



Corporate & Commercial Law Update

- ▶ COMPETITION BILL 2010
- ▶ WHISTLEBLOWER PROTECTION BILL 2010
- ▶ CAPITAL MARKETS AND SERVICES ACT 2007 (CMSA)
- ▶ NEW LABUAN OFFSHORE LEGISLATION

▶ Competition Bill 2010

The Competition Bill 2010 was passed by the House of Representatives on April 21, 2010 and is expected to be tabled in the Senate in the second session of Parliament this year in July 2010. Some salient features of the Bill are set out below. It is not discounted that the eventual Act may contain some variation. In any case, it is expected that the Act will not come into force until at least mid-2011.

1. Application

- 1.1 The Bill applies to any “commercial activity”, both within and outside Malaysia. In relation to the application of the Bill outside Malaysia, it applies to any commercial activity transacted outside Malaysia which has an effect on competition in any market in Malaysia.
- 1.2 The Bill **does not apply** to any commercial activity regulated under the Communications and Multimedia Act 1998 and the Energy Commission Act 2001 and such other legislation as the Minister may subsequently prescribe.
- 1.3 The “commercial activity” means any activity of a commercial nature but **does not include**:
 - (a) any activity, directly or indirectly in the exercise of governmental authority;
 - (b) any activity conducted based on the principle of solidarity; and
 - (c) any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity.

2. Anti-Competitive Practices under Part II of the Bill

(a) Anti-competitive Agreements

- 2.1 The Competition Bill prohibits a “**horizontal agreement**” as well as a “**vertical agreement**” between enterprises insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.
- 2.2 A “horizontal agreement” means an agreement between enterprises each of which operates at the same level in the production or distribution chain, whereas a “vertical agreement” means an agreement between enterprises each of which operates at a different level in the production or distribution chain.
- 2.3 The term “enterprise” means any entity carrying on commercial activities relating to goods or services, and a parent and subsidiary company shall be regarded as a single enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their actions on the market.



2.4 The Bill provides that a horizontal agreement between enterprises which has the object to:

- (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;
- (b) share market or sources of supply;
- (c) limit or control -
 - (i) production;
 - (ii) market outlets or market access;
 - (iii) technical or technological development; or
 - (iv) investment; or
- (d) perform an act of bid rigging,

is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

2.5 Notwithstanding the foregoing, an enterprise which is a party to an agreement may apply to the Competition Commission (to be established under the Competition Commission Bill 2010) for an “**individual exemption**” with respect to a particular agreement from the prohibition based on the following reasons:

- (a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
- (b) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;
- (c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and
- (d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

2.6 The Commission may also grant a “**block exemption**” to agreements which are, in the opinion of the Commission, within a particular category of agreements likely to be agreements to which paragraph 2.5 above applies. The Commission in granting the block exemption may impose any condition or obligation subject to which a block exemption shall have effect.

(b) Abuse of Dominant Position

2.7 An enterprise is also 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 services.

The term “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.

An abuse of a dominant position may include (but is not limited to) :



- (a) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer;
- (b) limiting or controlling—
 - (i) production;
 - (ii) market outlets or market access;
 - (iii) technical or technological development; or
 - (iv) investment, to the prejudice of consumers;
- (c) refusing to supply to a particular enterprise or group or category of enterprises;
- (d) applying different conditions to equivalent transactions with other trading parties to an extent that may -
 - (i) discourage new market entry or expansion or investment by an existing competitor;
 - (ii) force from the market or otherwise seriously damage an existing competitor which is no less efficient than the enterprise in a dominant position; or
 - (iii) harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market;
- (e) making the conclusion of contract subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contract;
- (f) any predatory behaviour towards competitors; or
- (g) buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification for buying up the intermediate goods or resources to meet its own needs.

The above does not prohibit an enterprise in a dominant position from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor. It is also expressly stated that the fact that the market share of any enterprise is above or below any particular level shall not in itself be regarded as conclusive as to whether that enterprise occupies, or does not occupy, a dominant position in that market.

3. Exclusions

3.1 The prohibitions on anti-competitive practices do not apply to :

- (a) an agreement or conduct to the extent to which it is engaged in order to comply with a legislative requirement;
- (b) collective bargaining activities or collective agreements in respect of employment terms and conditions and which are negotiated or concluded between parties which include both employers and employees or organisations established to represent the interests of employers or employees;



- (c) an enterprise entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibitions would obstruct the performance, in law or in fact, of the particular tasks assigned to that enterprise.

4. Enforcement

- 4.1 The Commission will have wide powers to investigate as it thinks expedient where the Commission has reason to suspect that any enterprise has infringed or is infringing any prohibition under the Bill or any person has committed or is committing any offence under the Bill. It may also investigate upon any complaint received. The powers include the power to require production of documents and other records, and to request a Magistrate for a warrant to enter premises by day or night. If the Commission officer is satisfied that he has reasonable cause to believe that, by reason of delay in obtaining a search warrant, the investigation would be adversely affected or evidence of the commission of an infringement or offence is likely to be tampered with, removed, or destroyed, he may enter premises even without a warrant.
- 4.2 The Bill appears to make a distinction between an “infringement” and an “offence” – an infringement is to do a prohibited act (“infringement” is defined) and leads to the possibility of financial penalties being imposed by the Commission under the Bill. An offence refers to only acts expressly stated as being an offence in the Bill and refers mainly to failure to cooperate in an investigation and obstructing the investigation, thereby leading to criminal penalties as prescribed in section 61.
- 4.3 Under section 40 of the Bill, if the Commission determines that there is an infringement of a prohibition, it :
 - (a) shall require that the infringement to be ceased immediately;
 - (b) may specify steps which are required to be taken by the infringing enterprise, which appear to the Commission to be appropriate for bringing the infringement to an end;
 - (c) may impose a financial penalty; or
 - (d) may give any other direction as it deems appropriate.

The maximum financial penalty is stated to be 10% of “world turnover” of an enterprise over the period during which an infringement occurred.

- 4.4 The Commission may bring proceedings before the High Court against any person who fails to comply with a direction given by the Commission or a decision by it under section 40. The High Court may make an order requiring the person to comply with the direction or decision. Where the High Court finds that the failure to comply with the decision includes a failure to pay a penalty within the specified period, the High Court shall, in addition to ordering that person to pay the penalty, order the person to pay interest at the normal judgment rate running from the day following that on which the payment was due. Any breach of an order of the High Court made shall be punishable as a contempt of court.
- 4.5 Any person who commits an offence under the Bill for which no penalty is expressly provided shall, on conviction, be liable—
 - (a) if such person is a body corporate, to a fine not exceeding RM5 million, and for a second or subsequent offence, to a fine not exceeding RM10 million; or
 - (b) if such person is not a body corporate, to a fine not exceeding RM1 million or to imprisonment for a term not exceeding 5 years or to both, and for a second or subsequent offence, to a fine not exceeding RM2 million or to imprisonment for a term not exceeding 5 years or to both.



- 4.6 If a body corporate commits an offence under the Bill, any person who at the time of the commission of the offence was a director, chief executive officer, chief operating officer, manager, secretary or other similar officer of the body corporate or was purporting to act in any such capacity or was in any manner or to any extent responsible for the management of any of the affairs of the body corporate or was assisting in such management—
- (a) may be charged severally or jointly in the same proceedings with the body corporate; and
 - (b) if the body corporate is found to have committed the offence, shall be deemed to have committed that offence unless, having regard to the nature of his functions in that capacity and to all circumstances, he proves—
 - (i) that the offence was committed without his knowledge, consent or connivance; and
 - (ii) that he had taken all reasonable precautions and exercised due diligence to prevent the commission of the offence.
- 4.7 If any person would be liable under the Bill to any punishment or penalty for his act, omission, neglect or default, he shall be liable to the same punishment or penalty for every such act, omission, neglect or default of any employee or agent of his, or of the employee of the agent, if the act, omission, neglect or default was committed—
- (a) by that person's employee in the course of his employment;
 - (b) by the agent when acting on behalf of that person; or
 - (c) by the employee of the agent in the course of his employment by the agent or otherwise on behalf of the agent acting on behalf of that person.

5. Rights of private action

- 5.1 Any person who suffers loss or damage directly as a result of an infringement of any prohibition under Part II of the Bill has a right of action for relief in civil proceedings in a Court against any enterprise which is or which has at the material time been a party to such infringement. The action may be brought by such person regardless of whether such person dealt directly or indirectly with the enterprise.

6. Appeal to Competition Appeal Tribunal

- 6.1 A party who is dissatisfied with the decision of the Competition Commission affecting it may appeal to the Competition Appeal Tribunal and the decision of the Tribunal will be final.

► Whistleblower Protection Bill 2010

The Whistleblower Protection Bill 2010 was passed by the House of Representatives on April 20, 2010 and is now awaiting passage at the Senate. On the assumption it will be passed without substantial variation, we set out below some excerpts from the Bill for your information.

Under Section 6, a person may make a disclosure of improper conduct to any enforcement agency based on his reasonable belief that any person has engaged, is engaging or is preparing to engage, in improper conduct, provided that such disclosure is not specifically prohibited by any written law. Such person shall be conferred with the following whistleblower protection under Section 7:



- (a) protection of confidential information;
- (b) immunity from civil and criminal action; and
- (c) protection against detrimental action.

For the purpose of paragraph (c), the protection shall be extended to any person related to or associated with the whistleblower.

(The term “improper conduct” means any conduct which if proved, constitutes a disciplinary offence or a criminal offence and the term “disciplinary offence” means any action or omission which constitutes a breach of discipline in a public body or private body as provided by law or in a code of conduct, a code of ethics or circulars or a contract of employment, as the case may be).

The relevant enforcement agency can revoke the protection under Section 7 if it is of the opinion, based on its investigation or in the course of its investigation, that -

- (a) the whistleblower himself has participated in the improper conduct disclosed;
- (b) the whistleblower willfully made in his disclosure of improper conduct a material statement which he knew or believed to be false or did not believe to be true;
- (c) the disclosure of improper conduct is frivolous or vexatious;
- (d) the disclosure of improper conduct principally involves questioning the merits of government policy, including policy of a public body;
- (e) disclosure of improper conduct is made solely or substantially with the motive of avoiding dismissal or other disciplinary action; or
- (f) the whistleblower, in the course of making the disclosure or providing further information, commits an offence under the Act.

► **Capital Markets and Services Act 2007 (CMSA)**

With effect from April 1, 2010:

- (a) the provisions with regard to take-overs, mergers and compulsory acquisitions under Division 2 of Part VI of the CMSA came into operation (replacing the provisions under Division 2 of Part IV of the Securities Commission Act 1993);
- (b) the Capital Markets and Services (Amendment) Act 2010 came into effect. Some of the material amendments thereunder are as follows :
 - (i) the establishment of a Shariah Advisory Council for Islamic capital markets, which shall be the authority for the ascertainment of the application of Shariah principles for the purposes of Islamic capital market business or transactions;
 - (ii) a new Section 317A which provides that a director or an officer of a listed corporation or any of its related corporations shall not do or cause anyone to do anything with the intention of causing wrongful loss to the listed corporation or any of its related corporations, irrespective of whether the conduct causes actual wrongful loss, contravention of which is an offence punishable with imprisonment for a term not exceeding 10 years and with a fine not exceeding RM10 million;



- (iii) a new Section 320A which provides that a person shall not influence, coerce, mislead or authorize any person engaged in :
 - (aa) the preparation of the financial statements of a listed corporation or any of its related corporations; or
 - (bb) the performance of an audit of the financial statements of a listed corporation or any of its related corporations,

to do anything which he knows or ought reasonably to have known may cause the financial statements or audited financial statements to be false or misleading in a material particular, the contravention of which is an offence punishable with imprisonment for a term not exceeding 10 years and be liable to a fine not exceeding RM10 million.

► **New Labuan Offshore Legislation**

With effect from February 11, 2010, the following Acts and Amendment Acts came into force:

- (a) Labuan Financial Services And Securities Act 2010 (which repealed the Labuan Trust Companies Act 1990, Offshore Banking Act 1990, Offshore Insurance Act 1990 and Labuan Offshore Securities Industry Act 1998);
- (b) Labuan Limited Partnerships And Limited Liability Partnerships Act 2010 (which repealed the Labuan Offshore Limited Partnership Act 1997);
- (c) Labuan Foundations Act 2010;
- (d) Labuan Offshore Financial Services Authority (Amendment) Act 2010;
- (e) Labuan Offshore Business Activity Tax (Amendment) Act 2010;
- (f) Offshore Companies (Amendment) Act 2010; and
- (g) Labuan Offshore Trusts (Amendment) Act 2010.