on the ICC's initiative, after ICC concluded its own research on the bidding process. The research itself was triggered by various sources of information, such as news from the media and information from other institutions.

Conduct investigated

Some businesses involved in the bidding process are alleged to have conspired in the tender process by manipulating the auction, or colluding in the procurement process of goods and services run by DKI Jakarta Provincial Transportation Agency.

Based on the Guidelines on Article 22 Regarding Prohibition of Conspiracy in Tenders (**Guidelines on Article 22**),[20] conspiracy can occur in 3 forms: horizontal conspiracy, vertical conspiracy, and a combination of both. 'Conspiracy' is cooperation carried out by business actors with other parties, on anyone's initiative and in any way, intended to help a certain bidder win a tender.

In this case, the horizontal conspiracy was the acts of collaborating in the form of communication and coordination in the preparation of bid documents (resulting in pseudo-competition).[21] The vertical conspiracy was the acts of the tender committee which disregarded (intentionally or otherwise) the signs of collusion.

Legal provisions

Article 22 of the Indonesia Competition Law

Business actors shall be prohibited from conspiring with other parties with the aim of determining the awardees of tenders which may cause unfair business competition.

The Guidelines for Article 22 list the following elements of this provision:

(a) business actor

(b) conspiracy

[20] KPPU, Guidelines on Article 22 Regarding Prohibition of Conspiracy in Tenders, July 2005.

[21] 'Pseudo-competition' means a kind of competition oligopolists engage in: enough to keep antitrust regulators at bay, but not enough to yield the fruits of true competition at Harvard Business Review, Pseudo Competition, 2 September 2010.

(c) other parties

(d) arranging and/or determining awardees of tenders

(e) unfair business competition.

Analysis

Article 22 of the Indonesia Competition Law uses the Rule of Reason approach to detect whether the conspiracy resulted in anti-competitive behaviour.

The Rule of Reason doctrine recognises that not all combinations and contracts that disrupt trade are necessarily illegal.[22] The doctrine gives the courts the ability to take into account both pro-competitive factors and trade barriers resulting from the alleged anti-trust acts i.e. whether it interferes, influences or even obstructs the competitive process.

In this case, pseudo-competition is carried out through coordination between the tender participants and/or the committee to ensure that certain participants win the tender. Such behaviour is an act that inhibits competition because it causes other business actors to be unable to compete fairly.

In addition, the tender committee conducted an assessment without regard to the rules for procuring goods and/or services. Such actions are dishonest and unlawful and can eliminate competition and have the potential to cause losses to the State.

As mentioned, the Guidelines on Article 22 explain horizontal and vertical conspiracies.[23] In this case, a horizontal conspiracy was proved based on:

- the existence of the same IP address used by the Reported Parties in logging access to the procurement website in the relevant tender, the existence of cross-ownership relations, a history of cooperative relations, and the similarity of personnel names proved the existence of communication and coordination that enabled the Reported Parties to intentionally condition themselves as partner companies in certain tender packages in the relevant tender
- there was a similarity in the preparation of implementation methods between the Reported Parties, proving that the bidding documents were made by the same person, or at least done jointly
- the above constituted the following forms of conspiracy listed in the Guidelines on Article 22:
  - cooperation between 2 or more parties
  - openly or secretly adjusting tender documents with other bidders' documents
  - creating pseudo-competition.

In this case, a vertical conspiracy was proved based on:

- the Tender Committee did not properly evaluate the bidding documents and failed to clarify the many similarities between the bidding documents (as described in the horizontal conspiracy section above). The Commission assessed that the Tender

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22 Udin Silalahi and Priskilla Chrysentia, 'Tender Conspiracy Under ICC Decision and Prohibition of Monopolistic Practices Act', Sriwijaya Law Review Vol. 4 Issue 1, January (2020).

23 KPPU, Guidelines on Article 22 Regarding Prohibition of Conspiracy in Tenders, July 2005, Chapter IV: Conspiracy in Tenders and Case Examples.

Committee had allowed horizontal conspiracy in the tender so as to set up the winner of the tender

- the above constituted the following forms of conspiracy listed in the Guidelines on Article 22:
  - not refusing to take an action even though they know or reasonably knows that the action was carried out to ensure a certain bidder wins
  - giving an exclusive opportunity by the organiser of the tender organiser giving an exclusive opportunity, directly or indirectly, to business actors participating in tenders, in a lawful manner.

Decision

The ICC found that the parties were legally and convincingly proven to have violated Article 22 concerning Conspiracy of Law Number 5 of 1999.

The ICC imposed total penalties of IDR 69,587,000,000 on the parties for being involved in a tender conspiracy.

Further, PT Indo Dongfeng Motor and PT Transportindo Bakti Nusantara were prohibited from participating in tenders in the field of construction services using DKI Jakarta Province funds from the Regional Revenue and Expenditure Budget for 2 years after the decision had permanent legal force.

Learning points

Bid rigging cartel

Bid rigging is a hard core cartel which is prohibited in countries which have a competition law. It is an illegal practice where competing parties collude to determine the winner of a bidding process.

When bidders coordinate, it undermines the bidding process and can result in a rigged price that is higher than what might have resulted from a free market with a competitive bidding process. According to the OECD, elimination of bid rigging can help reduce procurement prices by 20% or more.

Actions that can be taken by competition agencies in relation to bid rigging include:

- Procurement agencies must be briefed periodically on the incidence of bid rigging and trained to detect them.
- Competition agencies which successfully find an infringement of bid rigging must publicise the case to draw attention to the loss incurred by consumers and taxpayers.

Horizontal and vertical conspiracy in tender processes

Conspiracy in tenders may be classified into three categories, namely horizontal conspiracy, vertical conspiracy and a combination of vertical and horizontal conspiracy. These involve bidders as well as the agencies conducting the bid process.

Actions that can be taken to reduce the risk of bid rigging include:

- Ensure transparency for tender processes from announcement of the tender to the announcement of the winner. A thorough examination of tender documents must be conducted and businesses must be aware of the severe penalties for tender conspiracy.
- Standardisation and digitisation of procurement processes enable authorities to access transparent and comparable data which can assist in identifying potential bid rigging concerns.
- Bid rigging and corruption go hand in hand, therefore there is a need to work closely with the anti-corruption agency to eliminate the practices.
- Government departments and agencies must be also briefed on the consequences of being involved in a bid rigging process.

2.4. Controlling output cartel

Table 6. Controlling output cartel case overview

Agency	Australian Competition and Consumer Commission (ACCC)
Summary	An industry association and two egg producers attempted to persuade other egg producers to make a cartel to reduce the supply of eggs in Australia.
Decision date	10 February 2016[24]
Outcome	The Australian Court decided there was not enough evidence that the parties intended to make a cartel to reduce egg supply. The ACCC unsuccessfully appealed this decision in 2017.
Learning points	Trade associations sharing information with members

What is a controlling output cartel?

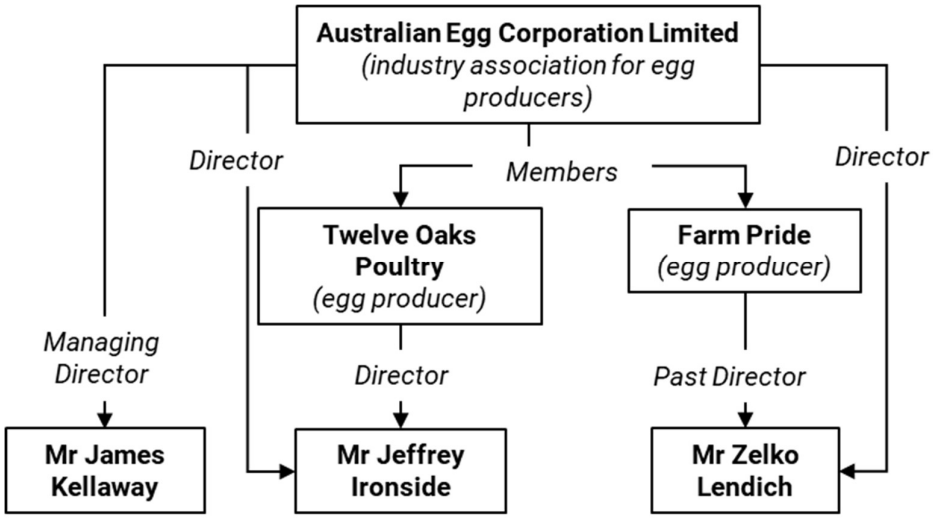
A controlling output cartel occurs when two or more competitors agree to control the output of production or limit the amount or type of goods and services available for supply. They do this to increase prices or stop prices from falling.

This type of cartel is known by many different names, including production limiting cartel, supply limiting cartel, and output restricting cartel.

[24] Federal Court of Australia, ACCC v Australian Egg Corporation Limited [2016] FCA 69, 10 February 2016.

Parties

The figure below shows the parties in this case: an industry association, two egg producers, and three individuals.



Background

The Australian egg industry includes chicken producers and egg producers. During 2011 and early 2012, there were about 10 chicken producers and about 323 egg producers. About 109 of the egg producers (34%) were members of the industry association, the Australian Egg Corporation Limited (**AECL**).

AECL monitors egg supply and demand in Australia and has a board that meets regularly. For most of 2011, the AECL board knew the supply of eggs was exceeding demand and that this would probably continue. The next figure shows key events in early 2012 relating to an urgent meeting to discuss the egg oversupply issue (called the **Summit**):

19 Jan
- The AECL board approved an urgent meeting of the top 25 egg producers to encourage destocking and egg disposal (the Summit)

20 Jan
- Mr Kellaway (AECL Managing Director) invited the top 25 egg producers to attend the Summit

25 Jan
- Mr Kellaway described the Summit in an email to members as a meeting *"to seek a path forward … in a coordinated and consolidated"* way

8 Jan
- The Summit was attended by 22 people from 19 egg producers to discuss the egg oversupply issue

Starting the investigation

In 2016, the ACCC took action against the parties in the Federal Court of Australia for attempted cartel conduct. Before the trial, one individual Mr Lendich (Director of AECL and Past Director of Farm Pride) agreed with the ACCC that he had engaged in the alleged attempt. The other parties did not agree and went to court against the ACCC.

Conduct investigated

The ACCC argued that the parties attempted to persuade other egg producers at the Summit to make an arrangement or reach an understanding to limit the supply of eggs in Australia. The ACCC said the Summit was a 'call to action' and was not simply a meeting to share information.

Legal provisions

Section 44ZZRJ[25] of the Australian Competition Act

A corporation contravenes this section if:

(a) the corporation makes a contract or arrangement, or arrives at an understanding; and

(b) the contract, arrangement or understanding contains a cartel provision.

The main question was whether the parties attempted to make an arrangement, or understanding containing a cartel provision.

To prove the 'attempt', the ACCC needed to show:

- the parties intend to make a cartel, and
- the parties took steps toward persuading others to reach an agreement or understanding that at least one or more of them would limit their egg production or supply.

Analysis

Attempted arrangement or understanding containing a cartel provision

For a provision to be a 'cartel provision' the ACCC need to show:[26]

- the provision had the purpose of directly or indirectly preventing, restricting, or limiting the supply of eggs by one or more egg producers, and
- the egg producers were competitors in the supply of eggs in trade or commerce in Australia.

The parties admitted that the egg producers who attended the Summit were competitors to supply eggs in trade or commerce in Australia.

The Court agreed with the ACCC that the following points supported its argument that the Summit was a 'call to action' and not just information sharing:

- The Summit took place when there was a feeling of an egg oversupply crisis in the industry.
- AECL believed part of its role was to prevent or correct an egg oversupply, which was a problem for the industry. In the past, AECL gave direct advice to egg producers about how to reduce egg supply.
- Arranging the Summit was unusual behaviour for the AECL.

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[25] This is now section 44AJ of the Australian Competition Act.

[26] 'Cartel provision' is defined in section 44ZZRD of the Australian Competition Act, which is now section 44AD.

- An independent auditor could monitor egg producers to check they were all taking the same action to follow the agreement (reducing egg supply), because egg producers did not trust one another.
- The language used in the Summit agenda, such as discussion to "resolve the current crisis" and to seek "a path forward in a co-ordinated and consolidated" way.

Overall, the Court did not think there was enough evidence to prove the parties intended to persuade egg producers to agree as a group to reduce egg supply. Some of its reasons included:

- The Summit focused on some egg producers who had increased their supply much more than demand. This "finger pointing" and extra pressure on those egg producers to reduce supply was inconsistent with an intention to persuade all egg producers to agree to reduce egg supply to help each other.
- AECL was an industry association. It is normal and legitimate for trade associations to encourage members to consider their profits and make production and price decisions to stay profitable.
- The egg industry was quite competitive and egg producers would likely only act when it benefitted them individually. AECL just wanted egg producers to think harder about their own circumstances and what they could do about the problem.
- The reference to an independent auditor may also have an 'innocent' explanation. It could have been a way for AECL to know whether each egg producer was, voluntarily and independently, reducing its egg supply. It does not point persuasively to an intention that egg producers enter into an agreement or understanding about reducing egg supply.
- The ACCC's case was circumstantial and based only on AECL documents. These documents did not clearly show AECL intended egg producers to take action as a group.
- The alleged intended arrangement or understanding did not have a precise form, which made it difficult for the ACCC to prove its case.

Decision and appeal

The ACCC's case failed because the Court decided that the parties did not intend egg producers to take action as a group to reduce egg supply.

The ACCC appealed the decision to the Full Federal Court and was unsuccessful because the Full Federal Court believed the first judge carefully considered all the relevant issues and the ACCC did not prove he had made any errors.

Since this decision, Australia's competition law has been amended to include a 'concerted practices' prohibition. It is possible that the court would reach a different decision in this case if it was heard today.

Learning points

Trade associations sharing information with members

The Court in this case decided that trade associations, like AECL, can legally encourage members to look at their own profits and to make production and price decisions to stay profitable.

However, trade associations should make sure they are only sharing information for members to individually consider and should not act in a way that encourages industry-wide or group agreement about taking specific steps.

See also **Trade associations facilitating the sharing of sensitive information** from case study 2.1 on page 15 above.

2.5. Sharing commercially sensitive information

Table 7. Sharing commercially sensitive information case overview

Agency	Competition and Consumer Commission of Singapore (CCCS)
Summary	Hotel owners and operators in Singapore exchanged confidential corporate customer information relating to the supply of hotel room accommodation
Decision date	20 January 2019[27]
Outcome	The parties infringed the Singapore Competition Act twice, from January 2014 to June 2015 and from July 2014 to June 2015, by participating in anti-competitive agreements and/or concerted practices to discuss and exchange confidential and commercially sensitive customer information relating to the provision of hotel room accommodation in Singapore. CCCS imposed penalties totalling S$1.5 million.
Learning points	Information sharing / information exchange Liability of employer for employee's actions Communications over messaging platforms

What is anti-competitive information sharing?

It is normal for businesses to engage in various types of **information sharing** (also called **information exchange**) with competitors through different channels. Information can be communicated directly, or indirectly through a third party (such as a trade association or manufacturer).

However, the sharing of *commercially sensitive information* may give rise to competition concerns and can, in certain circumstances, lead to an infringement of competition law as an anti-competitive horizontal agreement.

Examples of the types of information sharing that may infringe competition laws include:

- **price-related information** such as future intended prices, costs, discounts, rebates, or allowances
- **non-price information** such as information relating to sales, demand, market shares, investment plans, and capacity.[28]

[27] CCCS, Public Register, CCCS Issues Infringement Decision against the Exchange of Commercially Sensitive Information between Competing Hotels, 30 January 2019.

[28] MyCC, Competition Act 2010 – A Guide For Business, Promoting Competition, Protecting You, September 2013.

Parties

The figure below shows the parties in this case. The entities are grouped according to the different Single Economic Entities (**SEE**) the parties formed.

Capri by Fraser Changi City Singapore

- **Owner (until March 2015)**: Ascendas Frasers Pte Ltd
- **Owner (from March 2015)**: Frasers Hospitality Trustee Pte Ltd
- **Operator**: Frasers Hospitality Pte Ltd

Village Hotel Changi

- **Owner**: Far East Organisation Centre Pte Ltd

Village Hotel Katong

- **Owner**: Orchard Mall Pte Ltd

- **Operator**: Far East Hospitality Management (S) Pte Ltd

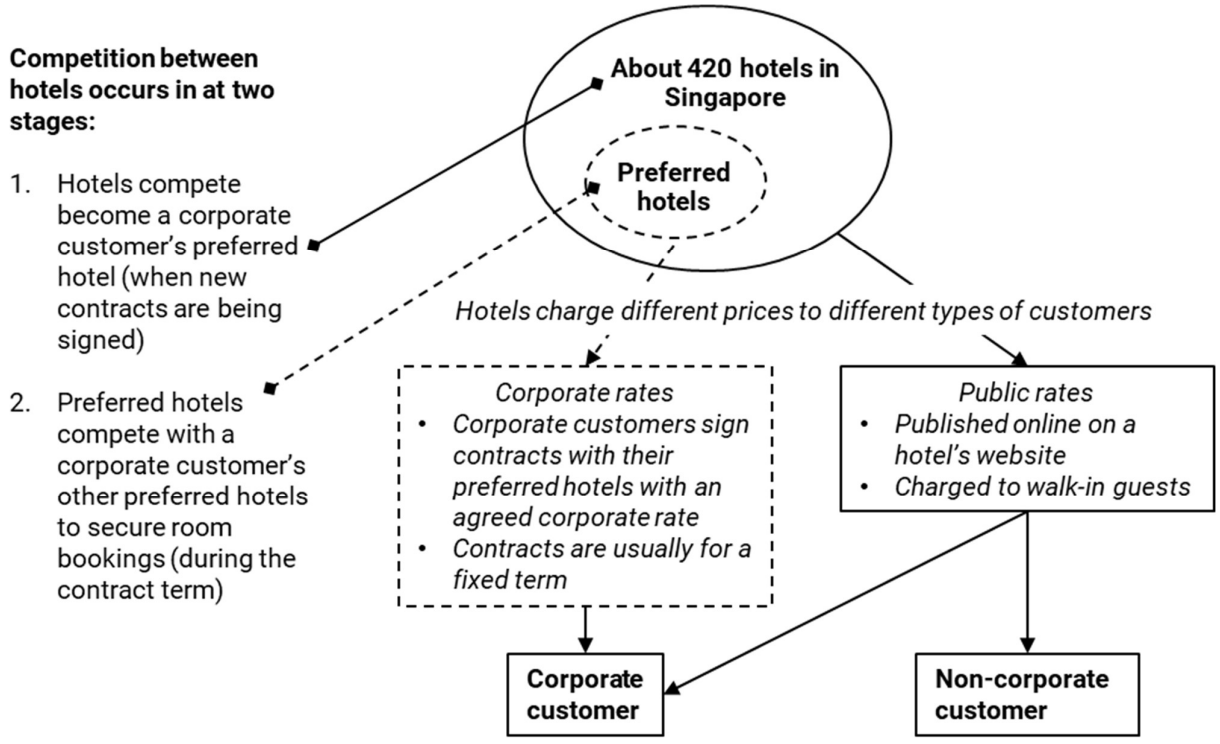
Crowne Plaza Changi Hotel Airport Hotel

- **Owner/master lessee**: OUE Airport Hotel Pte Ltd
- **Operator**: Inter-Continental Hotels (Singapore) Pte Ltd

Background

There are about 420 hotels in Singapore that have different prices, amenities, and branding. The corporate entity that owns or is the master lessee of the hotel can enter into a hotel management agreement with another entity, who manages and operates the hotel.

While the hotel owner may not be involved in operating decisions, it typically takes full responsibility for all working capital, operating expenses, and debt services. A hotel's annual budget is typically subject to the hotel owner's approval.



Starting the investigation

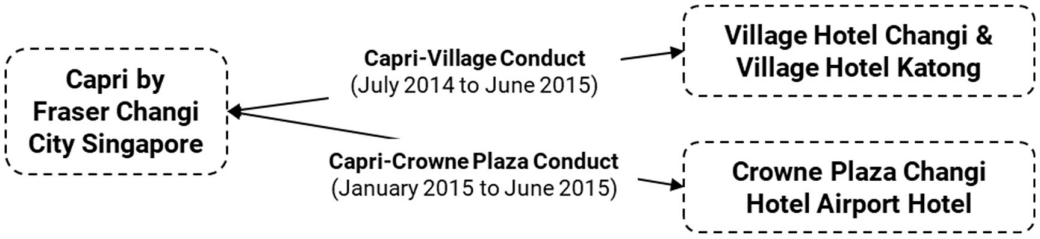
CCCS started the investigation under the powers of investigation vested in it under section 62 of the Singapore Competition Act, following its own enquiries into the hospitality sector in November 2013. This section permits the CCCS to conduct an investigation if there are reasonable grounds for suspecting that, among other things, the section 34 prohibition (anti-competitive agreements) has been infringed by any agreement.

In June 2015, CCCS conducted inspections on the Capri and Village hotels, interviewed people at the premises, and sent out notices to 4 other hotels. In July 2015, CCCS received a leniency application from OUE Airport Hotel in relation to anti-competitive conduct including the exchange of commercially sensitive information in connection with the provision of hotel room accommodation in Singapore to corporate customers.

Subsequently, with effect from April 2016, CCCS received a separate and group leniency application from FE Hospitality Management, Orchard Mall, and FE Organisation Centre in relation to anticompetitive conduct including the exchange of commercially sensitive information in connection with the provision of hotel room accommodation in Singapore to corporate customers.

Conduct investigated

CCCS investigated the exchange of confidential, customer-specific, commercially sensitive information by sales representatives of Capri, Village Hotels, and Crowne Plaza, as shown in the figure below. It believed the information exchanged would have likely influenced the hotels' subsequent conduct in the market or placed them in a position of advantage over their corporate customers in contract negotiations.[29]



Types of corporate customer information shared by hotel sales representatives, mostly via WhatsApp messages:

- hotel bid prices for customers' requests for quotes
- percentage discounts requested by customers and the hotel's response
- customers' potential room night requirements for the contract period
- customers' current and/or historical room rates
- customers' room night take-up
- a customer's perceived price sensitivity
- whether a customer is a key account for the hotel
- whether a hotel intended to pursue another hotel's customer.

[29] CCCS, Media Releases & Announcements, CCCS Issues Infringement Decision against the Exchange of Commercially Sensitive Information between Competing Hotels, 30 January 2019.

Legal provisions

Section 34 of the Singapore Competition Act

1) *Subject to section 35, agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited unless they are exempt in accordance with the provisions of this Part.*
2) *For the purposes of subsection (1), agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they –*

   (a) directly or indirectly fix purchase or selling prices or any other trading conditions; …

CCCS considered the following elements:

(a) whether the Parties were 'undertakings' and any Parties were a single economic entity

(b) whether there was an agreement or concerted practice

(c) whether the object or effect of such an agreement or concerted practice was the prevention, restriction, or distortion of competition within Singapore.

There was no need to determine a distinct market definition as this case involved an agreement/concerted practice that involved market sharing and price fixing. These types of cartels are prohibited *per se*, which means there is no need to evaluate the effect on competition. Understanding the relevant product and geographical market was needed only to determine the total fines.

Analysis

a) Undertaking and single economic entity

Section 2(1) of the Singapore Competition Act

In this Act, unless the context otherwise requires — …

"undertaking" means any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services.

This case involved several entities related to 3 hotels. One 'undertaking' cannot infringe the section 34 prohibition and one entity within a single economic entity (**SEE**) can be liable for the anti-competitive conduct of another entity within the same SEE. A SEE is therefore one 'undertaking' within the meaning of the Singapore Competition Act.

The CCCS found that each of the Parties are made up of different corporate entities which form a SEE. See the figure under The CCCS found that the owners and their respective operators each formed a SEE, as the operators worked for the benefit of and carried out the instructions of their respective owners. The hotel operators were therefore deemed to be agents of the hotel owners and they did not bear any economic risk as they were not in a position to act independently in respect of the activities that they were entrusted to perform.

Each SEE was therefore responsible for the conduct of their respective sales representatives, and the owners, as part of the SEE, were also jointly and severally liable.

Some of the principles considered by the CCCS included the following:

- Two legally separate entities who have an agency relationship may be a single economic unit. There are two relevant factors: whether the agent takes any economic risk and whether the services provided by the agent are exclusive.
- The assessment of the financial and economic risks associated with the activities the principal entrusts to the agent will be specific to the facts of the case.
- An agent and principal can be part of a single economic entity even if the agent is not exclusively acting on behalf of only one principal.

b) Agreement or concerted practice

There was evidence to support the existence of agreements and/or concerted practices between the Parties to share commercially sensitive information about corporate customers. This evidence included WhatsApp chat messages from sales representatives of the hotels obtained by CCCS during the investigation.

See also **Agreement or concerted practice** from case study 2.1 on page 13 above.

c) Object or effect of preventing, restricting, or distorting competition

The CCCS Guidelines on the section 34 Prohibitions has a list of factors to be considered before an agreement is deemed to have as its *object* the restriction of competition. The factors include:

- content of the agreement and the objective pursued by it
- the context in which the agreement is to be applied
- the actual conduct and behaviour of the parties on the relevant market(s).

See also **Object or effect of preventing, restricting, or distorting competition** from case study 2.1 on page 13 above.

The Parties' subjective intention is not a necessary factor in assessing whether or not the conduct had an anti-competitive object. 'Subjective intention' refers to a person's state of mind, instead of their expressed intentions.

However, in this case, the Parties did have the subjective intention of restricting competition when they exchanged confidential, customer-specific, commercially sensitive information to "reduce information asymmetries inherent in the negotiating process and prevent the customer from 'gaming the system'".

The sales representatives had knowingly substituted practical cooperation between them for the risks of competition. Without the conduct, the likely result would have been more competitive rates and/or terms offered to corporate customers for hotel room accommodation. Therefore, the Capri-Village Conduct and the Capri-Crowne Plaza Conduct each had the object of preventing, restricting, or distorting competition in Singapore.

Decision

CCCS found the Capri-Village Conduct and the Capri-Crowne Plaza Conduct were anti-competitive in nature and caused serious harm to competition and customers in the market. This is because the conduct reduced the competitive pressures faced by the hotels in making their commercial decisions, including the price they will offer to customers.

CCCS noted in its decision document that employers were responsible for the anti-competitive conduct of employees who were acting within the scope of their employment. Employers cannot escape liability by arguing that they did not instruct their employees to engage in the anti-competitive conduct.

The following penalties were imposed, totalling about S$1.5 million:

- about S$1.0 million on Capri
- about S$287,000 on Village Hotels, and
- about S$225,000 on Crowne Plaza.

Learning points

Information sharing / information exchange

The OECD considers information exchange among competitors may generally fall into three different scenarios under competition rules:[30]

i. as a part of a wider price fixing or market sharing agreement, by which the exchange of information functions as a facilitating factor

ii. in the context of broader efficiency-enhancing cooperation agreements, such as joint venture, standardisation or research & development agreements, or

iii. as a stand-alone practice, by which the exchange of information is the only cooperation among competitors.

Liability of employer for employee's actions

An employer is generally held liable for the anti-competitive conduct of an employee who is acting within the scope of their employment (in this case, their sales representatives). If the conduct is engaged in by an agent (in this case, the hotel operators were agents for the hotel owners), businesses are unlikely to escape liability by pleading ignorance or lack of involvement.

Therefore, businesses should ensure they have processes and procedures in place to stay informed of their employees' and agents' behaviour.

Communications via messaging platforms

In this case, most of the commercially sensitive information exchanged was using the messaging platform WhatsApp. While communications via messaging platforms can be an effective communication method to conduct business, it carries risks.

For example, if one participant in a group message sends commercially sensitive information, all other participants may be at risk of infringing competition laws even if they do not respond to the information or rely on it (see for example case study 2.1 above).

Businesses should have guidelines in place for employees and agents about communications with others in the industry, including via messaging platforms, which could:

- explain what commercially sensitive information is;

[30] OECD, Information Exchanges Between Competitors under Competition Law, 2010.

- explain that sending commercially sensitive information may be an infringement of competition laws;
- set out a process to follow if commercially sensitive information is either sent or received;
- require disclosure of any chat groups with other industry participants.

Competition agencies can prepare public guidelines on this competition issue and provide them to businesses, industry associations, and organisations who provide training for company directors or secretaries.[31]

2.6. Resale price maintenance

Table 8. Resale price maintenance case overview

Agency	Malaysia Competition Commission (MyCC)
Summary	Alleged resale price maintenance by beverage companies which may have prevented supermarkets and hypermarkets from setting independent resale prices for beverages in Peninsula Malaysia.
Decision date	23 September 2019[32]
Outcome	The parties did not infringe the Malaysia Competition Act. The vertical agreement was not resale price maintenance because it was unlikely to cause a negative effect on the market.
Learning points	Recommended retail prices

What is resale price maintenance?

Resale Price Maintenance (also known as '**RPM**') refers to the practice in which suppliers place restrictions on the prices that resellers may charge for selling the supplier's goods. It is an example of an anti-competitive vertical agreement.

The most common type of RPM involves a supplier preventing retailers from charging less than a certain price for the supplier's product.

RPM may **harm** consumers by restricting competition between retailers who sell the same brand (*intra*-brand competition), increasing what consumers pay. However, RPM may also **benefit** consumers by promoting *inter*-brand price competition (competition between products of different brands).

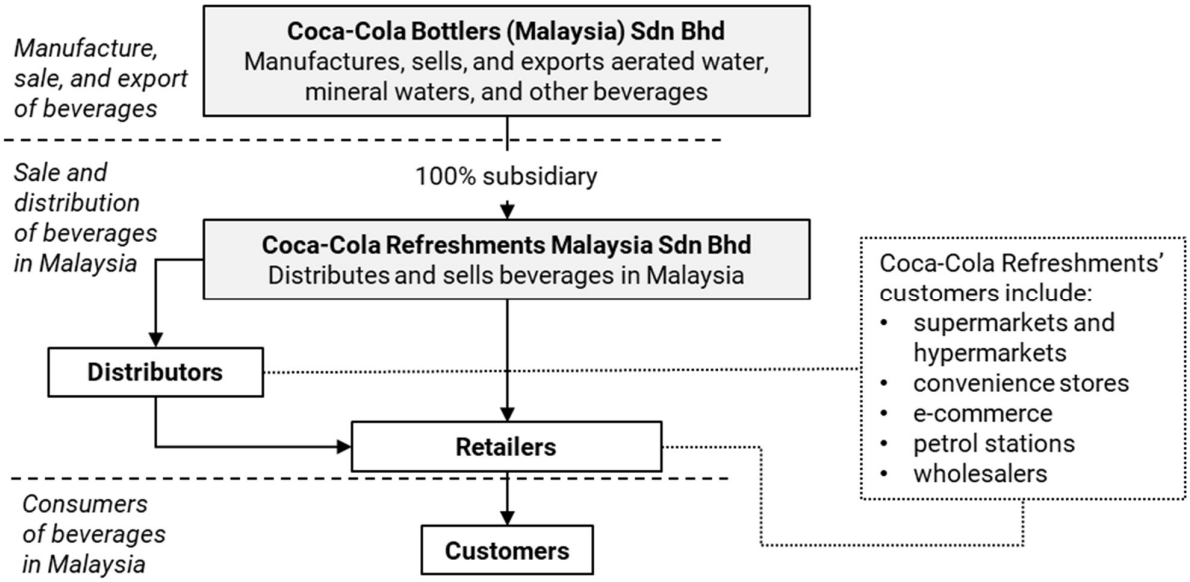
The approach to RPM is a matter of policy in each jurisdiction.

[31] Some examples of these types of organisations include the Companies Commission of Malaysia, the Institute of Corporate Directors Malaysia, and the Accounting and Corporate Regulatory Authority in Singapore.

[32] MyCC, Decision of the Competition Commission, Finding of Non-infringement under section 39 of the Competition Act 2010, 23 September 2019.

Parties and Background

The following figures shows the two Malaysian companies involved in this case and who they sell and distribute beverages to in the market:



Starting the investigation

The Minister of Domestic Trade and Consumer Affairs directed the Malaysia Competition Commission to investigate whether the Parties had infringed section 4(1) of the Malaysia Competition Act by restricting the price at which its resellers in Peninsula Malaysia sold carbonated soft drinks to end consumers. This direction was prompted by a notice issued by Coca-Cola Refreshments (explained below).

Conduct investigated

The investigation concerned a notice issued in July 2018 by Coca-Cola Refreshments to supermarket and hypermarket customers in Peninsular Malaysia. The notices contained the following prices for a wide range of its products (such as carbonated drinks, sports drinks, fruit juice, Ready-to-Drink tea, vitamin water and mineral water):

- Recommended retail prices (**RRP**): the price at which Coca-Cola Refreshments sold the products to its customers (not the retail price at which customers sell them to consumers). The RRP indicated in the notice is related to the price applicable to a case (12 or 24 units) and not a single unit that would be sold in retail outlets.
- Recommended consumer prices (**RCP**): a price guide for the customers' sale of products to consumers.

Coca-Cola Refreshments issued the notice in July 2018 due to new legislation on sales and service tax which was to be introduced on 1 September 2018.

Similar notices were issued on 18 July 2018, 13 August 2018, and 29 August 2018.

Customers typically would request for 2-month advanced notice in relation to any price changes so as to enable them to update their internal systems.

Legal provisions

Section 4 of the Malaysia Competition Act

1) *A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.*

MyCC considered the following elements:

(a) whether the Parties were 'enterprises'

(b) the relevant market

(c) whether there was an agreement and/or concerted practice

(d) whether the agreement had the object or effect of significantly preventing, restricting, or distorting competition in any market for goods or services.

Analysis

a) Enterprise

Section 2 of the Malaysia Competition Act

In this Act, unless the context otherwise requires – …

*"**enterprise**" means any entity carrying on commercial activities relating to goods or services, and for the purposes of this Act, a parent and subsidiary company shall be regarded as a single enterprise if, despite their separate legal entity, both form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining the actions of the subsidiaries on the market;*

MyCC decided that the Parties satisfied the definition in section 2 of the Malaysia Competition Act as they carried on commercial activities relating to, amongst other things, the manufacturing and distribution of carbonated soft drinks.

As Coca-Cola Refreshments was a wholly owned subsidiary of Coca-Cola Bottlers, MyCC made a legal presumption that Coca-Cola Bottlers exercised decisive influence over its subsidiaries and was therefore was liable for the conduct of Coca-Cola Refreshments.

b) Relevant market

Section 2 of the Malaysia Competition Act

In this Act, unless the context otherwise requires – …

*"**market**" means a market in Malaysia or in any part of Malaysia, and when used in relation to 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;*

MyCC's first step was to establish the relevant market. The law does not proscribe resale price maintenance as an 'object' breach in Malaysia,[33] so MyCC needed to assess the effect of the agreements on the market. Defining the market gave a framework to assess whether an agreement and/or concerted practice had a significant anti-competitive effect in the relevant market.

Defining the market required the MyCC to consider all products that are substitutable for the products in question (product market), and the geographic area within which those products are substitutable (because a customer would travel to purchase them) (geographic market).

- The relevant **product market** was determined to be non-alcoholic, ready-to-drink products, specifically carbonated soft drinks such as cola-flavoured, orange-flavoured, and other fruit-flavoured carbonated soft drinks.
- The relevant **geographic market** was determined to be Peninsular Malaysia. The Parties had the largest share in the carbonated soft drink market in Peninsular Malaysia.

c) Agreement and/or concerted practice

Section 2 of the Malaysia Competition Act

In this Act, unless the context otherwise requires – …

*"**concerted practice**" means any form of coordination between enterprises which knowingly substitutes practical co-operation between enterprises 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; …

*"**vertical agreement**" means an agreement between enterprises each of which operates at a different level in the production or distribution chain.*

The Notices were a form of vertical agreement and/or concerted practice that were potentially anti-competitive in nature.

Some of the relevant issues considered by the MyCC include:

- The section 4 prohibition applies to both legally enforceable and non-enforceable agreements, whether written or verbal: and may be reached in person or by telephone, letters, e-mail or through any other means.[34]
- Whether the notice issued by CCR dated 9.7.2018 with an appended product list with recommended retail price and recommended consumer price was a vertical agreement?
- Whether the parties had restricted supermarkets and hypermarkets in Peninsular Malaysia as well as their customers from determining their resale prices independently
- Whether the Parties had induced supermarkets and hypermarkets by way of incentives or promotional measures to encourage them to adhere strictly to the RRP and RCP.

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[33] However, the MyCC, Guidelines on Chapter 1 Prohibition (Anti-competitive Agreements), May 2012 state that the MyCC will take a strong stance against resale price maintenance, and recommended retail pricing which serves as a focal point for downstream collusion would be deemed as anti-competitive, paragraphs 3.14-3.15.

[34] MyCC, Guidelines on Chapter 1 Prohibition (Anti-competitive Agreements), May 2012, paragraph 2.1.

d) Object or effect of significantly preventing, restricting, or distorting competition

For the purpose of analysing vertical agreements involving potential RPM, MyCC carried out an analysis of the effect of the conduct on the relevant market.

The vertical agreement did not have the effect of significantly preventing, restricting, or distorting competition because:

- The prices charged by supermarkets and hypermarkets to consumers for the relevant products were different from the RCP in the Notice. That is, supermarkets and hypermarkets did not strictly follow the guideline prices in the Notice.
- The various agreements (relating to distribution, sales, and marketing) the Parties signed with distributor and retailer customers did not restrict supermarkets' and hypermarkets' ability to independently set retail prices for the Parties' products. They did not fix the resale price of products or impose a minimum resale price.
- There was no evidence the Parties pressured or provided incentives to customers to encourage them follow a recommended resale price to consumers.

Decision

In its decision, the MyCC concluded that while there was a vertical agreement between the parties concerned:

- The agreements entered into with customers by Coca-Cola Refreshments had not fixed the resale price of its products or imposed a minimum resale price of its products on customers.
- The Parties had not imposed any pressure or offered any incentives in order for their customers to retain the recommended resale price.
- In other words, this did not amount to RPM.
- Coca-Cola Bottlers and Coca-Cola Refreshments as a single economic enterprise were not involved in an agreement and/or concerted practice which had the effect of significantly preventing, distorting and restricting competition in the market for carbonated soft drinks in Peninsular Malaysia.

Learning points

Recommended retail prices (RRP)

RRP are prices which are recommended by the manufacturer which is actually the manufacturer's retail prices or a suggested price. Manufacturers are often well placed to make this recommendation based on their market research. This is a common practice in businesses.

However, once there is compulsion to adhere to the pricing, it may become anti-competitive as retailers will not have the freedom to fix their own pricing according to their business strategies. It is therefore important to understand the difference between recommended retail prices and (potentially anti-competitive) resale price maintenance. Competition agencies can educate suppliers on the difference.

Table 9. Comparison between RRP and RPM

Recommended Retail Price (RRP)	Resale Price Maintenance (RPM)
A supplier recommends retail prices to resellers. The reseller is free to choose to sell at any price.	A supplier pressures a reseller to sell at the recommended retail price. The pressure could be in the formal of incentives or punishments.
	A supplier restricts the reseller's ability to independently set its retail prices.
	A supplier prevents, or tries to prevent, a reseller selling below a specified minimum price.
	To avoid potentially engaging in resale price maintenance, a supplier must not: ▪ set minimum prices in formal policies or agreements with retailers; ▪ offer retailers discounts if they sell at or above a minimum price; ▪ refuse to supply retailers that sell below a minimum price; ▪ punish retailers for selling below a set price, for example, by taking away a discount or sending a warning.

2.7. Exclusive dealing

Table 10. Exclusive dealing case overview

Agency	Philippine Competition Commission (PCC)
Summary	Exclusive arrangements between an insurance pool and a government owned and controlled corporation relating to the supply of mortgage redemption insurance in the Philippines
Decision date	Final decision pending Press release: 4 February 2020[35]
Outcome	The parties infringed the Philippine Competition by entering into an anti-competitive agreement to exclusively supply mortgage redemption insurance to National Home Mortgage Finance Corporation and covered borrowers.
Learning points	Conduct commencing before competition laws are in effect Exclusive dealing

[35] ASEAN Experts on Global Competition, Media Release, PCC Investigation: Insurance pool charged for anti-competitive agreements, 4 February 2020.

What is exclusive dealing?[36]

Exclusive dealing occurs when a firm ("Company A") enters into an agreement with another firm ("Company B") to limit Company B from dealing with the Company A's competitors. For example, if a manufacturer supplies car batteries to a car maker on condition that the car maker must not buy car batteries from any other manufacturer.

This conduct is between firms operating at different levels of the supply chain and is a type of "vertical" restraint.

Vertical restraints can sometimes lead to efficiencies in supply chains and do not always harm competition. They can help suppliers and acquirers achieve cost savings and promote other efficiencies (such as specialisation).

However, exclusive dealing can be anti-competitive when Company A has market power. For example, if Company A is a brand that distributors must have, Company A could impose exclusive arrangements with most of the distributors to preserve its market power and prevent (foreclose) new entry or expansion by competitors.

Parties

The following entities (together, the **Parties**) were involved in this case:

- a group of 8 insurance companies known as the Pag-IBIG MRI Pool[37]
- members of the executive committee, known as the PMRI Pool Executive Committee
- the National Home Mortgage Finance Corporation (**NHMFC**)
  - The NHMFC is a state-owned organisation created in 1977 to increase the availability of affordable housing loans for Filipino homebuyers.
  - NHMFC's mission is "to sustain the liquidity and affordability in the housing market through the strengthening of the secondary mortgage operation, upscaling of products and services, and stakeholders' satisfaction".

Background

This conduct involves the secondary mortgage market, where home loans are bought and sold by various entities. The NHMFC, as a secondary mortgagor, manages mortgage loan portfolios that originate with banks, housing developers, or other primary lenders that offer loans for low-cost housing. These primary lenders enter into agreements with home loan borrowers with the intention of subsequently assigning or transferring rights to the loan to NHMFC. Once the loan has been transferred to NHMFC, NHMFC becomes the creditor.

As part of the terms and conditions of the loan agreement with the primary lender, the home loan borrower must obtain mortgage redemption insurance, which is a type of insurance that pays off the mortgage if the borrower dies before it is completely paid. The Pag-IBIG MRI Pool of insurers sold this mortgage redemption insurance to these borrowers.

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[36] See also OECD, Competition Primers for ASEAN Judges, July 2021.

[37] These companies were: Beneficial Life insurance Company, Inc; Country Bankers Life Insurance Corporation; First Life Insurance Co., Inc; Fortune Life Insurance Company, Inc; Manila Bankers Life Insurance Corporation; Philippines International Life Insurance Co., Inc; The Manufacturers Life Insurance Company (Phils), Inc; United Life Assurance Corporation.

The Philippine Competition Act, which was passed in 2015, had a 2-year transition period before coming into force on 9 August 2017. This period gave companies an opportunity to renegotiate agreements, amend practices, and restructure organisations to comply with the new competition laws.[38]

Starting the investigation

In May 2017, the NHMFC asked the PCC to review its agreements with the Pag-IBIG MRI Pool. NHMFC had previously tried to terminate the agreements and obtain a new mortgage redemption insurance provider through competitive bidding, but the insurance pool sued it.

Conduct investigated

The PCC investigated the agreements between the Pag-IBIG MRI Pool and the NHMFC which gave the insurance companies exclusive rights for an indefinite period to provide mortgage redemption insurance to the NHMFC and its covered borrowers. The PMRI Pool Executive Committee facilitated and implemented these agreements.

The indefinite and exclusive agreements had been in place for almost 40 years and could not be terminated simply by giving notice. They were still in place after the Philippine Competition Act came into force in August 2017.

Legal provisions

Section 14 of the Philippine Competition Act

(c) *Agreements other than those specified in (a) and (b) of this Section which have the object or effect of substantially preventing, restricting or lessening competition shall also be prohibited: Provided, Those which contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation of this Act.*

The PCC considered the following questions:

(a) whether the agreement between the Parties was exclusive, indefinite, and could not be terminated by mere notice

(b) whether the object or effect of the agreement is to substantially prevent, restrict, or lessen competition.

Analysis

a) Exclusive

In its Statement of Objections,[39] the PCC found that the exclusive arrangement deprived NHMFC and its covered borrowers of obtaining, for an indefinite period, mortgage redemption insurance from other providers which could have offered better terms and conditions at a lower cost.

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38 PCC, Press Release 2018-020, Beyond 8/8: Competition law's transitory period ends today, 8 August 2017.

39 PCC, Executive Summary, Competition Enforcement Office vs. Beneficial Life Insurance Company, et al., 4 February 2020.

The PCC also found that the PMRI Pool Executive Committee had facilitated the exclusive agreements that the insurance pool enjoyed, without any competitive constraints, for almost 40 years. This led to poor service, unfavourable premium rates, and lack of options.

b) Object or effect to substantially prevent, restrict, or lessen competition

The exclusive arrangement deprived NHMFC and the housing loan borrowers of choosing other insurance providers (other than the 8 insurance providers in the Pag-IBIG MRI Pool) for their mortgage redemption insurance coverage. Other insurance companies may have offered better terms and conditions at lower premium rates.

Any other insurance companies wishing to offer mortgage redemption insurance to NHMFC is effectively required to go through the pool, and so by this competition is foreclosed in the relevant market.

The agreements cannot be terminated by mere notice, thus aggravating the foreclosure effect.

Therefore, these agreements shielded the members of the Pag-IBIG MRI Pool of any competition which has resulted in poor service, unfavourable premium rates and lack of options to the detriment of thousands of account holders, including low cost and socialised housing borrowers. This had closed competition in the market for almost 40 years, as one of the agreements has been in force since 1980.

These agreements still exist despite the lapse of the two-year transitory period given by the PCC for entities to renegotiate their agreements, amend their practices, and restructure themselves to comply with the Philippine Competition Act.

Decision

The final decision is pending.

Learning points

Conduct commencing before competition laws are in effect

The case demonstrates that agreements entered into before a competition regime begins may contain anti-competitive elements and so should be reviewed every time it lapses. It also demonstrates that agreements should not be perpetual, as new laws and enactments (not necessarily related to competition) may be introduced and businesses must be aware of implications of those new laws. This point could be highlighted in advocacy programmes.

Exclusive dealing

Exclusive dealing is a common practice in commercial transactions and is normally done when an exclusivity clause is incorporated into a commercial agreement. For example when one business puts conditions on another business with which it is trading (e.g. McDonalds's to sell only Coca Cola).

These types of exclusivity provisions become anti-competitive when they substantially lessen competition. This happens when the product or service cannot be bought elsewhere, or the business has market power and it imposes exclusivity clauses so as to keep actual or

potential competitors out of the market. It is not always easy to determine whether an exclusive arrangement will substantially lessen competition.[40]

2.8. Abuse of dominant position

Table 11. Abuse of dominant position case overview

Agency	Malaysia Competition Commission (MyCC)
Summary	Abuse of dominant position by companies supplying electronic services to the Malaysian government, specifically managing online applications for permit renewals for foreign workers in Malaysia
Decision date	24 June 2016[41]
Outcome	The parties infringed the Malaysia Competition Act by abusing their dominant position in the upstream market (provision and management of online PLKS renewals) to impose different conditions for the same type of transactions in the downstream market (sale of Mandatory Insurances for online PLKS renewal applications). This occurred on two occasions: from 5 January 2015 to 22 January 2015 and 2 May 2015 to 6 October 2015. MyCC fined the parties a total of RM2,272,200.00, comprising a financial penalty of RM307,200 for the two infringement periods and a daily penalty of RM7,500 from 7 October 2015 to the date of the decision (24 June 2016).[42]
Learning points	The effect of government policies on competition

What is an abuse of dominance?

Abuse of dominant position is a unilateral conduct where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services. Or where the acts or behaviour of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on trade or economic development. [43]

Parties

This case involved the following entities:

40 See for further guidance ACCC, Exclusive dealing.

41 MyCC, 'Decision of the Competition Commission: Infringement of section 10 of the Competition Act 2010 by My E.G. Services Berhad', 24 June 2016.

42 On appeal by the parties, the Competition Appeal Tribunal affirmed MyCC's decision and imposed a further daily penalty of RM7,500 from 25 June 2016 to 28 December 2017 (paragraph 58(ii) of the Competition Appeal Tribunal decision).

43 United Nations Conference on Trade And Development, Model Law on Competition, 2007, Chapter IV.

- **MyEG Services Berhad**, a public listed company incorporated in Malaysia. MyEG Services Berhad develops and implements electronic services and provides other related services for the Malaysian government.
- MyEG Commerce Sdn Bhd (**MyEG Commerce**) is also incorporated in Malaysia and a wholly owned subsidiary of MyEG. MyEG Commerce provides auto insurance intermediary services and other related ancillary services.

Background

All temporary foreign workers who have a temporary working visit pass called the Pas Lawatan Kerja Sementara (**PLKS**) must have their PLKS renewed annually to continue working in Malaysia. The Immigration Department of Malaysia renews these passes.

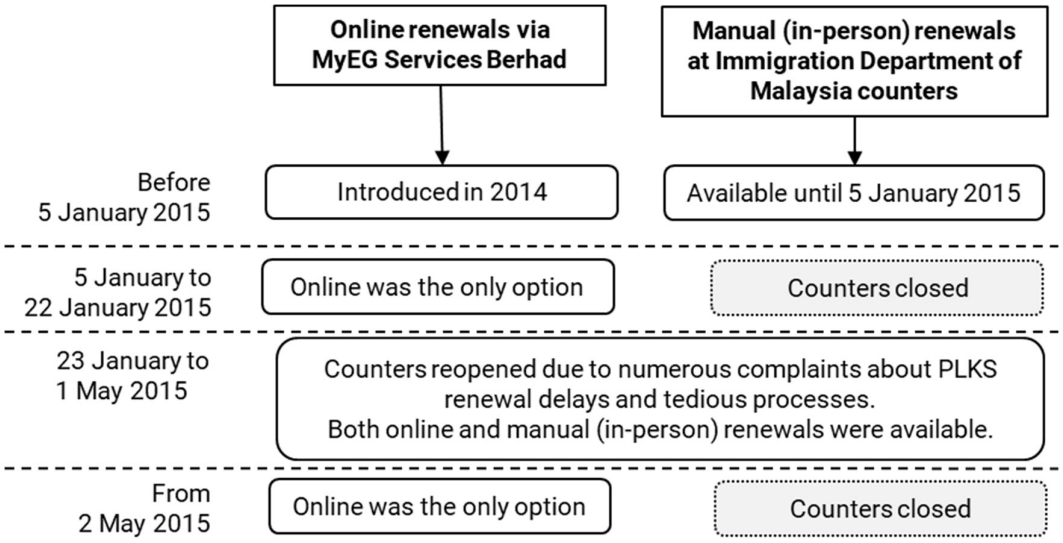
PLKS renewals

Historically, there have been two ways for employers to renew PLKS: manually (in-person) and online using MyEG Services Berhad's online system. MyEG Services Berhad has provided this online system since 2011, initially for domestic workers only and expanded afterwards to include foreign workers.

On 27 November 2014, the Ministry of Home Affairs sent a letter to all State Immigration Directors (in Peninsular Malaysia) informing them that:

- the Minister of Home Affairs had decided to implement MyEG Services Berhad's proof of concept for online PLKS renewals for all foreign workers from all sectors
- going forward, all PLKS renewals could only be done online.

See the figure below to see how PLKS renewal options for foreign workers has changed over time.



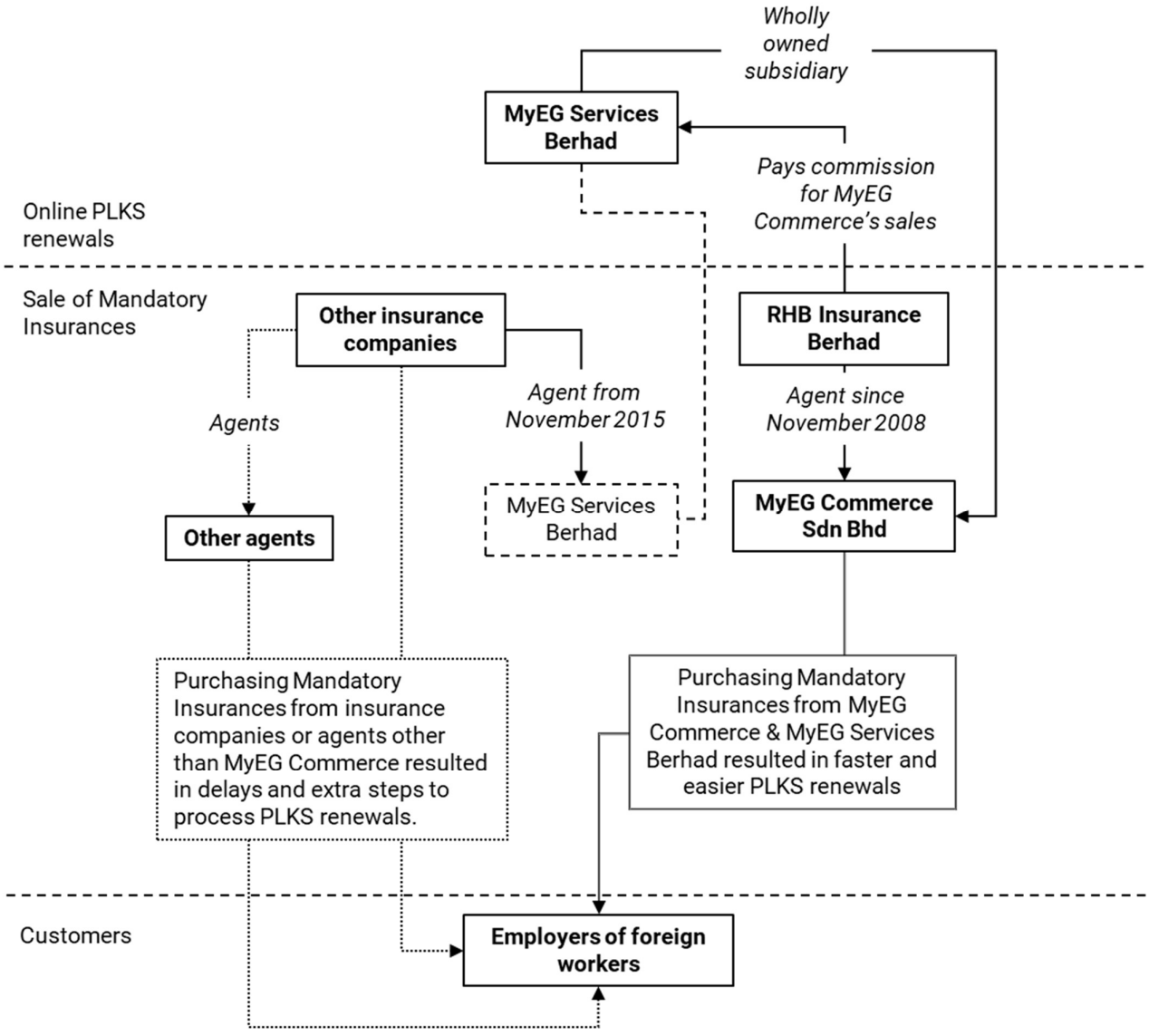
Mandatory Insurances

A condition of PLKS renewals is the purchase of three mandatory insurance policies by employers of foreign workers: the Foreign Workers Insurance Guarantee (**IG**), the Foreign

Workers Hospitalisation and Surgical Scheme (**FWHS**), and the Foreign Workers Compensation Scheme (**FWCS**) (together these are called the **Mandatory Insurances**).

The Central Bank of Malaysia determines the premiums for the Mandatory Insurances. IG can be obtained from any insurance company, whereas only a panel of insurance companies approved by the Ministry of Health and Ministry of Human Resources can sell FWHS and FWCS. Most employers purchase Mandatory Insurances through agents, except employers who have large numbers of foreign workers and who purchase Mandatory Insurances directly from insurance companies.

See the figure below for a diagram showing the relationships between MyEG Services Berhad, MyEG Commerce, RHB Insurance Berhad and other insurance companies/agents.



Frequently Asked Questions

MyEG Services Berhad's website published Frequently Asked Questions (**FAQ**) on its website at various times in 2015. In response to the question "Can I purchase my preferred insurance company for my foreign workers PL(KS) permit renewal?", the FAQ included the following:

- "For IG, it must be purchased through MyEG" (in January 2015)
- "*For faster and easier renewal, you may purchase IG, FWCS, and FWHS with MyEG. If not, you will need to upload the scanned IG, FWCS and FWHS cover notes for us to verify with the respective insurance principals" (in July 2015)*
- *"For faster and easier renewal, you may purchase FWCS, and FWHS with MyEG. If not, you will need to upload the scanned FWCS and FWHS cover notes for us to verify with the respective insurance principals. You must also ensure that the insurance must be purchased (2) months before the expiry date" (in all versions of the FAQ)*

Starting the investigation

MyCC started investigating because it received several complaints that:

- MyEG had abused its dominant position in the provision and management of online PLKS renewals, as it had (in effect) forced employers to purchase the Mandatory Insurances through MyEG Commerce.
- Even when employers were allowed to purchase the insurances from their preferred insurance companies or agents, it was alleged that MyEG had imposed unfair and unreasonable conditions on such parties. For example, Mandatory Insurances purchased directly through MyEG were automatically verified. In contrast, if customers purchased Mandatory Insurances elsewhere, additional steps were required to scan and upload the insurance policies for each foreign worker.
- Employers of foreign workers no longer had the option of renewing the PLKS at the Immigration Department counters.
- There were delays in obtaining the renewals and the process was tedious for employers.

Conduct investigated

The MyCC investigated MyEG Services Berhad's conduct:

- in publishing the FAQ that made it compulsory for employers of foreign workers to purchase the IG through MyEG
- persuading the employers of the foreign workers to purchase both FWHS and FWCS through MyEG if employers wanted faster and easier renewal.

Legal provisions

Section 10 of the Malaysia Competition Act

1) 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 service.

Without prejudice to the generality of subsection (1), an abuse of dominant position may include – …

(d) Applying different conditions to equivalent transactions with other trading parties to an extent that may –

discourage new market entry or expansion or investment by an existing competitor;

force from the market or otherwise seriously damage an existing competitor which is no less efficient than the enterprise in a dominant position; or

harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market; …

The elements of this provision are:

(a) whether the parties are an enterprise

(b) whether they are in a dominant position

(c) whether they abused their dominant position, which in this case means considering:

i. whether they applied different conditions to equivalent transactions to other trading parties

ii. whether the conduct harmed competition in a market they participate in.

Analysis

a) Enterprise and single economic unit

Section 2 of the Malaysia Competition Act

"Enterprise" means any entity carrying on commercial activities relating to goods and services, and for the purposes 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 unit within which the subsidiaries do not enjoy real autonomy in determining their actions on the market.

The MyCC decided that although MyEG Services Berhad and MyEG Commerce were separate legal entities, they formed a single economic unit and were treated as a single "enterprise" because they had two common directors and a common principal business address.

b) Dominant position in a market

Section 2 of the Malaysia Competition Act

"Dominant position" means 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.

MyCC had to define what the relevant markets were to determine whether MyEG had a dominant position in any market. This is the first step in assessing market power.

The relevant **upstream market** was considered to be the market for online PLKS renewals. MyCC considered that MyEG Services Berhad was in a dominant position in this market because:

- Since 2 May 2015, MyEG Services Berhad was the only provider that provided and managed online PLKS renewals in Peninsula Malaysia due to the agreement it had with the Immigration Department. See the figure above showing how PLKS renewal options for foreign workers changed over time.

- The number of PLKS renewals processed by MyEG Services Berhad in the 6 months from January to June 2015 was 30 times larger than the number of renewals processed in the 12 months in 2014.

The relevant **downstream market** was considered to be the market for the sale of Mandatory Insurance for online PLKS renewals in Peninsula Malaysia. MyEG Services Berhad's market share (through MyEG Commerce) in the sale of Mandatory Insurances was relatively small in percentage terms.

c) Abuse of dominant position

This case is an example of an entity using market power in one market (online PLKS renewals) to gain an advantage in another market (Mandatory Insurances). MyCC considered MyEG Services Berhad had applied different conditions to the same type of transactions with its competitors resulting in harm to competition in the downstream market for the sale of Mandatory Insurances.

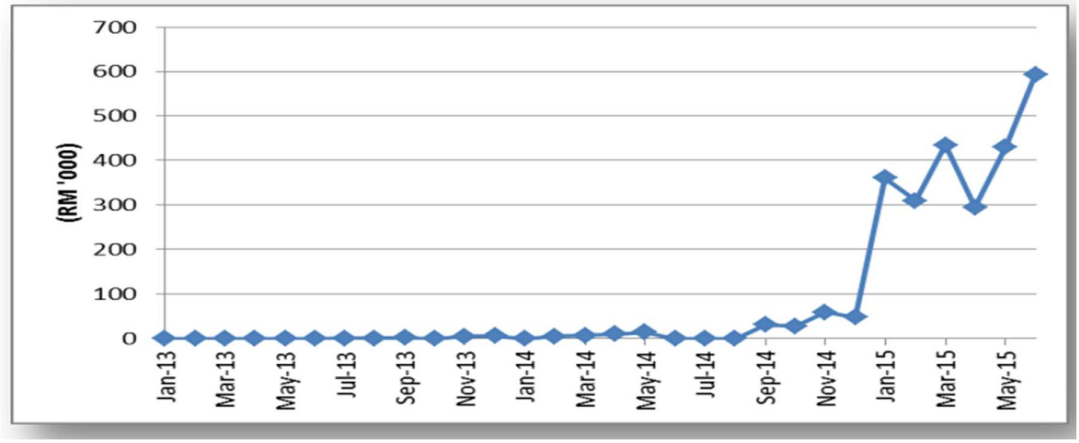
MyCC found that MyEG Services Berhad's market share (through MyEG Commerce) in the sale of Mandatory Insurances was relatively small in percentage terms. However, MyEG Services Berhad's dominance in the upstream market (online PLKS renewals) allowed it to abuse its dominant position in the downstream market (sale of Mandatory Insurances) through MyEG Commerce. This involved the following conduct:

- Mandatory purchase of IG through MyEG Commerce
  - MyEG Services Berhad had effectively made it compulsory for employers of foreign workers to purchase IG though MyEG Commerce.
  - This was communicated in the FAQ on its website. See **Frequently Asked Questions** above.
- Inducement for purchase of FWCS and FWHS through MyEG Commerce
  - MyEG Services Berhad had created difficulties by adding extra steps for employers if they purchased the Mandatory Insurances through other insurance companies.
  - These extra steps were communicated in the FAQ on its website. See **Frequently Asked Questions** above.
  - MyCC accepted that the Immigration Department required MyEG Services Berhad to check the validity and authenticity of the Mandatory Insurances purchased from other insurance companies.

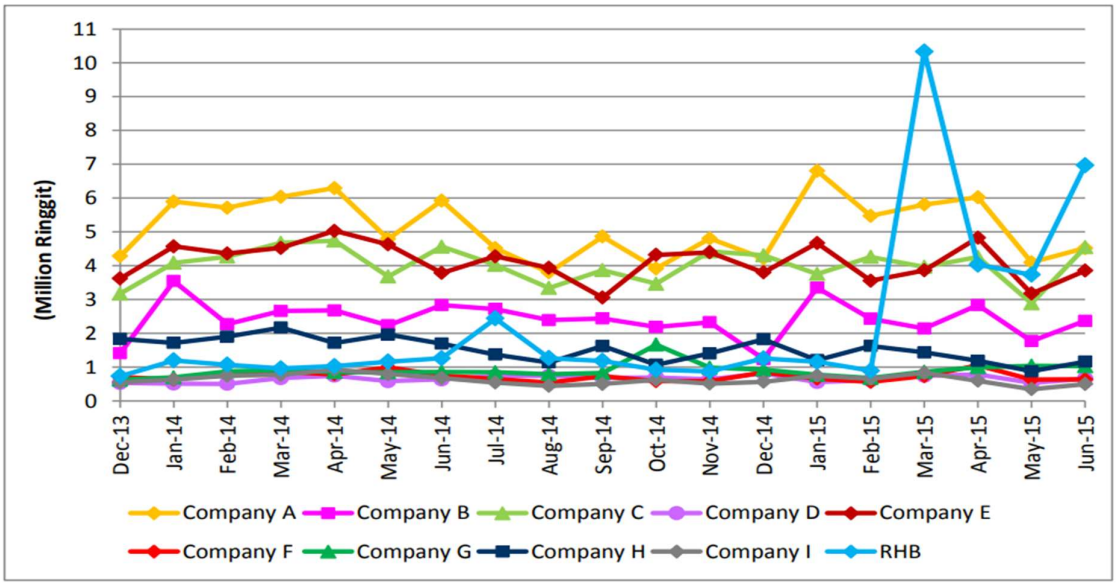
By creating the additional step described, MyEG Services Berhad applied different conditions to equivalent transactions with other competitors.

MyCC held that competition in the downstream market (the sale of Mandatory Insurances) was distorted because of MyEG Services Berhad's conduct. Some of MyCC's reasons included:

- MyEG Commerce was the top agent for RHB Insurance and competed with other insurance agents to sell Mandatory Insurances.
- The 10% commission RHB Insurance paid MyEG Services Berhad for MyEG Commerce's sales of Mandatory Insurance in 6 months from January to June 2015 was almost 10 times larger than the 10% commission paid for the 12 months in 2014.
- The figure below shows the commission earned by MyEG from selling the Mandatory Insurances:



- Data from other insurance companies indicated that their gross written premiums from the sales of the Mandatory Insurances decreased from December 2014 to June 2015 compared to the same period a year ago, while RHB Insurance gained market share.
- The figure below shows the gross written premium of the Mandatory Insurances sold by RHB Insurance compared to other insurance companies:



Decision

The MyCC decided that MyEG Services Berhad had infringed section 10 of the Malaysia Competition Act by abusing its dominant position in the market for online PLKS renewals by not ensuring a level playing field or applying different conditions to equivalent transactions with its competitors.

This harmed competition in the market for the sale of the Mandatory Insurances for online PLKS renewals. MyEG Commerce (a subsidiary of MyEG Services Berhad) participated in this market as an insurance agent.

The infringement took place from 5 January 2015 to 22 January 2015 and from 2 May 2015 to 6 October 2015. These dates are when online PLKS renewals were the only option available until the date MyCC served its proposed decision on MyEG Services Berhad.

MyEG Services Berhad and MyEG Commerce appealed MyCC's decision to the Competition Appeal Tribunal, which affirmed MyCC's analysis and decision. The parties then unsuccessfully appealed to the High Court[44] and the Federal Court.

Learning points

The effect of government policies on competition

Government policies and competition policies are both crucial aspects of economic governance that play distinct yet interconnected roles in shaping market dynamics and ensuring fair competition. Government policies can impact competition positively by fostering innovation and entrepreneurship. Nonetheless, government policies can also occasionally distort the market by preventing, restricting or distorting competition in a market. Addressing the distortions after policies have been implemented could be challenging, as the government may have made commitments and there could be policy justifications to support the potential distortion.

In particular, the effect of government policies that grant monopoly status or increase barriers to entry for competitors should be carefully monitored to identify potential harm to competition. The harm to competition can occur in the market the policy directly impacts and/or related (upstream or downstream) markets. There can be unintended anti-competitive effects of well-intended government policies designed to benefit society. These potential anti-competitive effects may not be immediately obvious, and by the time they are noticed it can be more difficult to change the situation.

In this case, the Malaysian Government intended to speed up PLKS renewals for the benefit of employers and foreign workers by moving renewals from manual (in-person) systems to online systems. However, the unintended anti-competitive effect of this policy was the creation of an unlevel playing field for other insurance agents in the downstream market.

Advocacy is crucial in a competition regime. Competition regulators should consider regular advocacy campaigns and engagement with government to help create and renew policy makers' awareness of competition law and policy.

2.9. Tying

Table 12. Tying case overview

Agency	Indonesia Competition Commission (ICC) / Komisi Pengawas Persaingan Usaha (KPPU)
Summary	A state-owned enterprise offering integrated port services throughout Indonesia was found to have been engaged in a vertical agreement with its sub-entity which was offering among other services, bulk breaking and loading and unloading services at particular docks.
Decision date	24 February 2015

[44] Application for Judicial Review No: WA-25-81-03/2018 between My E.G. Services Berhad & My E.G. Commerce Sdn. Bhd. And Competition Commission & Competition Appeal Tribunal, 19 April 2019.

Outcome	PT Pelabuhan Indonesia II (Pelindo II) and the PT Multi Terminal Indonesia (MTI) were found to have entered into a tying arrangement where they had issued a notification to all users of the port on the compulsory usage of the Gantry Luffing Crane which is a piece of equipment used for loading and unloading cargo. This was to improve the efficiency and productivity of loading and unloading. The party that gained from the arrangement was fined IDR5,332,500 million.
Learning points	Tying agreement

What is tying?

Tying occurs when a supplier supplies its customers on condition that the customer acquires a second product from that supplier. Tying can occur through direct contractual obligations, through financial incentives, or by the supplier refusing to trade without the condition.

Tying is a type of vertical restraint, which are usually categorised based on whether they restrict price or non-price factors. Some vertical restraints may also be an abuse of dominant position.[45]

Parties

PT Pelabuhan Indonesia II (Pelindo II) is an Indonesian State-owned enterprise offering integrated port service throughout Indonesia.

PT Multi Terminal Indonesia (MTI) is the sub-entity of the Port i.e. Pelindo II and involved in freight forwarding, cargo transportation, warehousing and distribution, loading and unloading.

Background

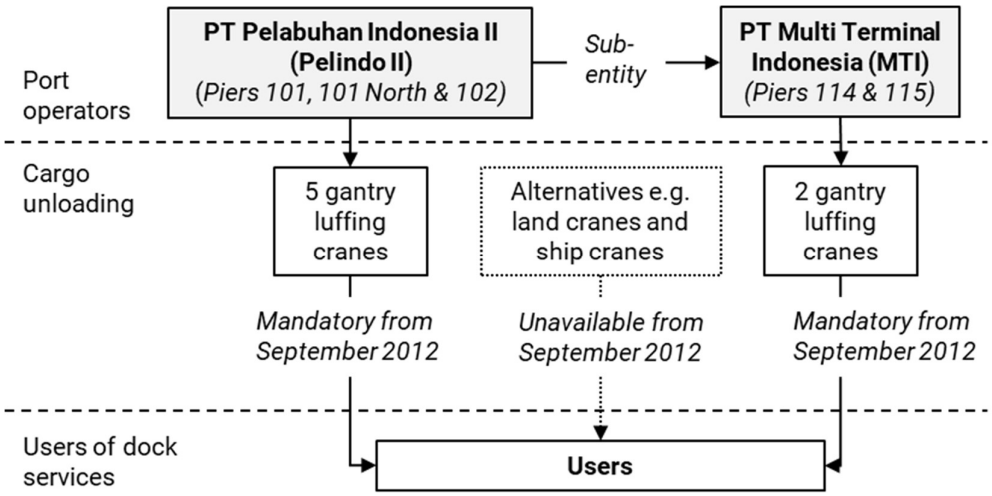
Pelindo II is a port enterprise which operates and manages the docks at the Tanjung Priok Port. It is also the operator of dock 101,101 North and 102. MTI is the operator of dock 114 and 115.

These docks are used for break bulk cargo unloading and loading activities from ships.

Gantry Luffing Cranes (**GLC**) are heavy cranes that are used to load and unload cargo at ports. Ship to shore gantry cranes are multi storey structures seen at most container terminals. The GLCs belonged to Pelindo II (5 units) and MTI (2 units).

The figure below shows the different levels of the market and the relationship between the parties and the GLCs.

[45] OECD, 'Competition Primers for ASEAN Judges - Vertical Restraints in Competition Law', July 2021.



Starting the investigation

On the initiative of the Indonesia Competition Commission (ICC) after the ICC concluded its own research. The research was triggered by various sources of information, such as news from the media and information from other institutions.

Conduct investigated

Pelindo II and MTI issued a notice in September 2012 which requested mandatory usage of the GLC by all users of docks 101,101 North, 102, 114 and 115. The GLC was provided by Pelindo II and MTI at the Tanjung Priok Port.

Legal provisions

Article 15(2) of the Indonesia Competition Law

Business actors shall be prohibited from entering into agreements with other parties setting forth the condition that the party receiving certain goods and or services must be prepared to purchase other goods and or services from the supplying business actor.

The elements of this provision are:

(a) whether there was a vertical arrangement/tying arrangement between the two parties

(b) whether the arrangement created any entry barriers for other bulk break operators.

Analysis

a) Arrangement

The notice issued to users of the docks which made it compulsory for them to use the GLC was deemed by the ICC to be direct evidence that there was an arrangement between the two parties.

b) Entry barriers

There were entry barriers in this case, as no other GLCs were allowed to operate at the docks mentioned above.

Tariffs for each usage of the GLC by Pelindo II and MTI translated into higher prices for consumers. The tariff charged for each use of the Gantry Luffing Crane by Pelindo II and its subsidiary MTI was IDR 17,000 (seventeen thousand rupiah) per ton, so that the cost of goods produced by importers increased and had the effect of increasing the price of goods at the end user/consumer level.

Service users who were not willing to use the equipment were not able to receive any loading and unloading services and were not provided with any dock space .

Prior to the obligation to use GLC by Pelindo II and MTI, users of the dock services had the option of using ship gear cranes or land cranes (mobile cranes, container cranes, shore cranes, HMC), which were leased by land crane equipment providers, to carry out loading and unloading activities. After the obligation to use the GLC was imposed, the land cranes and ship gear were not allowed to operate.

The prior existence of choices of loading and unloading equipment for users of the dock services demonstrated that dock services and loading and unloading equipment for land cranes were separate services. Land cranes and ship cranes have similar product characteristics. In terms of usability or function, land cranes and ship cranes have the same function, namely to unload ships.

With GLC as the only means of loading and unloading at pier 101, pier 101 north, pier 102, pier 114, and pier 115, where there were no substitutes, consumers did not have the ability to switch to other substitutable loading and unloading services, namely those provided by land cranes and ship cranes. This condition causes the elasticity of demand for GLC to be perfectly inelastic. Elasticity of demand is a measure of how sensitive demand is to its price. When it is inelastic, this means demand is relatively insensitive to price.

Pelindo II and MTI also issued their policy that multipurpose piers[46] would only be available at piers 101, 101 north, 102, 114, and 115 at Tanjung Priok Port, so that the market for dock services for ships carrying break bulk cargo and the market for loading and unloading equipment for GLC were only available at these five piers. This policy resulted in the diminishing of inter-port competition between the piers or terminals at the Port of Tanjung Priok.

Decision

The ICC found that the parties were involved in a tying arrangement that had harmed the port users. They instructed that the notice issued for the compulsory usage of the GLC be cancelled.

Pelindo II was not fined as evidence indicated that Pelindo II did not derive any profits from the tying arrangements. MTI was fined IDR5,332,500 million as they were found to have gained from the tying arrangement.

[46] Multipurpose piers are piers for all types of cargo, including containers and breakbulk cargo. However, for ships whose entire cargo is containers, they cannot berth at multipurpose piers and must berth at special container docks.

Learning points

Tying arrangements

When dealing with tying arrangements, coercion is a key feature to consider. If customers do not have a choice between products or services, then competition authorities may be concerned about impacts on the market. Certain tying arrangements are perceived to be justifiable and therefore a detailed economic analysis will have to be carried out to ascertain the harm a particular practice has on the market.

Market power is commonly required for a party to be able to impose a tying arrangement (as otherwise consumers would not agree to the tie.

2.10. Merger

Table 13. Merger case overview

Agency	Philippine Competition Commission (PCC)
Summary	An anti-competitive merger between two ride hailing companies operating in the Philippines was approved with conditions imposed to ensure fairness to consumers
Decision date	10 August 2018[47]
Outcome	The merger was anti-competitive and infringed the Philippine Competition Act. However, PCC approved the merger and imposed conditions to ensure fairness to consumers.
Learning points	Merger reviews Behavioural undertakings Relationship with sector regulators

What is a merger?

A horizontal merger occurs between firms that offer the same products or services. .

In ASEAN almost all jurisdictions have a mergers and acquisitions regime to control mergers which prevent competition.[48] A merger could be a complete union of two or more companies, a takeover, or the transfer of parts of one firm to another.

Analysing mergers which harm competition requires deep economic analysis of the markets and the effect of the transaction on the market.[49]

47 PCC, Commission Decision, Acquisition by Grab Holdings Inc. and MyTaxi.PH Inc. of Assets of Uber B.V. and Uber Systems, Inc., 10 August 2018.

48 For further information, see ASEAN Secretariat, Commonalities and Differences across Competition Laws in ASEAN and Areas Feasible for Regional Convergence, Second Edition, July 2022.

49 For more about mergers, see the OECD website on Mergers.

Parties

The parties involved in this matter are:

- Grab Holdings, Inc and MyTaxi.PH,Inc (together "**Grab**")
- Uber B.V. and Uber Systems, Inc (together, "**Uber**").

Background

Grab and Uber are two ride hailing companies offering easy transportation bookings through e-commerce platforms. Consumers were benefiting from the intense price wars as both entities offered attractive discounts and incentives in order to increase their market share.

According to a Wall Street journal publication,[50] Uber was losing approximately USD$200 million per year and in 2017 it posted a net loss of USD$4.46 billion which analysts observed was unsustainable.

Grab announced the acquisition of Uber's Southeast Asian business in consideration of Uber holding a 27.5% in Grab and Uber's CEO joining Grab's board.

There are about 55,000 Grab and Uber vehicles in the Philippines, mainly in Metropolitan Manila, where poor public transport systems have allowed private car services hailed from apps such as Uber and Grab to thrive.

There were some concerns in the Philippines, especially among loyal Uber riders, who said that Uber fares were cheaper and Uber drivers do not discriminate against passengers based on their trip destination unlike Grab and traditional taxi drivers.

Starting the investigation

Grab and Uber did not notify the PCC of the planned merger as they alleged that the value of Grab's assets or the revenues of Uber earned in the last fiscal year in the Philippines did not exceed the then notification threshold set by the PCC (PHP 1 billion) above which notification was required.[51]

The PCC invoked its authority under section 12(a) of the Philippine Competition Act (Republic Act No.10667) to "conduct inquiry, investigate and hear and decide on cases…*motu proprio*…" *Motu Proprio* is an official act taken without formal request from another party, in other words, on its own initiative.

The Mergers and Acquisitions Office commenced a *motu proprio* review of the transaction based on its preliminary assessment that there were reasonable grounds to believe that the transaction may result in a substantial lessening, prevention or restriction of competition.

Legal provisions

The Philippines has a mandatory pre-review process where merging firms are obligated to report mergers and acquisitions to the authority and obtain approval in advance, subject to notification thresholds.

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50 SMU Lexicon, Grab-Uber merger: observations and implications for Singapore's competition regime, 13 September 2019.

51 The threshold has since been increased to PHP 2.9 billion.

Section 16-23 of the Philippine Competition Act

These sections contain the merger regulations. They establish a pre-completion mandatory notification regime for merger or acquisition agreements where the value exceeds the notification threshold.

There is a notification period of 30 days which can be extended to 90 days. If the Commission has issued no decision, the transaction shall be deemed approved and the parties shall be free to complete the transaction.

If the Commission determines the agreement has some anti-competitive elements it may either:

1) prohibit the merger

2) prohibit the merger unless and until it is modified by changes specified by the Commission

3) prohibit the merger unless and until the parties enter into legally enforceable agreements specified by the Commission.

There are provisions for possible exemptions.

The PCC needed to consider whether the merger substantially prevented, restricted or lessened competition in the relevant market or in the market for goods or services.

Analysis

The PCC undertook the following analysis to determine if this was an anti-competitive merger.[52]

Market definition

The PCC concluded that the market for transport services must be differentiated between those which operated pre-determined fixed routes as compared to those which provided customised services according to the needs of riders who requested services on demand.

Therefore, it was concluded that the relevant product market was 'on demand private transportation online booking service through a mobile ride-hailing application'.

Theory of harm

Grab and Uber were the two dominant firms in the relevant market with a combined market share of about 93% of total registered Transport Network Vehicle Service (**TNVS**). With the merger, Grab would have 93% of the market and with practically no competition at all. The PCC found that consumer demand was inelastic which means riders are less sensitive to price changes due to lack of alternatives and the ability of Grab to increase its prices and reduce quality of service was seen to increase significantly post-merger. This was confirmed by the data analysed by PCC.

Further, drivers from Uber who had moved to Grab resulted in significant consumer harm. The comparison of fare structure also indicated that Grab was more expensive than Uber. Consumers who had enjoyed the lower-priced service were now deprived of it and forced to

[52] Based on Bernabes, Johannes, Journal of Antitrust Enforcement, Grab-Uber merger: challenges faced by a young competition agency, 20 January 2021.

use the services of Grab. Therefore, the PCC found that the elimination of a lower-priced service (Uber) resulting in a higher priced service (Grab) resulted in consumer harm.

Post-transaction, quality of services were also found to deteriorate. A study commissioned by the PCC found that there was increased driver cancellation, forced cancellation of rides and increased waiting time.

Adding to this, Grab allowed its TNVS drivers to see the destination of riders as they booked and this resulted in drivers being selective in relation to bookings and therefore discriminating against consumers, which was not formerly the practice of Uber.

Entry and expansion

The PCC also concluded that there would not be any likely new entrant to the market to compete with Grab due to barriers to entry. Those barriers included time to develop an app (2-3 years), obtain regulatory clearance, and a large upfront investment including attractive commissions and incentive schemes to encourage drivers and vehicle owners to sign up with a new entrant.

Moreover, the Land Transportation Franchise Regulatory Board (**LTFRB**) had imposed a common supply base cap of 65,000 vehicles which made it almost impossible for new vehicles and drivers to enter the market. There were about 55,000 Grab and Uber vehicles in the Philippines, leaving only 10,000 additional vehicles able to be licensed.

Decision

The Commission found that the transaction would likely result in a substantial lessening of competition in the market for on-demand private transportation online booking service through a mobile ride-hailing application. Grab's market power after the merger would be strengthened due to the elimination of its strong competitor, Uber. The merger had the effect of easing intense competition pressure in the digital platform market.

However, the Commission approved the merger conditional upon voluntary commitments (in the form of an Undertaking) designed to ensure fairness to consumers. The Commission considered the Undertaking sufficient to address the competition concerns that were of concern to the Commission.[53]

The Undertaking included the following commitments for a 12-month period:

- No driver and operator exclusivity provisions were allowed in the company's agreements
- Incentives given by Grab were to be monitored by the PCC. The PCC takes into consideration how these incentives may adversely affect the conditions of entry and the ability of Grab's competitors to expand post-Transaction.
- Strict price monitoring by the PCC to ensure that the pricing behaviour of the merged entity was not unreasonably different pre- and post-acquisition
- To improve the quality of service by increasing the acceptance rate for bookings by riders by 65% and reduce the cancellation rates by Grab drivers by 5%
- To remove the 'See destination' feature from drivers who fail to meet the mandated acceptance rates.

[53] For more on the Undertaking, see PCC, Commission Decision, Acquisition by Grab Holdings Inc. and MyTaxi.PH Inc. of Assets of Uber B.V. and Uber Systems, Inc., 10 August 2018.

Learning points

Relationship with sector regulators

During the process of evaluating the merger, the LTFRB decided not to renew the accreditation of Uber as a ride-sharing or a Transport Network Company, which meant that Uber had to cease and desist from any operations in the Philippines beginning 16 April 2018. This did not go down well with the PCC as the PCC had issued Interim Measures to the parties in the merger deal which included an order for Uber to continue independent operations. This led the parties to not comply with the Interim Measures.

This conflict with sector regulators is common especially in new jurisdictions when the role of a new Commission is not fully understood and discussions have been insufficient to determine the jurisdiction of each sector regulator. This can also come about even after the Commission has been established for a number of years and a new sector regulator is established. The way forward will be to enhance advocacy sessions with government agencies and pursue memoranda of agreements/understandings with relevant sector regulators (this is the approach taken by the PCC).

Challenges for behavioural undertakings

While fines were imposed and an extended Undertaking imposed on Grab, the issue that the PCC grappled with was whether the Undertaking was sufficient to deal with the competition concerns arising from a market power such as Grab.

Despite the commitments in the Undertaking (listed under **Decision** above), the lack of effective competition allowed Grab to wield market power and resulted in consumer harm in the following forms:

- extraordinarily high fares as compared with pre-transaction
- failure to meet the service quality obligations relating to the removal of the “See Destination” feature
- failure to improve driver cancellation rates.

Competition agencies should consider, and work together with, the entire competition ecosystem, which includes other government agencies, when trying to address the sometimes large and complex competition concerns that consumers and businesses face.

3. References

3.1. References

This section contains other references used in preparing this Case Study Manual that have not been previously footnoted above.

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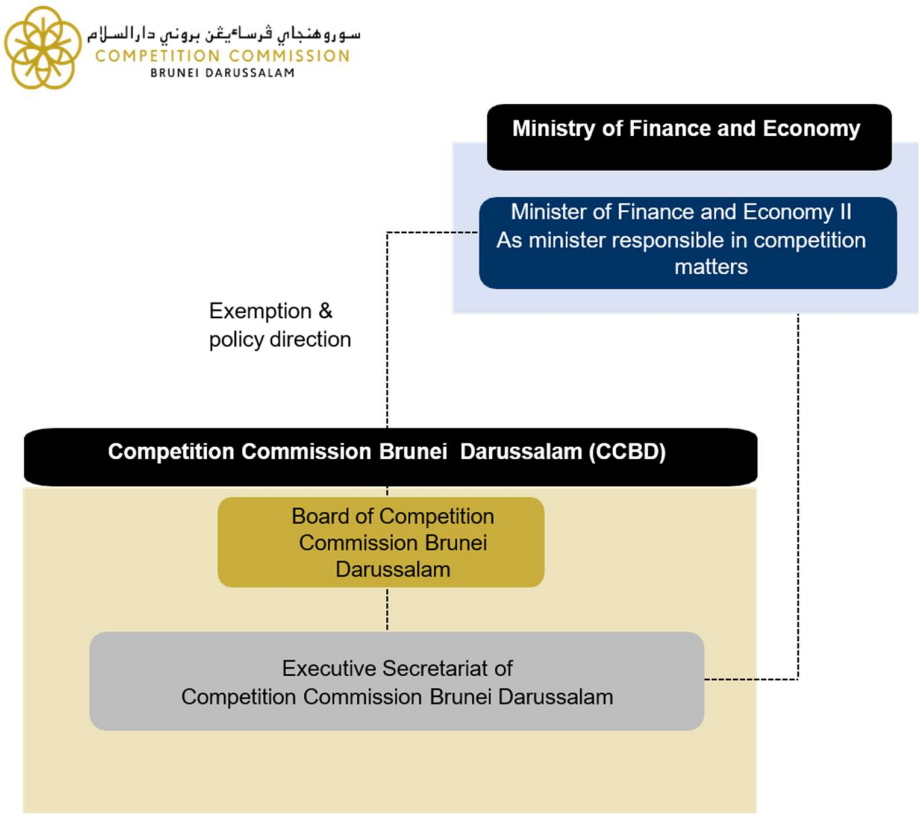
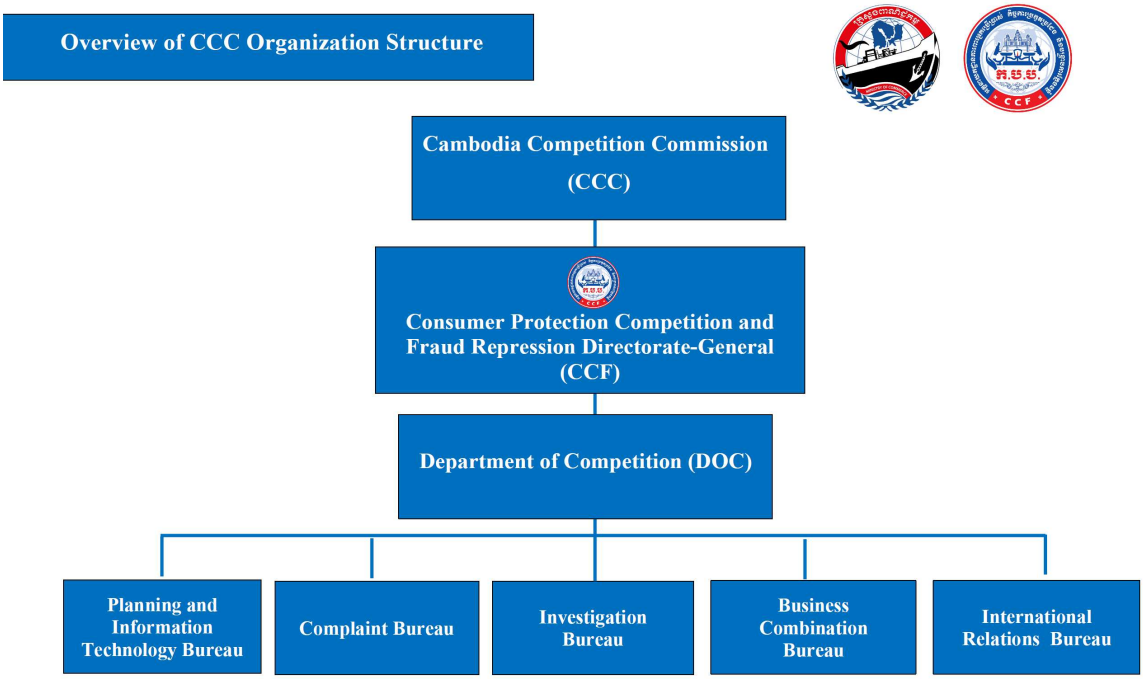
3.2. Organisation structures

This section contains diagrams showing the organisation structure of AMS competition agencies.

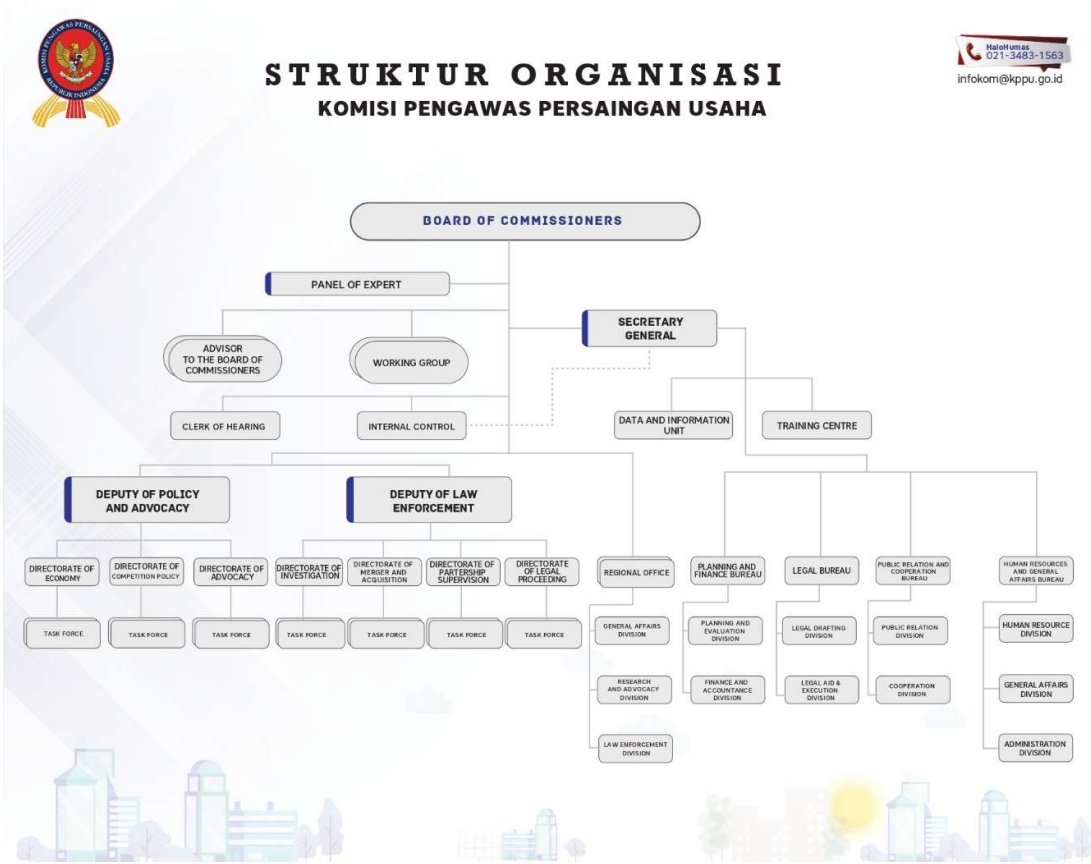
Brunei – Competition Commission Brunei Darussalam (CCBD)



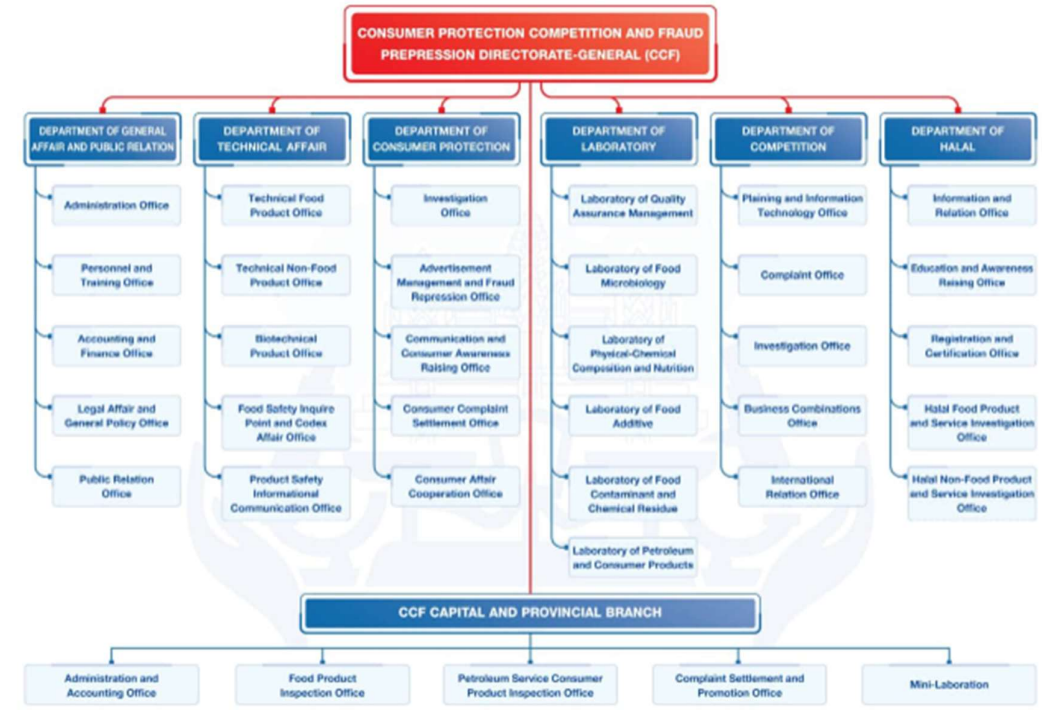
Cambodia – Competition Commission of Cambodia (CCC)



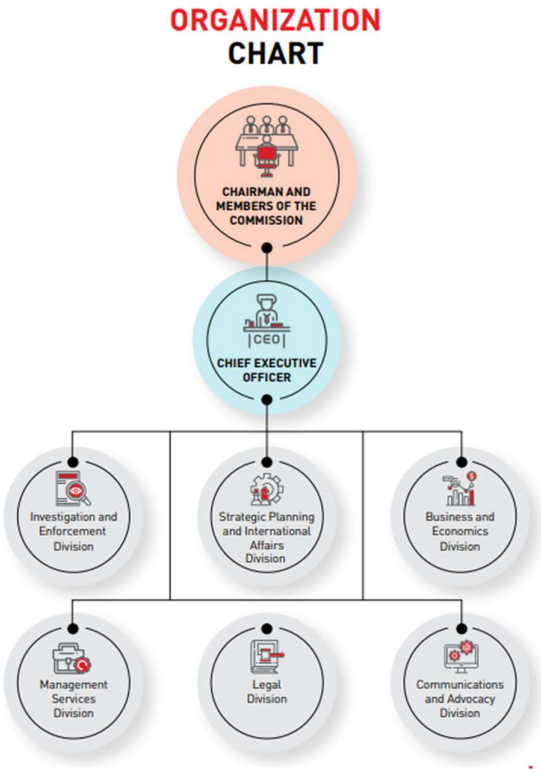
Indonesia – Indonesia Competition Commission (ICC)



Lao PDR – Lao Competition Commission (LCC)

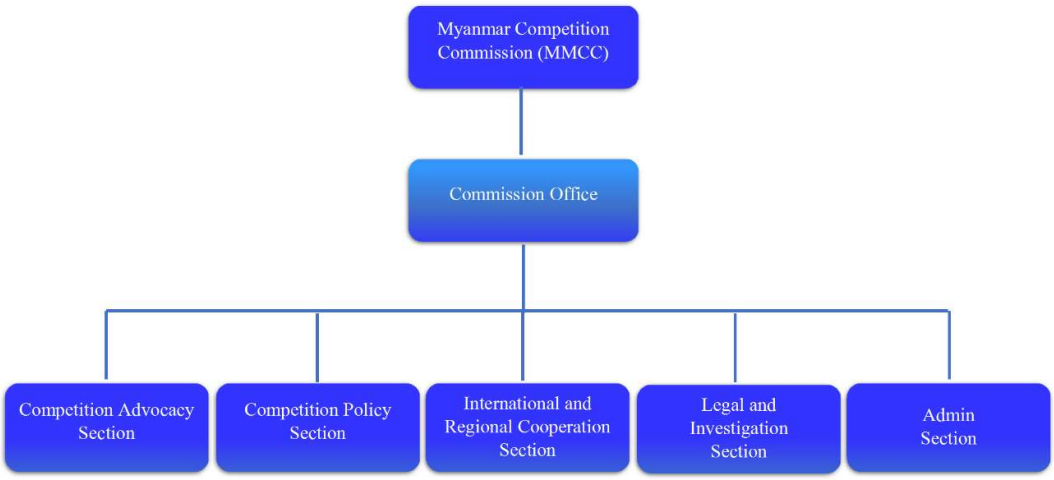


Malaysia – Malaysia Competition Commission (MyCC)

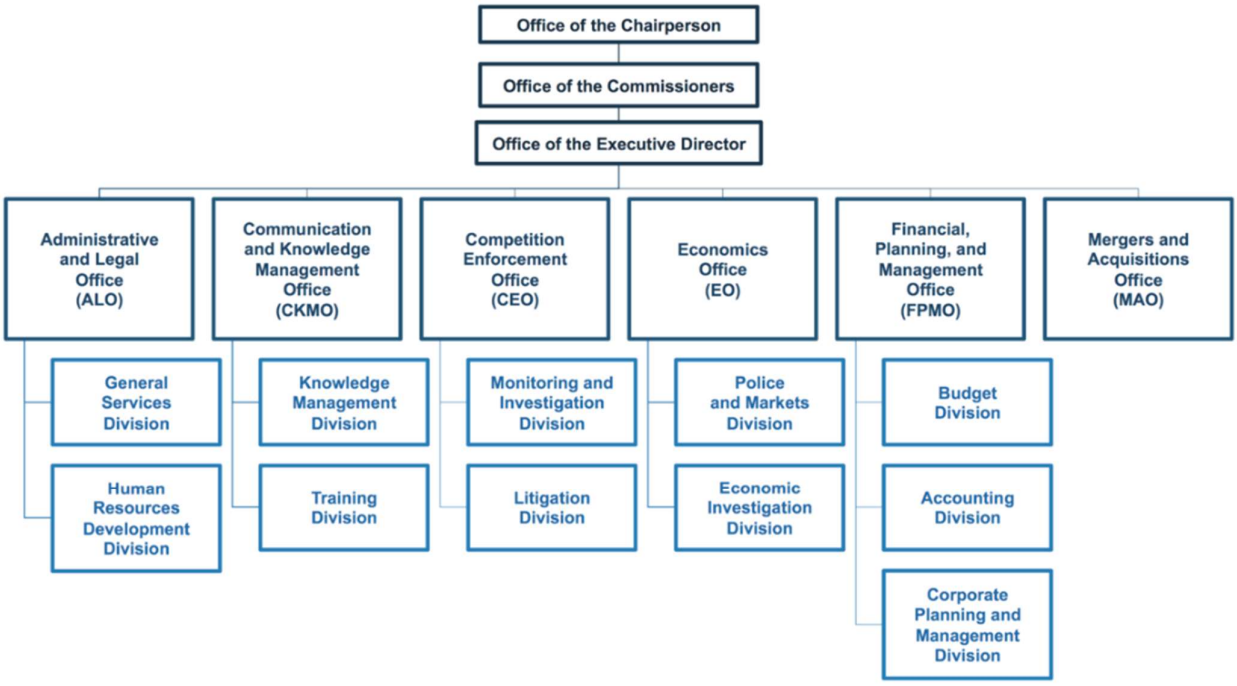


Myanmar – Myanmar Competition Commission (MMCC)

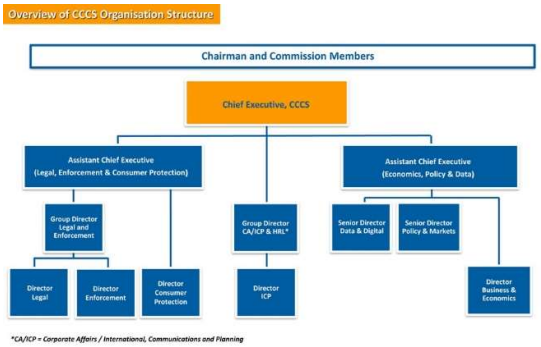
Institutional Structure of Myanmar Competition Commission

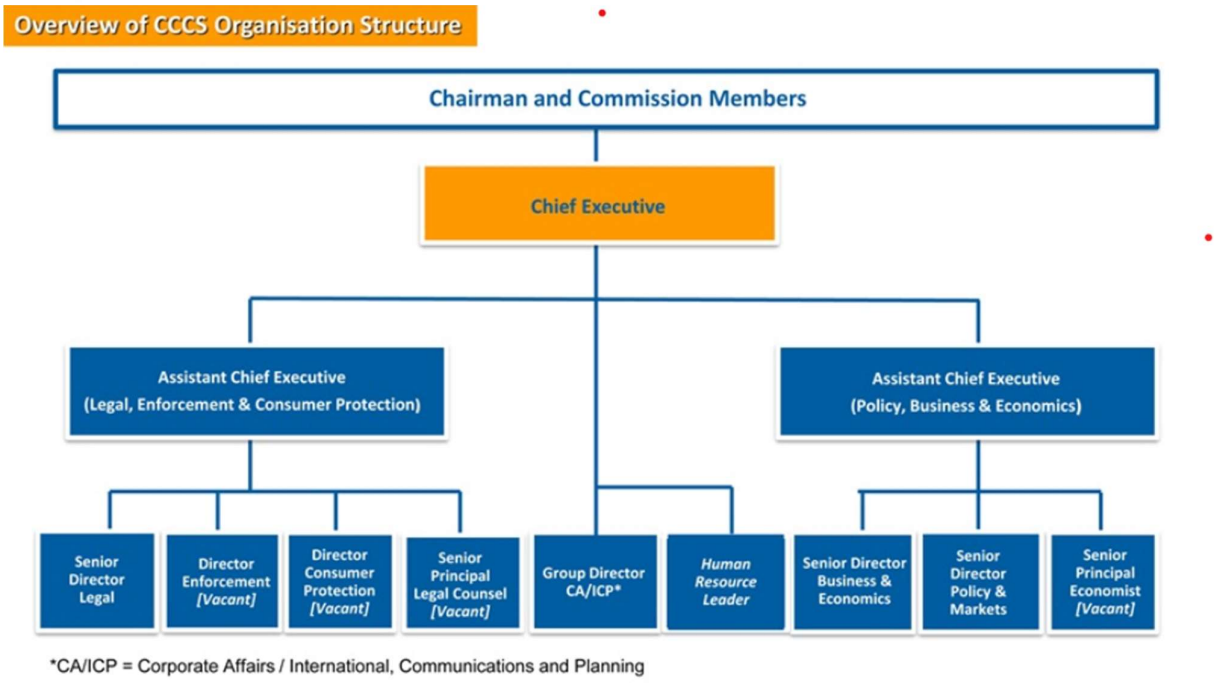


Philippines – Philippine Competition Commission (PCC)

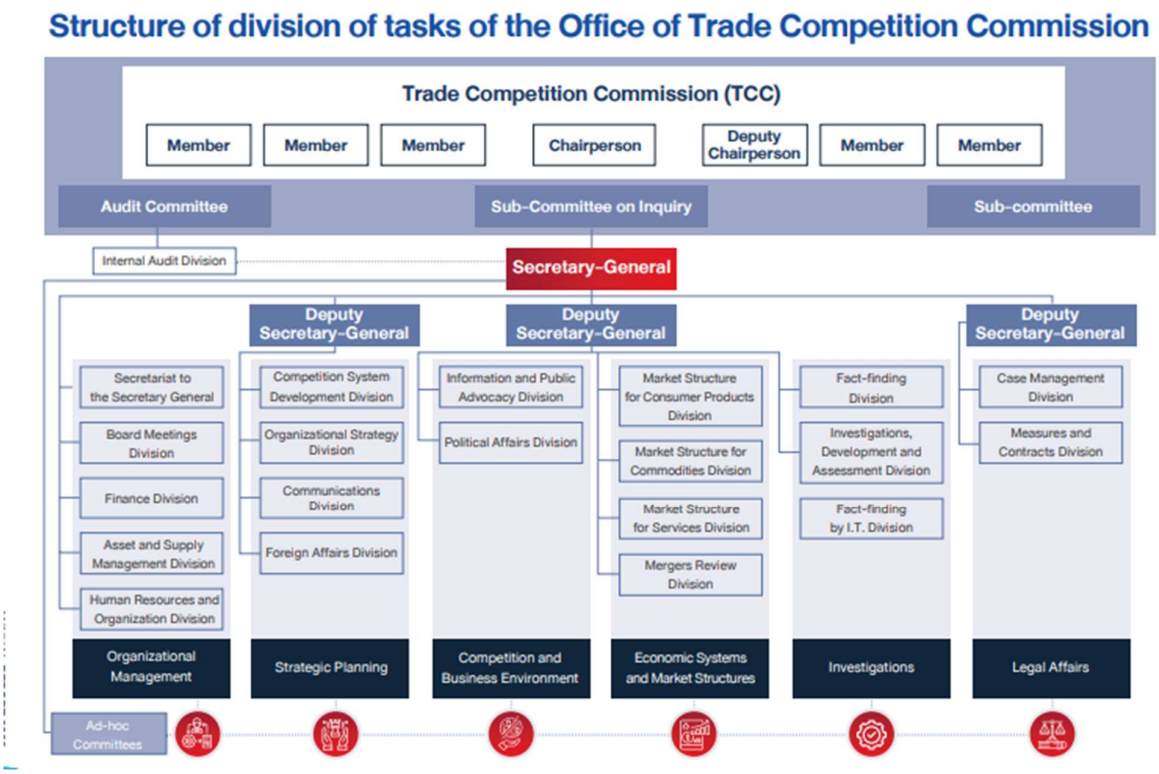


Singapore – Competition & Consumer Commission of Singapore (CCCS)





Thailand – Trade Competition Commission of Thailand (TCCT)



Vietnam – Vietnam Competition Commission