

# GUIDELINES

**ON COMPETITION FOR THE MALAYSIAN GAS MARKET  
IN RELATION TO MARKET DEFINITION,  
ANTI-COMPETITIVE AGREEMENTS AND ABUSE OF  
DOMINANT POSITION**

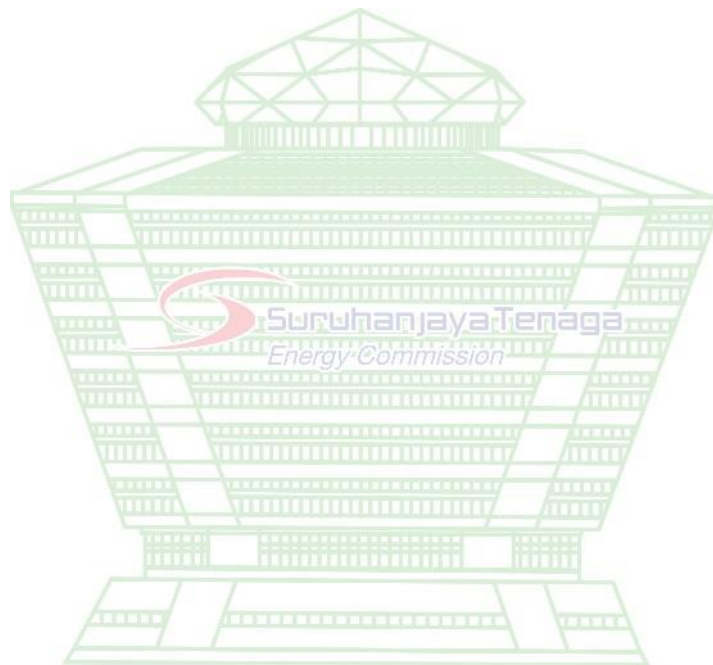
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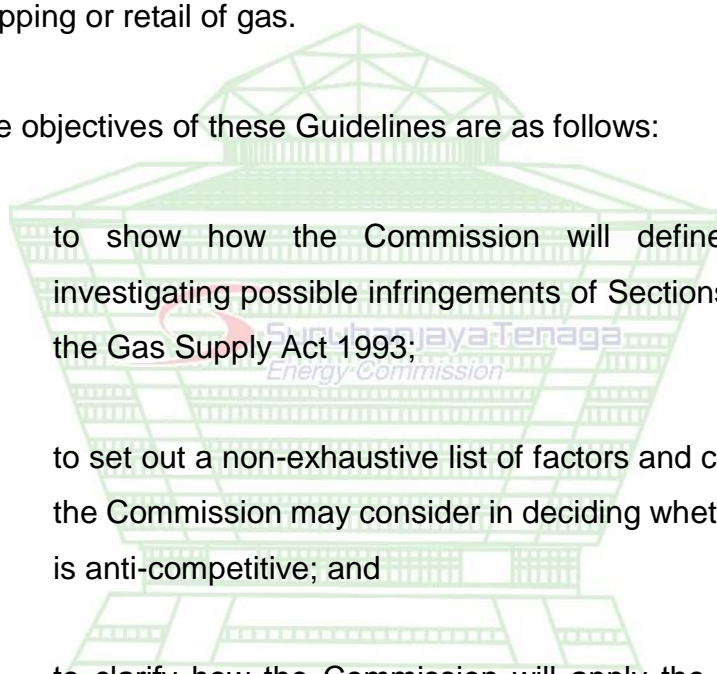
## 1. Objective and Scope

- 1.1. The Malaysian Gas Third Party Access System (“TPA System”) was implemented mainly for the purpose of allowing the utilisation of the country’s existing and future gas infrastructures by multiple parties to import gas into the country. By implementing the TPA System, it is envisaged that the country would promote competition in the gas market and ensure the reliability and sustainability of national gas supplies.
- 1.2. In order to implement the TPA System, the Gas Supply (Amendment) Act 2016 (the “Amendment Act”) was gazetted on 9 September 2016 to amend the then Gas Supply Act 1993 to include provisions in relation to the economic regulation of the import into regasification terminal, regasification, shipping, transportation and including safety and technical regulations in the case of distribution or the retail or use of gas through a piping system and related matters. More particularly, the Commission was given the task to regulate such matters.
- 1.3. The Gas Supply Regulations 1997 was also subsequently amended to cater for the new scope introduced by the Gas Supply Act 1993.
- 1.4. For the purposes of the following provisions of these Guidelines, any reference to the “Gas Supply Act 1993” shall mean a reference to such Act, as amended, varied or modified by the Amendment Act and any reference to the “Gas Supply Regulations 1997” shall mean a reference to such Regulations, as similarly amended, varied or modified.
- 1.5. The relevant parties are also to note that there may be other authorities who have jurisdiction over technical and safety issues throughout the gas value chain, for example, the current jurisdiction of the Department of Occupational Safety and Health (“DOSH”) on technical and safety issues relating to regasification terminals and transmission pipelines in Malaysia pursuant to the, Petroleum (Safety Measures) Act 1984 and

Factories and Machinery Act 1967. Such matters are not covered under the Gas Supply Act 1993 and as such the relevant parties are required to independently liaise with these authorities, if necessary. It shall be the sole responsibility of the relevant parties to identify and ascertain such matters.

1.6. Within its expanded regulatory scope, the Commission, pursuant to Section 4(1)(i) of the Act, is tasked with enabling licensees or other persons to compete effectively in importing liquefied natural gas into regasification terminals, utilization of such regasification terminals, shipping or retail of gas.

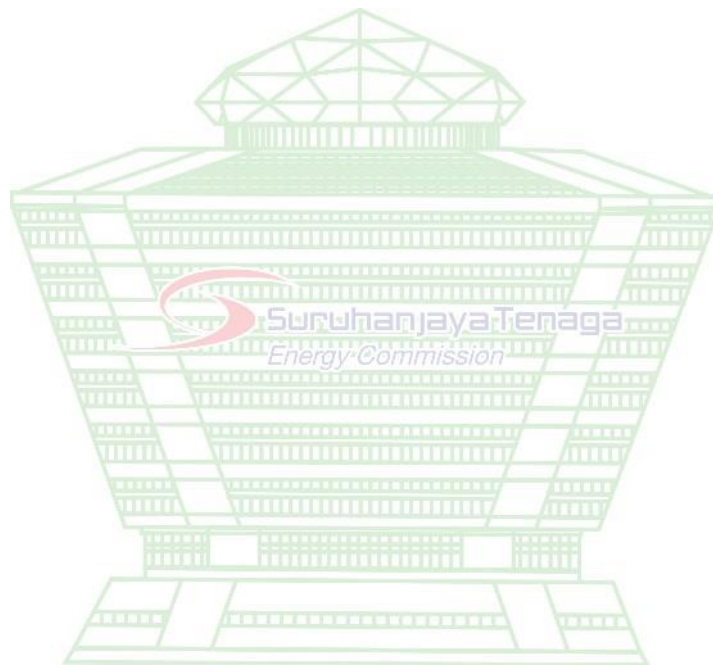
1.7. The objectives of these Guidelines are as follows:

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- (a) to show how the Commission will define markets when investigating possible infringements of Sections 28C and 28G of the Gas Supply Act 1993;
  - (b) to set out a non-exhaustive list of factors and circumstances that the Commission may consider in deciding whether an agreement is anti-competitive; and
  - (c) to clarify how the Commission will apply the test of “dominant position” to persons.

1.8. Where any examples are provided in these Guidelines, such examples are for illustrative purposes only. They are not exhaustive and do not set a limit on the investigation and enforcement activities of the Commission. It will be necessary to consider the circumstances of each case on an individual basis, with reference to these Guidelines in order to come out with a final conclusion and verdict by the Commission.

- 1.9. For the avoidance of doubt, the word “person” used in these Guidelines shall have the meaning assigned to it under the Interpretation Acts 1948 and 1967, and shall include a licensee.
- 1.10. These Guidelines are not the substitute for the Gas Supply Act 1993 nor for any Regulations made thereunder. Anyone in doubt about how they may be affected by the Gas Supply Act 1993 should obtain independent legal advice in respect thereof.

**END OF SECTION**



## 2. Introduction

- 2.1. The current gas market structure of Malaysia has significant natural monopolistic characteristics and hence give rises to patterns of activity that are not subject to normal market disciplines.
- 2.2. It follows that in the interpretation, application and enforcement of Part VIA of the Gas Supply Act 1993, there are some unique characteristics of the gas market that need to be considered, and they are as follows:
- (a) gas supply infrastructures in terms of regasification terminals, transmission and distribution pipelines are unlikely to be replicated due to the considerably high investment requirements;
  - (b) low elasticity of demand and supply for gas, particularly over short time periods, limits substitution opportunities on both the demand and supply side of the market;
  - (c) the presence of legacy agreements and contractual obligations amongst the current players creates entry barriers for new entrants in the Malaysian gas market; and
  - (d) the Malaysian gas market has standard product and service offerings to the consumers with limited scope for product and service differentiation to the end consumers.

**END OF SECTION**



### 3. Market Definition

- 3.1 In the Gas Supply Act 1993, “market” is defined as “the gas market in Malaysia or in any part of Malaysia, and when used in relation to facilities or services related to gas, includes a market for such facilities or services and other facilities or services that are substitutable for, or otherwise competitive with, the first-mentioned facilities or services”.
- 3.2 The term “market” has a special meaning in the Act because it is used to determine the level of competition, identify competitive constraints and assess anti-competitive conduct. This may be different from how persons identify market for their own business purposes. A “market” for the purposes of Part VIA is called a “relevant market” in these Guidelines.
- 3.3 While the definition of a relevant market is important in determining anti-competitive effect and determining whether an entity is dominant, it is also useful from an enforcement perspective because it allows the Commission to identify situations where agreements do not have a significant effect on competition or where persons clearly do not possess market power relatively quickly. For example, if a potentially anti-competitive horizontal or vertical agreement involves competitors with a small market share, then the Commission will be able to close an investigation under Section 28C of the Gas Supply Act 1993 at an early stage because the anti-competitive effect of the agreement is unlikely to be significant unless other relevant factors provide strong evidence of collective market power.
- 3.4 It should also be noted that for certain kinds of horizontal agreements, the Commission does not have to determine the anti-competitive effect as these agreements are already **deemed** by Section 28C(2) of the Gas Supply Act 1993 to be anti-competitive. In other words, for these kinds of agreements, the anti-competitive effect is automatic.



### 3.5 Defining Relevant Market

- (a) Defining the relevant market is not an end in itself but a key step in determining anti-competitive conduct. The objectives of defining the relevant market are as follows:
- (i) to identify all persons who compete in the same market, i.e. persons that compete with other persons against whom a complaint has been made;
  - (ii) to determine whether an agreement violates the Section 28C prohibition because it has the “object or effect of significantly preventing, restricting or distorting competition in the market”. Market definition is important to determine whether there is a significant anti-competitive effect in that market; and
  - (iii) to determine whether conduct by a dominant person violates the Section 28G prohibition by engaging in conduct which “amounts to an abuse of a dominant position in the market”. Determination of dominance requires an assessment in whether a person has substantial market power in that market.
- (b) It is to be noted that the relevant market can be defined widely or narrowly depending upon the case in hand. The scope of the relevant market will have a direct relation to the competitive landscape which a person is facing for that particular case. A wider/narrower scope of relevant market may reduce/increase the market share of the person, thus varying the conclusions regarding the market power of the person in the relevant market.

- (c) The term “relevant market” can be divided into two categories:
- (i) relevant product market; and
  - (ii) relevant geographic market.
- (d) A relevant product market comprises of gas and all facilities or services related to gas which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use. For example, in certain cases, gas as a product can be considered to have substitute products in the form of alternative sources of fuel like coal, hydropower, and petroleum products. This is because the intended use or the characteristics of these products (e.g. use as an alternative fuel resource, characteristics of the calorific content, etc.) can be conclusive of them being a relevant substitute of gas as a product. Whether consumers are able to interchange or substitute between these products would be assessed to finalize the relevant product market for gas in such cases.
- (e) A relevant geographic market comprises of the area in which the persons concerned are involved in the supply and demand of gas, facilities or services related to gas, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are significantly different in those areas. For example, whether Peninsular Malaysia will be considered as a single relevant geographic market or different States within Peninsular Malaysia will be individually considered as separate geographic markets will depend upon the outcome of the assessment of whether persons who supply or demand gas can substitute their supply or demand respectively within different geographic areas.

- (f) For the purposes of defining the relevant market, the Commission may also identify the value chain level at which the competitors are operating and the consumers they are catering to. This may be necessary as, in the gas industry, despite gas appearing as a single product, each value chain level of the gas market can have different product and service offerings resulting in different competitive constraints thus potentially warranting the definitions of relevant market at different value chain levels.

### 3.6 A Conceptual Approach to Defining Relevant Market

- (a) Defining a relevant market entails the identification all the close substitutes for the product under investigation. Products can be substituted both on the demand side (demand substitution) and on the supply side (supply substitution). In other words, the Commission may consider the following two questions to determine the relevant market:
- (i) *Demand Substitution*: If the price of the gas, facility utilization fee or gas related services go up, will consumers switch to other products or source them from a different geography?
- (ii) *Supply Substitution*: If the price of the gas, facility utilization fee or gas related services go up, will suppliers of other products quickly switch to providing gas, gas facilities or gas related services?
- (b) From an economic point of view, for the definition of the relevant market, the most immediate and effective disciplining force on the behaviour of the suppliers of a certain product is the demand substitutability. Therefore, the exercise of defining the relevant

market for the gas industry consists of identifying, mostly, the effective alternative sources of supply for the consumers of the persons involved in terms of products and geographic location of suppliers.

(c) The Hypothetical Monopolist Test (HMT)<sup>1</sup>

- (i) The HMT is a conceptual approach which may be used to define relevant markets.
- (ii) The HMT defines the relevant market as “the smallest group of products (in a geographical area) that a hypothetical monopolist controlling that product group (in that area) could profitably sustain a price above the ‘competitive’ price i.e. a price that is at least a small but significant and non-transitory increase in price (SSNIP) above the competitive price. The question to be answered is whether a person’s consumers would switch to readily available substitutes or to suppliers located elsewhere in response to a SSNIP. If the substitution were enough to make the SSNIP unprofitable, then those substitute products or areas need to be included in the relevant market definition. This analysis continues until the SSNIP becomes profitable with respect to the relevant product(s) and area(s).
- (iii) Typically, in most industries the HMT will use a price-range of 5-10% to represent a SSNIP. For the gas market, it is common to experience wholesale price movements that are many times higher than these benchmark numbers. As a consequence, the Commission will determine the range

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<sup>1</sup> This test originated from the United States, called the SSNIP test. It was later adopted by the Competition Commission of Malaysia to identify the relevant market for competition law purposes.

of SSNIP on a case to case basis depending upon the characteristics of demand substitutability at various levels in the value chain. The Commission may also, if it deems suitable, look at the way in which regional gas and LNG prices are set.

(iv) However, it must be recognized that the HMT only provides an analytical framework for assessing whether products are likely to be substitutable for, or otherwise competitive with the relevant product. Therefore, the HMT is rarely able to provide a precise answer.

(v) It should also be emphasized that defining a market in strict accordance with the aforementioned test's assumptions is rarely possible. Even if the test could be conducted precisely, the relevant market is, in practice, no more than an appropriate frame of reference for competition analysis. The test provides only a conceptual framework within which evidence on competitive constraints can be gathered and analysed.

### 3.7 Evidence Relied on to Define "Relevant Market"

(a) There is a range of evidence permitting an assessment of the relevant market. The Commission will adopt an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases. The Commission will not follow a rigid hierarchy of different sources of information or types of evidence.

(b) Some methods/sources of evidence which the Commission may adopt are as follows:



- (i) The Commission may contact consumers and market players to gather their views on the boundaries of the product and geography market. The Commission may also contact relevant trade associations for the assessment or request additional information from the persons involved in the case.
  - (ii) In certain cases, it is possible to analyse evidence relating to past events or shocks in the market that offers actual examples of substitution of products. Such evidence of substitution, if available, will be fundamental for market definition purposes.
  - (iii) A number of quantitative tests have been specifically designed for the purposes of understanding demand substitution behaviours. These include econometric and statistical approaches estimates of elasticities and cross-price elasticities. The Commission may consider such evidence to establish patterns of substitution in the past.
  - (iv) The Commission may also carry out visits or inspections to the premises of the parties, consumers and/or competitors.
  - (v) Information from marketing studies, consumer surveys which the gas industry has been using for their own decision making may also be considered.
- (c) It will not be necessary for the Commission to obtain evidence from all methods/sources mentioned above. Often in practice, the evidence provided by a subset of the aforementioned methods/sources will be sufficient to reach a conclusion.

**END OF SECTION**



## 4. Anti-Competitive Agreements

### 4.1. Introduction

- (a) Section 28C of the Gas Supply Act 1993 prohibits agreements between persons which have as their object or effect the significant prevention, restriction or distortion of competition in the gas industry or market.
- (b) An agreement which has the object or effect of significantly preventing, restricting or distorting competition in the gas industry or market, for the purposes of these Guidelines, is hereinafter, referred to as an “anti-competitive” agreement.
- (c) These Guidelines set out a non-exhaustive list of factors and circumstances that the Commission may consider in deciding whether an agreement is anti-competitive.

### 4.2. Some Important Terms Used in Part VIA of the Gas Supply Act 1993

- (a) Agreement
  - (i) An example of a horizontal agreement is an agreement between two or more shipping licensees in the shipping licensees’ market, or between two or more retail licensees in the retail licensees’ market.
  - (ii) An example of a vertical agreement is an agreement between a shipping licensee and a transportation licensee, or between a transportation licensee and a retail licensee.
  - (iii) The term “agreement” is very wide and includes both written and oral agreements. In this regard, undertakings

should be careful in communicating with each other, either in person or by telephone, letters, email or through any other means. For example, any form of communication about price between persons might constitute “an agreement” relating to price.

(iv) An agreement could also be found where persons attending a business lunch listen to a proposal without objection. Mere presence of persons at an industry association meeting where a decision was made may be sufficient to constitute an agreement between those undertakings present.

(v) Associations should also consider informing their members not to discuss the prohibited agreements stipulated in Section 28C(2) of the Gas Supply Act 1993 as a way of avoiding liability. A decision by an association includes a decision by a trade association but the provisions are not limited to any particular kind of association. Trade and other associations generally carry out legitimate functions intended to promote the competitiveness of their industry sectors. However, persons participating in such associations may in some instances collude and co-ordinate their actions which could infringe the Gas Supply Act 1993.

(vi) Similarly, any buyers and sellers should avoid vertical restrictions in a sales contract that could be anti-competitive. Vertical restrictions could apply at any stage of the gas value chain and could be either on price or non-price. For example, a shipping licensee and a retail licensee can get into an exclusive agreement to control

gas supplies within a relevant geographic market to foreclose competition in that relevant market.

- (vii) An agreement need not necessarily just be made between licensees. It may also be made between a licensee and a non-licensee or even between non-licensees.

(b) Concerted Practices

- (i) Concerted practices usually involve some form of informal co-operation. A concerted practice could arise where parties knowingly enter into an informal arrangement involving some practical co-operation or where their conduct is influenced in some way following contact or communication between them. This could involve, for example, an informal arrangement where one competitor sets the price and other competitors follow without any reasonable justification.
- (ii) Competitors should be wary of simply following the prices of competitors unless the decision was made completely independently from all other competitors and there is a reasonable explanation for following each other, such as an increase in price of an important input.

(c) Object of Agreement

- (i) 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 the light of the agreement's economic context.

- (ii) If the “object” of an agreement is highly likely to have a significant anti-competitive effect, then the Commission may find the agreement to have an anti-competitive “object”.
- (iii) Once anti-competitive “object” is shown, then the Commission does not need to examine the anti-competitive effect of the agreement.
- (iv) If an anti-competitive object is not found, the agreement may still breach the Gas Supply Act 1993 if there is an anti-competitive effect.

#### 4.3. Significant Object or Effect

- (a) Both horizontal agreements and vertical agreements are prohibited if they have an anti-competitive object or effect which is significant on the gas industry or market. Agreements are prohibited only if they significantly prevent, restrict or distort competition in the gas industry or market in Malaysia. How the Commission will interpret the “significant prevention, restriction or distortion of competition” will be discussed further below.
- (b) In general, ‘significant’ means the agreements must have more than a trivial effect. It should be noted that effect would be assessed in relation to the identified relevant market. In general, a good guide to the trivial effect of an anti-competitive agreement might be the market share of those participating in such an agreement. If the parties have a low combined market share, the agreement is unlikely to give rise to anti-competitive effects in the relevant market.

- (c) The Commission considers it unlikely that the effect of an agreement will be significant, if the combined market share held by the parties to the agreement does not exceed 20% in any of the relevant markets affected by the agreement, where the agreement is made between persons which are competitors on any of these markets.
- (d) Additionally, the Commission considers it unlikely that the effect of an agreement will be significant, if the market share held by each party to the agreement does not exceed 25% in any of the relevant markets affected by the agreement, where the agreement is made between persons which are non-competitors in any of these markets.
- (e) However, the Commission does not automatically presume the effect of the agreement on the competition to be significant if the market share exceeds the aforementioned thresholds.
- (f) The Commission understands that it is difficult to assess whether an agreement has significant anti-competitive effect in the gas industry. Differences in the inherent structure across the gas value chain, the variety of horizontal cooperation agreements and the different effects they may cause in different market situations warrant an assessment of agreements between two parties on a case by case basis. For example, it is understood that transmission and distribution system operations have natural monopolistic attributes and hence market share should not be the only indicator to be considered for assessment in these markets. Therefore, the Commission will consider additional factors, while determining whether the agreement has a significant effect or not, such as structure of the market, stability of market shares over time, market power of the parties, entry barriers and the likelihood

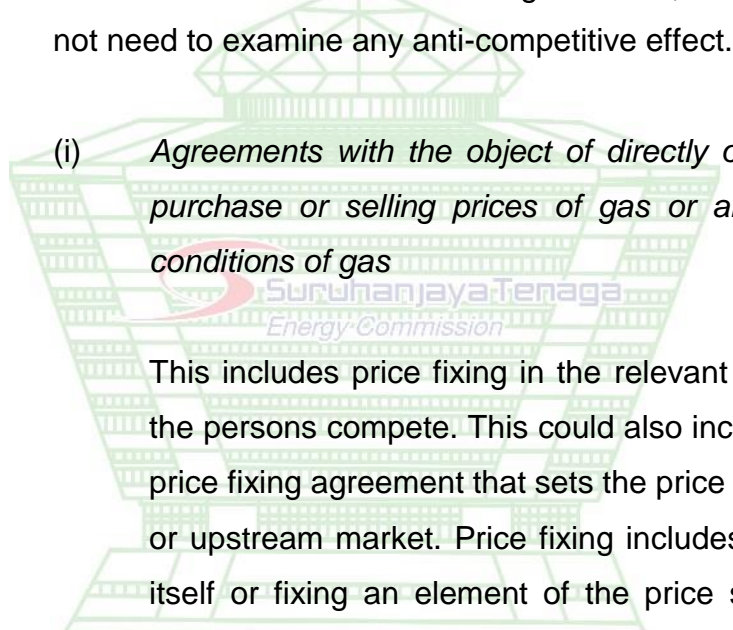


of market entry and buyer characteristics like presence of countervailing powers.

#### 4.4. Certain Horizontal Agreements Deemed to be Anti-Competitive

- (a) It is important to note that Section 28C(2) of the Gas Supply Act 1993 treats certain kinds of horizontal agreements between persons as anti-competitive. In these situations, the agreements are deemed to “have the object of significantly, preventing, restricting or distorting competition in the gas industry or market.” This means for these horizontal agreements, the Commission will not need to examine any anti-competitive effect.

- (i) *Agreements with the object of directly or indirectly fixes purchase or selling prices of gas or any other trading conditions of gas*



This includes price fixing in the relevant market in which the persons compete. This could also include a horizontal price fixing agreement that sets the price in a downstream or upstream market. Price fixing 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. It could also include setting the price of transport charges (such as tariffs of gas transportation and distribution), credit terms, etc. between persons.

Price fixing could also include an agreement or arrangement to indirectly restrict price competition in some way such as recommended pricing. This could also include agreeing to share price lists 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.

(ii) *Agreements with the object of limiting or controlling –*

(aa) *production*

The Commission will consider limiting or controlling production to include limiting or controlling LNG or gas imports into the Malaysian market. A horizontal agreement between gas producers or between importers which have an object to significantly prevent, restrict or distort competition along the gas value chain, would be deemed anti-competitive.

(ab) *market outlets or market access*

This could include competitors agreeing to 'stay out of each other's markets' or restricting access to the market by new entrants or setting territorial restrictions in gas contracts.

(ac) *technical or technological development*

This could include competitors agreeing not to introduce new products (e.g. bundling of gas with other utilities) or setting technology standards collectively that prevents other competitors from selling. Another example would be competitors agreeing not to buy technology from certain suppliers (a boycott) etc.

(ad) *investment in the gas industry*

This could include agreeing to limit investments in infrastructure capacity expansion in regasification, transmission and distribution systems to restrict competition.

(iii) *Agreements with the object of sharing markets or sources of gas supply*

This could include competitors agreeing to allocate consumers between themselves or agreeing to stay out of each other's geographic territory or consumer base. Agreeing to buy only from certain suppliers could also be deemed to be anti-competitive.

(iv) *Agreements with the object of performing an act of bid rigging*

This could include:

- (aa) parties agreeing to submit high cover bids that are intended not to be successful, where the unsuccessful bidders may get kick-backs;
- (ab) bid suppression where parties agree that only one of them will submit a bid for a contract; and
- (ac) bid rotation where the parties to the agreement take turns to win contracts.

More than one of these bid-rigging practices can occur at the same time. For example, if one party to the agreement

is designated to win a particular contract, the other parties could avoid winning either by not bidding ('bid suppression'), or by submitting a high bid ('cover bidding').

- (b) Section 28C(2) of the Gas Supply Act 1993 also means that persons should avoid communicating with competitors about price or engaging in any kind of joint conduct that could restrict competition between them. Persons should ensure their pricing and marketing decisions are made independently. To avoid possible future liability, persons should ensure that those making decisions on pricing, record the basis on which they make their decisions. Persons should ensure that sales and marketing people in the field understand that they should not talk to competitors about price etc. at association meetings or in the market.
- (c) In general, the frequent exchange of confidential information among all competitors in a market with few competitors is more likely to have a significant effect on competition. In addition, the exchange of information between competitors that is not provided to consumers is also likely to have a significant adverse effect on competition.

#### 4.5. Relief of Liability

- (a) There are a number of agreements in gas markets with features and requirements that seek to ensure safe, secure and efficient operation of gas networks. These agreements may contain provisions that have the effect of restricting competition as an unavoidable consequence of achieving their objectives relating to safety, security and efficiency. For example, requirement of consistent gas quality may merit certain provisions in the agreement which may restrict competition. Another example

could be when competitors engage in open discussions regarding gas supplies during times of energy crisis. Certain large scale infrastructural investments may also require exemptions for a certain time period to reduce the economic risks of such investments.

- (b) The onus of proving the stipulated requirements lies on the parties to the agreement. The party claiming for this relief is required to prove that the benefits gained are passed on to the consumers.

#### 4.6. Individual Exemption

- (a) Persons can apply to the Commission for an individual exemption which may be granted subject to conditions, obligations and for a limited duration. It is up to the parties to demonstrate the claimed benefits according to the criteria set out in Section 28E of the Gas Supply Act 1993.
- (b) An individual exemption can be cancelled or varied if there is a material change of circumstances or there is a breach or non-compliance of an imposed condition.
- (c) An individual exemption can be obtained by applying to the Commission in a manner prescribed by the Commission from time to time.

#### 4.7. Block Exemption

- (a) The Commission may grant a block exemption to a particular category of agreements. It is up to the parties to demonstrate the claimed benefits according to the criteria set out in Section 28F of the Gas Supply Act 1993.

- (b) For example, block exemptions for all gas supply agreements between licensees and consumers in a particular industry.
- (c) The advantage of a block exemption is that similar agreements can be examined at the same time which will allow the Commission to provide a better overall assessment of anti-competitive impact and an assessment of the claimed benefits. This will also relieve persons of having to submit separate applications for individual exemptions.
- (d) A block exemption can be cancelled or varied if there is a material change of circumstances or there is a breach or non-compliance of an imposed condition.
- (e) A block exemption can be obtained by applying to the Commission in a manner and as per the procedures prescribed by the Commission from time to time.



**END OF SECTION**

## 5. Abuse of Dominant Position

### 5.1. Introduction

- (a) Section 28G of the Gas Supply Act 1993 prohibits a person from engaging (whether independently or collectively with other persons) in any conduct which amounts to an abuse of a dominant position in the gas market in Malaysia.
- (b) In assessing whether a person has engaged in any conduct which amounts to an abuse of a dominant position in the gas market in Malaysia under Section 28G of the Gas Supply Act 1993, the Commission will proceed in three stages:

Stage 1: Define relevant market

Stage 2: Determine dominance in the relevant market

Stage 3: Determine abuse of dominance in the relevant market

### 5.2. Stage 1: Define Relevant Market

At the onset of the analysis of abuse of dominance, the Commission will define the relevant market of the particular case in hand. While defining the relevant market, the guidelines included in Chapter 3 of this document will be considered.

### 5.3. Stage 2: Determine Dominant Position in the Relevant Market

- (a) A person shall be dominant (whether as a supplier or a buyer) if such person has significant market power so as to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors.



- (b) Market power is not an absolute term but a matter of degree, and the degree of market power will depend on the circumstances of each case. In assessing whether a person has significant market power, it is helpful to consider whether and the extent to which a person faces competitive constraints. Those constraints might be coming from existing competitors, potential competitors and other factors such as strong buyer power from the person's consumers. Such constraints are as follows:
- (i) Existing Competitors. Here market shares of competitors provide a starting point for assessing the constraints competitors impose on the alleged dominant person. The higher the degree of competition, the lower the probability of dominance is.
  - (ii) Potential Competitors. The possibility that new entrants will come into the market if prices are set high by the alleged dominant person. The possibility of new entrants depends on the barriers to entering the market. For example, a significant barrier is licensing requirements on entry. The higher the entry barriers, the higher the probability of dominance is.
  - (iii) Other Constraints. These constraints are, for example, imposed by buyers with significant power or imposed by the Government as economic regulation such as price regulation.
- (c) The Commission may consider the following non-exhaustive list of factors and circumstances while deciding whether a person is in a dominant position in the gas industry:

(i) Market Share

Market share of a person is a good starting point to assess the position of dominance in the relevant market. However, market share as a sole indicator of dominance can never provide legal certainty. Dominance, which is assessed in terms of the person's ability to act without concern about competitor's responses or ability to dictate the terms of competition, can be affected by other factors as well e.g. barriers to entry, buyer power etc. Hence, market share will not be regarded as conclusive indicator of dominance.

The Commission considers a market share of above 60% as a strong indication of a dominant position in the relevant market while it considers it unlikely that a person will be individually dominant if its market share of the relevant market is below 40%.

Evidence on market shares may come from a number of sources including, but not limited to:

- (aa) Data provided by persons in the relevant market – persons will be asked for their sales data and their estimates of the market shares of their competitors;
- (ab) Data provided by trade associations;
- (ac) Market research reports;
- (ad) Market review by the Commission.

The market share will be calculated based on the definition of the relevant market and upon the appropriate method

depending on the case in hand (volume sales vs. value sales). Persons should be aware that the way they define their market and calculate their market share for internal reporting and marketing purposes may not be the relevant market defined by the Commission. Persons may refer to Chapter 3 of these guidelines on Market Definition for this purpose.

- (ii) Technology and commercial trends affecting market power:

These could include the effects of ownership of large infrastructure assets like regasification terminals, transmission and distribution pipelines resulting in natural monopolistic trends in the value chain; factors affecting the safe, efficient and consistent supply of quality gas for the benefit of the end user; etc.

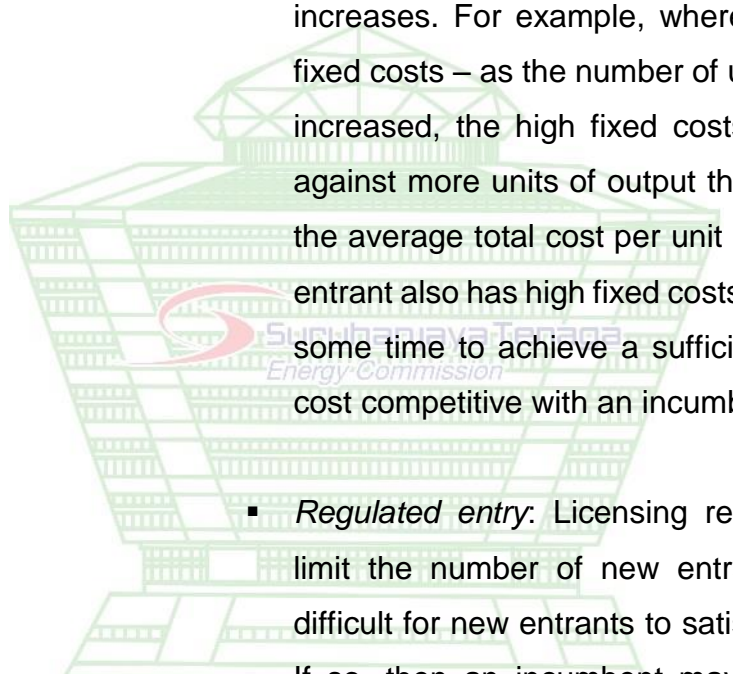
- (iii) The degree of service differentiation and sales promotion in the market:

This could include effects of service differentiation and sales promotion in the gas retail market (e.g. customer service, sales discounts, etc.).

- (iv) Any other matters which the Commission is satisfied are relevant:

The Commission understands that market dominance depends on many other competitive conditions in the relevant market. Some of those factors are discussed below:

(aa) **Barriers to Entry:** If new persons can easily enter a market where person A has a 100% market share, then A may not be dominant. A must have obtained its current market share by being more efficient or by being a first mover. The Commission may consider any barriers to entry when assessing dominance like:

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- *Economies of scale:* This occurs where the average costs of production fall as output increases. For example, where there are high fixed costs – as the number of units produced is increased, the high fixed costs are written off against more units of output therefore reducing the average total cost per unit of output. A new entrant also has high fixed costs but may require some time to achieve a sufficient output to be cost competitive with an incumbent.
  - *Regulated entry:* Licensing requirements may limit the number of new entrants or make it difficult for new entrants to satisfy entry criteria. If so, then an incumbent may be able to act without constraint.
  - *High Sunk Costs:* Sunk costs are irrecoverable costs. For example, pipeline costs cannot be recovered once it is laid down irrespective of the fact whether the gas flows through it or not at a later stage. If sunk costs are high then entry may not occur at all and so an incumbent dominant person can act without constraint.

- *Long term contracts:* Presence of long term contracts between a supplier and a buyer can also cause entry barriers as due to contractual obligations a buyer may not want to switch to another supplier.

(ab) Buyer Power: For example, having the following conditions may enhance the buyer's (e.g. a shipping licensee acting as a buyer of gas from an import into regasification terminal licensee) bargaining strength considerably:

- The buyer is well informed about alternative sources of supply;

- The buyer could commence production on the item itself or 'sponsor' new entry by another supplier;

- The buyer is important for the seller (i.e. the seller would be willing to cede better terms to the buyer in order to retain the opportunity to sell to that buyer);

- The buyer can intensify competition among suppliers through establishing a procurement auction or purchasing from a competitive buyer.

(ac) Economic Regulation Imposed by the Government: One example of economic regulation would be price regulation where the final consumer prices are regulated. In such circumstances the Commission may consider whether the person



under investigation still has any market power over other dimensions of competition.

(d) Collective Dominance:

Section 28G makes it clear that dominance is not simply a conduct by a single person but can also include conduct of persons exercising significant market power together.

The Commission will look at each case on its merits but in general there may be a breach of the Section 28G prohibition if two or more separate persons which have significant market power act similarly in a market and that conduct excludes equally efficient competitors.

5.4. Stage 3: Determine Abuse of Dominance in the Relevant Market

- (a) Section 28G of the Gas Supply Act 1993 prohibits a person from engaging (whether independently or collectively with other persons) in any conduct which amounts to an abuse of a dominant position in the gas market in Malaysia.
- (b) It is the abuse of, not the existence of, a dominant position that is prohibited by Section 28G of the Gas Supply Act 1993. Hence, where a person is in a dominant position in a relevant market, it has to be cautious to ensure that it does not abuse its dominant position. Where an abuse of a dominant position is alleged or suspected, the Commission will investigate further to determine whether or not any infringement has occurred.
- (c) The Gas Supply Act 1993 has provided with a list of examples whereby a dominant person may abuse its dominant position. They are:



- (i) directly or indirectly imposes unfair purchase or selling price or other unfair trading condition on any party pertaining to the delivery of gas or utilization of facilities in the gas industry or market;
- (ii) limits or controls production, market access or technical or technological developments or investments in the gas industry to the prejudice of all persons and consumers;
- (iii) applies different conditions to equivalent transactions with other trading parties which places the other trading parties at a competitive disadvantage; or
- (iv) makes the conclusion of agreements conditional upon acceptance by the other parties of obligations which, by their nature or by commercial usage, have no connection with the subject of the agreement.

5.5. What is Abuse of Dominance? Exploitative vs. Exclusionary Conduct

- (a) Abusive conduct generally falls into one or both of the following categories:
  - (i) Exploitative abuse – conduct by a person which exploits its consumers is termed as exploitative abuse. Exploitative conduct may relate to unfair pricing, unfair trading conditions on consumers.
  - (ii) Exclusionary abuse – conduct by a person which amounts to exclusionary behaviour, because it removes or weakens competition from existing competitors, or establishes or

strengthens entry barriers, thereby removing or weakening potential competition.

Exclusionary abuse is a conduct that prevents equally efficient competitors from competing.

Exclusionary conduct shall be assessed in terms of its effects on competition - which means its impact on the competitive process and not its effects on competitors. Effective competition drives inefficient persons out of the market. So even if a person is dominant it should not be stopped from engaging in competitive conduct that benefits consumers even if inefficient competitors are harmed.

The Commission shall ensure that conduct that benefits consumers will not be prohibited and therefore ensure that persons have the incentives to compete on merits. However, it is important to note that certain conduct, for example predatory pricing, may result in consumer benefits in the short run, but gives the dominant person a position to increase prices without constraints from the competition at a later date which may have detrimental effects on consumer benefits.

## 5.6. Examples of Forms of Abuse that may Amount to an Abuse in the Gas Industry

### (a) High Price Related Exploitative Conduct

If a dominant person believes there are no new entrants likely, then it will set a high price to exploit consumers. The resulting excessive profits are not a reward for innovation but rather an act of abuse of dominance.

(b) Exclusive Dealings

A dominant person may try to resort to exclusionary conduct by hindering its competitors from selling to consumers through use of exclusive purchasing obligations or rebates, together referred to as exclusive dealing. For example, a dominant shipping licensee may impose long term contracts on a consumer, wherein the shipping licensee may incorporate anti-competitive clauses in the agreement which prevents the consumer to switch to other suppliers.

(c) Predatory Conduct

The Commission will generally intervene where there is evidence showing that a dominant person engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term, so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm in the long run. Several cost concepts are potentially relevant in the investigation of a predatory pricing claim. The different methods include (but are not limited to):

- (i) *Average variable cost (AVC)*: This is a short-term cost concept, which is defined as the sum of all the costs that change as output changes, divided by the total quantity. All fixed costs are excluded.
- (ii) *Average avoidable cost (AAC)*: This covers all the costs (i.e. both variable costs and the fixed costs directly related to the product under investigation) that could have been avoided if the dominant person had not engaged in the

predatory strategy. If a person does not cover AAC then it is giving up profits (i.e. sacrificing profits).

- (iii) *Average long run incremental cost (LRIC)*: This refers to the change in total costs from the production of an increase in output (which can be either the total output or simply the increase in output due to the predatory conduct). So LRIC includes all the costs associated with the product under investigation even if those costs were sunk (i.e. non-recoverable) before the alleged predatory pricing conduct was engaged in.

Different situations may dictate the use of different cost measures and the Commission will decide the exact nature of the cost method on a case-by-case basis. In assessing predatory pricing, the Commission may consider whether price is below the cost and whether it is relevant to the particular fact of the case being investigated with a view of determining whether an *as-efficient* competitor is excluded.

- (d) Refusal to Supply and Margin Squeeze

The Commission acknowledges that any person, dominant or not, should have the right to choose its trading partners. Typically problems related to anti-competitive behaviour arises when the dominant person competes on another market with the buyer whom it refuses to supply or charges unfavorable prices for the product or service supplied. Such conduct either results in a complete foreclosure of the market or a 'margin squeeze' of the competitor thus becoming anti-competitive. For example, a distribution licensee, who also has a retail licence, refuses to grant access to its available transport capacity (capacity hoarding) or grants access in a less attractive form (capacity

degradation) or charges unfavourably high price to its competitors to access the infrastructure resulting in other retailers suffering from direct market foreclosure or margin squeeze.

(e) Tying and Bundling

Tying and bundling are common practices intended to provide consumers with better products or offerings in more cost effective ways. However, tying and bundling may sometimes amount to an abuse of dominant position.

‘Tying’ usually refers to situations where consumers that purchase one product (the tying product) are required also to purchase another (tied product). ‘Bundling’ refers to situations where a seller sells products together at lower price than when purchased separately.

The Commission will consider tying and bundling cases as an abuse of dominant position where a person has a dominant position in relation to the tying product. Having established this, the Commission will then consider whether the tying or bundling may lead to anti-competitive effects in the tied market, the tying market, or both at the same time.

For example, a shipping licensee may bundle the supply of gas with another product of its company to the consumer by which it forecloses the competition in the gas market.

5.7. Can Conduct That Would Otherwise be an Abuse be Justified?

Section 28G(3) states that it “does not prohibit a person in a dominant position from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the



market entry or market conduct of a competitor”. The onus of proof justifying conduct that would otherwise be found to be an abuse rests with the person claiming it. Some (non-exhaustive) examples could include a dominant person:

- (a) Defending its own commercial and economic interests in the face of action taken by certain competitors;
- (b) Refusing to sell to a buyer who has issues with its credit worthiness;
- (c) Conduct due to adherence to existing regulations and laws in Malaysia;
- (d) Offering a rebate that is related to the reduced costs or other such advantages which are passed on to the consumers of supplying a particular consumer;
- (e) Offering of tying and bundling products which results in savings in the operations translating into benefits to the consumers; or
- (f) Claiming that predatory pricing enables to achieve economies of scale or efficiencies related to the expanding of the market.

**END OF SECTION**



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