COMPETITION LAW GUIDELINES

INTERNAL USE

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1. INTRODUCTION

A. SCOPE OF THESE GUIDELINES

These Guidelines shall follow the principles of adoption applicable to GENTARI Governance documents where suitable, and guided by the following items:

a) Subject to item d) below, adoption of intent and principles of GENTARI governance documents is mandatory for GENTARI entities where GENTARI has more than fifty percent (i.e. majority) direct or indirect shareholding/interest and/or operational control at all phases of work activities.

b) In respect of entities where GENTARI does not have operational control or majority shareholding/interest, it will use its influence to promote the application to the GENTARI Governance documents and its underlying requirements, however, the Joint Venture Agreement will always prevail.

c) The application of GENTARI governance documents at entities shall not be in breach of the provisions in the respective entities' Constitutions and the current rulings and regulations of the relevant authorities where they operate.

d) Notwithstanding item a) above, GENTARI companies shall operate in accordance with the law of the country where it is domiciled and/or operates.

In light of the above, these Guidelines are intended to apply to every employee of every GENTARI group company worldwide. Any failure to comply with competition laws may have severe consequences for the entire GENTARI group.

B. PURPOSE OF THESE GUIDELINES

GENTARI is committed to complying with the competition laws of every country in which it operates. The purpose of this document is to outline the main competition laws applicable in most jurisdictions around the world and to provide guidelines to ensure that you strictly comply with these rules in your day-to-day business.

As a GENTARI employee, you must individually ensure that your actions towards business partners (e.g., customers and suppliers), competitors and enforcement authorities always reflect fair and proper business practices and are in compliance with the laws and regulations governing free and fair competition.

An employee participating in the violation of competition rules will be punished for any misconduct and any employee engaging in anti-competitive activities should expect to face disciplinary action by GENTARI. In case of doubt concerning the compliance of your activity with competition rules, kindly refer to your business legal counsel or the Legal Compliance Department ("**LCD**").

The objective of these Guidelines is to enable you to acquire a sufficient understanding of important aspects of competition laws to recognize situations and refer such issues and any questions to GENTARI's legal counsel. Further, these Guidelines are also intended to cultivate an effective compliance culture and ensure compliance by the global GENTARI group of companies.

These Guidelines have been developed as a primary reference document for all matters relating to competition law which might have potential implications on compliance. These Guidelines should be read together with:

(a) GENTARI Meetings and Information Sharing Protocol;

(b) GENTARI Competition Law Compliance Protocol on Merger and Acquisition Transactions;

and with any other compliance documents on competition law issued by Gentari.

C. BASIC PRINCIPLES OF COMPETITION LAWS

In most countries around the world, competition laws are aimed at ensuring that all market participants comply with the principles of free and fair competition.

Rules governing competition now exist throughout most of the industrialized world, and almost every country around the world, including Malaysia, has competition rules of its own. The most developed and strictest legislations concerning competition are found in the EU and the U.S. In terms of terminology, the EU will refer to competition laws whereas the U.S. will refer to antitrust laws, both of which will be interchangeably used in these Guidelines.

The main objective of competition law is to protect and foster free and fair competition among companies at all levels of trade. These laws are based primarily on the theory that consumers benefit by getting the best product at the lowest price through competition and that society's productive resources are best allocated and utilized by subjecting companies to the rigours of a competitive market. **Where competitors agree to fix prices, limit production, divide markets or allocate customers or carry out bid-rigging activities, consumers and society generally suffer. The same is true where a company abuses its dominant position in the market by engaging in exploitative or exclusionary conduct to foreclose actual or potential competitors.** In both cases, consumers and society lose the benefits of free competition. Competition laws protect businesses and consumers from unfair business dealings that threaten to deprive consumers of the benefits of competition.

Within the EU, Community rules and national rules on competition co-exist. Similarly, in the U.S., federal antitrust laws co-exist with State antitrust laws. National or State competition laws are generally similar to EU Competition Law and/or the U.S. Antitrust Law. GENTARI is a global company with operations around the world, many nations of which have antitrust/competition law regulations in place. As such, even though GENTARI is a Malaysian company, it is not only the Malaysian competition law that is of relevance for GENTARI's businesses. GENTARI employees should stand guided both by Malaysian competition laws as well as the antitrust/competition legal standards applicable in other jurisdictions.

A good reference point to note on this matter is on the application of competition law for upstream related activities in Malaysia. Under the Malaysian Competition Act 2010, domestic upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum are excluded from the application of domestic competition law. This, however, does not exclude the other activities of GENTARI which fall outside of the exclusion. In addition, the activities of GENTARI in its international operations are also subject to competition law requirements as applicable in other jurisdictions.

As a general rule, domestic competition laws apply to all companies doing business in that country, regardless of whether these companies are established in these countries or not; or regardless of whether a transaction is transacted within the country or not; so long as the transaction has an effect in a particular jurisdiction (the so-called "extra-territoriality" principle).

There are more than 130 different jurisdictions across the globe with each of them having developed their own competition legislation. Whilst many of these jurisdictions have qualities unique to themselves, they generally share many common competition law elements with other jurisdictions especially those of the EU and the U.S. Given that the EU

and U.S. are jurisdictions with leading competition authorities, many jurisdictions look to their competition laws as the legal standard. Since GENTARI operates in many such jurisdictions, GENTARI employees are expected to pay attention to the competition laws of the EU, U.S. and other jurisdictions to ensure compliance with all applicable competition laws.

Extraterritorial effect

Scenario

An agreement between 2 FPSO owners is signed in Indonesia agreeing to charge a minimum rate on all FPSO users in South East Asia, including in Malaysia. Would this agreement be prohibited under the Malaysian competition law?

Answer

Yes, it could. The Malaysian Competition Act 2010 will apply if there is an effect on competition in Malaysia even if the anti-competitive agreement was agreed or signed outside Malaysia.

D. MAIN CATEGORIES OF COMPETITION LAW VIOLATIONS

Competition and antitrust rules share three main prohibitions:

(a) Anti-competitive agreements which have as their object or effect the prevention, restriction or distortion of competition;

(b) Abuse of a dominant position or monopolization/attempted monopolization;

(c) Mergers or acquisitions between companies that may substantially lessen competition.

While most of the general principles set out in these Guidelines apply in most jurisdictions (including, e.g., the U.S., EU, UK, South Africa and Malaysia), certain specific rules may apply in some of the countries where GENTARI has a base or conducts business dealings.

E. CONSEQUENCES OF COMPETITION LAW VIOLATIONS

- **Fines.** Breaching competition laws can result in extremely serious financial penalties. For instance, in the EU, the European Commission may impose a fine of up to 10% of the annual worldwide turnover of the entire group, while in the U.S., fines for corporations can amount to US$100 million, twice the total gain to the conspirators, or twice the total loss to the victims, whichever is greater. In Malaysia, pursuant to Section 40(4) of the Competition Act 2010, the Malaysia Competition Commission ("**MyCC**") may impose a financial penalty of up to 10% of the worldwide turnover of an enterprise over the period during which an infringement occurred.

- **Prison sentence.** Violations of competition laws may in certain jurisdictions, including in the U.S. and UK, lead to criminal convictions of the involved employees.

- **Director Disqualification.** Violation of the competition laws of jurisdictions such as the UK or Australia might result in director disqualification, for example, the disqualification of directors who participate in cartel conduct.

- **Damages.** In addition, customers, competitors and/or consumers who have been harmed by the anti-competitive agreements or conduct of a company can issue a

damage claim against the participants to the infringement before national civil courts. Actions for damages have existed for a long time in the U.S. and are now becoming increasingly more common in the EU, especially in the form of follow-on actions (i.e., actions which follow a prior finding of an infringement by a competition authority).

- **Adverse publicity and waste of internal resources.** Competition law infringements can cause considerable damage to GENTARI in terms of reputation (i.e., negative press coverage) and lead to significant additional costs, in particular, legal fees. Furthermore, an investigation by competition authorities is burdensome and time-consuming and entails a significant allocation of internal resources in terms of time and money.

- **Contractual implications.** Finally, antitrust violations may also have other civil consequences such as the nullification of contracts or of provisions that infringe the relevant competition laws (including for example in key licences or supply contracts) or require remedial action (like making good any illegal price increase imposed on customers).

These Guidelines cannot cover all facts and circumstances that you may encounter in your daily business dealings. Therefore, you are urged to contact your business legal counsel or LCD if you have any doubts as to the lawfulness of any situation or business dealing as regards competition laws.

2. MAIN PROHIBITIONS OF COMPETITION LAW

A. PROHIBITION ON ANTI-COMPETITVE AGREEMENTS

Competition laws throughout the world generally **prohibit agreements between enterprises, decisions by associations or concerted practices, which have as their object or effect the prevention, restriction or distortion of competition within the market where any such agreements are applicable.**

Trade association meeting

Scenario

A Company representative in the lubricant division attends a trade association meeting which is also attended by representatives from other lubricant producers. The association meeting commences with a discussion of broad industry trends. The representative of a competitor of the Company, remarks that at least 10% of lubricant products is produced in excess compared to the market demand for this year and suggests that this problem could be resolved if producers in the room reduced their production by 10%.

The Company's employee did not agree to the suggestion, but she did not state her objection to it. She stayed silent during the entire meeting but did not take any action towards reducing Company's production for engine oil products. Can the Company be considered to be part of an anti-competitive agreement with competitors to reduce production?

Answer

Yes, the Company (through its employee) may be considered as being part of an anti-competitive agreement to reduce production together with GENTARI's competitors. Mere presence at a meeting where an anti-competitive agreement is made suffices as evidence of participation in the said anti-competitive agreement. The Company representative should have publicly distanced herself from the anti-competitive agreement by raising her objections at the meeting after the competitor's representative made his suggestion to

reduce production. If the discussions continue on the same topic even after objections have been raised by the Company representative, the latter should leave the meeting immediately and ask that the minute taker records her departure. The incident should also be reported to Group Legal and minutes of the meeting be requested to ensure that the objections are appropriately recorded.

Please refer to the GENTARI Competition Law Compliance Protocol on Meetings and Information Sharing for further guidance when attending formal and informal meetings with your competitors.

Please note that the type and wording of the agreement is irrelevant: **not only formal, but also informal agreements,** fall under this prohibition; **not only written, but also verbal agreements and so-called "Gentlemen's agreements",** fall within the scope of the prohibition on anti-competitive agreements.

Informal understandings

Scenario

The marketing manager from a Company division, attends an Oil and Gas products event. On the sidelines of the event, a few marketing managers from competitor companies are chatting and one competitor representative starts to complain about how his company's profits have been affected and that he is expecting no bonus this year. He informs the other marketing managers that he will therefore be increasing the prices of his company's products in the last financial quarter. Company Manager nods his head but does not say anything. Is there any infringement of competition law?

Answer

Yes, the Company (through its employee) is likely to be considered to have participated in a price fixing agreement which is prohibited under competition law. An 'agreement' under competition law covers all types of contract, arrangement or understanding, whether or not they are legally enforceable and whether or not it is in writing.

Anti-competitive agreements are divided into two categories: horizontal and vertical agreements.

(i) Horizontal agreements are agreements or coordinated practices between companies acting on the same level of trade, i.e., agreements between competitors. Horizontal agreements on key competitive parameters (e.g., prices, quantities, clients, sales territories) have generally been found automatically to be unlawful regardless of whether they have actually been implemented and/or have any effect on the market. Certain categories of horizontal agreements are generally always prohibited by competition authorities around the world. Examples of such agreements are:

(a) Price fixing agreements also known as 'cartels' – this includes fixing the price itself or fixing an element of the price, such as fixing a discount, setting a percentage price increase or setting the permitted range of prices between competitors. This could also include agreeing to share price lists between competitors before prices are increased either directly or indirectly through an industry or trade association or to require competitors to consult each other before making a pricing decision.

Price fixing

Scenario

A Company sales employee for gear oils is threatened by his brother-in-law, who is an employee of a Company competitor for the same product, to raise the prices of their respective employers' products by 1% to 10%. The Company employee, fearing his relative's retaliation, tells his brother-in-law that they have an agreement.

Will the Company (through its employee) be liable for participating in a price fixing cartel even though the employee does so under pressure from his relative and even though the brother-in-law only suggests a range of percentage rate for increase of the price of the product?

Answer

Yes, the Company (through its employee) will still be liable for participating in a price fixing agreement which is prohibited under competition law. Participating in a cartel under duress is not a valid defence and there is no need to reach an agreement on the precise increase for such activity to be prohibited under competition law. Price fixing cartels are competition authorities' enforcement priority, hence very heavily punished globally and as such, should be strictly avoided.

(b) Market sharing agreements – this includes competitors agreeing to allocate customers between themselves or agreeing to stay out of each other's geographic territory or customer base. This could also include agreements between competitors to specialise in certain products, ranges of products or technologies.

Market sharing

Scenario

A Company's employee, secures an understanding with the Company's competitor for the Company to service all potential customers outside of Malaysia and refrain from competing in East Malaysia. The competitor agrees as its customer focus is on East Malaysia and it has no facility outside of Malaysia. Is this anti-competitive?

Answer

Yes, this understanding may be viewed as a market sharing arrangement which is prohibited under competition law. Sharing of markets or sources of supply could include competitors agreeing to allocate customers between themselves or agreeing to stay out of each other's geographic territory or customer base.

(c) Bid-rigging agreements – this includes agreements between competitors in a particular market to coordinate their responses to invitations to tender. For example, competitors take turns to win competitive tender contracts via cover bidding, bid suppression or bid rotation. Please note however, that when GENTARI acts as the procuring company, the organisation is the victim of any undetected bid-rigging activities.

Bid-rigging

Scenario

At an industry meeting, a Company employee meets his counterpart from a competitor. They start discussing two large tenders which have been recently advertised and discover that both the Company and competitor intend to bid for the two projects. Both the Company and competitor's respective employee jointly decide that they should cooperate to ensure that the Company and competitor will each win one tender since the two companies are the preferred bidders for both projects. Both agree that if either of their company wins the first project, then the other company would submit an uncompetitive tender for the second project. Is this conduct anti-competitive?

Answer

Yes, this is a bid-rigging arrangement between competitors which is anti-competitive and must be avoided. Decisions on any tenders including their key terms must be independently decided by the Company without any understanding reached with any other bidders.

(d) Agreements to limit or control production, market access, technical or technological development or investment – this includes agreements between competitors to fix their output levels at a certain quantity (e.g. agreeing on production quotas), fix the degree of market access (e.g. competitors agreeing on where retail outlets are to be located or agreeing to stay out of each other's markets or restricting access to the market by new entrants), limit or control the technical or technological development of certain or all competitors (e.g. competitors agreeing not to introduce new products or setting technology standards that prevent other competitors from entering the market), or limit or control the degree of investment by competitors (e.g. agreeing not to add production capacity).

Limiting production

Scenario

The Company produces high quality medical grade lubricants. Due to the higher quality requirements for this type of lubricants, there are only two other producers of such lubricants in the market. The market demand each year for such lubricants is approximately 9,000l. The Company enters into an agreement with its two other competitors to fix their production to 3,000l each per annum. Is this anti-competitive?

Answer

Yes, any arrangement between competitors to control or limit production is anti-competitive and must be avoided.

(ii) **Vertical agreements** are agreements restricting competition between enterprises acting on different levels of trade, i.e., agreements between a supplier and its distributors or customers. The lawfulness of vertical restraints largely depends on the market context (in particular, market shares of the parties to the agreement and economic justifications) and often requires a precise legal analysis. As an exception,

vertical price-fixing such as resale price maintenance is typically considered anti-competitive in many jurisdictions without requiring any further competition assessment on market conditions.

Resale price maintenance

Scenario (A)

The Compant supplies petroleum products through its distributors for resale to the distributors' customers. In order to maintain the premium position of its products, it publishes a "Recommended Price List" which sets out prices for each of its products together with the applicable discount rates if certain volumes are purchased. Does the Company's Recommended Price List comply with competition law?

Answer (A)

On the face of it, the Recommended Price List is not anti-competitive. However, if the suggested pricing in the Recommended Price List is not a genuine suggestion or recommendation as the Company will impose penalties or take any other action against the distributor who does not comply with the resale prices stated in the "Recommended Price List", then the Recommended Price List could raise competition concerns.

Scenario (B)

A group of distributors approach the Company and notify hat they are unhappy with the discount given by the Company to customers who it sells directly to. The distributors suggest that everyone would be more profitable if everyone sell closer to the Company's recommended resale price – and it should lead the way. Should the Company go along with its distributors' suggestion?

Answer (B)

No, the Company should not. If it goes along with its distributors' suggestion, the recommended resale price will no longer be a genuine recommendation and this will raise competition concerns.

B. PROHIBITION ON ABUSE OF DOMINANT POSITION

Under competition laws, it is **illegal for companies with strong market power (a "dominant position") to exploit their market power** in an abusive way that may affect the market. A company is generally considered to have a dominant position if it is the principal supplier or purchaser of a given set of products or services, and if it is able to exercise a significant degree of market power over its customers or suppliers.

Market power may be held by one company individually or by two or more companies collectively. Although market share is not the only factor in determining whether dominance exists, it provides a reliable starting point to assessing the enterprise's market power. Generally speaking, a company will not be considered dominant if its market share is below 30%. Market shares between 30% and 50% may be indicative of market power/dominance. A case-by-case assessment is therefore required. Finally, market shares above 50% typically give rise to a presumption of dominance.

In determining market power, one would have to consider many factors. Market shares are a good starting point but a company with high market share may not necessarily be dominant. A situation of individual dominance generally arises where other conditions are

met, such as (i) the company's competitors have much smaller market shares and customers have no effective countervailing power; and (ii) barriers to entry or expansion (e.g., regulations, minimum investment size, lack of available input/intellectual property or distribution facilities) into this particular market are high, thereby limiting potential entry for new competitors or expansion by existing competitors. An assessment of market power under competition law therefore requires a detailed economic assessment of the dynamics of competition of the marketplace.

Generally, a company acting independently can act as it chooses, unless it becomes so dominant in a given market that it is considered to have "special duties" vis-à-vis its competitors, suppliers and customers. **Such "special duties" may prevent a company from engaging in certain business practices that would be considered as normal commercial conduct if the company were not dominant** (e.g., refusals to sell, promoting certain products as loss leaders or at very low prices, giving certain types of rebates or selling at certain conditions that result in "tying" customers, concluding exclusive arrangements with suppliers or customers, discriminating between different distributors, licensees, or customers, or in certain cases refusing to give access to certain intellectual property rights or assets to a competitor or customer). Note that it is not the dominant position in itself that is anti-competitive, but rather the way in which the dominant company acts on the market vis-à-vis its competitors, customers or suppliers that may raise abuse of dominance concerns.

C. PROHIBITION ON MERGERS AND ACQUISTIONS THAT MAY SUBSTANTIALLY REDUCE COMPETITION

While mergers and acquisitions can expand markets and bring benefits to the economy and consumers (e.g., development of new products, reduction of production or distribution costs), some combinations may lessen competition, usually by creating or strengthening a dominant player's market position. This is likely to harm consumers through higher prices, reduced choices or less innovation. Although very rare, competition authorities have the power to block a transaction if the transaction significantly reduces competition on any relevant market.

As a general rule, a transaction is subject to a notification duty in certain jurisdictions if it meets the thresholds (generally relating to the turnover achieved by the parties in the last financial year) set forth in the relevant merger control regimes of those jurisdictions. If a notification duty is triggered, these rules apply to all mergers no matter where in the world the merging companies have their registered offices, headquarters, activities or production facilities.

In most jurisdictions around the world, companies that meet the notification thresholds of merger controls are prohibited from closing or implementing their transactions before receiving clearances from relevant competition authorities (so-called "standstill obligation"). **Breaching the standstill obligation can subject the companies to heavy fines.**
To ensure that all required regulatory filings concerning any acquisitions of businesses or business units and joint venture agreements with other companies are timely made, any plan to enter into such a transaction must be first submitted to your business legal counsel or LCD at the earliest possible stage. Please refer to the GENTARI Competition Law Compliance Protocol on Merger and Acquisition Transactions for further guidance.

3. PRACTICAL GUIDELINES TO AVOID COMPETITION LAW VIOLATIONS

A. CONTACTS WITH COMPETITORS

No competitively sensitive information ("**CSI**") can be discussed or exchanged between competitors, and no formal or informal agreements may be entered into, with any representative of any competitors on any occasion, except as expressly permitted in these Guidelines. For further guidance on how to manage CSI, **please refer to the GENTARI Competition Law Compliance Protocol on Meetings and Information Sharing**.

In light of the above, you must act independently of GENTARI's competitors. This means that you must never attempt to influence the current or future behaviour on the market of GENTARI' competitors. Furthermore, if, in order to compete effectively, GENTARI must obtain information and intelligence on the commercial activities of its competitors, you may collect such information from a variety of public sources or internal GENTARI sources (e.g. end users, as well as newspapers, trade journals, industry analysis, competitors' websites and annual reports or their announcements to stock exchanges etc.). However, save for publicly available sources, you should never try to obtain such information directly from GENTARI's actual or potential competitors. **Where you receive information from a competitor, or which you think has or might have been sent from a competitor, you should immediately contact LCD.**

You should always document the source of competitive or confidential information, so that you can show that the information did not come from a competitor.

In the framework of your contact with competitors, you must also bear competition rules in mind regardless of how informal a meeting with a competitor is. Many legal problems concerning competition law infringements have arisen from what the parties involved considered to be "off-the-record" discussions. **A verbal agreement to limit competition is just as unlawful as a written agreement.**

Any contact, regardless of how informal it is (e.g., at a dinner, on a golf course, in a hotel elevator), that may influence the behaviour of competitors on the market is likely to breach competition laws. Note that even one isolated unlawful contact with competitors may amount to a violation of competition law.

You must never use third parties as intermediaries to communicate with competitors. Special care should also be exercised when it appears that a competitor may be trying to communicate with you or send "signals" through third parties such as agents, contractors, shippers or forwarders. Attempts by competitors to use third parties as conduits to exchange or facilitate the exchange of CSI should be rejected. Likewise, you should never use third parties to communicate information or policies that these Guidelines would otherwise prohibit if communicated directly.

In this respect, you **must never** discuss or exchange CSI with a competitor on any of the following topics:

- pricing and other terms of sale (e.g., discounts);
- production or other costs;
- profit margins and data;
- purchase prices and dealings with suppliers;
- marketing action items;

- identity and dealings of customers;
- production volumes and strategy;
- sharing markets in terms of products, customers or geographic areas;
- refusal to supply a certain customer;
- refusal to purchase from a particular supplier; and
- new products or investment plans.

More generally, you should limit your contact with competitors to what is strictly necessary for the purpose of that particular contact (e.g., a discussion about a new legislation to be adopted). **Please refer to the GENTARI Competition Law Compliance Protocol on Meetings and Information Sharing for further guidance.**

Exchange of current or future information

Scenario

Every December, Company A and its fellow competitors share amongst themselves their price lists for each category of product for the whole of the following year. Is this anti-competitive?

Answer

Yes. Competitors exchanging information on current and especially intended future pricing is prohibited under competition law. Such sharing reduces uncertainty on the market and must be avoided.

Exchange of historical information

Scenario

Every July, Company A and its fellow competitors share amongst themselves their price lists for each category of product for the whole of the past year. Is this anti-competitive?

Answer

It depends. If the information is not useful for any competitor to determine their current conduct on the market as it is too historical (older than one year or longer), then such information could be shared even as between competitors. Group Legal should be consulted before the information is exchanged.

Joint cooperation agreements between competitors (e.g., joint research and development, joint manufacturing or marketing and joint product development) can produce efficiencies. However, they can also restrict competition. **Therefore, any such planned agreements should always be submitted first to your business legal counsel or LCD for clearance.**

Joint production

Scenario

The Company and its competitor, MCo who are both suppliers of Product Z decide to close their current (old) facilities and build a larger and more efficient production plant run by their 50-50 new joint venture company, JVC. Would this raise competition concerns?

Answer

It needs to be further assessed. This agreement may lead to the Company and MCo sharing tremendous efficiency gains, for example, the replacement of two smaller and older production plants by a larger and more efficient one may lead to increased output at lower prices to the benefits of consumers. When creating the joint venture company, parties must also however be mindful that the JVC is not used as a medium for price or market-sharing collusion.

Please seek advice from Group Legal before reaching agreement, and in particular please ensure that an M&A global assessment is conducted before the incorporation of the JVC to ensure that merger clearance is timely obtained.

Specialisation agreement

Scenario

The Company and its competitor both manufacture product A and product B. To obtain economies of scale, both of them enter into a specialisation agreement whereby they agree that the Company would produce only product A whereas the competitor would produce only product B. Would this raise competition concerns?

Answer

Potentially, yes. In the absence of clear benefits to consumers, there are major competition concerns as it is a form of market sharing between two competitors. Please never enter into such arrangements without seeking advice from Group Legal.

Swap agreement

Scenario

The Company and its competitor both manufacture product X and each has production plants and customers in different parts of the country. They both intend to enter into a swap agreement which allows them to purchase an agreed annual quantity of product X from the other party's plant with a view to selling the purchased product X to those of their customers which are located closer to the other party's plant. They claim this is for transportation cost saving purposes. Would this raise competition concerns?

Answer

It needs to be further assessed. While this swap agreement appears to give rise to efficiency gains, there is a need for caution as it could result in unlawful exchange of information on production volumes and transportation costs with regards to product X, which may then lead to a collusive outcome. Please seek advice from Group Legal before adopting such business strategy.

- Trade association meetings

Joining a trade association meeting is, in principle, allowed. Topics that **may** lawfully be discussed at trade association meetings include:

- Proposals for the adoption of new legislation, lobbying for a modification of existing legislation with public authorities;
- Organization of and participation in exhibitions;
- Statistics showing the evolution of production costs or volumes, sales volumes or prices, **provided that** such statistics are exclusively based on **historical** (typically more than 12 months old) **and aggregated** (at least 4 participating companies) data;
- Development and use of shared quality symbols, provided that all manufacturers whose products meet the quality standards are allowed to use such symbols and that the individual manufacturer's marketing is not limited.

However, meetings or other trade association activities that involve sharing CSI with competitors are strictly prohibited under competition laws. Thus, you must never discuss the topics mentioned above which relate to prohibited contacts with competitors at trade association meetings.

If a discussion on any of these topics is initiated at a trade association meeting, you must request that the discussion be stopped and, should the other members of the trade association refuse to do so, you must leave the meeting and make sure that the minutes of the meeting record your objection to such discussion and your departure from the meeting. Please refer to the GENTARI Competition Law Compliance Protocol on Meetings and Information Sharing for further guidance.

In particular, when dealing with competitors and members of trade associations, you **must never**:

- enter into any discussion, exchange of information, agreement or understanding with competitors concerning prices, costs, production, customers, bids or marketing/commercial plans;

- engage in any discussions at meetings with competitors that do not adhere strictly to the topics on the agenda; and

- engage in any casual or social conversation with competitors that superficially touches upon business topics which may raise competition concerns.

Conversely, in the framework of trade association meetings, you have to:

- compete vigorously, independently and ethically;

- make sure that a written agenda is prepared before any meeting that competitors will be attending and that a copy of the agenda is sent to you in advance of the meeting (consult first your business legal counsel or LCD);

- request clearance from your business legal counsel or LCD before attending any trade association meetings or individual contact with a competitor;

- keep precise minutes of meetings with competitors;

- state your objection and leave the meeting room if a prohibited subject is raised or anti-competitive agreement is made at a trade association meeting; and
- make sure that all written communications however informal with competitors have a clearly lawful purpose and have been reviewed by your business legal counsel or LCD.

B. CONTACTS WITH CUSTOMERS AND SUPPLIERS

In addition to collusion between competitors which generally constitutes the most serious violation of competition laws and are generally illegal, certain other types of arrangements with customers or suppliers are also prohibited under competition laws. In a nutshell, you must never unduly interfere with GENTARI's suppliers or customers' businesses or impose unfair trading terms upon them. On the other hand, you should never allow GENTARI's freedom to run its own business to be unduly limited by anti-competitive practices of its suppliers.

The following arrangements with customers and suppliers may run afoul of competition laws:

- **Resale price maintenance.** It is legal to suggest resale prices to distributors or customers without enforcing adherence to such suggested prices. However, resale price maintenance (i.e., an agreement between GENTARI and its distributors or retailers on the price at which the distributors or retailers must sell GENTARI's products to third parties) can be considered illegal or anti-competitive in many jurisdictions. You must avoid any type of threat or coercion to force a distributor or retailer to adhere to a particular resale price or level of prices. An example of such illegal conduct is the imposition of additional fees or financial penalty on the distributors of GENTARI for failing to follow resale price lists issued by GENTARI. Furthermore, you should never discuss with suppliers the resale prices of goods that GENTARI resells. You are urged to consult first your business legal counsel or LCD before engaging in any resale price maintenance.

- **Discussing with distributors the pricing or marketing activities or any CSI of another distributor.** When a manufacturer terminates a distribution agreement in response to complaints from other distributors, there is a risk that an unlawful conspiracy between the manufacturer and the other distributors may be inferred. You must therefore handle complaints from certain distributors about the pricing or marketing behaviour of any other distributors with great care. You should never inform complaining distributors about what action GENTARI will take with respect to another

distributor or even indicate to them that any action will be taken. You should also be aware of the dangers of providing the CSI which one of your distributors have provided you with to another distributor. If such information is capable of influencing the current or future behaviour of these distributors, you should never in any instances be the facilitator or conduit in exchanging such information between your distributors. Such conduct may help facilitate the formation or implementation of a hub and spoke cartel and this is considered illegal and has been punished in many jurisdictions around the world.

- **Restriction on the territory into which, or on customers to whom, a distributor may sell goods.** A distributor and a supplier may agree that the distributor can only resell the products in a particular territory or to a particular class of customers under certain limited circumstances. Since an in-depth legal analysis is required to determine whether the requirements for the lawfulness of such arrangement are met, you are urged to submit all agreements that would contain such restrictions first to your business legal counsel or LCD to ensure that these restrictions are properly structured and supported by legitimate business purposes.

Territorial restriction *Scenario* The Company supplies fuel and non-fuel products and has entered into dealership agreements with many dealers in respect of these fuel and non-fuel products. Each of its dealers is allocated a location to distribute the Company's products and is prohibited from selling in a location allocated to another dealer. Is this permitted under competition law? *Answer* Further assessment is needed. In Malaysia and in other jurisdictions where the Company operates, whether this is prohibited under competition law depends on various factors including the establishment of market power and whether this is part of an arrangement entered into with an IPR holder. Please seek advice from Group Legal before finalising these agreements.

- **Discounts.** As a general rule, competition laws do not limit the types of volume discounts that may be granted, unless they are granted for products in respect of which GENTARI could be found to have market power. Even if GENTARI is dominant in a particular product market, volume discounts do not generally raise competition law concerns, provided that: (a) a customer knows from the outset how the discount will be calculated (i.e., the discount is transparent); (b) the discount is linear (i.e., based on the quantity of products purchased on an order-by-order basis); and (c) the discount is not conditional on a customer purchasing a large part of its requirements or exclusively from GENTARI. The discounts should also not be structured in a way which locks in customers who wish to benefit from the discounts in terms of the quantities they must purchase (such discounts are usually termed as loyalty discounts or rebates). An example of a way discounts may create a lock-in arrangement is when significant discounts are given only with the exclusive purchase of all of the buyer's demand. As the law on discounts is somewhat unclear and assessment of a given discount scheme to a large extent depends on the structure of that discount in its market context, you are urged to submit any proposed discount scheme first to your business legal counsel or LCD for clearance.

- **Tying.** A tying conduct is making the sale of a product or service conditional upon the purchase of separate and distinct products or services that a customer is not really

interested in buying, or that the customer may wish to purchase from someone else. An example of such conduct would be if the purchase of engine oil were only permitted by the company provided that the engine oil is purchased together with engine lubricant. You are urged to consult first your business legal counsel or LCD before entering into any such arrangement with any customer.

Tying

Scenario

The Company is dominant in the supply of product X. It imposes a condition on its customers to also purchase product Y when the customer orders product X without giving its customers any other options. Would this raise competition concerns?

Answer

Yes, it would. The tying of products leverages the market power that the Company has in one market to artificially increase its sales in another market.

- **Bundling.** A bundling conduct is when products are sold together at a lower price than separately. You are urged to first consult your business legal counsel or LCD before entering into any such arrangement with any customer.

Bundling

Scenario

The Company's Downstream Marketing Division is dominant in the retail market for the supply of engine oil. It also sells engine lubricant on the retail market. The Division packages the engine oil and engine lubricant together as a single product which is 30% cheaper than the retail price of the engine oil and engine lubricant purchased separately. Would this raise competition concerns?

Answer

Yes, it would if customers are not given the option to purchase engine oil and engine lubricant separately. This business strategy may be anti-competitive as it leverages the market power that the Company has in the market for the supply of engine oil to gain market share in the market for the sale of engine lubricant.

- **Discrimination.** Many competition laws around the world prohibit discriminatory conduct by dominant players, such as assigning different prices or applying different conditions for equivalent transactions, which will harm market competition. An example would be when a dominant upstream supplier sells its products to a certain downstream customer at a price which is higher than that which the dominant supplier charges to other downstream customers, without reasonable commercial justification. You are therefore urged to consult first your business legal counsel or LCD before engaging in any such conduct.

- **Predatory Pricing.** Selling products at prices below average variable cost may raise competition law concerns if GENTARI is found to be dominant in any relevant product market. This may occur, for example, where GENTARI's products are sold at prices below the plant's production costs. You are urged to submit any "special deal" that you consider offering to a customer to your business legal counsel or LCD first to ensure that the price terms you are envisaging are not abusive.

Predatory pricing

Scenario

The Company's head of business strategy hears that NewCo, a new and small producer, has entered the product X market which the Company has more than 60% market share in. The Company's employee puts into motion a strategy where it sells product X below its cost with the aim of driving NewCo out of the market. It knows that after NewCo is driven out of the market, it is able to restore the price of Product X. Is this business strategy legal?

Answer

No, it is not legal as predatorial pricing by a dominant entity would amount to an abuse of dominance and an infringement of competition law.

- **Exclusive dealings.** Exclusive dealing arrangements could involve an obligation on a purchaser to purchase all, or a substantial portion, of its requirements from one supplier or an obligation on a supplier to supply all, or a substantial portion, of its goods or services to one purchaser. An example of this would be a requirement imposed by GENTARI on distributors of a product to obtain their entire demand (or a substantial portion of their demand) of the said product solely from GENTARI. Although exclusive dealings are not automatically prohibited, exclusive dealings by dominant companies have generally been found to be abusive. Such exclusive dealings could also raise concerns under the prohibition against anti-competitive agreements. The legality of exclusive dealing arrangements depends on specific factual circumstances and market context. Since an in-depth legal analysis is required to determine whether the requirements for the lawfulness of such arrangements are met, you are urged to submit all agreements that would contain such exclusivity requirements first to your business legal counsel or LCD for clearance.

Exclusive purchasing

Scenario

The Company is in the market for the supply of fertilizers and, as a condition for supplying such fertilizers to plant nurseries at a discounted price, it requires the plant nurseries to agree only to buy all of its fertilizers from the Company. Is this permitted under competition law?

Answer

Further assessment is needed. In Malaysia and in other jurisdictions where the Company operates, whether this is prohibited under competition law depends on various factors. Please seek advice from Group Legal before finalising these agreements.

Single branding

Scenario

The Company is in the market for the supply of engine lubricants. It enters into supply agreements with workshops all over Malaysia. However, in those agreements, it is stated that the workshops can only sell their branded engine lubricants. Is this permitted under competition law?

Answer

Further assessment is needed. In Malaysia and in other jurisdictions where the Company operates, whether this is prohibited under competition law depends on various factors. Please seek advice from Group Legal before finalising these agreements.

Exclusive distribution

Scenario

The Company enters into an exclusive distribution agreement with a distributor in country X where there has never been a market for its product. The distributor will be given exclusive distribution rights for all of its products in country X. Is this permitted under competition law?

Answer

It depends, While an exclusive distribution agreement may be said to be anti-competitive, in this situation, there may be justifications for doing so especially if it can be shown that without such exclusive distribution rights, no distributor would be willing to make the investment necessary to open the market for the Company's products in country X. Please seek advice from Group Legal before finalising the agreement.

- **Most Favoured Nation (MFN).** An MFN clause is a contractual provision requiring that a party must receive rights and benefits under the contract that are equal to or more favourable than the rights and benefits received by any other parties. You are urged to consult first your business legal counsel or LCD before entering into any such agreement with any supplier or customer.

Most Favoured Nation Clause

Scenario

The Company is the purchaser of certain marketing services from an advertising agency. In its agreement, It requires the advertising agency to offer its services at a price that cannot be higher than the price offered to their competitors. Is this permitted under competition law?

Answer

Further assessment is needed. In Malaysia and in other jurisdictions where the Company operates, whether this is an infringement of competition law depends on various factors including the issue on market power. Please seek advice from Group Legal before finalising these agreements.

- **Refusal to supply.** A manufacturer acting independently is generally free to decide to whom it will sell its products for any valid business reason. However, refusing to supply products or services to a customer may be unlawful where there is no reasonable commercial justification for doing so, in particular in a situation where GENTARI is the dominant supplier of that product or service. GENTARI employees should also take note that a refusal by a dominant company to grant access to an essential facility that it controls constitutes an abuse of a dominant position if the refusal has significant restrictive effects on competition. This is the so called "essential facility" doctrine under competition laws. You should therefore always consult your business legal counsel or LCD whenever you are considering refusing to supply or provide access to any customer or distributor.

Refusal to supply

Scenario

The Company is dominant in the upstream market for the supply of chemical X which is essential for the manufacture of a downstream product Y. The Company has a subsidiary ("P-Sub") which is in this downstream market for the manufacture of product Y. It supplies chemical X to P-Sub subsidiary but refuses to supply chemical X to P-Sub's sole competitor, CoCo. Is this anti-competitive?

What if the Company refuses to supply chemical X to CoCo because CoCo has failed to pay for the last shipment of chemical X from the Company?

Answer

Yes, it is anti-competitive for a dominant entity, to take advantage of its vertically integrated structure to foreclose competitors in a separate market. The Company may however refuse to supply to CoCo who has failed to settle its debts owing to the Company as this could be a reasonable commercial justification for the refusal to supply.

- **Margin Squeeze.** Margin squeeze can occur where an enterprise is dominant in an upstream market and supplies key input to enterprises that compete with it in a downstream market. When supplying that key input, unlawful margin squeeze will require that, without any objective justifications, the spread between the key input prices and the retail prices being charged by the dominant company to the downstream end users is either negative or insufficient to cover additional necessary costs, which the dominant company must incur in order to supply its own retail services to downstream end users.

Margin squeeze

Scenario

One of the Company's existing customer is negotiating a new supply agreement terms and conditions for product A. The Company is dominant on the market for product A and product A is necessary for its customer to market product B, downstream where the Company is also a competitor (as a vertically integrated group of companies). If the Company significantly increases its price proposal for product A during the negotiation of the new terms and conditions, could this amount to margin squeeze and an abuse of dominant position?

Answer

Potentially yes. First of all, margin squeeze presupposes that the Company is dominant on the market for Product A and supplies same product A as a key input to competitors in a downstream market for product B.

Whether this amounts to a margin squeeze would depend on various circumstances and whether any objective justifications can be put forward. If the Company significantly increases its price for product A and the price is higher than what it charges in the downstream market for product B, then this could amount to a margin squeeze.

If the Company significantly increases its price for product A, leaving a margin between the cost of product A and the retail prices for product B that is insufficient to cover the additional specific cost the Company has to incur in producing product B, then this could also constitute a margin squeeze.

- **Buying up scarce supply in the upstream market**. This occurs when a dominant competitor in a downstream market buys all the supplies of scarce input needed by the dominant enterprise's competitors in the said downstream market. This then has the effect of increasing the cost of production of its competitors or preventing its competitors from producing at all.

Buying up scarce supply in the upstream market

Scenario

The Company is dominant in the market for the supply of product A which has two other competitors. The Company is the biggest customer to the suppliers of raw material X which is the main raw material required to produce product A. It enters into an agreement to purchase raw material X exceeding its requirements. Is this anti-competitive?

Answer

Yes, this is anti-competitive and an abuse of the Company's dominant position as such conduct will have an effect of foreclosing the Company's competitors from the market for the supply of product A since they will not have any raw material X.

In brief, when dealing with customers and suppliers, you **must never**:

- discuss with customers or suppliers about their resale prices or seek to dictate or control your customers' resale prices without first consulting your business legal counsel or LCD;

- discuss with distributors the pricing or marketing activities of another distributor;

- place territorial restrictions on a customer without first consulting your business legal counsel or LCD;

- condition the purchase of one product on the purchase of another without first consulting your business legal counsel or LCD;

- offer a package of two or more products at a discounted price which is lower than the sum of their prices when purchased separately without first consulting your business legal counsel or LCD;

- discriminate between suppliers or customers in a way which harms competition in the relevant market;

- carry out predatory pricing strategies;

- attempt to limit a customer's freedom to buy or sell products from a competitor without consulting your business legal counsel or LCD;

- terminate or refuse to sell to an existing customer without a legitimate business justification; or

- require exclusivity from a customer or grant exclusivity to a supplier unless this condition has been approved by your business legal counsel or LCD.

Conversely, you have to:

- apply uniform pricing policies and programs to competing customers; and

- request clearance from your business legal counsel or LCD concerning any business dealings with a customer or a supplier that could raise competition concerns.

4. OTHER COMPETITION LAW CONSIDERATIONS

A. COOPERATION WITH ENFORCEMENT AUTHORITIES

GENTARI is committed to cooperating with enforcement authorities when they are carrying out their law enforcement responsibilities. Be polite and cordial if you are contacted by the competition authorities, but **always refer them immediately to your business legal counsel or LCD before answering any questions or providing materials. Never provide any additional information or materials to the competition authorities before consulting your business legal counsel or LCD.**

B. INTERNAL DOCUMENTS AND OTHER COMMUNICATIONS

Internal documents are often the most important evidence in a competition law related investigation or litigation. This includes documents in hard copy and handwritten notes as well as electronic documents, such as e-mails and drafts that might be saved on a hard disk. **Thus, it is extremely important that you exercise due care in the drafting and exchange**

of any document or correspondence to avoid any legal problem, including internal documents.

In light of the above, when dealing with internal documents, you **must never**:

- write down/include anything that could be misconstrued and give the appearance of improper conduct vis-à-vis competitors, business partners and customers or use "buzz words", e.g., "market power", "dominant position", "destroy after reading", "we have consulted with the market" or "we will destroy these guys";

- exaggerate GENTARI's market position or market power, e.g., "we are dominant in this area" or "competitor is scared and will follow our prices";

- use language that could suggest coordination with competitors, e.g., qualify a competitor's lower prices as "unethical" or a lost customer as "stolen" by a competitor, or refer to a trade association as a "club";

- use expressions suggesting guilt, such as "destroy after reading", or "top secret"; such terms are generally useless and unnecessarily attract attention to what you are saying; and

- destroy any document or other piece of evidence – irrespective of how incriminating it may be for GENTARI– in case competition authorities conduct an unannounced inspection at one of GENTARI's sites or GENTARI is otherwise being investigated by the competition authorities.

Destruction, concealment, mutilation, or alteration of records, etc.

Scenario

The Company sales manager hears that officers from the competition authority have arrived at the office for a dawn raid and they are waiting to enter the premises. As a an employee, he is in possession of documents which contain discussions with competitors of a price fixing cartel in which the Company is a participant. He quickly shreds this evidence. Has our manager committed any offence?

Answer

Yes, this is a criminal offence and if convicted, our manager may be fined and imprisoned for destroying evidence.

Tipping off

Scenario

Upon hearing that competition authority officers have arrived to conduct a dawn raid, the Head of sales immediately sends a WhatsApp message to his friends at competitor companies telling them that the Company is under investigation for the price fixing cartel that all of them have been involved in so that his friends can immediately destroy evidence relating to the said cartel. Is this an offence?

Answer

Yes. Tipping off is a criminal offence and our Head of sales may be fined and imprisoned for tipping off his friends.

Conversely, you must:

- treat every document that you create as if it will be read by an enforcement official or an opposing lawyer in a litigation;

- treat e-mails and other electronic documents the same as hard copy documents. Assume that electronic versions of documents will remain on the system indefinitely and will be available to the other side in any future investigation or case;

- ask your business legal counsel or LCD to review documents that might have antitrust significance – in case of doubt about a document, always consult your business legal counsel or LCD, in particular, with regards to the review of meeting agendas prior to the meeting and drafts of meeting minutes afterwards. If feasible, have legal counsel attend the meetings and draft the meeting minutes;

- send all correspondence received directly from a competitor, which deals with CSI, to your business legal counsel or LCD; and

- carefully document the source of information, especially information concerning competitors, e.g., if you receive a competitor's price list from a customer, mark the document as such to avoid any suspicion of improper contact with a competitor.

C. COMMUNICATIONS WITH YOUR BUSNESS LEGAL COUNSEL OR LCD

You have a duty to seek the advice of your business legal counsel or LCD as soon as you identify a situation that you believe may involve GENTARI in a breach of competition rules.

Note that communications with your business legal counsel or LCD are not covered by legal professional privilege (i.e., the documents sent and received can be disclosed in legal proceedings and can be used to prove an infringement). Legal privilege only covers: (i) communications with external legal counsels; and, (ii) communications/documents (internally) prepared exclusively for the purpose of obtaining legal advice from external counsels.

To help your business legal counsel or LCD to provide the correct advice, you should disclose to the team all the relevant facts of which you are aware, whether favourable or embarrassing. You should also be prepared to assist in obtaining whatever additional information that may be required.