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Competition

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MyCC Review of the Pharmaceutical Sector

Competition Act 2010

Following a probe in 2016 into seven pharmaceutical companies for alleged anti-competitive behaviour as prohibited under the Competition Act 2010,^[1] the Malaysia Competition Commission, or MyCC, conducted a market review of the pharmaceutical sector in the country. A report of the review was recently published by MyCC on 8 January 2018.^[2]

The main objectives of the review were to:

- Determine the sector's market profile, structure and supply chain;
- Determine the competition level among players at different levels of the supply chain;
- Identify whether anti-competitive practices exist; and
- Identify whether the government has to intervene or change any policies that facilitate anti-competitive conduct.

The scope of the review, while limited to controlled medicines (more commonly known as prescription medicines), focused primarily on the first two levels of the pharmaceutical supply chain — namely, the manufacturers and importers (level 1), and the wholesalers and distributors (level 2).

The anti-competitive concerns in the local pharmaceutical sector that were identified in the review are in the following areas:

- Patent strategies by patent holders seeking to extend the exclusivity period beyond the 20-year patent term which may create a barrier to market entry.^[3]
- Product life-cycle management measures such as non-price strategies^[4] to maintain a dominant position and to delay the market entry of generic medicine.^[5]
- Strategies by originator companies to influence regulatory authorities in determining marketing authorisation.^[6]
- Price discrimination in the private sector favouring private clinics/hospitals over pharmacies.^[7]
- Regulatory barriers such as lengthy processing and approval

time periods.^[8]

- The sole concession system in Malaysia's products procurement which reduces competition in the public health sector.^[9]

MyCC has put forward the following recommendations to encourage competition within the pharmaceutical sector:

- Strengthening the domestic pharmaceutical industry and expanding export markets.^[10]
- A review of the regulatory issues for product registration and market authorisation currently faced by industry players.^[11]
- Closer collaboration between the Ministry of Health, the Intellectual Property Corporation of Malaysia, the Ministry of Domestic Trade, Co-operatives and Consumerism, and the Ministry of International Trade and Industry in handling patent, competition and trade-related issues that have an impact on public health.^[12]
- A coherent price policy to be adopted as part of the National Medicines Policy for price transparency at all levels of the supply chain.^[13]
- Splitting large procurement tenders, which will allow for more suppliers to compete.^[14]

The review highlighted the many areas where competition law plays an important role in regulating the pharmaceutical sector. It is evident from the review that competition law can be effective in encouraging price competitiveness, increasing accessibility and the transfer of health technologies, all of which will protect the interests of the consumers.

It remains to be seen how soon MyCC will proceed to conduct a market review further down the supply chain, focusing on the providers and suppliers (level 3) with whom consumers interact directly. Consumers stand to benefit from MyCC playing a bigger and more pro-active role in regulating the pharmaceutical sector in Malaysia.

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- [1] Elly Fazaniza, "MyCC probes 7 local pharma firms for alleged anti-competitive agreements", *theSun Daily* (10 August 2016) <<http://www.thesundaily.my/news/1997609>>
- [2] "Market Review on Priority Sector Under Competition Act 2010 Pharmaceutical Sector" published by MyCC (27 December 2017) ("the Review") <<http://www.mycc.gov.my/sites/default/files/media-review/Market%20Review%20on%20Pharmaceutical%20Sector.pdf>>
- [3] Paragraphs 5.4 (pages 134 to 144), 6.3(A) (pages 158 to 163) and 7.2 (pages 180 to 199) of the Review
- [4] Anti-competitive strategies that do not involve discrimination in pricing, examples of which were identified in the Review as follows: (i) indulging in vexatious litigation purely aimed at harassing rivals, (ii) influencing government or regulatory procedures, and (iii) impeding entry of generic medicine by disparaging rival products
- [5] Paragraphs 6.3(B) (pages 164 to 165) and 7.2 (pages 180 to 199) of the Review
- [6] *Ibid.*, para 6.3 (D) (pages 165 to 167)
- [7] Paragraphs 6.4 (pages 167 to 173) and 7.3 (pages 199 to 204)
- [8] Paragraph 6.5 (pages 173 to 174)
- [9] Paragraphs 2.5 (pages 60 to 68) and 6.6 (page 174)
- [10] Paragraph 8.2 (A) (page 214)
- [11] Paragraph 8.2 (B) (page 215)
- [12] Paragraph 8.2(B), (C) and (J) (pages 214 to 220)
- [13] Paragraph 8.2 (D) (pages 217 to 218)
- [14] Paragraph 8.2 (F) (pages 218 to 219)