



## Legislation and Jurisdiction

### The Law

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#### What is the relevant legislation?

The **Competition Act 2010** came into force on 1st January 2012 and introduces a comprehensive set of competition rules. It is accompanied by the **Competition Commission Act 2010**, which establishes the Competition Commission as the authority in charge of competition enforcement.

The Competition Act 2010 does not apply to any commercial activity regulated under the legislation specified in the First Schedule, i.e., the Communications and Multimedia Act 1998 and the Energy Commission Act 2001. These activities are subject to some competition-related provisions, which can be found in the following acts:

- Part VI, Chapter 2, of the **Communications and Multimedia Act 1998**. The Malaysian Communications and Multimedia Commission has issued the Guideline on Substantial Lessening of Competition (the “Guideline on Substantial Lessening of Competition (‘SLC’)”) under section 134 of the Communications and Multimedia Act 1998 to define the meaning of “substantial lessening of competition” and the Guideline on Dominant Position on a Communications Market (the “Guideline on Dominant Position”) under section 138 of the CMA to clarify how it will apply the test of “dominant position” to a licensee;
- The **Energy Commission Act 2001 (Act 610)**, the **Electricity Supply Act 1990 (Act 447)** and the **Gas Supply Act 1993**

**(Act 501)** are the “energy supply laws” that govern the electricity and downstream pipeline gas supply sectors in Malaysia. The Energy Commission which was established in 2001, apply these energy supply laws in regulating both respective sectors in the aspects of economic, technical and safety including competition in these sectors involving utilities and other licenced generators, transmission operators, distributors and suppliers, qualified practitioners, contractors and the consuming public.

- On competition matters, **Act 610** in Part III (paragraph 14(1)(h)) provides a wide function and power of the Energy Commission to “to promote and safeguard competition and fair and efficient market conduct or, in the absence of a competitive market, to prevent misuse of monopoly or market power in respect of the generation, production, transmission, distribution and supply of electricity and the supply of gas through pipelines”.
- Pursuant to the above and in specific reference to the regulation of competition in the electricity sector, **Act 447** in Part III (subsection 4(c)) provides for the function, duty and power of the Energy Commission to “promote competition in the generation and supply of electricity to, inter alia, ensure the optimum supply of electricity at reasonable prices.”
- Similarly for competition in the downstream pipeline gas supply sector, **Act 501** in Part III (paragraph 4(1)(g)) provides the specific function and duty of the Energy Commission to “enable persons to compete effectively in the supply of gas through pipelines.”

**To whom does it apply?**

The Competition Act 2010 applies to “**enterprises**”, defined as any entities carrying on commercial activities relating to goods or services, both within and outside Malaysia, provided that the commercial activity has an effect on competition in any market in Malaysia.

The Communications and Multimedia Act 1998 refers to any “conduct” in its broadest sense, encompassing any licensees engaged in commercial activity (Guideline on SLC, §6.1a). The energy supply laws govern the licenced electricity utilities and generators including the Independent Power Producers (IPPs), transmission and distribution licensees, licenced gas utilities and private gas licensees, all of whom perform their respective licenced activities in accordance with the competition provisions of the energy supply laws as regulated by the Energy Commission.

**Which practices does it cover?**

The Competition Act 2010 prohibits agreements which have the object or effect of significantly preventing, restricting or distorting competition, and the abuse of dominant position in any market for goods or services.

The Communications and Multimedia Act 1998 covers both concerted practices (agreements) and unilateral conduct with the purpose or effect of substantially lessening competition in the communications markets.

In accordance with the competition provisions under the energy supply laws, the Energy Commission promotes and safeguards competition and fair and efficient market conduct by persons governed under the laws as well as implementing numerous measures to prevent the misuse of monopoly or market power in the electricity and downstream pipeline gas supply markets.

**Are there proposals for reform?**

To date, there are no proposals for reform.

For the electricity supply sector, there are measures currently undertaken to enhance competition, for example to ensure transparency through competitive bidding for future power generation capacity.

For the downstream pipeline gas supply sector, a major reform has been introduced for Third Party Access (TPA) to the gas supply sector involving regasification facilities and gas delivery network. As a result, **Act 501** has been proposed to be amended including to enhance the existing competition provisions to be regulated by the Energy Commission.

**The Authorities**

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**Who is the enforcement authority?**

Pursuant to the Competition Commission Act 2010, the enforcement authority is the **Malaysia Competition Commission**. The Malaysia Competition Commission became fully operational on 1st April 2011.

Under Section 16 of the Act, the Malaysia Competition Commission has both enforcement and implementation powers (e.g., through guidelines). It also has advisory powers towards the Minister and other public authorities (e.g., through recommendations), as well as advocacy functions, carries out general studies in relation to issues connected with competition in the Malaysian economy or particular sectors thereof, and collects and publishes information.

For the electricity supply and downstream pipeline gas supply (“energy supply sectors”) and including competition under the energy supply laws, the Energy Commission is the enforcement authority.

### Are there any sector-specific regulatory authorities (RAs) with competition enforcement powers?

The **Malaysian Communications and Multimedia Commission** is responsible for the enforcement of the competition-related provisions under the Communications and Multimedia Act 1998, while the Energy Commission is responsible for the enforcement of the competition-related provisions under the **Energy Commission Act 2001**, the Electricity Supply Act 1990 and the Gas Supply Act 1993.

- any conduct by a licensee which has the purpose of substantially lessening competition in a communications market (Section 133 of the Communications and Multimedia Act 1998 and Guideline on SLC);
- arrangements and practices, whether legally enforceable or not, which provide for rate fixing, market sharing, boycott of a supplier of apparatus, or boycott of another competitor (Section 135 of the Communications and Multimedia Act 1998); and
- mandatory tying or linking arrangements regarding the provision or supply of products and services (Section 136 of the Communications and Multimedia Act 1998).

## Anticompetitive practices

### Agreements

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#### Which agreements are prohibited?

The Competition Act 2010 prohibits any horizontal or 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. The term “agreement” is defined as “any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices”.

In particular, the Competition Act 2010 prohibits horizontal agreements aimed at fixing prices or other trading conditions; sharing markets or sources of supply; limiting or controlling production, market outlets or market access, technical or technological development, or investment; or bid rigging.

In the **communications markets**, the Communications and Multimedia Act 1998 contains a prohibition of the following practices:

According to the Guideline on SLC (§6.1b), examples of prohibited conducts include, but are not limited to: predatory pricing, market foreclosure, refusal to supply, bundling, parallel pricing.

These prohibitions apply both to multilateral conduct (i.e., agreements) and unilateral conduct.

In the energy supply sectors, the competition provisions under the energy supply laws enable the Energy Commission to regulate the conduct of the parties governed under the laws, including agreements for the supply of electricity or gas through pipelines.

#### Which agreements may be exempted?

Agreements which are prohibited under the Competition Act 2010 can be exempted, provided that: (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 enterprises concerned to eliminate competition completely in respect of a substantial part of the goods and services.

More detailed information can be found in the **Guidelines on Chapter 1 Prohibition (Anti-competitive Agreements)**. This can be viewed at [www.mycc.gov.my/guideline.asp](http://www.mycc.gov.my/guideline.asp)

In the **communications markets**, under Section 140 of the Communications and Multimedia Act 1998 “any conduct which may be construed to have the purpose or the effect of substantially lessening competition in a communications market” can be authorised by the Malaysian Communications and Multimedia Commission when this is in the national interest. This will normally require that the national interest in the conduct outweighs the possible negative effects (if any) of substantially lessening competition in a communications market. The Malaysian Communications and Multimedia Commission can also authorise a conduct subject to undertakings.

In the energy supply sectors, the competition provisions under the energy supply laws enable the Energy Commission to regulate competition and the parties governed under the laws except that the power to issue any exemption is only exercisable by the Ministers responsible for electricity and downstream pipeline gas supply respectively.

**Is there any formal notification requirement and to which authority should a notification be made?**

An enterprise may apply for an individual exemption to the Malaysia Competition Commission, which may grant an exemption if the abovementioned requirements are fulfilled. An exemption may be subject to conditions or obligations, or granted for a limited duration.

The Malaysia Competition Commission may cancel the exemption, vary or remove any condition or obligation, or impose additional conditions or obligations in case of a material change of circumstances or a breach of an obligation. The exemption may also be cancelled when it is based on false or misleading information or any condition has been breached.

The Malaysia Competition Commission may also, after public consultation, grant block exemptions for agreements falling within a particular category.

Neither the Communications and Multimedia Act 1998 nor the Energy Act set up any notification procedure for exemption from the competition provisions. However in the communications markets, according to Section 140(1) of the Communications and Multimedia Act 1998, a licensee may apply to the Communications and Multimedia Commission for authorisation, “prior to engaging into any conduct which may be construed to have the purpose or the effect of substantially lessening competition in a communications market”.

For the energy supply sectors, any notification may be issued in the formal process as practiced by Government bodies and agencies for example, through official circulars and notices. In addition, notification may also be made by the Ministers in accordance with the legal process under the energy supply laws i.e. by publication in the Gazette.

**Procedure and timeline**

The Competition Act 2010 does not specify the procedural steps and timeline for an exemption. Guidelines shall be issued in due course.

Neither the Communications and Multimedia Act 1998 set up any notification procedure for exemption from competition provisions.

In the energy supply sectors, the procedures and timeline, wherever applicable, are usually included in the formal notification to be issued.

## **Monopoly and dominant position**

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### **Is monopoly or dominant position regulated?**

The Competition Act 2010 prohibits an enterprise 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.

Both the Communications and Multimedia Act 1998 and the energy supply laws prohibit specific unilateral conduct by enterprises in a position of monopoly or dominant position in those sectors.

### **What is a dominant or a monopoly position?**

The Competition Act 2010 defines a dominant position as “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”.

In the **communications markets**, according to the Guideline on Dominant Position (§7.2), “the primary characteristic of a firm in a dominant position in a market is its ability to undertake conduct to a significant extent independently of its competitive rivals and its customers (whether consumers or intermediate industry participants), and the pressures they would exert on the firm in a competitive market. This independence generally manifests itself as the ability to independently fix prices, although it extends to the ability to fix levels of output or the quality of output with similar disregard for the responses of rivals and customers in the market”.

In the energy supply sectors, the energy supply laws regulate monopoly or market power and the Energy Commission implements measures to prevent to prevent any misuse or abuse of dominant position or monopoly.

### **When are monopoly and dominant positions prohibited?**

Under the Competition Act 2010, dominance will only be prohibited if there is abuse. According to Section 10(2) of the Competition Act 2010, an abuse of a dominant position includes, but is not limited to, the following conducts:

- (a) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer;
- (b) limiting or controlling production, market outlets or market access, technical or technological development, or 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) 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.

In the **communications markets**, the Communications and Multimedia Act 1998 contains a prohibition of the following practices:

- any conduct by any licensee which has the purpose of substantially lessening competition in a communications market (Section 133 of the Communications and Multimedia Act 1998 and Guideline on SLC);
- understandings, agreements or arrangements which provides for rate fixing, market sharing, boycott of a supplier or competitor (Section 135 of the Communications and Multimedia Act 1998); and
- mandatory tying or linking arrangements regarding the provision or supply of products and services (Section 136 of the Communications and Multimedia Act 1998).

According to the Guideline on Substantial Lessening of Competition (§6.1b), examples of conducts which would concern the Malaysian Communications and Multimedia Commission include (but are not limited) to: predatory pricing, market foreclosure, refusal to supply, bundling.

According to Section 139, the Malaysian Communications and Multimedia Commission may direct a licensee in a dominant position in a communications market to cease a conduct in that communications market which has, or may have, the effect of substantially lessening competition in any communications market, and to implement appropriate remedies.

In the **energy markets**, the energy supply laws provide for the prevention of misuse of monopoly or market power in respect of the generation, production, transmission, distribution and supply of electricity and the supply of gas through pipelines and the Energy Commission implements the necessary measures, for example licensing requirements, to regulate the competition matters and the parties governed.

#### **Can abuses of dominant or monopoly position be exempted?**

According to Section 10(3) of the Competition Act 2010, Section 10 “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”.

More detailed information can be found in the **Guidelines on Chapter 2 Prohibition (Abuse of Dominant Position)**. This can be viewed at [www.mycc.gov.my/guideline.asp](http://www.mycc.gov.my/guideline.asp)

In the **communications markets**, under Section 140, “any conduct which may be construed to have the purpose or the effect of substantially lessening competition in a communications market” can be authorised by the Malaysian Communications and Multimedia Commission when this is in the national interest. This will normally require that the national interest in the conduct outweighs the possible negative effects (if any) of substantially lessening competition in a communications market. The Malaysian Communications and Multimedia Commission can also authorise a conduct subject to conditions.

In the **energy supply sectors**, a similar approach is implemented under the exemption powers of Ministers as aforementioned (page 24).

## Merger control

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There is no merger control regulation under the Competition Act 2010.

## Procedure

### Investigations

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The Competition Act 2010 provides the Competition Commission with powers to investigate any infringement or offence in accordance to the rules and procedures under Part III of the same Act.

Enforcement in the **communications markets** follows the rules and procedures of the Communications and Multimedia Act 1998. As for the **energy supply sectors**, the Electricity Supply Act 1990 and the Gas Supply Act 1993 provide the Energy Commission with investigative powers and procedures in respect of accidents, offences, information gathering and any non-compliance or contravention of these Acts and the Regulations made thereunder.

#### How does an investigation start?

Under the Competition Act 2010, an investigation can start on the Competition Commission's initiative, on the direction of the Minister or following a complaint.

The complaint shall specify the person against whom it is made and details of the alleged infringement or offence under the Act (Section 15(2) of the Competition Act 2010). If the Competition Commission decides not to investigate a complaint, it shall inform the complainant and state reasons for the decision (Section 16(2) of the Competition Act 2010).

More detailed information can be found in the

**Guidelines on Complaints Procedures.** This can be viewed at [www.mycc.gov.my/guideline.asp](http://www.mycc.gov.my/guideline.asp)

In the **communications markets**, the Malaysian Communications and Multimedia Commission is empowered to start an investigation upon its own initiative, following a complaint, or if directed by the Minister (Sections 68 and 69 of the Communications and Multimedia Act 1998).

A complainant must identify the person against whom the complaint is made.

The Malaysian Communications and Multimedia Commission will inform the respondent that the matter is being investigated at the beginning of the investigative phase (Section 70 of the Communications and Multimedia Act 1998). During the preliminary and investigating phases, the Communications and Multimedia Commission may ask further information from all related parties.

In the **energy supply sectors**, there are provisions on the conduct of investigation by the Commission through their authorized officers which also covers competition-related matters under the energy supply laws. For **Act 447**, Part III sections 4A until 8 provide for such powers and procedures of investigation and in the case of **Act 501**, similar provisions are contained in Part IV sections 4A until 9.

Lastly, Part III paragraph 14(1)(o) of the Energy Commission Act 2001 [Act 610] grants the Energy Commission the power to carry on all such activities as may appear necessary, advantageous or convenient for the purpose of carrying out or in connection with the performance of its functions.

#### What are the procedural steps and how long does the investigation take?

During the investigation, the Malaysia Competition Commission may give directions to prevent

serious and irreparable damage, economic or otherwise, or for protecting the interests of the public, when it has reasonable grounds to believe that any prohibition under the Act has been infringed or is likely to be infringed (Section 35 of the Competition Act 2010).

Upon completion of investigation, when it considers that one of the prohibitions under the Competition Act 2010 has been infringed, the Malaysia Competition Commission shall give written notice of its proposed decision to the enterprise(s) that may be directly affected by the decision (Section 36).

The enterprise(s) concerned may submit written representations and/or ask for oral representations, in which case an oral hearing will take place (Section 37).

The Competition Act 2010 does not introduce further detailed rules on procedural steps and timing. The Malaysia Competition Commission may decide to introduce procedural rules in the future.

In the **communications markets**, there are three stages: preliminary phase (up to 30 days); investigation phase (up to 90 days, and further 90 days if it involves the assessment of a dominant position); decision-making phase (up to 30 days).

For the energy supply sectors, the provisions on investigation powers and procedures under **Act 447** and **Act 501** do not limit the process and period of investigation and any further action to be taken by the Energy Commission.

### What are the investigation powers?

The Competition Act 2010 confers extensive investigation powers on the Competition Commission.

In general, the Commission officer investigating any offence under the Act “shall have all or any

of the powers of a police officer in relation to police investigation in seizable cases as provided for under the Criminal Procedure Code” (Section 17(2)).

In particular, the Commission has the power to require information (Section 18), take and retain documents (Section 19), access records and other material (Section 20), including computerized data (Section 27). The Commission can also, under the warrant of a Magistrate, enter and search premises and seize relevant material (Section 25). These activities can be conducted without a warrant when, due to the time needed for search warrant, the investigation would be adversely affected or when evidence is likely to be tampered with, removed, damaged or destroyed (Section 26).

In the **communications markets**, the investigation powers of the Malaysian Communications and Multimedia Commission are outlined in Part V, Chapters 4 and 5 and Part X, Chapter 3 of the Communications and Multimedia Act 1998. Under Section 246 of the Communications and Multimedia Act 1998, the Malaysian Communications and Multimedia Commission may investigate “the activities of a licensee or other person material” to ensure compliance with the Communications and Multimedia Act 1998 or its subsidiary legislation.

In the **energy supply sectors**, the investigation powers and procedures of the Energy Commission are specified under Part III, Sections 4A to 8 of the Electricity Supply Act 1990 [**Act 447**] and Part IV, Sections 4A to 9 of the Gas Supply Act 1993 [**Act 501**]. The Energy Commission has the general power to investigate any accident, misconduct, non-compliance and commission of offences under the said Acts and Regulations made under the Acts.

### What are the rights and safeguards of the parties?

The Competition Act 2010 guarantees, in particular, confidentiality (Section 21) and privileged communication between a professional legal adviser and his client (Section 22).

In the communications, as there are no specific provisions on the rights and safeguards of the parties in competition-related investigations, it is advisable to refer to the provisions on investigatory powers and limits of the respective authorities' officials, outlined in Part X, Chapter 3 of the Communications and Multimedia Act 1998.

In the energy supply sectors, the rights of any party are safeguarded under the general provisions of the energy supply laws. The powers and procedures of investigation, prosecution of offences in court and the determination of disputes by the Commission under the energy supply laws are to be performed strictly and in accordance with the requirements of the laws and in good faith. In this respect, section 37 of **Act 610** specifies that "The Public Authorities Protection Act 1948 [**Act 198**] shall apply to any action, suit, prosecution or proceedings against the Commission or a member of the Commission, a member of a committee, and an officer or agent of the Commission in respect of any act, neglect or default done or committed by him in good faith or any omission omitted by him in good faith, in such capacity."

### Is there any leniency programme?

Section 41 of the Competition Act 2010 introduces a leniency regime.

A reduction of up to a maximum of one hundred percent of the applicable penalty applies to any enterprise which has admitted its involvement in an anti-competitive agreement under Section 4(2) and provided information or other form of

co-operation to the Competition Commission. Different percentages of reductions apply depending on (a) whether the enterprise was the first person to bring the suspected infringement to the attention of the Commission; (b) the stage in the investigation at which an involvement in the infringement was admitted or any information or other co-operation was provided; or (c) any other appropriate circumstance.

The Communications and Multimedia Act 1998 provide for a leniency programme.

In the energy supply sector, the energy supply laws provide for compounding of offences i.e. reduction of up to 50% of the maximum fine with the result that the offender will not be prosecuted further in court if the compound is awarded. For electricity supply under **Act 447**, the compounding provisions of Part IX section 43 allows the Chairman of the Energy Commission with the written consent of the Public Prosecutor to compound certain offences, including the offence of obstruction of investigation, access to premises or information or the giving of false information by any person on any matter (section 8).

Under **Act 501**, Part VIII section 34 gives power to the Minister to prescribe by order in the Gazette, any offence pertaining to the supply of gas through pipelines in the Act or any regulation made thereunder as an offence which may be compounded. Pursuant to this, the Gas Supply (Compoundable Offences) Order 2006 [P.U.(A)320] allows for the compounding of all offences except offences relating to investigation, inquiry and obstruction or giving false information to an authorized officer of the Commission (sections 5(4), 29(5) and 30(3) respectively). Consequently, offences by a licensee under the Act, including activities beyond area of supply and non-compliance of licence conditions, may be compounded (subsections 30(2) and 30(4) respectively).

### Is it possible to obtain any informal guidance?

For further enquiries please refer to the Guidelines and Publications on the Competition Act 2010 which can be obtained at [www.mycc.gov.my](http://www.mycc.gov.my) or contact:

Malaysia Competition Commission (MyCC)  
Level 15, Menara SSM, No. 7 Jalan Stesen  
Sentral 5, KL Sentral,  
59623 Kuala Lumpur, Malaysia

 +603 22732277  
 +603 2272 1692

Specific guidance on the application of the Communications and Multimedia Act 1998 can be obtained at the following contacts:

Malaysian Communications and  
Multimedia Commission  
Competition & Access Department  
Market Regulation Division  
63000 Cyberjaya, Malaysia

 + 603 8688 8000  
 + 603 8688 1001  
 [Aduan\\_SKMM@cmc.gov.my](mailto:Aduan_SKMM@cmc.gov.my)  
 [www.skmm.gov.my](http://www.skmm.gov.my)

The relevant Unit and Department in the Energy Commission can be contacted as follows:

Energy Commission  
Legal Unit  
Energy Management and  
Industry Development Department  
7th and 5th Floors  
No. 12 Jalan Tun Hussein  
Precinct 2  
62100 Putrajaya MALAYSIA

 + 603 88708500  
 + 603 88888648  
 [www.st.gov.my](http://www.st.gov.my)

## Adjudication

### What are the final decisions?

Under the Competition Act 2010, further to the investigation the Competition Commission may take:

- (a) a decision that there is no infringement under the Act, in which case the Commission shall give notice of the decision to any person affected by the decision, stating the reason for the decision (Section 39);
- (b) a decision finding an infringement under the Act and requiring that the infringement be ceased immediately. The decision may specify the appropriate steps which are required for bringing the infringement to an end, and may impose a financial penalty or give any other appropriate direction; the Commission shall state the reasons for the decision (Section 40).

Under Section 43, the Competition Commission may also, subject to possible conditions, accept undertakings to do or refrain from doing anything, as the Commission considers appropriate, in which case the Commission shall close the investigation without making any finding of infringement and shall not impose a penalty.

In the **communications markets**, under Section 139 of the Communications and Multimedia Act 1998, the Communications and Multimedia Commission may direct a licensee with a dominant position in a communications market to cease a conduct which has, or may have, the effect of substantially lessening competition. The Communications and Multimedia Commission may also seek interim or interlocutory injunctions under Section 142 or seek the imposition of fines under Section 143, against a licensee engaging in any conduct prohibited under Section 133. The offence is prosecuted by the Public Prosecutor in the Sessions Court.

In the **energy supply** sectors the Energy Commission may make use of the general powers of determining disputes, holding enquiries and investigation and prosecution of offences in accordance with the energy supply laws. For electricity supply, **Act 447** provides for such powers in sections 30, 34, 5 to 7 and 42 respectively. Under **Act 501**, similar provisions are found under sections 29, 5 to 8 and 9 respectively.

#### **What are the sanctions?**

Under Section 40 of the Competition Act 2010, the Competition Commission may impose a financial penalty not exceeding ten percent of the worldwide turnover of an enterprise over the period during which an infringement occurred, or give any other appropriate direction.

Specific provisions on general penalties, compounding of offences and offences by body corporate are established under Sections 61 to 63.

In the **communications markets**, under Section 143, a person who contravenes any of the prohibitions under the Act shall be liable to a fine not exceeding five hundred thousand MYR and/or to imprisonment for a term not exceeding five years and shall also be liable to a further fine of one thousand MYR for every day or part of a day during which the offence is continued after conviction.

In the **energy supply sectors**, there are provisions on the sanctions applicable to include anti-competitive conduct or abuse of monopoly, especially by licensees. Under **Act 447**, Part IX subsections 37(6) and (7) provides for the offence by a licensee of carrying out activities outside the area of supply and the offence of non-compliance with licence conditions for which the punishments are provided i.e. RM 5,000.00 fine and RM 10,000.00 fine respectively. These offences are non-compoundable.

For the compoundable offence of obstruction and giving of false information under section 8, the punishment is a fine not exceeding RM 5,000.00 or imprisonment for a term not exceeding 2 years or both.

Under **Act 501**, Part VIII subsections 30(2) and (4) provides for the compoundable offence by a licensee of carrying out activities outside the area of supply and the offence of non-compliance with licence conditions for which the punishments are provided i.e. a fine not exceeding RM 100,000.00 or imprisonment not exceeding 5 years or both and RM 10,000.00 fine respectively.

## Judicial review

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### Can the enforcement authorities' decisions be appealed?

Section 44 of the Competition Act 2010 establishes a **Competition Appeal Tribunal**, which shall have exclusive jurisdiction to review any decision made by the Competition Commission under Sections 35 (interim measures), 39 (finding of non-infringement) and 40 (finding of an infringement).

Under Section 53 of the Act, pending the decision of an appeal by the Competition Appeal Tribunal, a decision of the Competition Commission is enforceable, except where a stay of decision has been granted by the Competition Appeal Tribunal.

Under Section 58(2) of the Act, the Competition Appeal Tribunal may confirm or set aside the appealed decision, or any part of it, and may: (a) remit the matter to the Commission; (b) impose or revoke, or vary the amount of, a financial penalty; (c) give such direction, or take such other step as the Commission could itself have given or taken; or (d) make any other decision which the Commission could itself have made. A decision of the Competition Appeal Tribunal is final.

In the **communications markets**, according to Section 18 of the Communications and Multimedia Act 1998, the Appeal Tribunal, established by the Ministry, may review any decision or direction (but not a determination) of the Communications and Multimedia Commission. Under Section 18 (2) of the Act, any decision by the Appeal Tribunal is final and binding on the parties to the appeal and it is not subject to further appeal.

In the **energy supply sectors**, the energy supply laws provide for appeals to the Minister from the decisions of the Energy Commission. Under **Act 447**, the relevant provisions are in Part VIII subsection 34(2) where any person aggrieved by

a decision of the Commission "may apply to the Minister for a re-consideration of the matter in dispute."

Under **Act 501**, similar provisions are found under Part VII subsection 29(8).

## Private enforcement

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### Are private actions for damages available?

Under Section 64 of the Competition Act 2010, any person who suffers loss or damage directly as a result of an infringement of any prohibition under Part II shall have a right of civil action for damages against any enterprise which is, or which has been, party to the infringement. The action may be brought regardless of whether the applicant dealt directly or indirectly with the enterprise.

In the energy supply sectors, the licensees which supply electricity or gas, as the case may be, hold a monopoly in their respective sectors. As such they cannot cease or reduce the supply of electricity or gas to customers except in the circumstances as provided under the laws since the customers have no other source of supply.

Under **Act 447**, Part IV subsection 17(3) allows for a claim for damage to person or property where "the damage or cessation is shown to have resulted from negligence on the part of persons employed by the licensee, his agents or servants, as the case may be, or from his faulty construction of the installation."

Under **Act 501**, Part VI subsection 20(4) allows for a claim for "damage to any person or property for any cessation or reduction of the supply of gas which is shown to have resulted from negligence on the part of persons employed by the licensee, his agents or servants, as the case may be, or from his faulty construction of the pipeline or installation."

## Exclusions

### **Is there any exclusion from the application of the Law?**

According to the Second Schedule of the Competition Act 2010, the above prohibitions do not apply to the following instances:

- (a) An agreement or conduct to the extent to which it is engaged in an 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.

The Commissions and Multimedia Act do not provide for specific exclusions.

For the energy supply sectors, this matter has already been covered under the exemptions as aforementioned (page 24).