سوروهنجاي ڤرساءيڠن بروني دارالسلام
COMPETITION COMMISSION
BRUNEI DARUSSALAM

Guidelines

ANTI-COMPETITIVE AGREEMENTS (SECTION 11)

These Guidelines are intended to be an introductory text and guidance document on how the Commission enforces and administers the provisions under the Competition Act ("Act"). These Guidelines, however, are not a substitute for the Act or any Regulations made pursuant to the Act. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the Competition Commission of Brunei Darussalam ("CCBD"). In applying these Guidelines, the facts and circumstances of each case will be considered in totality. These Guidelines may be revised should the need arise. In the event that any of the provisions in these Guidelines are inconsistent or incompatible with the provisions of the Act, the provisions of the latter shall take precedence.

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1. Introduction

1.1. Section 11 of the Act prohibits agreements between undertakings, decisions by associations of undertaking or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Brunei Darussalam, unless they are excluded or exempted in accordance with the provisions of Part II of the Act.

1.2. Section 11 prohibition may also be referred to as Anti-Competitive Agreements or cartels.

1.3. Section 11 prohibition came into force on 1 January 2020.

1.4. These Guidelines provide explanation on the prohibitions of Anti-Competitive Agreements under Section 11 and detail the examples of agreements that may fall under the prohibition.

2. Scope and application of Section 11 prohibition

2.1. Section 11 prohibition applies to agreement between undertakings which has an object or effect to prevent, restrict or distort competition within Brunei Darussalam regardless if:
(a) the agreement is made in or outside Brunei Darussalam; or
(b) any party to the agreement is outside Brunei Darussalam.

2.2. An agreement may be deemed to have an object or effect to prevent, restrict or distort competition with Brunei Darussalam 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 source of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by other parties of supplementary obligation which, by their nature or according to commercial usage, have no connection with subject of such contracts; or
(f) perform an act of bid rigging.

3. Interpretation of terms

3.1. Agreements

> "agreement" includes any agreement, arrangement, understanding, undertaking or promise, whether expressed or implied, written or oral;

3.1.1. The definition of agreement can be stipulated broadly to include both formal or informal agreements in which ever manner it is reached. Whether written or oral; via a physical meeting of the parties or through an exchange of letters, texts, e-mails or telephone calls or any other means.

3.1.2. Any party present during the conclusion of the agreement, regardless,
may or may not explicitly express the acceptance to the agreement;
may or may not play an active role in formulating the agreement; or
may or may not fully commit to its implementation,
may be sufficient to be later implicated as a party to that agreement.

3.1.3. A party which is not part of the agreement shall effectively distance or withdraw itself from the discussion and clearly make its objection from the agreement.

3.1.4. Section 11 prohibition applies to horizontal agreements that are made by two or more undertakings operating at the same level of the production or distribution chain.

3.1.5. Vertical agreements, as defined in Section 8 of the Third Schedule are excluded from the Section 11 prohibition. These are agreements entered into between two or more undertakings each of which operates at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain products. For example, an undertaking produces a raw material that the other undertaking uses as an input; or the first undertaking is a manufacturer, the second undertaking is a wholesaler and the third undertaking is a retailer. This does not preclude an undertaking from being active at more than one level of the production or distribution chain.

3.2. Undertakings

> "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.

3.2.1. It includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations, and non-profit-making organisations, regardless of its legal and ownership status and the way in which it is financed.

3.2.2. The key consideration is whether the undertaking is capable of engaging, or is engaged, in commercial or economic activity. This is generally understood as activity consisting of offering products in a market regardless of whether the activity is intended to earn a profit. An entity may engage in commercial or economic activity in some of its functions but not others.

3.2.3. The Section 11 prohibition does not apply to agreements involving two or more entities under single undertaking or single economic unit. The Commission's deduction to a single economic unit shall not be limited within the definition of company in other written law. The assessment needs to take into account the fact and circumstances of each of each case. Generally, two or more entities are considered as single economic unit when a company have decisive influence over the commercial policy of other company, either through legal or *de facto* control. In particular, an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third company, will not be agreements between undertakings 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.

3.3. Decision by association of undertakings

3.3.1. The Section 11 prohibition also covers decisions by associations of undertakings. Trade associations are the most common form of association of undertakings but the provisions are not limited to any particular type of association. Examples of associations of undertakings include, but are not limited to:

(a) trade associations,
(b) cooperatives,
(c) chambers of commerce,
(d) professional associations or bodies,
(e) societies, and
(f) club.

3.3.2. Trade and other associations generally carry out legitimate functions intended to promote the competitiveness of their industry sectors. However, undertakings participating in such associations may collude and co-ordinate their actions, which could infringe the Section 11 prohibition. The association itself may also make certain decisions or perform actions that could infringe the

Section 11 prohibition. The Commission considers 'decisions by associations of undertakings' to include, without limitation:
(a) the constitution of the association,
(b) the rules of the association,
(c) resolutions,
(d) rulings,
(e) decisions,
(f) guidelines, and
(g) recommendations of the association.

3.3.3. An association's co-ordination of its members' conduct in accordance with its constitution may also be a decision even if its recommendations are not binding on its members, and may not have been fully complied with. For example, recommended fee scales and "reference" prices of trade are decisions of associations of undertakings that would likely be considered as having the object of harming competition.

3.3.4. Where there has been an infringement of the Section 11 prohibition, the individual members of the association as well as the association itself may be fined if decision made by the decision is in breach of the Act.

3.4. Concerted practices

> "concerted practice" means any form of coordination between undertakings which knowingly substitutes practical co-operation between them for the risks of competition, and includes any practice which involves direct or indirect contact or communication between undertakings, the object or effect of which is either- (a) to influence the conduct of one or more undertakings in a market; or (b) to disclose the course of conduct which an undertaking 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;

3.4.1. A concerted practice may exist where there is informal co-operation, without any formal agreement or decision. A concerted practice would be found to exist if parties knowingly substituted the risks of competition with co-operation between them.

3.4.2. The following may be considered in establishing if a concerted practice exists:
(a) whether the parties knowingly entered into practical co-operation;
(b) whether behaviour in the market is influenced as a result of direct or indirect contact or communication between undertakings;

(c) whether parallel behaviour results from contact between undertakings leading to conditions of competition which do not correspond to normal conditions of the market;
(d) the structure of the relevant market and the nature of the product involved;
(e) the number of undertakings in the market; and
(f) whether they have similar cost structures and outputs.

3.4.3. It is important to note that, parallel behaviour by competitors in the market (for example where their prices are similar) does not mean that the competitors are involved in a concerted practice or have made an agreement. If a market is highly competitive, it is to be expected that competitors will respond almost immediately to each other's pricing in the market. For example, if one competitor lowers its price, others are likely to respond to avoid losing customers. This behaviour is the very essence of competition and is not a concerted practice.

3.5. Object [of harming competition]

3.5.1. The Commission will look into the context of the agreement, both economic and legal context, in examining whether an agreement has the object of harming competition. In general, the Commission will not just examine the actual common intentions of the parties to an agreement but also assess the aims pursued by the agreement in light of the agreement's economic context.

3.5.2. Nonetheless, agreements between competitors to fix prices, to share markets, to restrict output or to rig bids are agreements which the Commission has established to have the object of harming competition and are per-se illegal under the Act.

3.6. Effect [of harming competition]

3.6.1. Where an agreement has an anti-competitive object, it is not necessary for the Commission to demonstrate that the agreement has an anticompetitive effect. It is sufficient for the Commission to show that the agreement has the potential to harm or is capable of harming competition in the relevant context.

3.6.2. If an agreement does not have an anti-competitive object, it may nevertheless infringe Section 11 of the Act if it has an anti-competitive effect.

3.6.3. For an agreement to have an anti-competitive effect on competition, it must have, or be likely to have, an adverse impact on one or more of the parameters of competition in the market. Potential anti-competitive effect includes:
(a) higher prices
(b) reduced production
(c) welfare transfer from consumer to producers

(d) deadweight loss
(e) costs of forming and enforcing cooperation/collusion/cartel
(f) protects inefficient firms
(g) increased consumer search costs
(h) lower quality and variety of products
(i) decrease productive efficiency or innovation

4. Examples of agreements that may breach the Section 11 prohibition

This part contains a non-exhaustive set of example of agreements which might adversely affect competition. Equally, there will be other agreements which are prohibited because of their particular conditions or restrictions but which are not listed in Section 11(2) of the Act or below:

(a) directly or indirectly fixing prices;
(b) bid rigging (collusive tender);
(c) sharing markets or sources of supply;
(d) limiting or controlling production or investment;
(e) exchange of information;
(f) fixing trading conditions;
(g) restricting advertising;
(h) setting technical or design standards.

Other restrictions of competition, if found to be restricting competition by object will similarly be regarded as restricting competition to an appreciable extent.

4.1. Price fixing

4.1.1. Agreements that have the object to fix or effect of fixing prices of any goods or services will be regarded as restricting competition appreciably. It includes fixing the price itself or the component which may indirectly affect the prices, such as:
(a) discount;
(b) transport charges;
(c) payment for additional services;
(d) credit terms; or
(e) terms of guarantees.

4.1.2. Price fixing may also involve establishing the amount or percentage by which prices are to be increased or establishing a range which limit or restrict the independent of price movement by businesses.

4.1.3. Price fixing may also include an agreement or arrangement that indirectly restrict price competition in some way, such as:
(a) to adhere to published price lists;

(b) not to quote a price without consulting potential competitors; or
(c) not to charge less than any other price in the market.

4.1.4. Recommendations of a trade association in relation to price, or collective price-fixing or price co-ordination of any product, may be considered to be price-fixing, regardless of the form it takes. Price recommendations by trade or professional associations is regarded to have appreciable effect to competition as they create focal points for prices to converge, restrict independent pricing decisions and signal to market players what their competitors are likely to charge.

4.2. Bid rigging

4.2.1. Bid rigging, or commonly known as collusive tender, occurs when businesses conspire to fix prices, lower quality of products or services or otherwise coordinate their bids by allowing one cartel members to 'win' the tender through predetermination of winner. It refers to an agreement among some or all businesses to limit or eliminate competition during the tendering process.

4.2.2. Bid-rigging involves may involve any of the following:
(a) one or more bidders agree to submit bids with higher prices or less favourable terms than the "chosen" bidder, who is the designated winner (complementary or cover bidding);
(b) one or more potential bidders agreeing to refrain from submitting a bid or withdrawing previously submitted bid in favour of the designated winner (bid suppression or bid withdrawal); or
(c) businesses take turn to be the winner, by agreeing who will submit the lowest bid.

4.2.3. Bid-rigging practices should be distinguished from legitimate forms of joint tendering. While bid-rigging will be considered as having the object of harming competition, joint tendering will generally be assessed by reference to its actual or likely effects on competition.

4.3. Market sharing

4.3.1. Market sharing involves undertakings agreeing to share markets, whether by territory, type or size of customer, or in some other ways, so that the undertakings are "sheltered" from competition in their allotted portion of the market. This includes agreement not to compete in the production of certain products; not to sell in each other territories; or not to poach each other allocated customers.

4.4. Limiting production

4.4.1. Agreement to limit production may include, but not limited to, the control of:
(a) production, by agreeing, for example, on production quotas, which has the same effect as setting a higher price;
(b) market access, by agreeing, for example, on where retail outlets are to be located, to "stay out of each others' markets" or to restrict access to the market;
(c) technical development, by agreeing, for example, not to introduce new products or setting technology standards collectively that prevents other competitors from selling; or
(d) investment, by agreeing, for example, not to add production capacity.

4.5. Exchange of information

4.5.1. Sharing of market information could fall within the conduct deemed to have an appreciable adverse effect on competition, depending on the type of information exchanged and the structure of the market to which it relates.

4.5.2. The exchange of information on prices may lead to price co-ordination and therefore diminish competition, which would otherwise be present between the undertakings. This will be the case whether the information exchanged relates directly to the prices charged or to the elements of a pricing policy, for example, discounts, costs, terms of trade and rates and dates of change.

4.6. Fixed trading conditions

4.6.1. Undertakings may agree to regulate the terms and conditions on which products are to be supplied, in addition to prices. Associations of undertakings may be involved in the formulation of standard terms and conditions to be applied by members. Standard conditions may also have an appreciable effect on competition if a large proportion of members adopt those standard conditions leaving customers little choice in practice.

4.7. Restricting advertising

4.7.1. Restrictions on advertising, whether relating to the amount, nature or form of advertising, have the potential to restrict competition. Whether the effect is appreciable depends on the purpose and nature of the restriction, and on the market in which it is to apply. Rules or decisions of associations of undertakings prohibiting members from soliciting for business, from competing with other members, or from advertising prices, or prices below a minimum or recommended level, are all likely to have an appreciable effect on competition.

4.8. Setting technical or design standard

4.8.1. Standardisation agreement may have an appreciable adverse effect on competition, in particular, if it includes restrictions on what the parties may produce or is a means of limiting competition from other sources by raising entry barriers. Standardisation agreements which prevent the parties from developing alternative standards or products that do not comply with the agreed standard may also have an appreciable adverse effect on competition.

5. Exclusion

5.1. An agreement that falls within the Third Schedule of the Act is excluded from the Section 11 prohibition by the virtue of Section 12 of the Act. See Annex 1 for Exclusion from the Section 11 prohibition.

6. Guidance

6.1. The CCBD does not issue an advice or guidance to a specific agreement. It is the obligation of the parties to an agreement to ensure that their business arrangement is lawful and does not breach the prohibitions of the Act.

6.2. The parties to an agreement are advised to seek independent legal advice.

7. Consequences of the violation of the Section 11 prohibition

7.1. Null and void the agreements

7.1.1. Any provision of an agreement entered into on or after 1 June 2019[1] shall be void and unenforceable to the extent that it infringes Section 11 prohibition.

7.2. Penalties

7.2.1. A financial penalty not exceeding 10 per cent or such percentage of such turnover of the business of the undertaking in Brunei Darussalam, for each year of the infringement may be imposed for a maximum of 3 years.

7.3. Right of private action

7.3.1. Any person or party who suffers any loss or damage directly as a result of an infringement of Section 11 prohibitions has a right of action for relief in civil proceedings against any undertaking which has been party to such infringement

[1] Date of announcement of Competition Act against Anti-Competitive Agreements or cartels

7.3.2. The right of private action can only be exercised after the CCBD has established that the undertaking has infringed the Section 11 prohibitions.

8. Leniency Regime

8.1. Leniency application is available to businesses that are part of Anti-Competitive Agreements or cartel under Section 11 of the Act.

8.2. Under Section 44 (2) of the Competition Act, CCBD may grant reductions of up to 100 per cent of financial penalties that could otherwise be imposed on infringing undertakings.

8.3. The CCBD may take into consideration any circumstances including the fact that the undertaking was the first undertaking to come forward to the CCBD about an infringement, the stage in the investigation or other form of cooperation to be provided, and the information already in possession of the CCBD.

8.4. The undertaking or its representative may approach the CCBD anonymously in an informal manner to obtain more information on the leniency application.

8.5. For more details, please refer to Guidelines on Leniency.

9. Complaint Procedures

9.1. The CCBD relies on complaint from public as one of its source to identify potential infringement to the Act.

9.2. Any party may file a complaint concerning to anti-competitive activities to the CCBD by completing and submitting a Complaint Form the CCBD.

9.3. More details on how the CCBD will process and assess complaints, please refer to Guidelines on Complaint Procedures.

Annex A: Exclusion under Third Schedule of Competition Act

The Third Schedule provides specific exclusions for the prohibition of Section 11, which may be summarized as follow:

1. Vertical agreement
2. Agreement with net economic benefits
3. Undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly
4. Agreement/conduct made in order to comply with legal requirements imposed by/under any written law
5. Necessary agreement to avoid a conflict with international obligation of Brunei Darussalam
6. Agreement made on the ground of public policy
7. Agreement/conduct that relates to any goods or services regulated by other competition law or code of practice
8. Agreement/conduct which relates to Clearing House established under Banking Order, 2006
9. Agreement/conduct that is directly related and necessary to the implementation of merger
10. Agreement/conduct that results or would result in a merger
11. Undertaking specified activities:
    (a) Supply of waste management services, including the collection, treatment and disposal of waste;
    (b) Supply of schedule bus services under the Road Traffic Act (Chapter 68);
    (c) Supply of goods and services specified in Monopolies Act (Chapter 73):
        i. Licensed to collect within and exporting from Brunei Darussalam the skins of crocodiles, pythons and monitor lizards
        ii. Dealing of all kinds of firearms and ammunition and all kinds of defence equipment and armaments for lawfully established security forces of the Government of His Majesty the Sultan and Yang Di-Pertuan

Annex B: Recommended practices for compliance with Section 11 prohibition

Apart from getting familiar with the key prohibitions of the Competition Act, businesses are also encouraged to adopt the following approaches to avoid infringing the Act:

1. Building a competition culture

The notion of competition culture may seem abstract, but businesses have adopted some of the following strategies to apply or foster a competition culture:

Source: Competition Compliance Toolkit for Businesses in ASEAN

2. Implementing competition compliance manual

As there is no "one size fit all" approach in developing competition manual, the following are common aspects of competition compliance strategy that businesses may implement:

Source: Competition Compliance Toolkit for Businesses in ASEAN

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