

Regulating Anti-Competitive Business Conduct via Competition Law in Malaysia

*(Mengawal Selia Tingkahlaku Perniagaan Anti Persaingan Melalui Undang-Undang
Persaingan di Malaysia)*

C & Prof Dr Nazura Abdul Manap
Universiti Kebangsaan Malaysia
Selangor, Malaysia
hliza@usim.edu.my
nazura@ukm.edu.my

ABSTRACT

The introduction of the competition law in Malaysia via Competition Act 2010 has brought a tremendous shift in business practices. Common practice in businesses such as collusion to exploit quantity and price of goods in the market is no longer permitted with the coming into force the Competition Act 2010 in 2012. Hence, it is the aim of this paper to identify roles of Malaysia competition law in regulating anti-competitive business conduct in Malaysia. The result indicated that while competition law in Malaysia plays its role in combating anti-competitive business conduct, improvements of the provisions such as inclusion of specific merger provisions in the Competition Act 2010 and specific guidelines for intellectual property matters are needed in order to further support implementation of competition law in Malaysia. This paper employs library based approach which collects data from statutes, decided cases, journals and books.

Keywords: Anti-Competitive Business Conduct, Competition Law, Competition Act 2010, Competition Commission Act 2010

ABSTRAK

Pengenalan Undang-Undang Persaingan di Malaysia melalui Akta Persaingan 2010 membawa perubahan besar dalam amalan perniagaan. Amalan biasa dalam perniagaan seperti pakatan sulit untuk mengeksploitasi kuantiti dan harga barangan di pasaran adalah tidak lagi dibenarkan dengan mula berkuatkuasanya Akta Persaingan 2010 pada tahun 2012. Oleh itu, tujuan artikel ini ialah untuk mengenal pasti peranan Undang-Undang Persaingan di Malaysia dalam mengatur kelakuan perniagaan yang bersifat anti-persaingan. Hasilnya menunjukkan bahawa, walaupun Undang-Undang Persaingan di Malaysia memainkan peranan dalam memerangi perlakuan perniagaan yang bersifat anti-persaingan, namun penambahbaikan peruntukan seperti kemasukan peruntukan khusus berkaitan penggabungan dalam Akta Persaingan 2010 dan garis panduan khusus bagi perkara-perkara berkaitan harta intelek adalah diperlukan dalam usaha untuk terus menyokong pelaksanaan Undang-Undang Persaingan di Malaysia. Artikel ini menggunakan pendekatan kepustakaan yang mengumpul data dari statut, kes-kes yang telah diputuskan, jurnal-jurnaldan buku-buku.

Kata kunci: Anti-persaingan, Undang-Undang Persaingan, Akta Persaingan 2010

INTRODUCTION

Competition law concerns with practices that bring harm to the competitive process (Whish, R. 2009). Some of the practices which bring harm to the competitive process may include participating in agreements which have their objects or effects to restrict competition and improper monopolist behavior in the market. Agreement between competitors who agree to group together with the objective to reduce competition in the market by either fixing prices or sharing information may result to society losing the benefit from the competition law, simply because it will restrict the choice of prices for the same product and services from entrepreneurs.

Apart from that, for the purpose of protection or obtaining power in the market, monopolists tend to behave in such a way which may harm the competition process in the market. The aim to obtain market power is evidenced when a dominant supplier in the market buys all raw materials in order to exclude his competitor which amounts to market foreclosure, resulting harm in the competition process.

Thus, this article attempts to discuss the roles of Malaysia competition law in regulating anti-competitive behavior in business practices. The first part of this article highlights the meaning and types of anti-competitive practices, followed by a brief overview of competition law in Malaysia. This article will further provide discussion on the roles of competition law in regulating business conducts and highlight several issues which may be relevant for consideration by the competition authority in order to encourage fair business practices in the market.

ANTI-COMPETITIVE PRACTICES: ITS DEFINITION AND TYPES

Definition

Anti competitive practices or also known as restrictive business practices (Goode, W., 2007) refers to a wide range of business practices in which a firm or group of firms may engage in order to restrict inter-firm competition to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality (<https://stats.oecd.org/glossary/detail>).

Generally, anti-competitive practices relate to business practices which aim to restrict fair competition in the market for the purpose of maintaining market power. However, in determining which types of business practices are considered as anti-competitive varies by jurisdictions because each jurisdiction sets its own legal criteria in determining anti-competitive practices. Anti-competitive practices as indicated by the Competition Act 2010 refer to two kinds of conducts, which are participating in anti-competitive agreement and abuse of dominant position.

Types of anti-competitive practices

According to Walter Goode, competition law in most jurisdictions deals with the following kinds of firm behavior; horizontal arrangement, vertical arrangement, misuse of market power by monopolies and control of mergers and acquisitions (Goode, W., 2007). As such, it can be said that anti-competitive practices commonly relate to three kinds of conducts namely, cartels which may occur between firms operating at the same level of production (horizontal arrangement) or firms operating at a different level of production (vertical arrangement), abuse of dominant position by an enterprise which is dominant in the market and merger.

Cartels exist as a result of formal or informal agreement between firms which agree to manage the markets in order to eliminate competition (Goode, W., 2007) while abuse of dominant position occurs when an enterprise which possesses the market power abuses its dominant position in the market by behaving in such a way which restrict competition in the market. For example, limiting production in order to foreclose the market, refusal to deal or supply or excessive pricing.

On the other hand, mergers relate to combination of operations between two groups of companies. Mergers can take place via different ways such as horizontal mergers, vertical mergers or conglomerate mergers. Horizontal mergers happen when two competing companies join together and vertical mergers refer to combination of two companies in which one of the company is a supplier to the other. Another type of merger, known as the conglomerate merger occurs when two companies in different industries combine together (Mushera Ambaras Khan, 2013)

In Malaysia, the Competition Act 2010 includes only two kinds of anti-competitive practices namely prohibition from participating in anti-competitive agreement and abuse of dominant position (Part II of the Competition Act 2010). These two conducts which are declared as anti-competitive demands fulfillment of several criteria under the Competition Act 2010 before enterprises can be declared as engaging in anti-competitive practices. For example, under Section 4 (1) of the Competition Act 2010, it requires enterprises to engage in “horizontal or vertical agreement” which has “the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.” On the other hand, an enterprise is regarded as abusing its dominant position in the market if the dominant enterprise carry its conduct in any ways listed under Section 10(2)(a) – (g) of the Competition Act 2010, namely, imposition of unfair trading condition to suppliers or customers, limiting production, market outlets, technological development or investment to the prejudice of consumers, refusal to supply to a particular enterprise, applying different conditions to equivalent transactions with other trading partners, tying or bundling, predatory pricing and market foreclosure.

Provisions relating to mergers are excluded from the Competition Act 2010 due to the needs to “promote global corporate competition and to further strengthen the economy of Malaysia.” The decision to exclude mergers from the Competition Act 2010 was highlighted by the Minister, Dato’ Sri Ismail Sabri bin Yaakob during the presentation of the competition bill after “taking into account views from various agencies such as Bank Negara Malaysia and Securities Commission Malaysia” (Penyata Rasmi Parlimen Dewan Rakyat, 20 April 2010).

COMPETITION LAW IN MALAYSIA

The competition regulation in Malaysia was initially regulated by sectors - the energy and the communication sectors. The provisions relating to competition rules are incorporated in their respective legislations, indicating prohibitions relating to anti-competitive practices. For example, the Communications and Multimedia Act 1998 prohibits a licensee from “*engaging in any conduct which has the purpose of substantially lessening competition in a communications market*” (Section 133 of the Communications and Multimedia Act 1998) while Section 135 Communications and Multimedia Act 1998, prohibits a licensee from entering into any understanding, agreement or arrangement which provides for rate fixing, market sharing, boycott of a supplier of apparatus or boycott of another competitor. On the other hand, the energy sector provides a general provision relating to competition which can

be seen in Section 14(1) (h) of the Energy Commission Act 2001. Section 14(1) (h) of the Energy Commission Act 2001 gives power to the Energy Commission to “*promote and safeguard competition and fair and efficient market conduct or, in the absence of a competitive market, to prevent the misuse of monopoly or market power in respect of the generation, production, transmission, distribution and supply of electricity and the supply of gas through pipelines.*” It is pertinent to note that, although competition law has been regulated by the abovementioned sectors, it does not cover other kinds of commercial activities.

Hence, a bill known as Fair Trade Practices Bill was introduced and approved on the 26th of October 2005 in the Parliament, the purpose of which is to accommodate the growth of trade and business and encourage fair competition in business. The Fair Trade Policy seeks to accomplish several policy objectives which, among others include; to promote and protect market competition, produce active and competitive entrepreneurs, create fair and competitive market prospects as well as to hinder anti-competitive practices that affect domestic market in order to prevent unjust trade practices.

Competition laws in Malaysia refer to the following; the Competition Act 2010 and the Competition Commission Act 2010 including any subsidiary legislation made under the abovementioned laws (Section 2 of the Competition Commission Act 2010). The Competition Act 2010 mainly consists of provisions relating to the application of competition law in Malaysia. The Competition Act 2010 mainly highlights the coverage of the Competition Act 2010 including commercial practices prohibited by the competition law, procedures relating to investigation, imposition of penalty and appeal procedures.

On the other hand, the Competition Commission Act 2010 provides provisions relating to the establishments, powers and functions of the MyCC as well as other matters connected therewith. In brief, the Competition Commission Act 2010 elaborates on the establishment of the MyCC including the functions and powers of the MyCC as well the financial aspect of the MyCC such as establishments of the Competition Commission Fund and the management of the fund.

Apart from the abovementioned legislations on competition law, it is also worth mentioning that the application of the competition laws in Malaysia is assisted by soft laws, which takes the form of guidelines. At present, the guidelines issued by the competition authority in Malaysia are Guidelines on Leniency Regime, Guidelines on Financial Penalties, Guidelines on the Market Definition, Guidelines on Complaints Procedures, Guidelines on Abuse of Dominant Position and Guidelines on Anti-Competitive Agreement. These guidelines are general in nature, applicable to all commercial activities, their main function being to provide clarification relating to existing provisions in the Competition Act 2010 for the purpose of implementing and deciding issues in competition law.

ROLES OF MALAYSIA COMPETITION LAW IN REGULATING ANTI-COMPETITIVE BUSINESS PRACTICES

The roles of competition law varies depending on the aims and objectives of the competition law in a particular jurisdiction. In relation to Malaysia, the primary objectives of the competition law can be deduced from the preamble of the Competition Act 2010 which provides for the promotion of economic development and protection of consumer's interest. The Competition Act 2010 further provides that, for the purpose of promoting economic growth, the process of competition is to be protected because such process encourages

efficiency, innovation and entrepreneurship which will promote competitive prices, improvement in the quality of products and services as well as serving wider choices for consumers (Preamble of the Competition Act 2010).

The application of the Competition Act 2010 covers all commercial activities within and outside Malaysia regardless of the status of the entity that carries them out. This is an indication that associations, government-linked companies (GLCs) as well as SMEs are not excluded from the coverage of Competition Act 2010 as expressly provided under Section 3 of the Competition Act 2010. By virtue of Section 3(4) of the Competition Act 2010, commercial activity refers to “any activity of a commercial nature” but does not include activities authorized by the government whether direct or indirect, activities which are based on solidarity principles and purchase and offering of goods and services which are not part of any economic activity.

The discussion below attempts to highlight the roles of competition law in regulating anti-competitive business practices.

(i) Preventing collusion in the market under Section 4 of the Competition Act 2010

In order to prevent collusion in the market, Section 4(1) of the Competition Act 2010 prohibits enterprises from participating in horizontal or vertical agreement which has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services. The term ‘enterprise’ as referred to in Section 4 (1) of the Competition Act 2010 means ‘any entity carrying on commercial activities relating to goods or services’. The term ‘agreement’ as employed by Section 4(1) of the Competition Act 2010 refers to the following: any form of contract, arrangement or understanding, whether or not legally enforceable and includes a decision by an association and concerted practices. The term ‘concerted practice’ refers to secret co-operation made among enterprises, usually between competitors. Section 2 of the CA 2010 elaborates the meaning of ‘concerted practice’:

any form of coordination between enterprises which knowingly substitutes practical co-operation between them for the risks of competition and includes any practice which involves direct or indirect contact or communication between enterprises, the object or effect of which is either—

- (a) to influence the conduct of one or more enterprises in a market; or
- (b) to disclose the course of conduct which an enterprise has decided to adopt or is contemplating to adopt in a market,

in circumstances where such disclosure would not have been made under normal conditions of competition.

It is therefore submitted that the usage of the term ‘agreement’ under the Competition Act 2010 is broad. The inclusion of contract under the term ‘agreement’ signifies that it may be a written or unwritten agreement since contract may exist regardless whether it is made orally or in writing. Other conducts such as arrangement, understanding, decisions by associations as well as secret cooperation indicate that informal arrangements are not excluded from the ambit of ‘agreement’ under the Competition Act 2010. Further, the Competition Act 2010 expressly mentions that contract, arrangement and understanding need not be legally enforceable in order to fall within the meaning of ‘agreement’ under the Section 2 of the Competition Act 2010.

Section 4(1) of the Competition Act 2010 expressly provides that agreements which have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services are prohibited, regardless whether such agreement is horizontal or vertical. Horizontal agreement is agreement between enterprises operating at the same level of production. In contrast, vertical agreements refer to agreement concluded between enterprises functioning at different levels of production.

The significant role of competition law in combating collusion in the market can be seen when the Competition Act 2010 declares that horizontal agreement whose objectives are either to fix price, to allocate markets between competitors, to limit or control production and bid rigging as anti-competitive. Some of the instances in which this provision is violated can be seen when entrepreneurs agree among themselves to enter into price fixing agreement. As in the case involving four container depot operators and an information technology service provider, the MyCC was of the opinion that these entrepreneurs engaged in price fixing which may result to financial penalty (Case Number: MyCC.700.2.005.2013).

Although scholars such as Mark Furse suggests that horizontal agreement is prone to distort competition in the market rather than vertical agreement (Furse,M, 2008), vertical agreement is not excluded from the provision of anti-competitive agreement under the Competition Act 2010. In fact, it is also recognized by the Malaysia Guidelines on Chapter 1 Prohibition under paragraph 3.11 which expressly provides that ‘vertical agreements in general are less harmful to competition than horizontal agreements’. According to Tilottama Raychaudhuri, vertical agreement may to a certain extent be anti-competitive when the firm imposing a vertical restraint possesses market power which will consequently limit competition from other firms products. For example, in an exclusive supply agreement, a manufacturer usually restricts distributors from acquiring products from other manufacturers. This kind of restriction might harm competition in the market because of its ability to foreclose the market and encourage collusion (Tilottama Raychaudhuri, 2011).

This may be the reason why vertical agreement is included in the prohibition under Section 4(1) of the Competition Act 2010. However, the determination of whether vertical agreement is anti-competitive is rather flexible since it employs rule or reason approach. In contrast, assessment of horizontal agreement is based on the deeming provision under Section 4(2) of the Competition Act 2010, commonly known as per se rule. Once a horizontal agreement contains objects indicated under Section 4(2) of the Competition Act 2010, it is highly regarded as anti-competitive.

(ii) Preventing abuse of market power under Section 10 of the Competition Act 2010

Abuse of dominant position is another restriction provided in the Competition Act 2010 which aims to control enterprises from abusing their dominant position in the market. Dominant position occurs when “one or more enterprises possess such significant power in a market” so as to enable them to “adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors.” The above definition on dominant position as referred to by the Competition Act 2010 suggests that it does not prohibit entrepreneurs from possessing dominant positions in the market. This is supported by the provision in Section 10 (1) of the Competition Act 2010 which provides that only those dominant enterprises which engage in conducts listed under Section 10(2) (a) to (g) would amount to abuse of dominant position.

Section 10(2) (a)-(g) of the CA 2010 provides a non-exhaustive list of abusive behavior by dominant position which include excessive pricing, market foreclosure, refusal to deal or license, tying and bundling, and predatory pricing. Excessive pricing relates to a situation in which entrepreneurs would raise prices by restricting output. As a result, consumers who purchase the goods would have to pay more due to the absence of competitive condition (Graham,C, 2013). Market foreclosure occurs when a supplier who is in a dominant position buys all raw materials in order to exclude his competitor from the market while refusal to deal may occur when entrepreneurs set unacceptably high price in order to refuse request of supply (Liyang Hou, 2011).

Tying, on the other hand refers to a situation where the customer is forced to buy a second product from the seller, failing which the seller would refuse to sell the first product to the customer while predatory pricing refers to entrepreneurs who excludes rivals from the market by setting prices below cost.

Recent examples can be seen in the case where MyCC proposed to impose financial penalty to My EG Services Bhd (MyEG) for infringing Section 10 of the Competition Act 2010. According to MyCC, MyEG contravenes Section 10 (2) of the Competition Act 2010 by applying different conditions to equivalent transactions with other trading parties to the extent that may harm competition (Case Number: MyCC (ED) 700-1/1/2/2015).

Enforcement of provisions of the Competition Act 2010

The MyCC is an independent body under the Ministry of Domestic Trade, Co-operatives and Consumerism whose function is to enforce provisions contained in the Competition Act 2010. At present, the chairperson of the MyCC is YBhg Tan Sri Dato' Seri Siti Norma Yaakob who was formerly a Chief Judge of Malaysia. The MyCC consists of a Chairman, four representatives from the government and three to five members made up of those knowledgeable in commerce (Section 5 of the Competition Commission Act 2010).

MyCC is vested with powers to enforce competition law (Section 16(d) of the Competition Commission Act 2010) including imposition of penalty for infringement of competition law provisions (Section 17(2)(b) of the Competition Commission Act 2010), organizing competition law awareness programs among the public (Section 16(i) (j) of the Competition Commission Act 2010)giving advices and alert the Minister in matters relevant to competition law especially when dealing with international agreements (Section 16(a),(b),(k) of the Competition Commission Act 2010), perform studies in relation to issues relevant for competition law in Malaysia (Section 16(g) of the Competition Commission Act 2010) and to act as an advocate for competition matters under Section 16(f) of the Competition Commission Act 2010.

Enforcement of competition law in Malaysia takes two approaches, namely soft and hard approaches. Soft approach refers to enforcement of competition law by the MyCC without imposing financial penalty to infringers. For example, the case of Cameron Highland Floriculturist Association (CHFA) which was the earliest case decided by the MyCC relating to infringement of Section 4 (2) (a) of the Competition Act 2010 on price fixing. In that case, the MyCC decided that no financial penalty will be imposed to CHFA because the competition law at that time was still in its infancy. Hence, the MyCC decided that stern warnings and advises to CHFA were sufficient to educate CHFA to comply with the competition rules. The

MyCC required the CHFA to perform the following act: to cease and stop the act of fixing prices of flowers; to provide responsibility on its members to refrain from any anti-competitive practices in the relevant market and to publish the remedial actions taken by them in the mainstream newspapers (Case Number: MyCC/0003/2012(ACA)).

On the other hand, hard approach takes place when the MyCC imposes financial penalty to infringers such as the case of ice manufacturers who agree among themselves to increase the price of ice cubes. Their agreement to raise the price of ice cubes was published in the local newspapers. After due investigation by the MyCC, it was decided that the ice manufacturers infringed Section 4(2)(a) of the Competition Act 2010 which resulted in financial penalty imposed by the MyCC (Case Number: MyCC.700.2.0001.2014).

Apart from that, the MyCC may accept undertaking from enterprises subject to the conditions imposed by the MyCC. This is expressly provided under Section 43(1) of the Competition Act 2010. In the event the MyCC accepts an undertaking from enterprises in relation to an infringement, such enterprises will not be imposed financial penalty and the investigation will be closed. Examples are cases involving Barbers Association (MIHSA) and Malaysia Lorry Owners Association (PMLOA). The Chairman of Barbers Association issued media statement relating to increase in the price of haircut. The Chairman of the Association further warns that members of the Association who fail to follow the decision will be taken action upon by the Association (<http://www.mycc.gov.my/sites/default/files/Undertaking-Barbers.pdf>). Similarly, in the case involving Malaysia Lorry Owners Association (PMLOA) who agrees to fix transport charges for lorry services indicates violation of Section 4(2)(a) of the Competition Act 2010 (<http://www.mycc.gov.my/sites/default/files/Undertaking-PMLOA.pdf>). In both cases, the MIHSA and PMLOA provide undertakings not to proceed with their decision to fix prices and directed their members to cease and desist from further implementing the decision. Their undertakings have been accepted by the MyCC in accordance with Section 43 of the Competition Act 2010.

CHALLENGES AHEAD

The coming into force of the Competition Act 2010 in Malaysia is seen as a step towards promoting fair competition in the market. The Competition Act 2010 is a comprehensive legislation since it contains common provisions relating to anti-competitive practices whose purpose is to act as a legal mechanism in combating unfair business behavior in the market. Nevertheless, there are few issues that need to be observed by the Malaysia competition authority in order to ensure competition law can be implemented effectively in Malaysia. The issues are as follows:

(i) Issues relating to mergers

Since there is absence of specific provisions controlling mergers and acquisitions under the Competition Act 2010, it indicates that there is a lack of a comprehensive regime regulating anti-competitive mergers and acquisitions in Malaysia. At present, mergers and acquisitions in Malaysia are regulated by sectors such as Bank Negara Malaysia, Malaysia Communication and Multimedia Commission and Energy Commission.

Takeovers and mergers may infringe the competition law especially when parties in horizontal mergers decide to share information such as pricing information with competitors. Another instance is when the merger has taken place, there is a risk of abuse of dominant position in

the market because combination of two companies in the market would result in a dominant position which may lead to abuse of dominant position and cartel.

(ii) Issues relating to intellectual property

Intellectual property becomes part of the discussion under competition law when intellectual property holders engage in practices not authorized by intellectual property law but seem to have anti competitive effects (Hovenkamp, H.J., 2008). The main concern relating to intellectual property is due to the fact that intellectual property is governed by laws relating to intellectual property, while the manner in which such intellectual property is to be exercised may be subject to competition law observation. Competition authority should be careful when dealing with intellectual property matters because too strict assessment of competition law in intellectual property matters may restrict innovation.

Examples of intellectual property issue which falls within the ambit of competition law is when intellectual property owners enter into licensing agreement. Some intellectual property licensing agreement has the possibility to create dominant market power and foreclose the market from competitors. Other situations such as contractual restrictions contained in the intellectual property licensing agreement may be used to cover market sharing agreements which is prohibited under the competition law (Anderman, D.S. & Schmidt, H., 2009).

The current situation requires issues relating to intellectual property to be dealt by using the provisions contained in the Competition Act 2010 and the existing general guidelines. However, based on Paragraph 4 of the Guidelines on Chapter 1 Prohibition, the MyCC endeavor to issue a separate guideline in near future to deal with intellectual property matters.

CONCLUSION AND RECOMMENDATION

The foregoing discussion showed significant roles of Malaysia competition law in regulating business conduct namely, prohibiting business operators from participating in anti-competitive practices, prevention of abuse of dominant position by dominant business operators in the market and enforcement of competition law by a specific body regulating competition law in Malaysia, which is the MyCC.

However, specific provisions relating to mergers in the Competition Act 2010 are yet to be incorporated in the Competition Act 2010. Taking into consideration the possibilities of infringement of competition law in the event mergers takes place, it is suggested that provisions relating to mergers be incorporated in the Competition Act 2010 so as to prevent abuse of dominant position in the market.

Another area of concern is relating to implementation of competition law in intellectual property matters. Although the Competition Act 2010 provides provisions relating to conducts condemned by the competition law, the provisions and guidelines contain general application, which applies to all kinds of commercial activity. In the field of intellectual property, it is suggested that specific guidelines would be helpful because guideline is able to provide a framework which can be used by the competition authority in deciding issues relating to intellectual property (Carrier, M.A., 2002). Further, as practiced in Europe and United States of America, the existence of a specific guideline relating to intellectual property provides

additional assistance to the competition authority as well as illustrative examples to solve arising issues relating to intellectual property and competition law. As for Malaysia, the specific guideline for intellectual property will serve as a guide to the MyCC in solving issues on competition law related to intellectual property.

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