

Salient Features of Competition Act 2010 on Commercial Activity in Malaysia

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Abstract

Malaysia Competition Act 2010 was introduced recently by the Malaysian government in 2010 which came into effect in 2012. Among the aim of the Competition Act 2010 is to encourage economic development via regulating competition process for commercial activity in Malaysia. As such, Malaysia Competition Commission was established under the Competition Commission Act 2010 to implement provisions contained in the Competition Act 2010. Since the Competition Act 2010 is new, it remains uncertain whether the provisions in the Competition Act 2010 affects ongoing business practices in Malaysia. Thus, the objective of this study is to identify provisions in the Competition Act 2010 which implicates commercial activity in Malaysia. Result of the study indicated that provisions relating to two main prohibitions contained in the Competition Act 2010, namely anti-competitive agreement and abuse of dominant position are applicable to various commercial activity in Malaysia. This study reveals that, although the Competition Act 2010 is silent on the detail application of its provisions in specific commercial sector, yet it provides general outline to be applied to all types of commercial activity in Malaysia.

Keywords: Competition Act 2010, anti-competitive agreement, abuse of dominant position, commercial activity

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1.0 INTRODUCTION OF COMPETITION LAW

Competition happens when businesses have the same aim of obtaining business from third parties (Bryan A. Garner, 2011, p.278). In addition, it is also viewed as struggling effort by businesses in commercial field. (R. Whish, 2009, p.3). Competition law consists of law dealing with issues arising as a result of monopolies, mergers, restrictive trading agreements, resale price maintenance including agreements which may distort competition and affected by European Union (L.B. Curzon, 2010, p.82). In Malaysia, according to Section 2 of the Competition Commission Act 2012, competition laws refer to Competition Commission Act 2010, Competition Act 2010 as well as other subsidiary legislation made under the said laws.

2.0 THE DEVELOPMENT OF COMPETITION LAW IN MALAYSIA

Prior to the Competition Act 2010, the competition law policy was introduced to two sectors in Malaysia, namely the energy and the communication sector. No other national competition legislation was available during that time. Through Section 133 of Communications and Multimedia Act 1998, the communication sector was however provided with the prohibition of anti-competitive conducts which “will substantially lessen competition in communications and multimedia sector.” Likewise, the energy commission is obligated to supervise competition and monopoly provided under section 14(h) of Energy Commission Act 2001 for the energy sector. Initial effort towards regulating a single national legislation on competition existed in the form of a Bill known as Fair Trade Practices Bill which was approved on the 26th October 2005 in the Parliament. The initial purpose were to accommodate the growth of trade and business and encourage fair competition in business. This move was seen as the first step in achieving a fair and competitive environment in the field of business.

When Fair Trade Policy was introduced, its purposes is to accomplish several policy objectives which were among others; 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 inside and coming from outside of Malaysia that affects domestic market and lastly, prevent unjust trade practices. A national legislation on competition was at last established namely the Competition Act 2010. The Fair Trade Practices Policy, adopted by the Competition Act 2010 was modified to incorporate issues pertaining to competition and ending unfair trade practices.

3.0 GOVERNANCE OF COMPETITION UNDER MALAYSIA COMPETITION COMMISSION (MyCC)

Malaysia Competition Commission (MyCC) is responsible in implementing provisions contained in the Competition Act 2010 under the Competition law. As a body corporate with perpetual succession, it can enter into contracts and at the same time acquire both tangible and intangible property with vested interest. Therefore, benefits to businessman, consumers and economy can be well provided as part of the establishment of MyCC.

MyCC is made up of a Chairman, four representatives from the government and three to five members made up of those knowledgeable in commerce. The Chief Executive Officer (CEO) is an employee of the commission whom was appointed by a minister. The CEO's duty is to oversee the administration and management of the Commission. The role of the MyCC is to investigate and enforce. In investigation, Section 17 of the Competition Act 2010 has granted the commission power to conduct investigation. This includes the rights to retain documents, conduct searches and seizures. In terms of enforcement, the Malaysia Competition Commission has the authority to penalise infringers as well as reduce penalty under leniency regime.

MyCC also has roles in regulating as well as promoting. Section 66 of the Competition Act 2010 provided regulatory roles which grant the MyCC to issue guidelines in order to implement provisions in the Competition Act 2010. Four guidelines are already being issued this far. They are Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreement), Guidelines on Chapter 2 Prohibition (Abuse of Dominant Position), Guidelines on Market Definition and Guidelines on Complaint Procedure. In its educating role, MyCC raises understanding among members of the public through seminars. For instance, a seminar for members of the public was held in September 2013 aimed at raising awareness among businessmen in relation to competition law.

■4.0 COMPETITION ACT 2010

On 20 June 2010, Malaysia Competition Act 2010 received its royal consent and later came into force in January 2012. Preamble of the Competition Act 2010 reflects paramount concern of the Malaysian Government on the need to regulate competition process for the purpose of economic development. The Competition Act 2010 which consisted of 67 sections and divided into 6 parts elaborates on the coverage of the Competition Act 2010, prohibited practices under competition law in Malaysia, consequences of infringement of prohibited practices as well as possibility for applying exemptions under the Competition Act 2010.

4.1 Scope of Competition Act 2010

4.1.1 Commercial activity

Section 3 of the Competition Act 2010 provides that the Competition Act 2010 applies to commercial activity both in Malaysia and abroad. By virtue of Section 3(4) of the Competition Act 2010, it states the meaning of commercial activity which is, any forms of activity which are commercial in nature. Dato' Tan Lian Hoe in his speech during the presentation of the competition bill stressed that GLC (Government Link Company) will not be given exemption and all commercial activities will be regulated in spite of entity and ownership. Therefore, application of Competition Act 2010 explores into the commercial activity of enterprises but not the status of the entity that carries out the commercial activity.

4.1.2 Extra Territorial Reach

The Section 3 of the Competition Act 2010 applies to commercial activities carried out within Malaysia and abroad. There is indication that the provision has extra territorial effect. Extraterritoriality refers to the laws of one country being enforced outside of its territory (Walter Goode, 2007). Section 3(2) of the Competition Act 2010 grants that the Malaysian Competition Act 2010 is applicable to commercial activities carried out away from Malaysia providing that it has effects on competition in the Malaysian market.

4.1.3 Excluded Matters Under The Competition Act 2010

Section 3 of the Competition Act is applied to all commercial activities conducted inside as well as outside of Malaysia. Nevertheless, Section 3(4) of the act provides that the commercial activities do not include those such as:

- (a) activities directly or indirectly authorized by the government;
- (b) activities conducted on the basis of solidarity principles;
- (c) purchase and offering of goods and services which is not part of any economic activity.

Section 3 (3) of the Competition Act 2010 also identifies commercial activities not governed by the Competition Act 2010. Commercial activities involving communication and energy sectors under Communications and Multimedia Act 1998 and Energy Commission Act 2001 listed in First Schedule of the Competition Act 2010 falls under the regulation of their respective legislation. The petroleum sector was later added to the First Schedule of Competition Act 2010 and became effective from 1 January 2014. By virtue of the Competition (Amendment of First Schedule) Order 2013, it provides that the following shall be added in second paragraph of the First Schedule of the Competition Act 2010:

Petroleum Development Act 1974 [Act144] and the Petroleum Regulations 1974[P.U. (A) 432/1974] are added in the First Schedule in so far as the commercial activities regulated under these legislation are directly in connection with upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether on shore or offshore of Malaysia.

Other exclusion provided apart from the ones listed under the First Schedule of the Competition Act 2010, are under Chapter 4 of the Competition Act 2010. According to Section 13 of the Competition Act 2010, prohibitions mentioned in Part II of the Act shall not pertain to matters provided in the Second Schedule of the Competition Act 2010. Therefore, anti-competitive practices as well as agreements and abuse of power will not be applicable to these situations:

- (a) An agreement or conduct engaged merely to comply with a legislative requirement;
- (b) Collective bargaining activities or collective agreements pertaining to employment terms and conditions not negotiated or concluded between both employers and employees or organizations established on behalf of the interests of employers or employees;

- (c) An enterprise trusted to operate on services of general economic interest or with characteristics of a revenue-producing monopoly whereby the prohibition under Chapter 1 and Chapter 2 of Part II would prohibit the performance, whether in law or the fact that particular tasks was assigned to that enterprise.

For the time being, Competition Act 2010 does not apply to mergers and acquisition by reason of the economic background of Malaysia. Nevertheless, there have been suggestions that mergers and acquisition provisions be included in the Competition Act 2010 in the near future (Nasaruddin Abdul Rahman et.al, 2013).

4.2 Prohibitions in Competition Act 2010

4.2.1 Anti-Competitive Agreement

Agreements that have the effect of significantly preventing, restricting or distorting competition in Malaysia is anti-competitive. Specific reference to two kinds of anti-competitive agreements specifically, horizontal and vertical agreement is provided in Section 4 of the Competition Act 2010. The term ‘agreement’ means “any form of contract, arrangement or understanding whether or not legally enforceable between enterprises and contains decision by an association and concerted practices”. ‘Agreement’ is defined under the Competition Act 2010 indicating that it may exist in the form of formal or informal arrangement, therefore an indicative of that written agreement is not the requirement under Competition Act 2010.

Section 4(1) of the Competition Act 2010, states that:

A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.

Agreement between enterprises operating at the same level of production is called horizontal agreement. On the other hand, agreement between enterprises operating at different level of production is a vertical one. For example, agreement between manufacturers is horizontal in nature while agreement concluded between manufacturers and distributors is a vertical one. The agreements mentioned above will be assessed to determine their level of anti-competitiveness to extent of whether there are elements of significantly preventing, restricting or distorting competition.

Severe treatment is nonetheless accorded to horizontal agreement in the Competition Act 2010 owing to its ability of restricting competition. Section 4(2) of the Competition Act 2010 provides that horizontal enterprise consisting of objects listed in Section 4(2) (a)-(d) also known as cartels is considered to have the object of significantly preventing, restricting or distorting competition. The Competition Act 2010 does not define ‘object’. It does however provides that horizontal agreement owning the following object such as price fixing, market sharing, limiting or controlling production and bid rigging are regarded to have the object of significantly preventing, restricting or distorting competition in markets of goods or services by virtue of Section 4(2) of Competition Act 2010.

An example of price fixing is the act of fixing discount or setting the price of transport charges. As mentioned by the MyCC in a case involving Pan Malaysia Lorry Owners Association (PMLOA) who agreed to fix the price of transport charges between members of PMLOA, it was regarded as an act which amounted to price fixing under Section 4(2) of the Competition Act 2010. A further example relating to anti-competitive agreement can be seen in the case of market sharing, whereby parties agree to allocate consumers based on geographical territories. In a recent case decided by MyCC involving MAS and Airasia, it was found that when parties decided to ‘focus on separate sectors in the airlines industry’, this amounted to market sharing as prohibited under Section 4(2) of the Competition Act 2010.

4.2.2 Abuse Of Dominant Position

Abuse of dominant position is another restriction in the Competition Act 2010. Prohibition relating to abuse of dominant position is stated in Section 10 of the Competition Act. Section 2 of the Competition Act 2010 defined dominant position as follows:

a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors.

By virtue of Section 10(1) of the Competition Act 2010, it provides that:

An enterprise is prohibited from engaging whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.

Some of the examples of abuse of dominant position mentioned by the Competition Act 2010 are, excessive pricing, market foreclosure, refusal to deal or license, tying and bundling, predatory pricing. Although some of the acts listed under Section 10(2) of the Competition Act 2010 are overlapping with the objects listed under Section 4 (2) of the Competition Act 2010, yet the application of both Section 4 and Section 10 of the Competition Act 2010 is different. Section 4 of the Competition Act 2010 relies on the term ‘agreement’ as defined by Section 2 of the Competition Act 2010 which includes formal and informal arrangement between parties. Once agreement is concluded between parties, regardless of whether it is a horizontal or vertical agreement, as long as it has the object or effect of restricting competition, it will be caught by Section 4 of the Competition Act 2010.

On the other hand, Section 10 of the Competition Act 2010 does not prohibit anyone from being in a dominant position. The provisions only capture enterprises which abuses their dominant position by doing any of the acts listed under (a)-(g) under Section 10(2) of the Competition Act 2010. This indicates that enterprises which acquire dominant position, yet does not restrict competition does not fall under Section 10 of the Competition Act 2010.

Competition Act 2010 generally. However, a person in a dominant position engaging in any of the acts listed in Section 10(2) (a)-(g), has violated Section 10 of the Competition Act 2010. This was clearly illustrated in the case of Megasteel Sdn Bhd whereby it was found guilty under Section 10 of the Competition Act 2010.

4.3 Exemptions in Competition Act 2010

It is stated in Section 5 of the Competition Act 2010, when a party violates the provisions contained in Section 4 of the Competition Act 2010, exemptions is applicable from MyCC whether individual or block exemption. Nevertheless, preceding that are four cumulative requirements to be fulfilled by a party which seeks to apply for exemptions and they are:

- (a) significant identifiable technological, efficiency or social benefits directly arising from the agreement is present;
- (b) without the agreement having the effect of preventing, restricting or distorting competition, the benefits could not have been reasonably provided by the parties to the agreement;
- (c) the detrimental effect of the agreement on competition is in proportion to the benefits granted; and
- (d) the agreement does not permit the enterprise involved to remove competition completely regarding a substantial part of the goods or services.

Article 5 of Guidelines on Chapter 1 Prohibition stated another additional condition to be fulfilled before obtaining exemption under Section 5 of the Competition Act 2010. The party needs to substantiate that the benefits stated in Section 5 of the Competition Act 2010 are presented to the consumers. It is important to observe that Section 5 of the Competition Act 2010 only relates to prohibitions mentioned under Section 4 of the Competition Act 2010 and not to any other prohibitions specified in the Competition Act 2010. Nevertheless, there are no further explanations on how assessment will be carried out by the MyCC in order to grant relief under Section 5 of the Competition Act 2010.

Thus, a party that has successfully met the requirements under Section 5 of the Competition Act 2010 and proved that the benefits are passed to customers, the Commission may grant the relief of liability either by way of individual exemption, block exemption or by invoking Section 5 of the Competition Act 2010. When a party is granted relief under Section 5 of the Competition Act 2010, it needs to take into account that such relief is not permanent. Individual exemption is only granted for a limited time as provided in the order granted by the MyCC by virtue of Section 6(4) (b) of the Competition Act 2010. Pertaining to block exemption, Section 8 (5) (d) of the Competition Act 2010 clearly indicated that the block exemption ceases to have effect after expiration of the period bestowed in the order by the MyCC. Additionally, individual or block exemption in Malaysia only has effects in the form of specific authorization obtained in the form of Gazette. In Malaysia, block exemption has so far been granted by the MyCC to Vessel Sharing Agreements and Voluntary Discussion Agreements with regards to liner shipping.

4.4 Leniency Regime Competition Act 2010

Section 41 of the Competition Act 2010 in Malaysia provided leniency regime to those who support the competition authority with matters to identifying cartels. Moreover, the leniency regime is also applicable when an enterprise has declared its involvement in cartels provided under Section 4(2) of the Competition Act 2010. However, it has to borne in mind that the leniency regime is not applicable for acts committed under Section 10 of the Competition Act 2010 on abuse of dominant position. As such, once an enterprise falls under the leniency regime in Section 41 of the Competition Act 2010, a maximum reduction of 100 percent on penalties being imposed will be applicable to them. However, the determining factors in concluding the amount of reduction rely on the following:

- (a) whether the enterprise was the first person to bring the suspected infringement to the attention of the Commission;
- (b) the stage in the investigation at which an involvement in the infringement was admitted or any information or other co-operation was provided; or
- (c) any other circumstances which the Commission considers appropriate to have regard to.

4.5 Effect of infringement in Competition Act 2010

By virtue of Section 4(1) of Competition Act 2010, with regards to the effects of anti-competitive agreement, prohibition relating to horizontal and vertical agreement is provided. The effect of breaching Part II of the Competition Act 2010 is liability of infringement. In the case of an infringement, the MyCC as provided by Section 40 of the Competition Act 2010;

- (a) Shall demand that the infringement to be ceased at once;
- (b) May specify mandatory steps to be taken by the infringing enterprise, which is viewed by the Commission to be suitable to end the infringement,
- (c) May impose a financial penalty; or
- (d) May provide other direction deemed as appropriate.

Financial penalty shall not exceed 10% of the worldwide turnover of an enterprise in the period when the infringement occurred should the MyCC decided to impose this form of penalty. An example of this can be observed when a penalty of RM10 million to both MAS and AirAsia was imposed by MyCC for contravening Section 4(2)(b) of the Competition Act 2010. Here, MyCC resolved to impose the financial

penalty based on the turnovers earned between 1 January 2012 and 30 April 2012 by MAS and AirAsia on the following routes, specifically Kuala Lumpur to Kuching, Kuala Lumpur to Kota Kinabalu, Kuala Lumpur to Sandakan and Kuala Lumpur to Sibul.

In addition, four steps were taken by MyCC in deciding the specific amount for financial penalty. First, to determine the basic amount of financial penalty as a proportion of the flight turnover earned between January and April 2012. Second was to raise the financial penalty by reason of aggravating factors for instance whether an enterprise has repeated the offence or is an instigator or to decrease the financial penalty. After that, by adjusting the financial penalty further (as necessary), this increases the deterring effects specifically and generally. As a final point, verifying the financial penalty to no more than 10% of the enterprise's worldwide turnover over the period of infringement is also involved.

■5.0 APPLICATION OF COMPETITION ACT 2010 IN COMMERCIAL SECTORS

Several orders issued by the MyCC are presented to illustrate the application of Competition Act 2010 in various commercial sectors which are as follows:

5.1 Cameron Highland Floriculturist Association (CHFA)

This first case decided by the Malaysian Competition Commission was related to infringement of Competition Act 2010 under Section 4 (2) (a) which is price fixing. The increase of 10% for prices of cut flowers sold in Malaysia and abroad, except Japan was agreed by the members of CHFA. A proposed decision to CHFA was issued by MyCC. No financial penalty was imposed by MyCC. Nevertheless, CHFA was required by MyCC to perform the following, 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.

5.2 Transportation Sector

In April, 2014, Malaysian Airline System Bhd (MAS) and AirAsia Bhd were both found guilty of infringing Section 4(2)(b) of Competition Act 2010 thus penalized by the MyCC. Both airlines had entered into agreement whereby they share the market which had obviously contravened Section 4(2)(b) of the Competition Act 2010 on anti-competitive agreement. A fine of RM10 million was imposed to the respective airlines (The Sun Daily, 11 April 2014). Besides that, MyCC resolved to impose proposed interim measures to Pan Malaysia Lorry Owners Association (PMLOA) which was found to breach Section 4(2) of the Competition Act 2010 when the association agreed to fix price for transportation charges among its members and related lorry enterprises. Nonetheless, MyCC has accepted an undertaking from PMLOA on this matter in 21 May 2014.

5.3 Ice Manufacturers

Due to its involvement in price fixing, Ice manufacturers was penalized by the MyCC as this was clearly violating Section 4 of the Competition Act 2010. Financial penalties do not exceed 10% of the worldwide turnover of the enterprise during the period that infringement occurred as stated in subsection 40(4) of the Act. In determining the level of financial penalty, the MyCC considered, the gravity of the infringement, the period of the infringement; aggravating factors such as level of uncooperativeness during investigation; and mitigating factors like cooperativeness during investigation. The first interim measures issued by the MyCC to the ice manufacturers was on January 20, 2014, after their announcement on December 24, 2013 in a few local medias, stating their plan to raise the price of edible tube ice to 50 cent per bag and the price of block ice to RM2.50 per big block from January 1, 2014.

5.4 Megasteel Sdn Bhd

Megasteel's act of abusing its dominant position under Section 10(1) of the Competition Act 2010 had resulted in penalty imposed by MyCC. It was found that Megasteel was in the practice of charging or imposing a price for its hot rolled coil (HRC) disproportionate to the selling price of its cold rolled coil (CRC) which amounted to a margin squeeze producing anti-competitive effects in the market, and is also an infringement of section 10(1) of the Act. As reported by a local newspaper, the MyCC after taking into account the nature of the product, the structure of the market, the market share of the enterprise, entry barriers and effects of Megasteel's margin squeeze on its downstream competitors as well as the gravity of the infringement, a penalty of RM4.5 million was determined as the basic amount to be imposed unto Megasteel Sdn Bhd for contravening section 10 of the Competition Act 2010 (The Sun Daily, Nov 4 2013).

■6.0 CONCLUSION

In conclusion, Competition Act 2010 has general applications to commercial activity performed by commercial sectors inside and outside of Malaysia. The provisions contained in the Competition Act 2010 are useful for businesses to serve as a guideline in performing their daily business practices. Prohibitive measures introduced by the Competition Act 2010 are useful to create healthy business environment. In addition, the Competition Act 2010 also provides exemptions and exclusions to businesses carrying out commercial activity. It is hoped that orders issued by the MyCC in implementing the Competition Act 2010 is well guided so that it can serve as a guide for future reference.

References

- A.G Bryan, *Blacks Law Dictionary*, 7th Edn, Min,West Group,St Paul,Minn, 1999.
- Competition (Amendment of First Schedule) Order 2013 Federal Government Gazette 31 December 2013 P.U.(A)384
<http://mycc.gov.my/wp-content/uploads/2014/05/Competition-Amendment-of-First-Schedule-Order-2013.pdf>
- <http://www.nst.com.my/latest/mycc-imposes-proposed-interim-measures-to-pan-malaysia-lorry-owners-association-1.360057>,20 September 2013
- <http://www.thestar.com.my/Business/Business-News/2013/12/20/Mycc-Grants-Conditional-Block-Exemption-For-Liner-Shipping-Agreements.aspx/> accessed on 23 May 2014)
- <http://www.thesundaily.my/news/1013979> MyCC Finds Airasia, MAS Guilty, Airlines To Appeal Fine, 11 April 2014
- L.B.Curzon, *Dictionary of Law*, Sixth Edn, International Law Book Services, Malaysia, 2010.
- MyCC accepts undertaking from lorry owners association <http://www.nst.com.my/latest/mycc-accepts-undertaking-from-lorry-owners-association-1.602263>, 21 May 2014
- MyCC proposes RM4.5m penalty against Megasteel, <http://www.thesundaily.my/news/872619>, Nov 4 2013
- MyCC proposes RM4.5m penalty against Megasteel, <http://www.thesundaily.my/news/872619> , Nov 4 2013
- R.Whish, *Competition Law*, Sixth Edn, Oxford University Press, Britain, 2009.
- Walter Goode, World Trade Organization, *Dictionary of Trade policy Terms*, Fifth Edition, Cambridge University Press, United States of America, 2007