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Competition Law in Malaysia

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I. INTRODUCTION

The Malaysian Competition Act 2010 (“CA”) was enacted in 2010 and came into force on January 1, 2012. The CA applies to all commercial activity within Malaysia as well as commercial activity outside Malaysia that has an effect on competition in any market in Malaysia. The Competition Commission of Malaysia (“MyCC”) was established under the Competition Commission Act 2010 (“CCA”), which was passed together with the CA.

In this regard, the enactment of the CA is consistent with the ASEAN Economic Community Blueprint, pursuant to which ASEAN member states had committed to introduce competition policy by 2015 and to “establish a network of authorities or agencies responsible for competition policy to service as a forum for discussing and coordinating competition policies.”

As will be noted from the discussion below, MyCC has not pursued many high profile cases, with the possible exception of MAS-Air Asia. The apparent inertia in dealing with cartelized conduct, relatively low fines for cartels, and what appears to be a disproportionate number of abuse of dominance investigations, have left some uncertainty and questions about the MyCC’s priorities and willingness to act. The role and involvement of Ministry of Domestic Trade, Co-operatives and Consumerism (“MDTCC”) may also be something that will require clarity going forward.

II. THE MALAYSIA COMPETITION COMMISSION (“MYCC”)

As mentioned earlier, MyCC is a body corporate established under the CCA. It is interesting, and some may consider it unusual, that a separate Act (namely, the CCA) was enacted at the same time as the CA to provide for the establishment of the MyCC. Pursuant to the CCA, the MyCC is entrusted with, among other duties, overseeing, regulating, enforcing, and investigating competition law matters across various commercial sectors. Responsibilities of the MyCC include encouraging and promoting good corporate governance and conduct among directors, managers, professional bodies, and corporations. The MyCC is also responsible to act as an advocate for competition matters and to educate the public regarding the ways in which competition may benefit consumers.

A new CEO of the MyCC, Dr. Mohd Khalid Abdul Samad, was appointed with effect from January 6, 2015. He takes over from MyCC’s first CEO, Ms. Shila Dorai Raj, who ended her tenure on December 31, 2014 after three and a half years.

Dr. Mohd Khalid in his first statement claimed that the MyCC would maintain its independence “despite being parked under the auspices of the Ministry of Domestic Trade, Co-

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operatives and Consumerism.”² He was the former Director of Consumerism Standards Division and Director of Co-operative Development Division in the MDTCC and has been in civil service for the last 20 years. Dr. Khalid³ is well-qualified and holds, among other credentials, a Bachelor of Science degree and other qualifications, although it is noted that none appear to be directly related to law or economics, much less to competition law or competition economics.

III. THE MAIN REGULATIONS UNDER THE CA

A. Three Key Prohibitions

The CA contains three key prohibitions, namely the prohibitions against anticompetitive horizontal and vertical agreements and the prohibition against abuses of dominance. It is abundantly clear that the Malaysian prohibitions are largely modeled upon EU competition law principles (i.e. under the Treaty on the Functioning of the European Union and EU jurisprudence generally). However, it is crucial to note that the CA contains no provisions on merger control nor does it contain any provisions on the criminalization of cartels.

The general horizontal and vertical prohibitions in the CA are found in Section 4(1) of the CA, which prohibits any agreement that has “the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.” Decisions of associations and “concerted practices” are treated as “agreements” which, if they are anticompetitive in nature, are prohibited by Section 4 CA.

“Significant” means that the agreements must have more than a trivial impact. While this may appear to differ from the EU concept of “appreciable effect,” in practice there may not be a material difference in concept. According to the MyCC’s Guidelines on Chapter 1 Prohibitions, anticompetitive agreements will not be considered “significant” if they come within certain safe harbors (which concept is also employed in the European Union albeit with lower market-share thresholds). These safe harbors include less than a 20 percent combined market share if the parties to the agreement are competitors and less than a 25 percent market share individually (at each level) if the parties to the agreement are not competitors.

Additionally, Section 10(1) of the CA prohibits an enterprise 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.” The CA does not prohibit an enterprise in a “dominant position,” as defined in the CA, from engaging in conduct that has a reasonable commercial justification or is a reasonable commercial response to market entry or conduct by a competitor. According to the Guidelines on Chapter 2 Prohibition, the MyCC will consider a market share of above 60 percent to be an indication that an enterprise is dominant.

A renowned authority on competition law, Professor Robert Ian McEwin, is responsible for the drafting of three key guidelines issued by the MyCC; namely, the guidelines on Section 4 CA, Section 10 CA, and market definition. His guidance, and the decision to model the key CA

² *MyCC is independent, says CEO*, THE SUN DAILY (January 30, 2015).

³ Available at http://mycc.gov.my/wp-content/uploads/2014/05/News-Release-Dr-Mohd-Khalid-Abdul-Samad-As-MyCC-New-CEO_26012015_final.pdf.

prohibitions upon tenets of EU competition law, have given Malaysia a good start in the MyCC's jurisprudential infrastructure needed to establish and enforce competition law in Malaysia.

B. A Brief Comparison Between the Provisions of the CA and EU Competition Laws

As the salient language of the CA prohibitions is modeled upon EU competition law principles, it is likely that European cases, materials, and authorities from other jurisdictions may provide some guidance on the interpretation of the CA provisions and may well be adopted and applied by the courts in Malaysia.

A brief comparison of the language relating to horizontal and vertical agreements and relief of liability is set out in the table below:

CA (Malaysia)	Treaty on the Functioning of the European Union (TFEU)
<p>Opening words Section 4(1) – "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."</p>	<p>Opening words Article 101(1) – "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which..."</p>
<p>Substantive Language Section 4(2) – "Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to: - fix, directly or indirectly, a purchase or selling price or any other trading conditions; - share market or sources of supply; - limit or control production, market outlets or market access, technical or technological development or investment; or"</p>	<p>Substantive Language Article 101(1) – "The following shall be prohibited ... - Directly or indirectly fix purchase or selling prices or any other trading conditions; - Limit or control production, markets, technical development, or investment; -Share market or sources of supply;"</p>
<p>Different Language Section 4(2), cont'd – "(d) perform an act of bid rigging; is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services."</p>	<p>Different Language Article 101(1), cont'd - "(d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) Make the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."</p>

CA (Malaysia)	Treaty on the Functioning of the European Union (TFEU)
<p>Opening words Section 5 - "Notwithstanding section 4, an enterprise which is a party to an agreement may relieve its liability for the infringement of the prohibition under section 4 based on the following reasons:.."</p>	<p>Opening words Article 101(3)- "The provisions of paragraph 1 may, however, be declared inapplicable in the case of: - any agreement or category of agreements between undertakings, - any decision or category of decisions by associations of undertakings, - any concerted practice or category of concerted practices,..."</p>
<p>Substantive Language "(a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement; (b) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition; (c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and (d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services."</p>	<p>Substantive Language "which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."</p>

A brief comparison of the language relating to abuse of dominance is set out in the table below:

CA (Malaysia)	Treaty on the Functioning of the European Union (TFEU)
<p>Opening words Section 10(1) - "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."</p>	<p>Opening words Article 102 - "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."</p>
<p>Substantive Language Section 10 (2) - "Without prejudice to the generality of subsection (1), an abuse of a</p>	<p>Substantive Language Article 102 - "Such abuse may, in particular, consist in:</p>

CA (Malaysia)	Treaty on the Functioning of the European Union (TFEU)
<p>dominant position may include –</p> <p>(a) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer;</p> <p>a) limiting or controlling –</p> <p>(i) production;</p> <p>(ii) market outlets or market access;</p> <p>(iii) (iii)technical or technological development or; or</p> <p>(iv) investment,</p> <p>b) applying different conditions to equivalent transactions with other trading parties ...;</p> <p>c) making the conclusion of contract subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of contract;.."</p>	<p>a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;</p> <p>b) Limiting production, markets or technical development to the prejudice of customers;</p> <p>c) applying dissimilar conditions to equivalent transactions with other trading parties...;</p> <p>d) Making the conclusion of contracts subject to acceptance by other parties of supplementary obligations ... have no connection with the subject of such contracts."</p>
<p>Additional Language</p> <p>"(d) refusing to supply to a particular enterprise or group or category of enterprises;</p> <p>(e) any predatory behaviour towards competitors; or</p> <p>(f) buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification for buying up the intermediate goods or resources to meet its own needs."</p>	<p>(Not expressly provided for in TFEU)</p>
<p>Additional Language</p> <p>Section 10 (3) – "This section does not prohibit an enterprise in a dominant position from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor."</p>	<p>(Not expressly provided for in TFEU)</p>
<p>Additional Language</p> <p>Section 10 (4) – "The fact that the market share of any enterprise is above or below any particular level shall not in itself be regarded as conclusive as to whether that enterprise occupies, or does not occupy, a dominant position in that market."</p>	<p>(Not expressly provided for in TFEU)</p>

C. Right of Appeal

The CA provides that a person who is aggrieved or whose interests are affected by a decision of the MyCC—for example, a finding by the MyCC of an infringement under Section 40 CA—may appeal to the Competition Appeal Tribunal (“CAT”) by notice of appeal in writing within 30 days from the date of decision. The decision of the CAT is final and binding on the parties to the appeal. However, the decision of the CAT can be challenged by way of a judicial review or other appropriate application to the High Court.

D. Exemptions Under the CA

The CA enables an enterprise to apply to the Commission for an individual or block exemption with respect to a particular agreement or category of agreements from the prohibition under section 4. If the MyCC is of the opinion that an agreement or a particular category of agreements would be agreements to which Section 5 CA (relief of liability) applies, the MyCC may grant an exemption to the particular category of agreements in a gazetted order.

E. Exclusions Under the CA

Section 3 of the CA provides that the CA applies to “commercial activity,” which is defined to mean “any activity of a commercial nature.” The CA excludes any activity carried out directly or indirectly in the exercise of governmental authority. Section 3 of the CA, read together with the First Schedule (as amended), further provides that the CA will not apply to any commercial activity regulated under the Communications and Multimedia Act 1998, the Energy Commission Act 2001, and the Petroleum Development Act 1974 and Petroleum Regulations 1974 “in so far as the commercial activities regulated under these regulations are directly in connection with upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia.”

F. The MYCC’s Powers of Investigation and Enforcement

The CA grants the MyCC broad powers of investigation and enforcement under Parts III and IV of the CA. An investigation may be commenced by the MyCC on its own initiative or on the direction of the MDTCC Minister or upon a complaint by any person. Further, Section 18 of the CCA provides that the MDTCC Minister may give the MyCC written directions of a general character relating to the performance of the functions and powers of the MyCC and the MyCC shall give effect to such directions.

The MyCC may conduct any investigation as the MyCC thinks expedient where the MyCC has reason to suspect that any enterprise has infringed or is infringing the CA or has committed any offense under the CA. Under the CA, the MyCC officers have the powers of a police officer in relation to police investigations in seizable cases as provided for under the Criminal Procedure Code. The wide powers granted by the CA include the powers (i) to require any person to produce any information or document specified in the request within the time-limit stipulated in the request, (ii) to retain such documents, and (iii) to conduct a search and seizure with warrant under Section 25 of the CA or without a warrant under Section 26 of the CA and other powers. Any failure or omission by a person to comply or cooperate, including any failure to disclose or to give any relevant information, evidence, or document in response to a direction issued by the MyCC constitutes an offense under the CA.

Section 35 of the CA grants the MyCC broad powers to institute or grant interim measures. Specifically, the MyCC can suspend any agreement, practice, or conduct where the MyCC has reasonable grounds to believe that the infringement of the CA involves serious and irreparable damage—economic or otherwise—to a particular person or category of persons or for the purposes of protecting public interest provided that the directions so given are appropriate and proportionate for that purpose.

The MyCC also has the power to conduct hearings to determine whether an enterprise has infringed prohibitions under the CA. It is relevant to note that, while it is not a criminal offense to be in a cartel, non-compliance with the provisions of Part III of the CA MyCC's investigative and enforcement provisions may give rise to a criminal offense.

G. Penalties and Leniency Guidelines

A notable development under the former CEO was the issuance of *Guidelines on Financial Penalties* and *Guidelines on the Leniency Guidelines* on October 14, 2014.

Infringement penalties are financial in nature and fines that can be levied under the CA may potentially be very severe i.e. up to ten percent of the worldwide turnover of an enterprise (this includes the parent and subsidiary companies and, though it is less clear, it may even include other subsidiaries) over the period during which the infringement occurred.

According to the guidelines, the financial penalties would have to “reflect the seriousness of the infringement” along with an aim to “deter anti-competitive practices leading to an infringement prohibition under the Act.” The *Guidelines on Financial Penalties* further sets out the factors to be considered when determining the amount of the penalty. The MyCC can take into account factors that include the seriousness of the infringement and the impact of the infringement on the market.⁴

The CA enables the MyCC to grant up to a 100 percent reduction in terms of financial penalties on the first successful leniency applicant where the applicant admits involvement in an infringement of Section 4(2) of the CA (*per se* prohibitions against cartels) and at the same time provides significant information or any form of co-operation to the MyCC.⁵ The *Guidelines on Leniency Regime* reiterates the MyCC's strong stance against cartel initiators.

H. Power to Accept Undertakings

The CA further provides for the power to accept undertakings under Section 43 of the CA. By accepting an Undertaking, the MyCC would close the investigation without making any finding of infringement. Accordingly, the MyCC would not be able to impose a penalty on the enterprise when acting under Section 43 of the CA.

The MyCC has accepted a total of four undertakings since the CA came into force. These undertakings are published on their website. MyCC's preparedness to accept undertakings given by enterprises may encourage more enterprises to offer undertakings as a means to address any

⁴ MyCC, *Guidelines on Financial Penalties* (October 14, 2014).

⁵ MyCC, *Guidelines on Leniency Regime* (October 14, 2014).

competition concerns that the MyCC may have. It is crucial to note that undertakings may be given without any admission of liability by the enterprise concerned.

IV. THE MYCC ACTIVITY SINCE COMING INTO FORCE

A. Undertakings

1. Malaysia Indian Hairdressing Saloon Owners Association

The first undertaking accepted by the MyCC was given by the Malaysia Indian Hairdressing Saloon Owners Association (“MIHSA”). The MIHSA member enterprises were found to have infringed Section 4(2) of the CA by fixing prices of haircut services and threatening action against member enterprises who failed to comply with the decision of the MIHSA. The MyCC accepted the undertaking given by the MIHSA to cease such anticompetitive agreements.

2. Pan-Malaysia Lorry Owners Association

The MyCC also accepted an undertaking given by members of the Pan-Malaysia Lorry Owners Association (“PMLOA”) in relation to price-fixing. Members of the PMLOA had engaged in a horizontal price-fixing agreement among themselves by agreeing to increase transport charges by 15 percent, contrary to the CA. One of the terms of the undertaking was that PMLOA had to make a public apology in various newspapers for their anticompetitive behavior.

3. Giga Shipping Sdn Bhd and Nexus Mega Carriers Sdn Bhd

The most recent undertakings accepted by the MyCC were on October 1, 2014 in a case involving two major logistics service providers in Malaysia; namely, Giga Shipping Sdn Bhd and Nexus Mega Carriers Sdn Bhd. The MyCC commenced investigations into the enterprises in regard to allegations that they had entered into anticompetitive exclusive agreements with customers. These logistics service providers denied the allegations of infringement as the exclusive agreements provided to customers had the overall effect of being pro-competitive and pro-consumer by resulting in cost savings to their customers—this can be seen from the contents of the undertakings themselves.

The logistics service providers entered into undertakings with the MyCC without any admission of liability and with a view to addressing the MyCC’s “preliminary competition concerns and to avoid time, the inconvenience, and expense of further proceedings or actions.”⁶ The service providers agreed to discontinue the use of exclusivity clauses, save for situations in which there had been an open tendering exercise and the clauses were for a period of two years or less.

⁶ Undertakings by Logistic Providers — Giga Shipping Sdn Bhd & Nexus Mega Carriers Sdn Bhd, (October 1, 2014).

B. First Competition Case

Cameron Highlands Floriculturist Association (“CHFA”)—2012

The first Malaysian case dealing with an infringement of the CA involved the CHFA. The MyCC acted after a press statement was published by the President of the CHFA to announce that they had decided to increase the prices of cut temperate flowers by ten percent, purportedly arising from increases in production input costs such as fertilizers, electricity, plastics, etc. and that all its 150 members had agreed to the price increase.

The MyCC issued a cease and desist order directed against the CHFA’s price-fixing activity. However, no financial penalties were imposed upon the CHFA, likely because the MyCC took the view that the law was still new and that the CHFA was not a sophisticated trade association, largely comprising of farmers and smallholders.

C. Competition Cases in Which Financial Penalties Were Imposed on an Infringement

1. Megasteel Steel Sdn Bhd

In November 2013, the MyCC issued its proposed decision on Megasteel Steel Sdn Bhd (“Megasteel”) in relation to an infringement of the CA by Megasteel’s abuse of dominant position. Investigations into Megasteel commenced after a complaint was lodged by Melewar Industrial Group Berhad alleging an abuse of dominant position by way of margin squeeze. A financial penalty of RM4.5 million has been proposed by the MyCC in its proposed decision.

However, the MyCC has yet to publish or announce any final decision made on this matter since the announcement of the MyCC’s proposed decision in November 2013. There has been no explanation given to-date for the long delay in issuing a final decision. Such delays should be avoided by a young authority like the MyCC.

2. Malaysian Airlines System Berhad (“MAS”) and AirAsia Berhad (“Air Asia”)

The highest penalty imposed on a single enterprise by the MyCC thus far was in the sums of RM10 million each in the case of MAS and Air Asia. Both MAS and Air Asia were found to have entered into a mutual agreement with each other to share markets within the air transport services sector.⁷ The MyCC’s chairman—Tan Sri Siti Norma Yaakob—stated in a press release last year that the decision of the appeal would be given in March 2015. This appears to be the first case in Malaysia to be appealed to the Competition Appeal Tribunal (“COMPAT”). It is understood that the case is currently still on appeal before the COMPAT with no indication yet of when a decision would be delivered.

3. Ice Manufacturers

Twenty-four ice manufacturers were found to have infringed the CA when they agreed to increase prices of edible tube ice and block ice and the decision to increase prices was announced in local newspapers. The fines imposed by the MyCC ranged from approximately RM1,000 to RM100,000. Enterprises that rendered full cooperation to the MyCC during investigation were

⁷ MyCC, *Decision of Competition Commission*, available at <http://mycc.gov.my/wp-content/uploads/2014/05/FINAL-DECISION-ON-MAS-AIRASIA-PDF1.pdf> (March 31, 2014).

given a reduction in financial penalties while the financial penalties of three enterprises were increased due to non-cooperation.⁸

4. Sibü Confectionary and Bakery Association

The MyCC in this trade association case imposed a fine of RM247,730 upon 14 members of the Sibü Confectionary and Bakery Association (“SCBA”) for infringing the CA. This action followed a public statement in a local newspaper announcing their decision to increase the prices of bakery and confectionary products by 10-15 percent in Sibü, a relatively small town in East Malaysia.

Following an investigation by the MyCC into 24 enterprises that were members of SCBA, 14 members were fined while the MyCC found that nine enterprises did not infringe the CA and the final enterprise generated an insignificant amount of turnover during the infringement period. Accordingly, no financial penalties were imposed upon these ten other enterprises.

D. Other Recent Developments

Allegations were made against MyEG Services Bhd (“MyEG”) pertaining to online renewal of permits for foreign workers. The MyCC’s new CEO announced on January 15, 2015 the commencement of investigations into MyEG.

In May 2015, the MyCC announced that it would enforce anti bid-rigging laws involving businesses in the private and government sectors with the help of the Malaysian Anti-Corruption Agency (“MACC”).⁹

E. Four Professional Bodies Dismantle Their Scale Fees

The MyCC directed four professional bodies to dismantle their scale of fees and, pursuant to a news release dated May 26, 2015, the MyCC announced that the scale of fees set by the four professional bodies, i.e. the Malaysian Institute of Arbitrators, the Malaysian Institute of Architects, the Malaysian Dental Association, and the Institute of Landscape Architects Malaysia, had been dismantled.¹⁰

F. Association of Water and Energy Research Malaysia (“AWER”)

The Association of Water and Energy Research Malaysia (AWER) recently lodged a complaint to the MyCC in relation to “alleged anticompetitive practices in the retail sale of non-energy efficient products in Malaysia.”

In March 2015, the MyCC observed on its website that “AWER had earlier alleged that there is “element of cartel and profiteering” regarding the phasing out of Compact Fluorescent Light (CPL) lamp in Malaysia.” It is interesting to note that this may be the first time the MyCC has made a public statement to report a meeting it had with a complainant. The MyCC stated that the objective of the meeting was to discuss ways in which the complainant could cooperate with the MyCC.

⁸ Decision of the MyCC, Infringement of Section 4(2)(a) of the Competition Act 2010 by TwentyFour (24) Ice Manufacturers of Kuala Lumpur, Selangor, and Putrajaya (January 30, 2015).

⁹ *MyCC to enforce anti-bid rigging laws soon*, NEW STRAIT TIMES, (May 16, 2015).

¹⁰ *Four professional bodies dismantle scale of fees, says MyCC*, THE STAR, (May 26, 2015).

G. My Egg Consortium Sdn Bhd

The MyCC commenced an investigation into suspected infringements of the CA by My Egg Consortium Sdn Bhd (“My Egg Consortium”) sometime in November 2012 after receiving anonymous complaints of anticompetitive practices by My Egg Consortium resulting in an increase in egg prices.

The MyCC concluded its investigations in May 2015 with no finding of infringement and, in a brief decision and explanation, found that the claim was “unfounded and unsubstantiated,” with no evidence to support allegations made against My Egg Consortium.

H. Container Depot Operators and an Information Technology Service Provider

The MyCC issued a Proposed Decision on June 19, 2015 against four container depot operators and an information technology (“IT”) service provider on the basis of the MyCC’s provisional finding of price-fixing activities. The IT service provider was provisionally found to have engaged in “concerted practices” with the four container depot operators who were in turn provisionally found to have increased depot gate charges from RM5 to RM25. The container depot operators were provisionally found by the MyCC to have entered into an agreement to fix prices among themselves.

Although some aspects of the case are ambiguous, the language of the MyCC’s proposed decision raises interesting questions as it seems that an enterprise may be found to have infringed the CA if it happens to be a contracting party to an agreement in which other enterprises may have committed an infringement by way of an anticompetitive horizontal agreement although the first mentioned enterprise was not on the same level of the production or distribution chain.

The proposed decision may signal that the MyCC is prepared to take a broader interpretation of the prohibition against anticompetitive agreements, but this will have to be revisited in the light of the grounds of the decision, which have yet to be issued.

V. PROPOSED AMENDMENTS TO THE CA AND OTHER DEVELOPMENTS

A. Proposed CA Amendments

Recently, the MyCC published on its website a number of new proposed legislative amendments to the CA for “Stage 1 Online Public Engagement.” Members of the public, including relevant stakeholders and other interested parties, have been invited to submit their comments and feedback by way of the Online Public Engagement Feedback Form available on the MyCC’s website.

In this regard, it has been proposed that the language of the definition of “enterprise” in Section 2 CA be enlarged to include “any person, being an individual, a body corporate, an unincorporated body of persons or other entity, capable of carrying on commercial or economic activities....” Further, in a move that appears to be consistent with the objective of the CA to protect the interests of consumers, the provision on relief of liability in Section 5 may be amended to include the words “while allowing consumers of the fair share of the resulting benefit.”

A provision empowering the MyCC to vary or impose additional conditions or obligations in the block exemptions which have been granted has been proposed by way of amendments to Section 8(5) of the CA. Further, there are proposed amendments to the power of the MyCC to require the provision of information under Section 18 CA to include the power to require a person—whether an individual, a body corporate, a public body, or a partnership—to appear at a private hearing before the MyCC officer at a time and place specified in the notice to give evidence.

There are other proposed amendments to the CA and the CCA, including amendments to Sections 35 and 36 of the CA and introduction of new Sections 58A and B of the CCA.

However, the glaring omissions from the list of proposed amendments are the lack of merger control or even some form of merger notification provisions, as well as provisions to criminalize individual conduct for involvement in or initiating cartels.

B. Draft Guidelines on Intellectual Property Rights

We further understand that a set of draft guidelines to address Intellectual Property Rights and issues dealing with Franchise Agreements and the guidelines is being considered by the MyCC.

C. Malaysian Aviation Commission Bill 2015

A notable development in Malaysia is the passing of the Malaysian Aviation Commission Bill 2015 (“the MAC Bill”) on April 22, 2015 that provides for the establishment of a Malaysian Aviation Commission. The Commission will be responsible for regulating economic matters in relation to the civil aviation industry of Malaysia by encouraging effective competition within the civil aviation industry. The MAC Bill provides for competition regulation and the key prohibitions in the MAC Bill are similar to the CA. It is interesting to note that the MAC Bill provides for mergers in Division 4 of the Bill and Clause 54 provides that “mergers that have resulted, or may be expected to result, in a substantial lessening of competition in any aviation service market are prohibited.”

VI. IMPLEMENTATION OF THE CA SINCE COMING INTO FORCE

Overall, the MyCC undertook a large number of investigations under the CA in 2014 (several described above), and there seem to be quite a number of investigations which are still pending. Since the coming into force of the CA in 2012, the MyCC reports that it has investigated a total of 51 cases and closed, or concluded (as the case may be) 18 investigations, resulting in settlements by way of undertakings given by some of the investigated enterprises or some findings of infringement under Section 40 of the CA.¹¹

As mentioned earlier, the MyCC may conduct an investigation on any enterprise upon a complaint by any person. However, there is no information or transparency on the volume and nature of complaints received by the MyCC on which no action has been taken by the MyCC.

There is a concern that certain subsidiaries, joint venture companies, or operations of multinational companies could be members of trade associations in Malaysia and that they may

¹¹ *Supra* note 9.

be exposed to risks of infringement. The concern would be greater if such Malaysian operations of foreign companies were engaged in risky arrangements or practices and exported their products to jurisdictions that criminalize cartel behavior.

Malaysian enterprises would be well advised to undertake appropriate measures to ensure compliance. The MyCC has gone on record to say that:

having an effective compliance programme will help an enterprise to avoid having to pay for costs brought on by investigation or private actions, possibly obtain a reduction in penalties, and enhance corporate governance thus boosting the image and viability of the enterprise.¹²

There has been a seemingly disproportionate number of alleged abuse of dominance investigations undertaken by the MyCC in comparison to other infringement cases. Fines and infringement penalties in cartel cases are surprisingly low compared to cartel fines imposed across the world, where some countries criminalize such conduct in addition to imposing a fine on the enterprise. Overall, awareness among enterprises regarding the introduction of the CA is low, partially due to the low fines imposed for cartels in Malaysia.

As mentioned earlier, the CA does not provide for any merger controls as compared to the competition legislation of other ASEAN countries such as Singapore, Vietnam, and Indonesia. Pursuant to statistics in early 2015, Malaysia's Government Linked Companies ("GLCs") comprise approximately 34 percent of Malaysian Stock Exchange's capitalization and 54 percent of the entities that make up the Kuala Lumpur Composite Index.¹³ With a seemingly high proportion of GLCs in the Malaysian market, there is an increasing need for merger controls in the CA as this complete lack of merger controls may result in the creation of dominance and/or monopolies (or near monopolies) in certain sectors and industries.

One of the concerns in an economic climate such as Malaysia, given the prevalence of GLCs, is that once such market power is created or strengthened by way of mergers or acquisitions, it may be difficult to limit or control such market power. The ability of such GLCs/enterprises to exercise their market power may give rise to barriers to entry against new enterprises and may harm the process of competition to the prejudice of consumers in the long run.

VII. CONCLUSION

It has been five years since the enactment of the CA and the CCA, and more than three years since the implementation of the CA in Malaysia. However, the awareness of the CA is still somewhat low.

Given the high ceiling for fines, i.e. up to 10 percent of the worldwide turnover for the enterprise (which may mean the entire group of companies) for the duration of the infringement,

¹² MyCC, Compliance collaboration between MyCC & Federation of Malaysian Manufacturers (FMM), (November 25, 2014).

¹³ *The Power of Malaysia's Government-Linked Companies*, ECONOMY WATCH, (January 14, 2015), available at <http://www.economywatch.com/features/The-Power-of-Malaysias-Government-Linked-Companies.01-14-15.html>.

the Malaysian regime, if enforced to the fullest, could result in potentially large damaging fines, particularly for multinational enterprises with operations in Malaysia.

In some cases, trade associations have continued to openly discuss and agree upon price increases and even announce them in the media, in keeping with "customary practices" in Malaysia. In the case of the SCBA, there was even a photograph of SCBA members raising their hands to vote in favor of price increases, which was published in local newspapers. However, despite this, fines for cartelists remain relatively low.

This approach, and the relatively low fines, if not a reluctance to fine are not in keeping with developments in other jurisdictions and may have the consequential effect of leading Malaysian enterprises to adopting a more lackadaisical attitude towards compliance.

There are clear concerns with trade associations, and there also remain widespread "customary practices" that may involve cartels which should be addressed by the MyCC on a priority basis. Given these concerns, it is unclear why there appears to be a focus by the MyCC on cases involving allegations of abuse of dominance. While all allegations of infringements of the CA should be investigated, one would have expected greater focus and emphasis on stamping out cartels, which are widely recognized as the more egregious form of anticompetitive conduct.

Although the MyCC does engage in outreach and advocacy programs to increase the public awareness of competition law, it does seem that awareness remains low and that there has been a decrease in such programs. It is clear that there are various challenges that a young competition authority such as MyCC needs to overcome.

Further, given the tendency of trade associations and competitors towards communications and conduct that give rise to horizontal competitive risks, multinational enterprises in Malaysia should be concerned by possible cross-border exposure, particularly if the cartel has any cross-border effects. For example, in the case of exports to the United States, the European Union, and certain other jurisdictions, there could be exposure to criminal prosecutions that should not be overlooked.

Notwithstanding the various challenges, the implementation of the CA in Malaysia is a step in the right direction in promoting fair and effective competition for the benefit of Malaysian consumers. However, it is the view of the authors that there is still some way for Malaysia to go and the lack of merger control (for the foreseeable future) remains a significant shortcoming in the Malaysian competition law regime at this stage.

Of central importance to the effective implementation of competition law is the independence of the regulator enforcing the law. It is apparent that the MDTCC remains influential in the MyCC's operations. In March of this year, the then Minister of MDTCC issued a statement that was carried on the MyCC's website setting out the objectives of the MyCC for 2015. He stated that the MyCC would be focusing on small- to medium-sized enterprises ("SMEs"), the pharmaceutical sector, professional bodies, and bid-rigging issues this year. The Minister therefore appears to be setting the direction of the MyCC. While the MDTCC took the right steps in promoting the establishment of the MyCC, and in the enactment of the CA, there should come a time when the apron strings are cut.