Competition Law in Malaysia: Issues and Challenges in regulating market behaviour

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Abstract. The fundamental objective of competition law is to protect the process of rivalry between firms in the market. It prohibits any anti-competitive behaviour such as cartel, abuse of dominant position and mergers that have the effect of lessening competition. However, in practice regulating firms' behaviours in the market is not an easy task. It requires both legal and economic analysis to determine which conducts are or are not allowed under the competition law regime. This paper seeks to identify and analyse the important provisions of "anti-competitive agreements" and "abuse of dominant position" under the Malaysian Competition Act 2010 (CA). It is observed that the CA has been heavily influenced by the UK and EU competition law. Despite the similar concepts applied, the actual implementation of the law may differ. This paper seeks to explore the issues and challenges that the Malaysian competition authority might be facing in enforcing competition rules which are largely drawn from foreign ideas.

1. Introduction

There are now more than 100 countries that have adopted competition law in the world. As countries globalised and open their markets, increasing numbers of nations have now enacted and implemented competition law. The key objective of competition law is to regulate the firm's behaviour in the market to ensure efficient allocation of resources and to protect consumer's welfare. It aims to promote competitive forces in the market by dismantling anti-competitive conducts and eliminate exploitation of dominant market players. It has been long established that a competitive market would lead to maximum welfare for both consumers and producers, especially in terms of lower price, greater choices and quality, innovation and cost efficiency.

However, regulating firm's behaviour is not easy. There is a possibility of under-inclusiveness (that is, that anti-competitive behaviour will be found not to be illegal) or over-inclusiveness (that is, that pro-competition behaviour will be found illegal).This dilemma arises because dominant market power is undesirable. The competition authority needs to differentiate whether certain conducts are the result of anti-

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competitive arrangements or merely normal and reasonable commercial activities. In the case where firms achieve market power through innovative activities, being the most-efficient producer or supplier, inventing a novel product that out-compete their rivals, and other aspects of producing excellent product and service values, then such market power is absolutely legitimate and desirable[5]. There are three types of market power that have potential to be anti-competitive and exploitative. These include dominant firms that practice predatory behaviour, firms that seek to collude (explicitly or tacitly) and dominant players that merge to form monopoly in the market. The most challenging part is if the anti-competitive conducts are sanctioned by the government or are the outcome of national policies.

This paper aims to examine issues and challenges faced by the competition authority in Malaysia in regulating firm's behaviour given the political and socio-economic backdrop of the country. The first part of this paper provides a discussion on the historical background of competition law in Malaysia. The paper will then analyse the substantive provisions of the competition law based on the Competition Act 2010 and identify issues and challenges involved in regulating firms' conducts in the market. Finally, the paper will provide some useful recommendation for the effective implementation of competition law in Malaysia.

2. Historical background of competition law in Malaysia

The proposal to introduce a national competition law in Malaysia was initiated in 1991 as a result of the privatization and trade liberalization programs that were implemented since mid-1980s. However, the introduction of the law was held-up until 2001 due to lack of political will to implement the law. Many observers associated the delay with the implementation of national socio-economic policies that were at odds with the principle of market competition, especially the affirmative action policies[6] and the strategies to create national champions.[7]In addition, privatisation schemes in Malaysia have been merely transfers of public-owned monopolies to private hands. Thus, most of the privatization initiatives in Malaysia failed to stimulate competition, though there were instances where it managed to diminish market concentration.[8]

It was only after the end of the economic crisis in 2001 did the government show its seriousness in the introduction of national competition law. It was the external pressures that pushed the introduction of the competition law, especially the intensification of trade liberalisation exercise as a result of the commitments taken under the World Trade Organisation (WTO), the Association of Southeast Asian Nations (ASEAN) Free Trade Agreement (AFTA)[9] as well as the bilateral FTAs. For example, in 2006, during the

[5]Paul Hofer, Mark Williams and Lawrence Wu, "Principles of Competition Policy Economics" (2004), *The Asia Pacific Review*, pp.4-7

[6]See for example, ShankaranNambiar, 'Enhancing Institutions and Improving Regulation: The Malaysian Case' (Eaber Working Paper No. 4, Malaysia Institute of Economic Research, 2006) 25. See also OECD, Third Global Forum on Competition, Malaysia, Session III, 6 Feb 2003, p. 2.

[7]See, eg, OECD, 'Second Global Forum on Competition, Malaysia', Session VII, 11 February 2002, 3.

[8]See for example Jomo K.S. and Tan WooiSyn, Privatization and Renationalization in Malaysia : A Survey (2009) <http://www.jomoks.org/research/other/rp027.htm> 25-26

[9] Malaysia is a member of the ASEAN Free Trade Agreement (AFTA) and Malaysia is committed to provide tariff preference to AFTA members, see Authukorala, P.C., 'Trade Policy in Malaysia: Liberalization Process, Structure of Protection and Reform Agenda' (2005) 22 *ASEAN Economic Bulletin*19, 31.

negotiation process of the *United States–Malaysia FTA*, the US authority urged Malaysia to introduce its national competition law that is in line the best and international practice.[10] Introducing a national competition was also part of the Malaysia's commitment under the ASEAN Economic Community Blueprint.[11]Furthermore, market opening policies are expected to expose local firms to intense competition from established foreign firms, as well as to abuse of market power by the large multinational companies. Malaysian government responded to these concerns by introducing competition law that emphasised promotion of fair trade practices. This initiative was highlighted in the Eight Malaysian Plan (2001–2005) [12]which states the following:

> During the plan period, efforts will be made to foster fair trade practices that will contribute towards greater efficiency and competitiveness of the economy. In this context, a fair trade policy and law will be formulated to prevent anti-competitive behaviour such as collusion, cartel price fixing, market allocation, and the abuse of market power. The fair trade policy will, among others, prevent firms from protecting or expanding their market shares by means other than greater efficiency in producing what consumers want. In addition, a national policy and master plan on distributive trade will be formulated to facilitate an orderly and healthy development of the sector.

Even though the mandate to implement the law was given in 2001, the *Competition Act* was only passed in the Parliament in May 2010. The Ministry of Domestic Trade, Cooperatives and Consumerism (formerly known as the Ministry of Domestic Trade and Consumer Affairs), i.e. the Ministry that is responsible in drafting the law, admitted that the delay was due to the Ministry's lack of exertion in convincing the government as to the need to introduce a competition law and the importance of free market forces in improving welfare and efficiency.[13]

It was only in 2007 that the Ministry determined to realign its competition law aspiration. A dedicated team was formed to draft the law and to conduct an extensive consultation on competition law with industrial players. The initial draft contained the element of fair trade practices in line with the mandate given in Eight Malaysian Plan. However, the inclusion of fair trade provisions received criticisms from the stakeholders consulted. After a series of discussion and consultation, the national competition law was eventually passed by the Parliament in May 2010.

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[10]See AMCHAM Malaysia/U.S Chamber of Commerce, 'Public Submission for the Proposed U.S. – Malaysia Free Trade Agreement (USMFTA)' (19 May 2006) 82–83.

[11]Malaysia has signed the Declaration of the ASEAN (Bali) Concord II in October 2003, which aimed to integrate ASEAN market economy by establishing an ASEAN Economic Community (AEC). All ASEAN leaders, including Malaysia, agreed to fast track the establishment of an AEC by 2015 and adopted the AEC Blueprint, H Soesastro, 'Implementing the ASEAN Economic Community (AEC) Blueprint' in H Soesastro (ed), *Deepening Economic Integration—The ASEAN Economic Community and Beyond* (Economic Research Institute for ASEAN and East Asia, 2007) 48.

[12]*Eighth Malaysia Plan, Chapter 16: Distributive Trade*< http://www.epu.gov.my/html/themes/epu /images/common/pdf/8th_msia_plan_c16_cont.pdf> cl 16.32, 467.

[13]Based on an interview with the relevant authority in May 2010.

2.1 Competition Act 2010

The *Competition Act 2010*(CA 2010) adopted UK legislation almost wholesale, while the UK in turn modelled its legislation after the EU Treaty on competition. For example the provisions in section 4 of the CA 2010 modelled after section 2 of the UK Competition Act 1998and Article 101 of the Treaty for the Functioning of European Union (TFEU) which prohibits anti-competitive agreements which have the object or effect of restricting and preventing competition. Whereas section 10 of the CA 2010 modelled after section 18 of the UK Competition Act and Article 102 of the TFEU which prohibits abuse of dominant position. The reason for choosing the UK system as an anchor lies in the similarity between the laws and legal systems of Malaysia and the UK. This is understandable given Malaysia's long exposure to the English common law system and the fact that it refers to the English courts' precedent as guidance in resolving various legal issues.[14]

The historical and legal relationship and the tendency to tie up to the commercial law statutes of the UK, make the UK the best model to follow. Section 3 and 5 of the *Civil Law Act1956* recognises the application of the English legal system in commercial matters. Additionally, the officer in charge of drafting the law at the ministerial level had a UK educational background. The other reason is that competition law is a complex area of law and transplanting foreign competition provisions is a cost-saving mechanism by which a bulk of cases and experience becomes available for referral. Inventing a new law is time consuming and requires extensive resources. The efficacy and reputation of the foreign law, especially from the EU, might be the reason for transplanting this law. The competition laws of the EU and UK have been developed and tested, and transplanting the developed Western legal system might be the pre-requisite for claiming that the country is or is going to be a developed country. This can also attract Western investors to Malaysia, especially when investors come from a similar legal environment.

Compared to the US antitrust model which focuses on economic efficiency effects, the EU model is more relevant to Malaysia since it also takes into consideration broader socio-political objectives such as regional development and the promotion of small and medium enterprises.[15] The EU and UK competition regimes allow much space for social and political considerations and this style of competition law matches with the Malaysian context, since promoting social objectives such as income distribution has been an important part of Malaysian economic policy.

2.2 Structure of *Competition Act 2010* (CA)

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[14] See Wan Azhar Wan Ahmad, 'Time to Malaysianise Common Law System', *thestaronline* (online), 5 November 2010 < http://thestar.com.my/news/story.asp?file=/2007/9/18/focus/18907359&sec=focus>; BAR, 'No Need to Scrap English Common Law', *thestaronline* (online), 22 October 2010, in which the Malaysian Bar Council states that the English Common Law may be applied in new areas that have not been developed in Malaysia <http://thestar.com.my/news/story.asp?file=/2010/10/22/nation/7278426&sec=nation>

[15] ChoongKwaiFatt et al, 'Doctrine of Corporate Governance and Competition Laws: The Malaysian Perspective' (2010) 4 *African Journal of Business Management* 1175, 1183.

The main framework of competition law is to regulate the market structure and behaviour of market players to ensure the efficient allocation of resources in market for the overall economic development. Based on industrial organization analysis, market structure such as the number of sellers and buyers and entry barriers influences the conduct of firms such as pricing behaviour which influence the proper functioning of the market.[16] One of the most important contributions on the relationship between industrial structure and competition policy comes from Scherer who articulated the Structure-Conduct –Performance Model (SCP).[17] This model sees a connection between the structure of the market, the type of conduct in which the firms in the market engage, and manner in which the firms perform. In the light of the SCP paradigm, the CA prohibits certain undesirable conducts which may affect the market outcomes such as leading to higher price for consumer, shortage of supply and limiting technological progress.

The structure of the market refers to the external conditions that may affect the way a firm operates and includes firm size and barriers to entry. This highlights the point that a firm of significant size operating in a market with high barriers to entry will be able to engage in particular types of conduct such as employing predatory pricing tactics to keep out new entrants, engage in advertising and product differentiation to increase its sales. Firms in competitive markets will not be able to engage in such behaviours. Scherer's model proposes that a firm operating in a less competitive market will be able to control demand and accordingly affect performance. The classic example is that of a monopolist who is able to use the concentrated industrial structure to engage in conduct that reduces competition and accordingly sets its own price for a product or service.

While Scherer's Structure-Conduct-Performance paradigm sees an essential place for mergers, the CA has no jurisdiction to control mergers that have effect on competition. Rather, the general belief is that the provision of abuse of dominant position is enough to control market concentration issue. However, as argued by Scherer 'it is much easier to nip the growth of market concentration in the bud through a hard line against mergers than it is to correct abuses or atomize market structures once monopoly or tight oligopoly has emerged'. [18]

The main crux of the CA is divided into 2 important parts: provision that prohibits anti-competitive agreement under section 4 and provision that prohibits abuse of dominant position under section 10 of the CA. These two provisions are largely drawn from Article 101 and Article 102 of the Treaty for Functioning European Union (TFEU). The ensuing sections provide legal framework of the Malaysian Competition Act.

a) Anti-competition agreement

Section 4 of the CA prohibits anti-competitive conducts that have the object and effect of significantly restricting competition. This section was largely drawn from Article 101 of the EU Treaty on competition law. Section 4 (2) laid down a non-exhaustive list of conducts that are presumed to have the object of restricting competition including

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[16] See F.M. Scherer, *Industrial Market Structure and Economic Performance* (Houghton, 2nd Ed, 1980) see for example, 1-7.

[17] See Scherer Ibid, see also Rex Ahdar, 'The Meaning of "Competition" and the Commerce Act 1986' (1986) 6(2) *Otago Law Review* 319, 320. Available at http://www.austlii.edu.au/nz/journals/OtaLawRw/1986/8.pdf

[18] See Scherer, above n 16, 546.

agreements to fix price, to limit production and market access etc. By adopting the EU provisions regarding the prohibition of certain anti-competitive behaviours it assist the young competition commission to determine conducts that have the object of restricting competition without the need to prove its effect on competition which is tedious and complex. The Commission has only to prove that an enterprise has entered into an agreement that falls under categories of agreements that are listed under Section 4(2). This will assist the commission to focus on the more serious anti-competitive conducts such as conspiracy to fix price, limit output and market access.

In the EU, though the agreement entered by two parties or more has clearly the objective of restricting competition, the Commission is still bound to prove that it has an appreciable effect on trade between Member States.[19] This requires a quantitative analysis based on market share of the parties to the agreement. Under the C*ommission Notice on agreements of minor importance* if the aggregate market shares of the parties to the agreement do not exceed 10 per cent on any of the relevant market, the conduct of the enterprises will not be caught under the EU competition law. However, the Commission slightly departs from the EU practice. In Malaysia the so called *de minis clause* is provided in the Malaysia Competition Commission (MyCC) Guidelines on Chapter 1 Prohibition. According to the Guidelines, anti-competitive agreements will not be considered 'significant' if:

> "the parties to the agreement are competitors who are in the same market and their combined market share of the relevant market does not exceed 20%."[20]
>
> Or
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> "the parties to the agreement are not competitors and all of the parties individually have less than 25% in any relevant market, for example, an exclusive distribution agreement between a wholesaler and a retailer neither of whom has more than 25% of the wholesale market or retail market".[21]

However, if the agreement fall within the list of agreements stipulated under the section 4 (2), it is deemed to have the object of significantly restrict competition without the need to investigate the market share of the parties to the agreement. The advantage is that it eases the burden of the competition commission to prove the market shares of the parties to the agreement which involves complex economic and market analysis. The drawback is that it catches the conduct of the parties holding small market shares in the relevant market. For an example, if two or more parties collude to increase price, they will be caught under the Commission even though consumer may respond to the price increase by switching to other producers who are not parties to the agreement.

The CA does only prohibit an express anti-competitive agreement but also prohibits anti-competitive conduct through 'concerted practice'.[22] The 'concerted practice'

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[19]Richard Whish, *Competition Law* (Oxford, 6[th]ed, 2009) 117.

[20]MyCC Guidelines on Chapter I Prohibition, 6, para 3.4

[21]Ibid, 7, para 3.4.

[22] Section 2 of the CA defines 'concerted practice' as 'any form of coordination between enterprises which knowingly substitutes practical co-operation between them for the risks of competition'. This includes:

Any practice which involves direct or indirect contact or communications between enterprises, the object or effect of which is either:

doctrine was borrowed from the EU practice under Article 101 of the TFEU. This doctrine is important to cater for the situation in which there is an absence of evidence such as e-mails, faxes and correspondence, as parties to a cartel may destroy incriminating evidence. The term 'concerted practice' is designed to cater for looser forms of collusion falling short of an agreement. Both concepts were transplanted to cater for a situation in which cartel behaviour or abuse of dominant position was difficult to prove especially when the market is concentrated and less transparent. It avoids a young Competition Commission by determining in detail the degree of involvement of each party in a cartel, which is far from easy and is often time consuming. For example, it allows the competition authority to take action based on parallel behaviour without the need to bring forward documentary evidence and prove each individual action.

The concept of concerted practice is controversial. The competition authorities must exercise care and diligence to differentiate implicit cartels from reasonable and purely parallel commercial activities.[23] Parallel behaviour may be the result of market observation and the need of individual business to match its competitor's strategy in order to remain in the market.[24]For example, in the cement industry, there are currently five players: Lafarge (controlled 40 per cent of the domestic cement market), YTL Cement (29 per cent), CIMA (16 per cent), Tasek (9 per cent) and Holcim (the balance).[25] This indicates that the cement sector in Malaysia is largely an oligopolistic market with a high barrier to entry.[26] The mutual interdependence between firms in the oligopolistic market creates market power that may harm consumer.[27]In addition, in oligopolistic market, collusion can be easily established. For example, when Laferage Malayan Cement Bhd announced that it would raise the price of cement in 2008[28] and in 2012,[29] the other players indicated they would match Lafarge's move.

Another type of concerted practice that has been reported is suspicious parallel behaviours among the financial institutions in Malaysia.[30] This can be seen in the adjustment of the base lending rates (otherwise known as the primate rate) between financial institutions and the margin of financing which is set almost simultaneously. It is not clear whether the parallel behaviour is the result of collusion or concerted practice

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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.

This definition was adopted from *Dyestuffs* (C-48/69) [1972] ECR 619, 655 para 64 and Adopted from *SuikerUnie v Commission* (C-40/73) [1975] ECR 1663, 1942, para 174.

[23]Whish, above n 19, 104.

[24]Ibid.

[25]Yvonne Chong, 'Waiting for a Concrete Decision', *Malaysia Business* 1 June 2008.See also John Loh, Probe warranted if cement makers have pact to raise prices, *thestaronline,* August 3, 2012.

[26]Malaysia Equity Research, *Market Focus* (5 November 2008) <http://www.einvest.com.my/Archive-CompanyFocus/3.%20Market%20Focus/2008%20Market%20Focus/20081105%20Market%20Strategy.pdf> 4.

[27]Jonathan Faull and Ali Nikpay, *The EC Law of Competition* (Oxford University Press, 2nd ed, 2007), 341, 342, citing J Stigler, 'A Theory of Oligopoly' (1964) 72 *Journal of Political Economy* 44.

[28] 'Cement Price Set to Rise Further', *thestaronline* (online), 30 July 2008 <http://biz.thestar.com.my/news/story.asp?file=/2008/7/30/business/21952061&sec=business>

[29] John Loh, 'Probe Warranted if Cement Makers Have Pacts to Raise Prices', *thestaronline* (online) 23 August 2012.

[30]CAP, *Public Consultation Document: A Commentary on Fair Trade Law* (2008) copy held by author

between firms or simply a unilateral action by the market leader and the other players merely follow suit to match the market leader's strategy.[31] Punishing firms for their conducts without a clear evidence of collusion may further distort and stifle competition in the market. Practically, concerted practice is difficult to prove and most of the time documentary evidence is needed to prove a case against collusion.

In Malaysia, there is a lack of confidence in the ability of market forces in allocating resources efficiently that may have resulted in high prices. This could explain the imposition of price control mechanism that restricts competition. It may also facilitate tacit collusion that difficult to detect. This practice would add burden to the Commission to prove concerted practice. For example, retailers may tacitly collude to set retail price below or at the level of the price ceiling. This behaviour is hard to detect since there is no expressed agreement and the conduct appears to comply with the regulation. The requirement for trade associations to submit price information to the ministry (under *Supply Control Act 1961*) may also lead to information sharing which facilitate collusion.

Price control mechanism is also being practiced in banking sector and legal profession. In the banking sector, Bank Negara formulated Guidelines to Control Operating Cost of Life Insurance Business, which limits the rate of commission that can be received by insurance agents. There are also fee guidelines formulated by the associations in financial sectors. For example, fees on transactions have been determined by the Association of Banks and cannot be varied without the approval of the Central Bank. In a general insurance business, the rate on premiums under both the motor and fire tariffs that can be imposed by an insurer was standardised and determined by the General Insurance Association of Malaysia. In the legal profession, the *Solicitors Remuneration Order 2005* which fixes the fee for certain legal services may be used as a "legal sanction" by legal firms to collude to fix the price of legal service. The existence of price control provides limited space for competition. However, this policy is implemented with the incentive of the government and remains protected as a 'nice cartel'.

b) Abuse of dominant position

In the light of the Structure-Conduct-Performance paradigm, section 10 of the CA seeks to ensure that industrial structure is kept in line with competitive direction. This involves the assessment of market power and the determination of whether a firm in a dominant position abuses its market power. The CA does not intend to prohibit the acquisition of dominant position through economies of scale. The Act only prohibits abuse of that dominant position.

The law on abuse of dominant position has also borrowed the foreign idea on disciplining firms' behaviour in the market. Section 10 (2) laid down certain conducts that are presumed to be illegal. This includes imposing unfair selling price and trading conditions, limiting output, refusing to supply and predatory behaviours. It provides certainty about the legality of certain conducts of monopolist and eases the burden of proof. It assists the competition commission to draw the line between dominant and the

[31] In fact, it was argued that 'some firms may be independently aware that coordinated conduct is more profitable than independent action and independently act in the expectation that others in the market place will act in the same way', see OkeogheneOdudu, 'Collective Dominance Clarified?' (2004) 63 *The Cambridge Law Journal* 44, 45.

conducts that constitute abusive. A bulk of cases and how to interpret the law on dominant position are available for reference at no or less cost.

Section 10 of the CA requires the determination of the relevant and market share to determine whether a firm is occupying a dominant position. This involves a complex and tedious process which may slow down the process of investigation and adjudication. In the EU even though market share is not the only factor that will be taken into consideration, 'it is natural that market shares are looked at, and that they may be regarded as a proxy, albeit an imperfect one, for determining dominance".[32]The MyCC Guidelines on Chapter 2 Prohibition (abuse of dominant position), a firm holding sixty per cent and above market share is an indicative of occupying a dominant position.[33]The CA adopts the best practice of determining a dominant position i.e. it will be decided on case-to-case basis having regard to the actual market power of a firm in the market (other considerations such as the extent of entry barriers will also be taken into consideration). Having a threshold would be helpful to provide legal certainty and reduce the cost of investigation. However, market threshold may be used as a screening device to start up a competition investigation. Due to limited resources and time constraint, MyCC may focus on firms holding 60 per cent or above of market share. This may result in firms holding less than 60 per cent but possesses market power to be slipped out of the attention of the Commission.

The CA does not only prohibit the abuse of dominant position 'independently' but also 'collectively'. Collective dominant is the result of tacit understanding behaviour between a few independent players in the market to influence the market. However, currently there is no present widely-accepted theory of how independent non-dominant firms can control the market simply because when their market shares are combined, they become dominant. Even in the EU, 'it took many years for the Community Courts to determine the proper scope of Article 82'[34] that includes the operation of collective dominance provision. Punishing non-dominant firms without clear evidence of collusion among them may further distort competition and lead to excessive market intervention by the regulator.

It is important to note that market structural problem can be a result of government policies to create national champions and to foster competition and cooperation with businesses to achieve long term economic growth.[35]This had led to the encroachment of business into the political arena. Consequently, the ability of the Commission to discipline firms' behaviour may be constrained. To illustrate this point, we may refer to sugar refinery. In Malaysia, license to refine sugar was given only to a few producers. It was reported that the shortage of sugar supply in 2009 was attributed to the move by these refineries that limited the supply after overselling the commodities that exceeded the quota approved.[36]Another abusive conduct involving dominant firms is refusal to supply products whenever they encounter potential threat to their firms' commercial interests. These may involve a dominant multinational company[37] or local businesses

[32]Whish, above n 19, 175.

[33]MyCC Guidelines on Chapter 2 Prohibition, para 2.14, 5.

[34]Whish, above n 19, 558.

[35]OECD, Second Global Forum on Competition, Malaysia, Session VII, 11 Feb 2002, 3.

[36] 'Refineries' Action May Have Caused Shortage', *STAR*, 18 August 2009.

[37] It has been reported that a dominant cement producer, La Farge (A), had threatened other local manufacturers that it would cease to supply them with clinker (a common product used to mix with other ingredients to produce better ready-mix cement) should they supply company B. It was also reported that La Farge and other cement producers formed a cartel to control more market share in South East Asia: sources: based on an interview with relevant authority, May 2010.

monopolised by politically well-connected corporate figures. Such behaviour was reported in Sarawak when a politically connected cement firm, Cahaya Mata Sdn Bhd., threatened not to supply cement to other small contractors if they import cement directly from Peninsular Malaysia[38]. This kind of conduct has not only forced small firms out of the industry, but has also led to shortage of supply.

In the steel industry, there have been complaints by several market players against the dominant firm supplying steel raw materials to downstream firms. Megasteel Sdn. Bhd. is a sole supplier of hot rolled coils (HRC), an important material to produce cold rolled coils (CRC). Megasteel also owns a subsidiary company that produces CRC which competes with other players in the downstream CRC market. It was alleged that Megasteel practices unfair and discriminatory price by charging higher prices for HRC to other firms that produce CRC.[39]The import of HRC is controlled by the government to allow Megasteel obtain sufficient rates of returns on its investment. As such, the law to promote competition may not be in line with the government's policy.

Section 10 (a) (unfair purchase and selling price) and 10 (f) of the CA (predatory behaviour) also confer the Commission a status of 'a quasi-price regulator'. It is another form of price control mechanism that is antithetical to an efficiently functioning market system and there may be a tendency to consider as 'too high' (or 'too low) any price (or cost). Since the word "unfair" is subjective and contested, it is difficult to enforce price regulation provision in a transparent and consistent manner. Section 10 (f) prohibits predatory behaviour by a dominant firm which include the imposition of predatory pricing. It was argued that 'predatory pricing is one of the most daunting subjects confronting nations with competition law'.[40] There is no precise definition of predation and there is significant room for the Commission to make a mistake.[41] It may be used to protect competitors than the process of competition. For example, in 2009, the government instructed hypermarkets not to offer discounts on four subsidised items in an effort to protect smaller businesses and to create a level playing field. The government viewed promotions held by the hypermarkets that offered those items at below the fixed price as predatory behaviour that could adversely affect smaller businesses. However, this move was criticised to be distorting the market since lower prices could lead to consumer welfare, especially among the low-income groups.[42]

3. A way forward

The implementation of competition law in Malaysia is still at the infant stage. Nevertheless, it is expected that there will be a significant impact on the way businesses are conducted. For instance, price fixing is a common business practice in Malaysia and

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[38]*Parliamentary Debate on Malaysian Competition Bill 2010 (Bill 23)*, 21 April 2010, Malaysia Parliament Hansard (2010) <http://www.parlimen.gov.my/eng-op.php> 57.Retrieved 1st July 2010.

[39] Kathy Fong, 'MyCC Probes Steel Industry', *the Edge Malaysia*, 18 October 2012.

[40] E Fox, 'Price Predation US and EEC: Economics and Values' (Fordham Corporate Law Institute, 1989) 687, cited in Alison Jones and Brenda Sufrin, EC Competition Law: Text, Cases, and Materials (Oxford University Press, 2008) 443.

[41] For example, it is difficult to distinguish prices that are low for predatory purposes from prices that are low but as part of pro-competitive effects. A firm may lower its price as a short-term promotion when it introduces a new product, to capture a new market or as part of its strategy to lure customers to buy additional products sold at higher profits (loss leading): see AditiGopalakrishnan, 'Abuse of Dominance: Examining Issues in Predatory Pricing' (Paper submitted to the Competition Commission of India, Delhi University, 15 February 2008) 31, 32.

[42] 'Hypermarkets Told Not to Cut Prices of Subsidized Items', *New Straits Times*, August 2009.

most of the time trade associations play an important role in coordinating the conduct of their members. This is prevalent especially the insurance, automotive, banking, shipping and hauliers industry. Competition law is expected to change this deep-rooted practice.

The first competition case in Malaysia was taken against the Cameron Highlands Floriculturist Association (CHFA) for fixing the prices of flowers sold to distributors and wholesalers in Malaysia, i.e. agreement to increase price by 10 % among 150 members starting 16 March 2012.[43] This is a clear cut case of price fixing whereby members of CHFA hold more than 90 per cent of the market shares of the temperate cut flowers produced locally in Malaysia. Even though MyCC took a softer approach by not imposing a financial penalty on the CHFA and its members, this first ever competition cases sent out a strong message about the seriousness of MyCC to combat anti-competitive behaviours which have effects on consumers and acted as a wake-up call to all businesses who are still unaware of the law.

Implementing competition law is a dynamic process. The law needs time to develop and mature. Further guidelines and policies must be formulated to inform the manner in which the law should be enforced in the future. Transparency is an important key to the effectiveness of any new law enforcement. A full proposed decision should be made available to the public. This is important for the public to understand the reasons for the decision and the manner in which the Commission would enforce the new law. Any competition rules that proved to be inconsistent with the ultimate objective of the law should be revisited and amended. Weaknesses of the law should not become an impediment to the enforcement of the law but rather should be part of the learning process for the future improvement. Many market structure problems are the result of the government's policy itself. This provides a limited space for competition to function even with the presence of the competition law. The best approach to encourage competition will be by implementing competition law and encouraging self-correcting market mechanism instead of having licensing, tariff and price control system.

The CA does not address the issue of dynamic process of concentration through merger control provision. In the absence of merger provision, the ability of competition law to improve market structure and market performance is doubtful since mergers increase market concentration and provide an incentive for firms to engage in coordinated action and collusion which is difficult to screen out. This will result in misallocation of resources and social loss. It is, however, to be noted that merger policy is difficult to implement in small market economies with concentrated industries. Further market concentration is necessary to achieve minimum economy of scale in many of these countries where the customer base is small. On the one hand, over prohibiting mergers may prevent efficiency-enhancing mergers, which are important in small economies. Conversely, over permitting mergers in small economies with high entry barriers may create monopolistic structures that are then difficult to remove. Therefore, merger policy in small market economies, as suggested by Gal, 'should not rely on structural variables alone or on rigid and limiting structural assumptions as the main or only element to be considered in the design of merger control. Rather, they should base their policy on contestability considerations'.[44] In other words, mergers

[43] MyCC Issues Final Decision Against CHFA, (MyCC Press Release, 6 December 2012) <http://www.mycc.gov.my/archive.asp?page=archive2012press>

[44] Michal S Gal, *Competition Policy for Small Market Economies* (Harvard University Press, 2003) 195–96.

should not be rigidly prohibited on the assumption that they may produce anti-competitive effects without considering efficiencies that may arise from the mergers.

There are many other challenges that the implementation of competition law will bring and an important one worthy of further research is the means by which both specific regulations and cross-sector competition law interact with one other. For example, activities that fall under the purview of both the *Communication and Multimedia Act 1998* and the *Energy Commission Act 2001* are excluded from the CA. The CMA, for example, is only applicable to licensees. Non-licensees are beyond the scope of the CMA. This institutional arrangement means that there may be different laws governing market players in the telecommunications industry. This may result in legal uncertainty and increase the cost of regulatory compliance for the market players. The water sector is not excluded from the CA. However, there are other regulators, such as the Water Commission, that oversees competition issues through various mechanisms, including through licensing. In the absence of a clear framework governing the relationship between competition authority and sector regulator may result in regulatory turf among regulators which at the end delays the process of adjudication and decision-making.

Regulating firm's behaviour is a delicate matter. In order to ensure effective enforcement of the law, the authority needs to have a clear understanding on how the market works, what is the fundamental forces underlying firm's conduct and what are the effects of competition law on the economy. This requires a well- balanced and rigorous economic analysis.