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## Competition Law Developments in Malaysia

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## I. INTRODUCTION

The preceding two years have been instrumental for Malaysia in the area of competition law. After many years of germination, the Fair Trade Practices Policy, which was approved in 2006, finally evolved into competition legislation. In 2010, the Malaysian Parliament passed the Competition Act 2010 (“the CA”) and the Competition Commission Act 2010 (“the CCA”). The CA has only been in force since January 1, 2012, while the CCA became effective a year before. The Chairperson of the Competition Commission, a former judge of Malaysia’s apex court, was appointed in April 2011 with nine other Commissioners appointed the following month.

Within the relatively short span, there have been significant developments. The purpose of this article is to provide a brief introduction to the competition law regime in Malaysia<sup>2</sup> and the developments that have taken place in the last two years.

## II. THE COMPETITION ACT AND THE COMPETITION COMMISSION

Like most other competition law regimes, the Malaysian CA sets out the two core prohibitions against anticompetitive practices and abuse of dominance. Similar to the provisions of the Treaty on the Functioning of the European Union’s Article 101 and Article 102,<sup>3</sup> the CA provides for Chapter 1 prohibition on anticompetitive agreements (ss4 - 9) and Chapter 2 provides a prohibition against abuse of dominance (s10). There is, however, no provision for merger control. Its non-inclusion was explained as the need to ensure a capital market and encourage mergers and acquisitions to strengthen the domestic economy, and to fuel competition for entities to enter the global market.<sup>4</sup>

The Chapter 1 prohibition against anticompetitive agreements includes both horizontal and vertical agreements that have the “object or effect of significantly preventing, restricting or distorting competition in any market for goods and services.” In the first enforcement of the CA, a final decision was made against the Cameron Highlands Floriculturist Association on December 6, 2012 for contravention of s4(2) where members of the Association were found to have increased the prices of flowers by 10 percent.

The Chapter 2 prohibition against abuse of dominance provides in s10(2) a non-exhaustive list of situations of abuse of a dominant position. “Dominant position” has been defined in s2 as “a situation in which one or more enterprises possess such significant power in a

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<sup>2</sup> For a fuller account of the Competition Act, see May Fong Cheong, *A New Catalyst for Malaysia: The Competition Act 2010*, L. REV. 107 (2011).

<sup>3</sup> See Julian Nowag, *An Introduction into Competition Law: The Substantive Provisions of the Malaysian Competition Act in light of its European Origins*, 4 MLJ (2014).

<sup>4</sup> Statement by Domestic Trade, Co-operatives and Consumerism Minister, Datuk Seri Ismail Sabri Yaakob, see Malaysian digest.com July 29, 2010 (local July 9, 2010).

market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors.”

To assist businesses to better understand the CA, the Commission has produced three substantive guidelines—on market definition, on anticompetitive agreements, and on abuse of dominance. A fourth guideline sets out the complaints procedure. As part of its educational efforts to increase awareness, a *Handbook for General Public* on the CA has been published. All of these publications are accessible on the Commission’s website.<sup>5</sup> A concise account of the Commission’s activities in implementing the competition legislation can also be obtained from the Commission’s 2011 Annual Report.

The coverage of the CA is sufficiently wide, and it applies to any commercial activity carried out by an enterprise relating to goods and services. For the purpose of the CA, a parent and subsidiary company shall be regarded as a single enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their market actions. The CA also has extra-territorial effect and applies to commercial activity transacted outside Malaysia that has an effect on competition in any market in Malaysia.

However, two major sectors are excluded from the coverage of the Act. The CA does not apply to either the communications and multimedia industry,<sup>6</sup> or the energy industry.<sup>7</sup> Competition provisions exist for these two sectors, but they are regulated by the Malaysian Communications and Multimedia Commission and the Energy Commission, respectively.

The CA also provides exclusions (s13) for agreements engaged in order to comply with a legislative requirement, collective agreements relating to employment, and enterprises entrusted with the operation of a general economic interest. Exemptions (ss6 and 8) can also be given as a block exemption applying to a particular category of agreements, or as an individual exemption. Applications for both exemptions need to satisfy the criteria provided in s5 showing identifiable technological, efficiency, or social benefits arising directly from the agreement.

The Commission has thus far received two applications—one for block exemptions from shippers and hauliers, and one from the insurance industry. An application for individual exemption has also been received and all three applications are pending the decision of the Commission.

Besides the above, the Commission has been active in its advocacy program. The 2011 Annual Report stated that advocacy will be a key strategic thrust given its belief that understanding and support for the new law is a main factor for achieving compliance. During the last two years, briefings have been given to Government ministries, business groups, and industry associations on the importance and benefits of competition.

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<sup>5</sup> See [www.mycc.gov.my](http://www.mycc.gov.my).

<sup>6</sup> See May Fong Cheong, *State Relations in the Telecommunications Industry in Malaysia*, (8) MQJBL 279 (2011); P K Yong, *Competition and Regulation in the Communications Sector*, 4 MLJ i (2009).

<sup>7</sup> See May Fong Cheong, *Competition and Regulation of the Electricity Industry in Malaysia*, (54) ANTITRUST BULL. 67 (2009).

Early this year, the Commission announced that its focus will be on SMEs (small and medium enterprises) who have expressed uncertainty as to the implications of the CA on franchisors and distributors. Another focus will be trade and professional associations concerning whether, and to what extent, their rules and regulations are anticompetitive.<sup>8</sup>

Bid-rigging has also been identified as a key concern and the Commission has stated that it will no longer take a soft approach and will impose financial penalties. This may be a strong deterrent and encourage businesses to make more efforts towards establishing proper compliance programs.<sup>9</sup>

The Commission may impose a financial penalty not exceeding 10 percent of the worldwide turnover on an enterprise over the period during which an infringement occurred.<sup>10</sup> There are also provisions for an enterprise being investigated for an infringement to provide an undertaking (s43) to do—or not to do—anything the Commission considers appropriate.

Provisions are also in place to encourage enterprises to come forward through the leniency program (s41), which allows a reduction of a maximum of 100 percent of the penalty that would otherwise have been imposed. An enterprise may admit its involvement in an infringement and/or provide information or other forms of co-operation to the Commission that would significantly assist the Commission's investigation.

To enable it to carry out its functions, the Commission has been provided with powers similar to that accorded for public prosecution, including powers to access records as well as search and seizure.

The CA further provides for the Commission's decision-making process. Its decisions may be reviewed by a Competition Appeal Tribunal. Persons who are aggrieved or whose interest is affected by a decision of the Commission may appeal to the Tribunal. A decision given by the Tribunal may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect. Overall the necessary provisions to address both substantive and procedural concerns in order to provide for a functioning competition law regime have been provided for in the CA.

Under the CA, the Commission also has powers to conduct market reviews (s11). It completed its first review last year on the domestic broiler market (chickens reared for commercial meat production).

For the coming years, it is expected that there will be more activities from the competition front. As at June 2012, the Commission had received seven official complaints; two were from consumer groups while five complaints were from enterprises affected by suspected anticompetitive conduct by other businesses. There have also been concerns raised by the

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<sup>8</sup> See, for example, Eng Siang Tay et al., *Competition Law Perspectives on the Solicitors' Remuneration in West Malaysia*, 2 MLJ xxxvii (2012).

<sup>9</sup> See Kien Chong & Bee Hong Ooi, *Competition Law in Malaysia: 'Just' Another Compliance Issue or a Matter for the Board?* L. REV 63 (2011).

<sup>10</sup> See s40 (4). In the Cameron Highlands Floriculturist Association case, the Commission, in its final decision, did not enforce its initial imposition of fines but retained the orders for remedial actions, stating that the Association was cooperative.

Malaysian Automotive Association concerning the sharing of information. Two cases remain in the investigation stage; the first concerning a share-swap plan between Malaysia Airlines Bhd and Air Asia Bhd and the second, a complaint against a steel monopoly, Megasteel Sdn Bhd, for alleged unfair pricing. The Commission has emphasized that investigations may take time for a full and proper assessment.

### III. CONCLUSION

With the enactment of the CA and the establishment of the Competition Commission, Malaysia now joins the more than a hundred jurisdictions having a competition law regime. Being a very newly constituted Competition Commission, the spotlight is on the Commission. There are three challenges that lie ahead.

1. A discerning appraisal for competition enforcement in view of the broad objectives of the CA is needed. The long title of the CA states that it is “to promote economic development by promoting and protecting the process of competition, thereby protecting the interest of consumers ...” In the Malaysian context, the promotion of economic development is also connected to the protection of local industries and the development of *bumiputera* participation in the economy. The challenge is to carefully balance the related, but sometimes, divergent interests in achieving the aims set out in the CA.
2. The Competition Commission’s role *vis-à-vis* other Commissions tasked with regulating sectors that are excluded from the coverage of the CA is still unclear. There is a vital need to ensure consistency in the application of competition rules in Malaysia. To some extent, this has been anticipated and steps have been taken to allay any possible problems.<sup>11</sup>
3. Finally as an institutional matter, the Competition Commission has to ensure that it has sufficient resources and staff who are qualified and experienced to implement and enforce the CA.

In the future, more cases can be expected as the implications of the CA become clearer to businesses and, also, to consumers. The competition legislation in Malaysia is beginning to have a life of its own and will contribute greatly to a resilient and competitive commercial environment in Malaysia.

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<sup>11</sup> A Special Committee on Competition has been set up comprising representatives from the sectoral regulators, namely the Malaysian Communications and Multimedia Commission, the Energy Commission, the National Water Services Commission, the Land Public Transport Commission, the Central Bank of Malaysia, the Securities Commission, and the Competition Commission. The terms of reference covered by this Committee and the role of the Competition Commission with respect to sector regulators were agreed upon at its inaugural meeting held on May 14, 2012.