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REGULATING FIRMS' BEHAVIOR IN THE MARKET UNDER THE COMPETITION LAW: ISSUES AND CHALLENGES

The objective of competition law is to protect the process of rivalry between firms in the market. It prohibits any anti-competitive behaviors such as cartel and abuse of dominant position. However, in practice regulating firms' behaviors in the market is not an easy task. It requires both legal and economic analysis to determine whether a firm is occupying a dominant position and whether the conduct is abusive. This paper seeks to identify the important provisions of "anti-competitive agreements" and "abuse of dominant position" under the Malaysian Competition Act 2010. It is observed that competition law across the counties have been heavily influenced by the UK and EU competition law. Despite the similar concepts applied across the jurisdictions, in practice the implementation differs. This paper seeks to explore the benefits of adopting foreign concepts on competition law and how the rules will be implemented especially in re-

sponse to the different political, economic and social environment. This paper will also include the approach taken by Indonesia with regard to implementation of foreign ideas on competition law to suit the local need.

INTRODUCTION

Competition law has become an important instrument to promote economic growth. There are now more than 100 competition law systems throughout the world. Competition law achieves its objective by regulating the conduct of economic actor in the market that has the potential of restricting competition. For example, by prohibiting price fixing arrangement, firms are encouraged to compete on price, increase efficiency and innovation and lower the price of products and services for consumers. However, regulating the economic behaviour is far from easy. Competition law involves both law and complex economic analysis. 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). A competition law system may be transplanted from foreign developed rules which are complex, difficult to enforce and may not be in line with the needs of a particular country. In most of the cases the competition authority has to differentiate whether certain conducts are the result of anti-competitive arrangements or merely normal and reasonable commercial activities. Ambiguous and open ended rules may be misinterpreted to pursue narrow political interests. The most challenging part is that most of anti-competitive conducts are sanctioned by the government or are the result of the government action. The first part of this paper will outline the historical background of competition law in Malaysia. The paper will then analyze the substantive provisions on competition law based on the Competition Act 2010 and identify issues and challenges involved in regulating firms' conducts in the market. The Indonesia's experience in enforcing its competition law will also be referred to in this paper. Finally, the paper will provide some useful recommendation for the future implementation of competition law in Malaysia.

1. Historical background of competition law in Malaysia

The effort to introduce a national competition law in Malaysia began in 1991. The decision to adopt a competition regime flowed from the political decision to undertake a privatization and trade liberalization program in the mid-1980s. However, until the year 2001, there was no political will to introduce the law. Many observers associated the delay with the existence of national economic policies that may be at odds with the principle of market competition such as the government interventionist policy to promote affirmative action[1] and policy to promote national champion.[2] Privatization in Malaysia did not increase competition. It was merely a transfer of public monopoly to private hands, even though to some extent it reduces market concentration.[3] Trade liberalization policy was not based on neo-classical dimension and laissez faire system but rather increase price regulation and fiscal incentives that may not in be line with the principle of competition.[4] Only after the end of the economic crisis in 2001 did the government show its seriousness about the implementation of a national competition law. The opening up of the domestic market, such as that under the Association of Southeast Asian Nations (ASEAN) Free Trade Agreement (AFTA),[5] was expected to expose local firms to abuse of market power by the large multinational companies. For this purpose the introduction of a competition law was placed under the Eight Malaysian Plan by the Government (2001–2005).[6] The plan states:

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.

Despite the mandate given in 2001, the *Competition Act* was only passed in the Parliament in May 2010. According to the Ministry of Domestic Trade, Cooperatives and Consumerism (formerly known as the Ministry of Domestic Trade and Consumer Affairs), the Ministry that in charge with drafting the law, the delay was due to the lack of effort on the part of the Ministry to convince the political master as to the need to introduce a competition law and the importance of relying on free market competition.[7] External pressures to introduce the competition law had mounted. In 2006, during the 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.[8] Introducing a national competition had also become part of the Malaysia's commitment under the ASEAN Economic Community Blueprint.[9]

In 2007 the Ministry in charge decided 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.

The *Competition Act 2010* adopted UK legislation almost wholesale, while the UK in turn modelled its legislation after the EU Treaty on competition. 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.[10] 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 Act 1956* 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.[11] 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. Structure of *Competition Act 2010* (CA)

The objective of competition policy and law is to promote the economic development by protecting the process of competition. By protecting the process from anti-competitive conducts such as cartel and abuse of dominant power, it encourages firms to compete among themselves and increase their operational efficiency and innovation in order to offer products and services of good quality with lower price. This objective is in line with classical economics which defines competition as the process of rivalry of competition in the market. Competition law ensures the efficient allocation of resources in the society.[12] Its primary concern is allocative efficiency whereby resources are allocated in the most efficient manner.

The main framework of competition law is to regulate the market structure and behavior 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 behavior which influence the proper functioning of the market.[13] 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).[14]

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 behaviors. 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'. [15]

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 advantage of borrowing foreign concept on competition law, it does not need to reinvent the new system of competition but relies on the existence of comprehensive system from other well-developed jurisdictions. It save cost of legal formulation and a bulk of decided cases, legal interpretation can be used to interpret the law. While it assists Malaysia in setting up a new competition regime, implementing foreign competition rules in a different environment is indeed a challenging task.

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 presumed to have the object of restricting competition including agreements to fix price, to limit production and market access etc. By borrowing the EU ideas of prohibiting 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 Competition Commission has only to prove that an enterprise has entered into an agreement, and the agreement fall under the category of agreements that have an anti-competitive objective. It assists the commission to focus on the most serious conducts such as hardcore cartel, i.e. 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.[16] 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 CA 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%."[17]

> Or

> "the parties to the agreement are not competitors and all of the parties individually has 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".[18]

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 CA 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'.[19] The 'concerted practice' 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 their care and diligent to differentiate implicit cartels from reasonable and purely parallel commercial activities.[20] 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.[21]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).[22] This indicates that the cement sector in Malaysia is largely an oligopolistic market with a high barrier to entry, such as in the form of high transportation costs and cheaper local prices as compared to regional price.[23] The mutual dependence between firms in the oligopolistic market creates market power that may harm consumer.[24] Consequently, in oligopolistic markets, where there are few firms in that market, collusion can be easily facilitated and monitored. For example, when Laferage Malayan Cement Bhd announced that it would raise the price of cement in 2008[25] and in 2012,[26] the other players indicated they would match Lafarge's move.

Suspicious parallel behaviours in increasing various fees charged by Malaysian financial institutions have been suspected on several occasions.[27] There are similarities in the adjustment of the base lending rates (otherwise known as the primate rate) between financial institutions and the margin of financing are set almost simultaneously. It is not clear whether the increase of price is the result of collusion or concerted practice between the firms or simply a unilateral action by the market leader (such as in the cement industry) and the others follow suit to match the former's strategy.[28] 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.

There is little faith in the market's ability to allocate resources and it is still seen as a source of high prices. This has resulted in the imposition of several price control mechanisms. The existence of price control provides limited space for competition. It may also facilitate tacit collusion that difficult to detect. It further adds the burden to the competition 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 express agreement and the conduct appears to comply with the regulation. The system of supplying price information by associations to government ministries (under *Supply Control Act 1961*) may also lead to information sharing and the facilitation of collusion, even by officials.

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 professional service, 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 SCP 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 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 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".[29] The MyCC Guidelines on Chapter 2 Prohibition (abuse of dominant position), a firm holding 60 per cent and above market share is an indicative of occupying a dominant position.[30] 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 in 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 the market structure itself. In the oligopolistic market with a high barrier to entry, the mutual dependence between firms in the oligopolistic market creates market power that may harm consumer.[31] However, there is no present widelyaccepted theory of how non- dominant firms can control price without effective constraint from competitors simply because their market shares, when accumulated together, are substantial. Even in the EU, 'it took many years for the Community Courts to determine the proper scope of Article 82', 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 is more often than not the result of the government policy to promote national champion and to foster competition and cooperation with businesses to achieve long term economic growth.[32] This had led to the encroachment of business into the political arena. The ability of the competition commission to discipline the firms' behaviour may be constrained. To illustrate this point, we may refer to sugar refinery. In Malaysia, license to refine sugar in Malaysia was given to a few producers. The shortage of sugar supply in 2009 was attributed to a move by a few refineries that limited the supply after overselling the commodities causing overproduction exceeded the quota approved.[33] Refusal to supply has been reported as a response to a potential threat to firms' commercial interests. These involve threats by a dominant multinational company[34] or businesses monopolised by politically well-connected corporate figures.[35] A case in which wholesalers were forced to buy rice to get sugar was reported by a local newspaper.[36] This kind of conduct has not only forced firms out of the market, but has led to shortage of supply and consumer demands going un-met.

In steel industry, the policy to promote national champion had resulted in complaint lodged by several steel players against the dominant steel producer and supplier, Megasteel Sdn Bhd. Megasteel Sdn Bhd is a dominant supplier in hot rolled coils (HRC), an important material to produce cold rolled coils (CRC). It also competes with other steel players in downstream market to produce the CRC. It was alleged that Megasteel had imposed unfair and discriminatory price of the HRC on other players competing with Megasteel in downstream market to produce CRC.[37] At the time of the research, no decision or action has been taken by the competition commission regarding this issue. The entry barriers import of RHC is controlled by the government itself to allow Megasteel sufficient rates of returns on its investment. 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'.[38] There is no precise definition of predation and there is significant room for the Commission to make a mistake.[39] It may be used to protect competitors than the process of competition. 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 as distorting the market since the lower price promoted consumer welfare, especially among low-income groups.[40]

3. Indonesian Experience

In Indonesia, the initiative to introduce policy relating to business competition began in the mid 1980s but it was abandoned. The law was only introduced in 1999 by virtue of the Law No. 5 of 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, ("Law No. 5 of 1999") which came into effect in March of 2000. It was part of the Indonesian commitment under the International Monetary Fund (IMF) loan loan-rescue program in January 1998 to end the financial crisis suffered by Indonesia in 1997-1998. Unlike Malaysia, the 1999 law is not the product of direct transplantation from other developed countries. Most of the competition law provisions were unique to Indonesia and crafted to tailor with the Indonesian political legal climate. One of the clear examples is the objectives of the law itself. The law pursues multiple and even conflicting goals including safeguarding the interests of the public and to improve national economic efficiency; to promote equal business opportunities for large-, middle- as well as small scale business actors in Indonesia; to prevent monopolistic practices and or unfair business competition; and to create effectiveness and efficiency in business activities [41]

Anti-competitive conducts such as cartel were normally sanctioned by the government and the ability of the competition authority to influence the government's policy is limited. [42] Despite some skepticism about the ability of the competition authority to regulate the conducts of the market player, there were signs of gradual changes in the way of doing businesses in Indonesia after few years of introducing the law. This was evident in transport sector such as airlines and taxi. Before the introduction of competition law, the airfare was set by the Association of Indonesia's National Air Carrier. As a result consumers have to pay high price and to waive some services provided by the airlines. Competition law managed to influence this practice since price fixing is illegal under the law. As a result, airlines are now free to set their own prices and consumers are now able to choose their preferred airlines based on variety of prices and services. In the taxi sector in the Jakarta region, tariff was set by the Jakarta Land Transportation Association. This was sanctioned by the Indonesia Ministry of Transport. The Competition Authority managed to convince the government on the harmful effect of price fixing on market competition and on consumers who have to pay high price for taxi services. The policy of fixing taxi tariff was no longer implemented.[43]In addition to this, competition law has also to some extent influenced the conducts of the public officials. A report indicates that most of the competition cases related to government tender conspiracy associated with corruption by the government officials.[44]

The implementation of the competition law in Indonesia is not without difficulty. Anti-competitive conducts are divided into three main categories: (a) prohibited agreements including oligopoly, price fixing, territorial division, boycott, cartels, trusts, oligopsony, vertical integration, closed agreements and agreements with foreign parties; (b) prohibited activities including monopoly, monopsony, market control and conspiracy; and (c) dominant position, subdivided into general provisions, multiple positions and share ownership.[45]

There is no general provision prohibiting horizontal anti-competitive agreement that restricts or prevent competition in the market. The 1999 law prohibits specific conducts based on several specific provisions. The setback of this approach is some anti-competitive conducts will be left unregulated.[46] Another characteristic that features the Indonesian competition law is some anti-competitive conducts that are inherently anti-competitive and normally evaluate under *per se* rules are treated based the *rule of reason* approach. For example, Article 9 (market allocation) and Article 11 (cartel in general) illegal if it is “potentially resulting in monopolistic practices and or unfair business competition”. Treating these conducts under *the rule of reason* may expose the competition authority to substantial competition analysis which is tedious and time-consuming. The word ‘unfair’ is ill-defined and there is a tendency the well-being of competitors will be taken into consideration.

The law imposes some duties on a firm occupying a dominant position. Article 25 prohibits a dominant firm from taking advantage of their dominant position by for example imposing trade terms with the intention to prevent the consumers to acquire competitive goods and/or services or restricting the market and technology development.[47] However, the law considered one entrepreneur or a group of entrepreneurs controls 50% (fifty percent) or more of the market share on one type of goods or service; or two or three entrepreneurs or groups of entrepreneurs control 75% (seventy five percent) or more of the market share on one type of certain goods or services as dominant.[48] This mean that dominant position will be determined based on market share alone. The best practice is that dominant position should be assessed based on the actual market strength of a firm. A firm may have market power even though it holds less that 50 per cent of the market shares due to some other factors such as high entry barriers and intellectual property rights. A rigid law will catch the conduct of firms which in fact does not have market power while releasing firms possessing the actual market power from the ambit of the law. The law 1999 treats unilateral conduct by a dominant position as *per se illegal*. This may also produce undesired results. For example, exclusive dealing, price discrimination and tying may be pro-competitive. On the other hand, low price may be misconstrued as predatory to the disadvantage of larger firms. Treating these conducts as illegal *per se* may have the chilling effect on competition in the market.

4. A way forward

The implementation of competition law in Malaysia is still at the infant stage. However, the effect of this implementation on the way of doing businesses should not be underestimated. Price fixing is a normal business practice in Malaysia. Thus, trade associations play an important role in coordinating the conduct of their members. This is prevalent for example, in the insurance, shipping, 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. 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 available to the public. This is important for the public to understand the reasons for the decision and the manner in which the Commission enforces the new law. The objective of competition law is to protect the process of competition. 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.

ENDNOTES

1 See for example, Shankaran Nambiar, '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.

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

3 MIER, 'Study on Restrictive Business Practices and Their Effects on Malaysia's Competitive Dynamics' (Report prepared for the Ministry of Domestic Trade and Consumer Affairs, Vol I, 31 October 2003) 67.

[4] Lee Hwok Aun, 'Industrial Development and Equity Distribution in Malaysian Manufacturing: Institutional Perspective' (Working Paper No. 25, Centre on Regulation and Competition, October 2005) 10.

[5] Malaysia is a member of the ASEAN Free Trade Agreement (AFTA) and Malaysia is committed to provide tariff preference to AFTA members, see Authukorala, above n 19, 31.

[6] *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.

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

[8] 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.

[9] 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.

[10] See Dr 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>

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

[12] An economist views the allocative efficiency in the market as pareto optimal i.e., it is impossible to make some consumers better off without making the others worse off, see for example, Joseph E. Stiglitz, 'Pareto Optimality and Competition' (1981) 36 (2) *The Journal of Finance* 235.

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

[14] 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

[15] See Scherer, above n 13, 546.

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

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

[18] Guidelines, above n 17, p 7, para 3.4.

[19] 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:

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 *Suiker Unie v Commission* (C-40/73) [1975] ECR 1663, 1942, para 174

[20] Whish, above n 16, 104.

[21] Ibid.

[22] 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.

[23] 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.

[24] 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.

[25] '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>

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

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

[28] 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 Okeoghene Odudu, 'Collective Dominance Clarified?' (2004) 63 *The Cambridge Law Journal* 44, 45.

[29] Whish, above n 16, 175.

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

[31] 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.

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

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

[34] 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.

[35] In Sarawak, the cement industry was monopolised by family members of a political figure under the company name Cahaya Mata Sdn Bhd. The license to produce cement was given only to the company investing in an integrated cement project. The license was granted based on the need and daily production of cement. Initially there was an AP to import cement from Peninsular Malaysia into Sarawak. In 2008, the Government abolished the AP after Cahaya Mata Sdn Bhd bought a clinker company to produce raw materials to produce cement. Cahaya Mata Sdn Bhd threatened not to supply cement to other small contractors if they imported cement directly from Peninsular Malaysia in cases of shortage: *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.

[36] Edward Rajendra, 'No Sweet Deal This: Wholesalers Forced to Buy Rice to Get Sugar', *The Star*, 25 August 2006; see also 'Wholesalers Warned against Disrupting Sugar Supply Chain', *thestaronline* (online), 21 February 2010 < http://thestar.com.my/news/story.asp?file=/2010/2/21/nation/20100221180157&sec=nation>

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

[38] E Fox, 'Price Predation US and EEC: Economics and Values' (Fordham Corporate Law Institute, 1989) 687, cited in Jones and Sufrin, above n 11, 443.

[39] 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 Aditi Gopalakrishnan, 'Abuse of Dominance: Examining Issues in Predatory Pricing' (Paper submitted to the Competition Commission of India, Delhi University, 15 February 2008) 31, 32.

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

[41] Law No. 5 of 1999, art. 3 (a)-(d).

[42] See for example, OECD, Reviews of Regulatory Reform, Indonesia, Competition Law and Policy, 16-17.

[43] Syamsul Maarif, 'Competition Law in Indonesia: Experience to be Taken for the Development of Competition Law in China' (2004) 3 (2) *Washington University Global Studies Review* 333, 343-44.

[44] UNCTAD, 'Voluntary peer review of competition law and policy: Indonesia Overview' (Re-

port by the UNCTAD secretariat, 2009) 7.

[45] UNCTAD, above n 44, 5; see Law No. 5 of 1999, Chapter III, IV, V.

[46] OECD, above n 42, 24.

[47] Law No. 5 of 1999, Art 25 (1)

[48] Law No. 5 of 1999, Art 25 (2) (a) & (b)