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The Competition Act 2010—Issues and Development since Coming into Force

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Abstract: *Competition law was almost unheard of in the first hundred years after the Sherman Act was passed. However, the number of jurisdictions with a competition law increased dramatically in the last 20 years. One of the countries that joined the rank is Malaysia when it passed Competition Act 2010 and Competition Commission Act 2010. Competition Act 2010 represents an attempt to reduce the hitherto European competition jurisprudence to a concise piece of legislation supported by other guidelines. This paper will attempt to examine the two pieces of legislation, and explore various issues, both normative and practical. It will also look at some development that has taken place since the law came into force in January 2012, some cases, and initiatives of the Commission.*

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1. Introduction

Malaysia joined other jurisdictions with established competition law enforcement when it passed a general competition law, the Competition Act 2010 (CA 2010) in 2010. In addition to this Act, it also adopted the Competition Commission Act 2010 (CCA 2010), which provides for the establishment of the Malaysia Competition Commission to enforce the law.[1] These two Acts aside, there are two other pieces of legislation that deal with sectoral competition regulation.[2] These are the Communications and Multimedia Act 1998 and the Energy Commission Act 2001.

2. The Laws

The relevant legal provisions in the CA 2010 and CCA 2010 will be analysed in this section.

2.1.Scope of Application

In terms of territorial jurisdiction the CA 2010 applies to "any commercial activity, both within and…outside Malaysia."[3] In relation to commercial activities carried on outside Malaysia, CA 2010 applies to "any commercial activity transacted outside Malaysia, which has an effect on competition in any market in Malaysia."[4] In other words, CA 2010 incorporates the effects doctrine found in the US antitrust jurisprudence.[5]

[1] For more literature review on CA 2010 and CCA 2010, please refer to See (2012) and See (2013).
[2] The Communications and Multimedia Act 1998 is the law that deals with competition issues in the communications and multimedia industry, while the Energy Commission Act 2001 deals with issues in the energy sector. Commercial activities that are regulated under these two pieces of legislation are carved out of the scope of CA 2010. As it will go beyond the scope of this report to deal with issues arising from CMA 1998 and ECA 2001, this report will mainly address CA 2010 and CCA 2010. The reader may refer to See (2010) on the competition-related provisions in CMA 1998.
[3]See section 3(1); unless expressly stated otherwise, all references to a section, paragraph, or schedule in an Act shall refer to such section, paragraph, or schedule in CA 2010.
[4] See section 3(2).
[5] This stands in contrast to the EU implementation doctrine found in the UK Competition Act 1998.

CA 2010 applies to enterprises only. The word "enterprise" is defined in CA 2010 to mean "any entity carrying on commercial activities relating to goods or services…"[6] Thus, to understand the meaning of "enterprise", one will have to first understand the meaning of the words"commercial activities." CA 2010 applies to supply of goods and services alike. While the word "service" is not defined, the word "goods" is given an extensive definition that appears to cover any form of movables as well as commercial leases.[7]

CA 2010 applies to commercial activities only.[8] CA 2010 does not define what a commercial activity means. Instead, the term "commercial activity" is given an exclusive definition to mean any activity of a commercial nature except: (a) any activity, directly or indirectly, in the exercise of governmental authority, (b) any activity conducted based on the principle of solidarity, and (c) any purchase of goods or services not for the purpose of offering the goods and services as part of an economic activity.[9] As to what amounts to "the exercise of governmental authority", CA 2010 does not define it. This is presumably discernible from case law in the European Union (EU) competition law where a line is drawn between the commercial activities carried out by a government authority, and non-commercial activities carried out in the course of the exercise of governmental authority.[10] While there has not been

[6] See section 2.

[7] The term "goods" means "property of every kind, whether tangible or intangible and includes (a) all kinds of movable property; (b) buildings and other structures; (c) vessels and vehicles; (d) utilities; (e) minerals, trees, and crops, whether on, under, or attached to land or not; (f) animals, including fish; and (g) choses-in-action."
The term "choses-in-action" means rights that can be enforced by legal action (e.g., debts or causes in action in tort [see Garner 1987, p.112]). With this definition of "goods" it appears to be wide enough to cover all kinds of movables, as well as interests in land, including leases. There is no doubt that even interests in land may be manipulated in an anti-competitive manner so as to, for instance, raise strategic barriers. This concern may be seen in the guideline of OFT (2011).

[8] See section 3(1).

[9] See section 3(4); the words "commercial nature" are not defined either. The term "commercial activity" stands in contrast to the wider concept of "economic activity" adopted in the European competition jurisprudence.

[10] A good example may be the operation by some municipal council of some pay-for-car parks where people are charged a fee for parking—which is a commercial activity, and is part of discharging its town planning authority—which is presumably an exercise of its governmental authority. This distinction is, however, rendered more ambivalent where there is a statutory pension fund, which is the statutory guardian of the pension fund and is also statutorily required to invest the fund to make a return for its members. It is unclear whether the act of making investments is an exercise of its *statutory* function (in which case, it may be an exercise of governmental authority) or a *commercial* activity, or both. It is also questionable whether this kind of statutory body is a *governmental* body.

any judicial pronouncement on the meaning of the words "the exercise of governmental authority", such appears to be the intended meaning.[11]On paragraph (b), one criticism of the exclusion based on the principle of solidarity is, while it appears to summarise the position in the EU competition jurisprudence, it does not provide a definition or the scope of this principle. There is no doubt that it summarises the various EU cases on the so-called principle of solidarity, but the cases are not all consistent with one another and it is hard to tell what case stands for the principle and what case does not, let alone generalise a proposition of law from them.[12] As for the third paragraph in the definition of "commercial activity", it appears to have been intended to refer to State purchasing for subsequent use in purely social services,[13] although it is also wide enough to potentially cover the so-called final consumption; more on this exclusion will be elaborated below.[14]

Commercial activities that are regulated under the Communications and Multimedia Act (CMA) 1998 and Energy Commission Act (ECA) 2001 are also excluded from the scope of CA 2010.[15] With the exclusion of these two sectors, there are effectively three regimes of competition regulation in Malaysia—the general competition supervision under CA 2010, and two sectoral regulations. The exclusion of commercial activities regulated under CMA 1998 and ECA 2001 may present some practical difficulties. One example is the sale of a cellular phone bundled with a line subscription for two years. The line subscription falls within the purview of CMA 1998, due to section 3(3) of CA 2010, while the sale of the phone remains within the scope of CA 2010.This relates to the issue of the establishment of the Interworking Committee.[16] A recent amendment in 2013 excludes commercial activities regulated

[11]While the MyCC has released three guidelines, none appears to have touched on this point. The partial exclusion of the exercise of governmental authority stands in contrast with the total exclusion in the Thai Trade Competition Act B.E.2542 (AD1999): Nkikomborirak (2004, p. 96); Nkikomborirak (2006, p. 600).

[12]On the other hand, it is questionable whether this principle is ever definable, at least based on the existing case law.

[13]See *FENIN v Commission* T-319/99 [2003] ECR II-351, aff'd C-205/03 [2006] ECR I-6295; compare with *Bettercare Group Ltd v DGFT*[2002] CAT 7.

[14]See Part5.3, *infra.*

[15]Section 3(3) to be read together with the First Schedule; the First Schedule may, according to section 3(3), be amended by the minister-in-charge. In contrast to the Second Schedule, *infra*, amendments to the First Schedule lie within the sole discretion of the minister-in-charge without any procedural prerequisite. Thus, it was apparently amended surreptitiously to add the Petroleum Development Act 1974 without any public consultation.

[16]See Part 2.8, *infra.*

under the Petroleum Development Act 1974 [17] and Petroleum Development Regulations 1974[18] insofar as the activities are directly in connection with upstream operations comprising the activities of exploring, exploiting, winning, and obtaining petroleum whether onshore or offshore of Malaysia.[19] It appears debatable whether this amendment is in line with the original intention of having the First Schedule in the first place. The reason for providing for the First Schedule was premised on the argument that since competition provisions are present in the CMA 1998 and ECA 2001, the respective industry regulators would remain the competition regulator for their respective industry. However, the same does not seem to apply to the Petroleum Development Act (PDA) 1974 and Petroleum Development Regulation (PDR) 1974. First, neither the PDA 1974 nor PDR 1974 contains any competition regulation provision. Indeed, PDA 1974 is nothing but a piece of legislation to grant exclusive rights to the national petroleum corporation called PETRONAS—the statutory creation of a monopoly as opposed to competition. Second, the amendment expressly relates to "the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore" but these activities are exactly the kinds of activities that form PETRONAS' statutory monopoly. However, the amendment certainly has its purpose. Since PETRONAS is the entity that undertakes the exploration, exploitation, winning, or obtaining activities itself, they are simply the exercise by PETRONAS of its statutory exclusive rights. On the other hand, where PETRONAS does not undertake such activities itself and gives the so-called concession to a third party, the grant of the concession may possibly be carried out in an anti-competitive manner. Thus, for instance, where the industry players want to decide among themselves who should get the exploration concession and subsequent winning of petroleum, or to set quotas among themselves as to how much to produce daily, or even possibly to set prices at which crude oil is sold to the refiners—this is one area where this amendment can probably be useful to the industry players.[20]

[17] See Act 144.
[18] See P.U. (A) 432/1974.
[19] See Competition (Amendment of First Schedule) Order 2013, P.U. (A) 384/2013, 31 December 2013.
[20] Only the retail petrol prices are regulated. Crude oil prices appear to follow the world prices.

There are further agreements and activities that are excluded from the scope of CA 2010, as stated in section 13(1) read in conjunction with the Second Schedule. Such agreements and activities include "(a) an agreement or conduct…engaged in an order to comply with a legislative requirement; (b) collective bargaining activities or collective agreements in respect of employment terms and conditions…; (c) an enterprise entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition…would obstruct the performance, in law or in fact, of the particular tasks assigned to that enterprise."[21] Paragraph (a) of the Second Schedule is basically a restatement of the equivalent of the State compulsion doctrine known in other jurisdictions though, in accordance with the EU competition jurisprudence, it is coined in narrower terms and dictates that for an agreement or conduct to be excluded from the application of competition law upon the excuse of compliance with a legislative requirement, there must be a law and the law concerned must require the enterprises concerned to take a particular course of action though it is against competition law and it must leave the enterprises concerned with no room for discretion.[22] Paragraph (b) deals with collective bargaining and trade union matters that are commonly excluded from competition law as it is in the interest of the society that such matters be excluded from the ambit of competition law. Paragraph (c) is the restatement of Article 106(2) of the Treaty on the Functioning of the European Union (TFEU).[23] With the exclusion of energy and communications from the ambit of CA 2010, the kinds of commercial activities that come with paragraph (c) include the collection of household rubbish, provision of water supply, public ferry services, port services, and highway concessions.[24]

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[21]In the Second Schedule; similar to the First Schedule, the minister concerned has the power to amend the Second Schedule though there is a procedure for it: section 13(2) and (3), *Cf.* section 3(3).

[22]*Consiglio Nazionaledegli Spedizionnieri Doganali (CNSD) v Commission* T-513/93 [2000] ECR II-1807, paras. 58-59.This exclusion finds its equivalent in para. 5, Schedule 3, General Exclusions of the UK Competition Act 1998. While CA 2010 does not define the term "legislative requirement", the Executive Summary of the market review on fixing of fees/prices by professional bodies made available to the public by MyCC refers to "legislative requirement" as "a stipulation laid down in any written law that is in force in Malaysia that could be in any form or instrument (including statutes, subsidiary legislation and other legislative forms or instruments)."

[23]The equivalent of para. 4, Schedule 3 General Exclusions of the UK Competition Act 1998.

[24]These are the areas where *ex ante* regulation usually prevails over *ex post* competition supervision.

2.2.The Two Prohibitions

There are two prohibitions in CA 2010, namely, the prohibition of anti-competitive agreements, whether horizontal or vertical, and abuse of dominant position. There is no merger control in the CA 2010.

2.2.1. Prohibition of Anti-competitive Agreements

The relevant provisions are found in Chapter I of Part II of CA 2010.[25] Section 4(1) provides for a general prohibition of horizontal or vertical agreements between enterprises that have the object or effect of significantly preventing, restricting, or distorting competition in any market for goods or services.[26] Section 4(1) aside, subsection (2) provides for four groups of horizontal agreements that are deemed anti-competition by object.[27] In contrast with Article 101 of the TFEU, CA 2010 makes it explicit that bid-rigging is a form of hardcore cartel activity. Subsection (3) provides that an enterprise, which is a party to an anti-competition agreement, shall be liable for an infringement of the prohibition. In contrast to Article 101 of the TFEU, there is no provision on the legal consequences of an agreement that is found to have infringed section 4, presumably because a separate piece of legislation—the Contracts Act 1956—deals with this issue and any such anti-competition agreement will be void or unenforceable.

The term "agreement" is defined widely to mean "any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises and includes a decision by an association and concerted practices."[28] In other words, an anti-competition agreement need not be legally binding within the meaning of Contracts Act 1956. The term "concerted practice" has a long definition,[29] which is in

[25] See sections 4–9.

[26] The language is similar to the language used in Article 101 of the TFEU.

[27] They include agreements to "(a) fix, directly or indirectly, a purchase or selling price or any other trading conditions; (b) share market or sources of supply; (c) limit or control—(i) production, (ii) market outlets or market access, (iii) technical or technological development, or (iv) investment; or (d) perform an act of bid rigging."While the EU and UK competition laws do not expressly group bid-rigging with other agreements that are anti-competitive by object, CA 2010 does (See 2012).

[28] See section 2.

[29] The term "concerted practice" means "any form of coordination between enterprises, which knowingly substitutes practical cooperation between them for the risks of competition and includes any practice that involves direct or indirect contact or communication between enterprises, the object or effect of which is either of the following:

essence taken from the jurisprudence of the ECJ cases.[30] The definition is wide enough to cover both bilateral exchange as well as unilateral disclosure of commercially sensitive information.[31]

Exclusions mentioned under the scope of application of CA 2010 aside, any agreement that is anti-competition by virtue of section 4 may be exempted. The two kinds of exemptions are individual and block exemptions.[32] While an individual exemption covers either a particular agreement or a set of agreements for a transaction and requires an application from a party to the agreement,[33] a block exemption automatically applies to any agreements that fall within the description.[34] There is a statutory procedure for a block exemption to be granted and it includes a 30-day period of public consultation.[35] Both individual and block exemptions may come with certain conditions and are subject to a limited duration.[36] Further, an individual or block exemption may be varied, cancelled, or imposed with additional conditions.[37]

The criteria for both exemptions are the same, and they are found in section 5.[38] As a whole, the criteria are similar to the provisions in Article 101(3) of the TFEU

(a) to influence the conduct of one or more enterprises in a market; or
(b) to disclose the course of conduct that 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".

[30] *SuikerUnie* 40/73 etc [1975] ECR 1663, para. 26, 173; *Wood Pulp* C-89/95 [1993] ECR 1307, para. 63; *T-mobile Netherlands* C-8/08 [2009] 5 CMLR 11, para. 26.

[31] See, for instance, the OFT decision against the Royal Bank of Scotland, OFT Press Release 34/10, 30 March 2010, available at http://www.oft.gov.uk/news-and-updates/press/2010/34-10#.Ul-PU1NmSC8 (accessed October 17, 2013).

[32] In sections 6–9; this follows the EU competition jurisprudence.

[33] See section 6(1). The only application for an individual exemption, so far, came from Nestlé's Malaysian subsidiary, which attempted to apply for an exemption to allow it to continue with its resale price maintenance practice. Nestlé, however, upon consultations with MyCC, decided to withdraw its application (MyCC 2013c).

[34] See section 8(3); MyCC is currently considering a block exemption for liner shipping agreements.

[35] See section 9.

[36] See sections 6(4) and 8(4)(5).

[37] See sections 7(1)(2) and 8(5). MyCC has since prescribed an Exemption Application Procedure, together with prescribed fees.

[38] Section 5 on "Relief of Liability" provides that "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:
(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

though with some significant differences. One difference is while Article 101 refers to "improving the production or distribution of goods or…promoting technical or economic progress…", its equivalent in section 5 says "there are significant identifiable, efficiency or social benefits directly arising from the agreement." While the two sets of languages seem at first glance to be different, there is arguably not much substantive difference between the two as decisions and practice of the European Commission and the European Court of Justice (ECJ) have since clarified that benefits derived from an otherwise anti-competition agreement must be appreciable,[39] which is presumably another way of saying "significant" though the former sounds more economic whereas the latter sounds more legal. The word "identifiable" does not seem to add anything new either, as it has been the practice for any party seeking an exemption to identify the relevant benefits. Even the words "social benefits" can be derived from certain decisions of the European Commission and ECJ.[40] Paragraphs (b) and (d) of section 5 simply mirror the two negative requirements in Article 101(a) and (b). Paragraph (c), on the other hand, appears to be slightly different. It reflects the proportionality principle, in the sense that the detrimental effect should be proportionate to the benefits derived and should not, in any event, outweigh the benefits. While this requirement of proportionality is not expressly stated in Article 101, the decisions and practices of the European Commission and ECJ have much support for it.[41] Despite the inclusion of all these four criteria in section 5, something is amiss. Article 101 expressly requires that the benefits derived from the otherwise anti-competition agreement must allow consumers a fair share of the resulting benefit. This element is noticeably missing from section 5. It is unclear whether the element of giving consumers a fair share of the resulting benefit was intentionally dropped from section 5 or whether Parliament thought it is implicit in one of the four criteria—

(d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services."

[39] See *Volk v Vernaecke* (1969), 5/69 ECR 295, 302.

[40] See *Ford/Volkswagen* (1993), OJ L20/14 (JV would create jobs and substantial foreign investment in one of the poorest regions in the EU); *Metropole TV SA v Commission* T-528/93 etc. [1996] ECR II-649, para. 118 ('Commission is entitled to base itself on considerations connected with the pursuit of public interest in order to grant an exemption under Art 101[3]'

[41] See *Metropole TV (M6)* T-112/99 [2001] ECR II-2459 para. 104 (in defining the term "ancillary restraint"); European Commission (2004), *Guidelines on Application of Art 81(3)*OJ [2004] C 101/97.

perhaps arguably as part of the notion of proportionality. However, one significant consequence of dropping this requirement is certainly to make the legal practitioners' job much easier as it has been their argument that while it is hard to identify the benefits that may be derived from the otherwise anti-competition agreement it is much harder to show that consumers at large will, in some foreseeable future, benefit from it and the extent of such benefit.[42] The downside to it is certainly that consumer interests may be relegated or omitted from any consideration under section 5 and, if this were the case, it is debatable whether this would run counter to the objective(s) of CA 2010.[43]

The fact that CA 2010 follows the EU competition jurisprudence in treating even the four groups of hardcore horizontal agreements as merely being "deemed anti-competition by object" means that even the most egregious agreements may, in theory, be exempted.[44]This approach is different from the *per se* approach adopted in the US antitrust laws. To qualify for an exemption, all four criteria must be met.[45]

2.2.2. Prohibition of Abuse of Dominant Position

An enterprise is prohibited from engaging, whether independently or collectively, in any conduct that amounts to an abuse of a dominant position in any market for goods or services.[46] This is the general prohibition of an abuse of a dominant position. There is also a list of specific conducts that are deemed an abuse of dominant position and they include:

(a) Imposing directly or indirectly unfair purchase or selling price or other trading conditions on any supplier or customer;

(b) Limiting or controlling production, market outlets or market access, technical or technological development, or investment to the prejudice of consumers,

(c) Refusing to supply,

(d) Discriminatory pricing or trading conditions,[47]

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[42] See the analysis on this point in the European Commission (2004), *Guidelines on Application of Art. 81(3)*OJ [2004] C 101/97.

[43] The answer to this can only be determined after one has ascertained the objective(s) of CA 2010.

[44]*Matra Hachette v Commission* T-17/93 [1994] ECR II-595.

[45] This is due to the word "and" in section 5; this is also in line with the EU competition law.

[46] See section 10(1).

[47] Section 10(2)(d) provides that "applying different conditions to equivalent transactions with other trading parties to an extent that may—

(e) Tying,[48]

(f) Predatory behaviour toward competitors, or

(g) Buying up a scarce supply of intermediate goods or resources without any reasonable commercial justification.[49]

The retention of the imposition of unfair prices or trading conditions is controversial, for it essentially requires the Malaysia Competition Commission (MyCC) to tell an enterprise that the prices it charges or the trading terms that it imposes are unfair, though it is short of requiring the MyCC to tell the enterprise what prices and what trading conditions are fair.[50] While Article 102 of the TFEU does not expressly refer to the concept of refusal to supply, necessitating case law to develop such an abuse, section 10(2) (c) expressly incorporated it. While Article 102(c) of the TFEU has a rather brief statement on discriminatory conditions, section 10(2)(d) has three subparagraphs in it, thus expanding as well as acknowledging the various abuses involving discriminatory pricing or conditions of dealing. One significant difference between section 10(2) (d) and Article 102(c) is that the words "placing them at a competitive disadvantage" are not found in the former. It seems that section 10(2) (d) implicitly contains a statutory presumption that if any enterprise can demonstrate that it comes within any of the three sub-paragraphs it *is* placed at a competitive disadvantage.[51]

(i) discourage new market entry or expansion or investment by an existing competitor;
(ii) force from the market or otherwise seriously damage an existing competitor that is no less efficient than the enterprise in a dominant position; or
(iii) harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market".

[48] Section 10(2)(e) provides: "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 the contract".

[49] Section 10(2) (g) provides that "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".

[50] The MyCC has on occasions stated that it is not the price regulator.

[51] Conversely, it is arguable that in two situations only is an enterprise placed in a position of competitive disadvantage: first, when there is an abuse so as to discourage the enterprise's market *expansion* (but not market *entry*, for without having a foot in the market in the first place it is debatable whether a denial of market entry places a prospective enterprise at a *competitive* disadvantage); second, to harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market (upon the presumption that the harm does

The words "dominant position" is given a statutory definition to mean "a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors."[52] In accordance with the EU competition jurisprudence, mere possession of a dominant position is no infringement; a dominant enterprise must take the next step to abuse it.[53] In contrast with the exemption procedure for anti-competition agreements, there is the possibility of advancing defence or a justification for an otherwise abuse of a dominant position: a dominant enterprise is allowed to take any step that has a reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor.[54] On the determination of a dominant position, CA 2010 states that a particular market share is not conclusive on the issue of whether an enterprise occupies a dominant position.[55] However, by the same token, the same provision does allow a presumption to be made and the MyCC has since issued guidelines to the effect that, in general, it will consider a market share above 60% as indicative of dominance.[56]

2.3.Market Review

Despite the lack of provisions for merger control, CA 2010 gives MyCC the power to conduct market review. MyCC may initiate the review either on its own or upon the request of the Minister. The review may be carried out on any market and the purpose is to determine whether any feature or combination of features of the market prevents, restricts or distorts competition in the market.[57] A market review includes a study into the structure of the market concerned, conduct of enterprises in the market,

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not cause market exit, which would be covered under sub-paragraph [ii]). In other words, these are in situations envisaged in sub-para. (i) and (iii) only.

[52] See section 2. While it is undeniable that dynamic efficiency is an element to be reckoned with when analysing a case under competition law, the definition of "dominant position" appears to have taken the price aspect as the shorthand reference.

[53]See MyCC (2012c), para. 1.2.

[54] See section 10(3). These two forms of justification are not defined in CA 2010. MyCC (2012c) does not seem to be helpful either in this respect though it does provide four examples of justification in para. 5.2.

[55] Section 10(4) provides that 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, a dominant position in that market.

[56] See MyCC (2012c), para. 2.2.

[57] See section 11(1).

conduct of suppliers and consumers to the enterprises in the market, or any other relevant matters.[58] There are merits in having this provision for there are many occasions when market problems are beyond the reach of the two prohibitions and it is compounded by the lack of a merger control. However, the duty of MyCC under section 12 seems to end with the publication of its findings and recommendations. As to whether MyCC will go one step further in accordance with its statutory functions[59] and whether the government will take heed of the findings and recommendations in the report, this remains to be seen. Nor is it provided that the review should be conducted entirely internally by MyCC officials or whether, for instance, a committee should be established to include external economic and legal experts so as to give more transparency and public confidence in the work of MyCC. It is also debatable whether MyCC may exercise its market review power on the communications and multimedia market, and on the energy market.[60]

MyCC has since exercised its power to conduct two market reviews—one on the broiler market, and the other on the fixing of fees and prices by professional bodies. CA 2010 provides that upon conclusion of the market review, MyCC *shall* publish a report of its findings and recommendations and the report *shall* be made available to the public.[61] MyCC published an interim report on the broiler market on 21 December 2012 and the final report on 21 March 2014.[62] In the final report, MyCC came to the

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[58] See section 11(2).

[59] This includes providing advice to the Minister or any other public or regulatory authority on all matters concerning competition under section 16(a) of CCA 2010.

[60] Section 3(3) states '[t]his *Act* shall not apply to any *commercial activity regulated* under…' (emphasis added).

[61] See section 12(1)(2).

[62] An Executive Summary on the fixing of fees and prices by professional bodies was subsequently made available on the MyCC website after the author drew the attention of MyCC that the report had yet to be made public. It seems that this is merely a summary as opposed to the full report. Section 47 entitled "Method of publication" in CCA 2010 provides that "(1) Where the Commission is given power to publish, or is required to publish, a direction, guidance, withdrawal, clearance, nomination or other decision or document under the competition laws, such publication *may* be by electronic means in such manner as is likely to make it reasonably accessible to any person wishing to view it, and publication of a document by that method shall be effective for all purposes under this Act."

(2) For the purposes of this section, "electronic" means the technology of utilising electrical, optical, magnetic, electromagnetic, biometric, photonic or other technology as may be determined by the Commission." (emphasis added).

Section 12 of CA 2010 and section 47 of CCA 2010 together suggest that, while there is a *duty* to publish and the mode of publication is within the discretion of the MyCC, there is no statutory requirement that such publication be made *expeditiously*. While section 47 gives MyCC the

conclusion that there was no horizontal arrangement between the farms to fix the ex-farm price, or even restrict supply to raise the same. Further, with increasing vertical integration, there is less competition at each stage of the supply chain. In order to "promote economic development by promoting and protecting the process of competition," MyCC would continue to monitor market behaviours of the relevant parties.

MyCC has also conducted a market review on the fixing of prices or fees by professional bodies. In an executive summary made available to the general public, MyCC surveyed 132 professional bodies or associations grouped into 34 sectors. MyCC found, among others, that professional bodies or associations in 10 sectors are empowered by legislation and do establish scale of fees for their members.[63] In three other sectors, the governing bodies are empowered by legislation to fix scale fees but have yet to do so.[64] However, the summary does not seem to indicate the next course of action by MyCC.[65] Pending the release of the full report, if any, one significant issue that was not addressed in the executive summary was the legal difference between requiring or compelling enterprises to fix fees or prices, on the one hand, and permitting such enterprises to fix fees or prices, on the other hand.

2.4.The Guidelines

The power of MyCC to issue guidelines is provided for in CCA 2010.[66] MyCC has since issued three guidelines—one on market definition, and two on the two prohibitions.[67] They are not exhaustive, nor do they set any limit to the investigation

discretion vis-à-vis the *mode* of publication, it is debatable whether MyCC has the power to withhold the full report from the public.

[63] They include the architects, engineers, quantity surveyors, land surveyors, valuers, appraisers, estate agents, town planners, accountants, legal practitioners, and medical and dental practitioners.

[64] They include midwives and nurses, counsellors, and food analysts.

[65] Further to the market review, an economic consultant was apparently flown all the way in from overseas to speak at a conference on the anti-competitive effects of price-fixing by professional bodies though the benefit thereof, if any, remains unclear.

[66] Section 16(e) to be read with section 17(1), 17(2)(j).

[67] The guidelines are not substitutes for CA 2010.There is also another guideline on lodging complaints.

and enforcement activities of MyCC.[68] MyCC has also since published two draft guidelines for consultation—guidelines on financial penalty and on leniency.

On market definition guidelines, they adopted the same hypothetical monopolist test or the small but significant, non-transitory increase in price (SSNIP) test.[69] They also adopted similar economic concepts like the relevant market, relevant product market, relevant geographic market, and entry and expansion barriers. Defining the relevant market is a useful first step in determining quickly whether an agreement has a significant effect on competition or whether an enterprise possesses market power.[70] Market definition need not be absolutely precise and requires considerable practical judgment.[71] The goal of market definition is to find the smallest market in which a hypothetical monopolist could impose an SSNIP.[72] Market definition is, however, not required for the four types of horizontal agreements that are deemed anti-competition by object.[73] On the relevant geographic market (RGM), since the term "market" is defined to mean "a market in Malaysia or in any part of Malaysia", other countries are not included as part of the definition of the RGM. Thus, if imports could easily come into Malaysia from a neighbouring country, the RGM would still be confined to Malaysia while the imports would be considered in the next step as part of the competition analysis.[74]

On the prohibition to prevent anti-competition agreements, the guidelines provide some insight into the stand taken by MyCC. As section 4(1) requires a *significant* effect on competition, the guidelines provide a "safe harbour" approach so that anti-competition agreements will, in general, not be considered to have a significant effect 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%, or

[68] See MyCC (2012a); in applying the guidelines, all the facts and circumstances of each case must be considered.
[69] See MyCC (2012a), paras. 1.6 and 2.3, with a price range of 5%–10%.
[70] See MyCC (2012a), para. 1.7.
[71] See MyCC (2012a), para. 1.9.
[72] See MyCC (2012a), para. 2.4.
[73] See MyCC (2012a), para. 1.8
[74] See MyCC (2012a), para. 3.1. This stands in contrast with, for instance, the guidelines issued by the OFT (2004, para. 4.1).

- the parties to the agreement are not competitors and all of the parties individually have less than 25% in any relevant market.[75]

On information sharing between competitors, the guidelines state that, in general, frequent exchange of confidential information among all competitors in a market with few competitors is more likely to have a significant effect on competition. In addition, the exchange of information between competitors, but which information is not provided to consumers is also likely to have a significant adverse effect on competition.[76] The guidelines take the view that vertical agreements are, in general, less harmful to competition than horizontal agreements.[77] However, MyCC will take a strong stand against *minimum* resale price maintenance.[78] As for other forms of resale price maintenance, including maximum pricing or recommended retail price, which serves as a focal point for downstream collusion, these would also be deemed anti-competition.[79] The same guidelines also provide that the criteria in section 5 may be invoked in the event that there is an investigation for breach under section 4, and in civil litigation.[80] MyCC will not entertain any application for guidance or approval of any agreement, except where there is already an application beforehand for an exemption.[81]

On the prohibition of abuse of dominant position, the guidelines state that market share above 60% would be indicative of dominance while 100% market share is likely to be dominant because of lack of competition.[82] The guidelines group the abusive conduct into two categories—exploitative and exclusionary conduct.[83] Market share aside, the guidelines mention three other factors that may have an impact on dominance— degree of product differentiation, price elasticity, and the degree to

[75] See MyCC (2012b), para. 3.4.
[76] See MyCC (2012b), para. 3.7.
[77] See MyCC (2012b), para. 3.11.
[78] See MyCC (2012b), para. 3.14; it is unclear what is meant exactly by "strong stance". It is unclear whether the MyCC intended it to mean anti-competitive by object as the four groups of horizontal agreements within section 4(2). However, the recent withdrawal of the application for an individual exemption by Nestlé Malaysia seems to suggest so (MyCC 2013c).
[79] See MyCC (2012b), para. 3.15.
[80] See MyCC (2012b), paras. 5.10 and 5.11.
[81] See MyCC (2012b), para. 6.
[82] See MyCC (2012c), paras. 2.2 and 2.7.
[83] See MyCC (2012c), para. 2.4.

which innovation drives competition.[84] On predatory pricing, the guidelines acknowledge that different situations may dictate the use of different cost measures and the method used by MyCC will depend on the circumstances and particular conditions in the industry under investigation.[85] On the issue of intent, the guidelines state that such evidence to drive a competitor out of business is not by itself indicative of predatory conduct, though such intention could be evidence of effect, i.e., that a predatory strategy is likely to succeed.[86] On the issue of price discrimination, the guidelines simply gloss over it without addressing the legal terminology.[87] The guidelines also make some reference to the doctrine of essential facilities though MyCC acknowledges that enterprises are, in general, free to deal with whoever they choose and there is a difficult trade-off.[88] On justification, the guidelines state, *inter alia*, that meeting a competitor's price even though the price may be below cost (in the short term) may be defended.[89]

As for the draft leniency guidelines, they reiterate the statutory conditions of admitting to cartel involvement and provision of significant assistance to MyCC.[90] While the draft guidelines state that MyCC would be inclined to give full leniency where these two conditions are fulfilled, they go on to allow the MyCC to provide full leniency "in other circumstances" though it is unclear what these other circumstances may be. The same guidelines also propose to implement the "marker" system of identifying the priority order in the leniency application process. The guidelines also list down the information needed when applying for leniency.

The draft guidelines on financial penalty, on the other hand, propose that financial penalties bear the objectives of reflecting the seriousness of the infringement, and deterrence. The draft guidelines list down a number of factors that may be taken into account when determining the amount of financial penalty, including the (i) gravity of

[84] See MyCC (2012c), para. 2.18.
[85] See MyCC (2012c), para. 3.14; the guidelines mention a few cost concepts, including average variable cost, average avoidable cost, long-run incremental cost, and average total cost.
[86] See MyCC (2012c), para. 3.16.
[87] See MyCC (2012c), paras. 3.17 to 3.20.
[88] See MyCC (2012c), paras. 3.25 to 3.27.
[89] See MyCC (2012c), para. 5.2. This stands in contrast to the guidelines on anti-competitive agreements that warn competitors against "simply following the prices of competitors unless the decision was made completely independent from all other competitors and there is a reasonable explanation for following each other…" (MyCC 2012b, para. 2.6).
[90] See section 41.

the infringement, (ii) turnover of the market involved, (iii) duration of the infringement, (iv) recidivism, and (v) existence of a compliance programme. MyCC will also take into account various aggravating and mitigating factors. One shortcoming of the proposed guidelines is they do not seem to state the rule-of-thumb initial sum of a financial penalty.

2.5.Appellate Process

There is a Competition Appeal Tribunal (CAT) established under the CA 2010. It has the power and exclusive jurisdiction to review any decision made by MyCC under sections 35 (interim measures), 39 (finding of no infringement), and 40 (finding of infringement and orders made thereunder).[91] The CAT consists of a President, who is a judge of the High Court, and between 7 and 20 other members appointed by the Prime Minister upon the recommendation of the Minister concerned.[92] Based on the words "exclusive jurisdiction", it appears that an MYCC decision under the relevant sections can only be reviewed by the CAT and not by a civil court. Further, the function of the CAT is merely to *review* a decision of MyCC. However, section 57(1) goes on to provide a list of the powers of the CAT and these include *inter alia* the power to (i) summon parties to the proceedings or any other person to attend before it to give evidence; (ii) procure and receive evidence on oath or affirmation and examine witnesses; and (iii) require the production of any information, document, or other things to admit or reject evidence adduced. The CAT has also the powers of a subordinate court[93] in enforcing the attendance of witnesses, hearing evidence on oath or affirmation, and punishment for contempt.[94] The CAT's decisions are made on the majority basis.[95] The CAT, in making its decisions, may confirm or set aside the MyCC decision or any part of it and may remit the matter to MyCC, impose, revoke, or vary the amount of a financial penalty, and give such other directions or make such

[91] See section 44.
[92] See section 45(1) (2).
[93]A "subordinate court" means the courts below the High Court, including the Sessions Court and the Magistrates' court. There is probably some oddity here in the sense that while the president of the CAT is a High Court judge, and while by its "exclusive jurisdiction" the CAT seems to be the final court on substantive competition issues under the CA 2010, barring any judicial review, its powers are merely equivalent to those of the subordinate courts.
[94] See section 57 (2).
[95] See section 58 (1).

other decisions.[96] A decision of the CAT is final and binding on the parties to the appeal and may be enforced by leave of the High Court as if it were a judgment or order.[97] The CAT has since been established and comprises seven members, including the President.[98]

2.6.Right of Private Action

This right is expressly provided for in CA 2010, section 64.[99] As drafted, it allows both follow-on and stand-alone civil actions and there is no automatic stay of court proceedings pending investigation by MyCC or appeal to the CAT. The action may be brought by any person who has suffered direct loss or damage regardless of whether or not such a person dealt directly or indirectly with the enterprise concerned.[100]

2.7.Related Criminal Offences

There are some related criminal offences provided for in the CA 2010. They are merely related to the performance of the functions and exercise of the powers of MyCC and have nothing to do with an infringement of the two prohibitions.[101] Such offences include giving false or misleading information, evidence or document,[102] destruction, concealment, mutilation and alteration of records etc.,[103] obstruction,[104] tipping off,[105] and threat and reprisal.[106]

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[96] See section 58 (2).
[97] See sections 58 (3) and 59.
[98] See http://www.kpdnkk.gov.my/documents/10137/1231800/COMPETITION+APPEAL+TRIBUNAL.pdf
[99] Section 64 (1) provides that "(1) Any person who suffers loss or damage *directly* as a result of an infringement of any prohibition under Part II shall have a right of action for relief in civil proceedings in a court under this section against any enterprise which is or which has at the material time been a party to such infringement" (emphasis added). With the word 'directly', CA 2010 requires direct causation as the basis for bringing a civil claim.
[100] See section 64(2); thus, it allows both direct and indirect purchasers to sue.
[101] An infringement is merely sanctioned by a financial penalty, if any, which is administrative and not criminal in nature.
[102] See section 23.
[103] See section 24.
[104] See section 32.
[105] See section 33.
[106] See section 34.

2.8. Interworking Committee

As some sectoral regulators had existed prior to the passing of CA 2010 and CCA 2010, though some of such sectoral regulators may not by law have the power to oversee competition issues, section 39 of CCA 2010 provides for MyCC to work with such regulators.[107] For this purpose, a committee has since been established, comprising a number of other sectoral regulators.[108] MyCC has also entered into a Memorandum of Understanding (MOU) with the Central Bank "to promote and protect the process of competition, while ensuring that the overall stability of the financial sector is preserved."[109] The MOU sets out the framework for the consultation and resolution of issues in developing and proposing amendments to laws, guidelines, regulations, and other legal instruments issued by the Central Bank and MyCC in common regulatory areas, such as anti-competition business conduct prohibited in the Financial Services Act 2013 and in Islamic Financial Services Act 2013.[110] The two authorities also agreed to notify each other upon detecting any infringement and will endeavour to reach a prompt mutual agreement on the course of action, taking into account competition principles and implications on financial stability.[111] In addition to domestic sectoral regulators, section 39 also gives MyCC the power to liaise with international organisations concerning competition enforcement, such as the Organisation for Economic Co-operation and Development (OECD), International Competition Network, and others.

[107]Section 39 of CCA 2010 entitled "Interworking with other authorities" states that "The Minister may direct the Commission regarding interworking arrangements between the Commission and any other authority in Malaysia or in a foreign jurisdiction or any international organization and determine the arrangements for such interworking or membership of international organizations".

[108] These include the Malaysian Communications & Multimedia Commission (MCMC), Energy Commission, National Water Services Commission (*SPAN*), Land Public Transport Commission (*SPAD*), Central Bank of Malaysia, and Securities Commission (MyCC News Release, 14 May 2012). Of all these sectoral regulators, only the MCMC and Energy Commission appear to have been granted statutory powers to handle competition matters in their respective industry. One issue to note here is, while the MCMC and Energy Commission have joined the Interworking Committee, no responsible authority under the PDA 1974 has, although there appears to be such a need in the light of the amendment to the First Schedule.

[109] See MyCC (2014e).

[110] See MyCC (2014e).

[111] See MyCC (2014e).

3. Enforcement

3.1.The Malaysia Competition Commission (MyCC)

MyCC is made up of a body of Commissioners comprising the Chairman, four members representing the government, and not less than three but not more than five other members.[112] The Chairman may, with the Minister's prior written approval, hold other office or employment, whether remunerated or not,[113] while no person shall be appointed or remain a commissioner if he holds full-time office in any public-listed company without the Minister's prior approval.[114] The term of office is not more than three years although a commissioner may be reappointed subject to a maximum of two consecutive terms.[115] The chairman is entitled to remuneration and allowances while other commissioners are merely entitled to allowances.[116] The office of the commissioner shall be vacated on one of such grounds as stated in section 12 of CCA 2010.[117] MyCC may also establish any committee as it deems necessary or expedient in the performance of its statutory functions.[118] A committee shall be chaired by any commissioner, may determine its own procedure, and its members may come from the

[112]CCA 2010, section 5(1) provides that "The Commission shall consist of the following members who shall be appointed by the Prime Minister upon the recommendation of the Minister:

(a) a Chairman;

(b) four members representing the Government, one of whom shall be a representative of the Ministry for the time being, responsible for matters concerning domestic trade and consumer affairs; and

(c) not less than three but not more than five other members, who have experience and knowledge in matters relating to business, industry, commerce, law, economics, public administration, competition, consumer protection or any other suitable qualification as the Minister may determine".

[113] See CCA 2010, section 8(1),.

[114] See section 8(2), CCA 2010.

[115] See section 9, CCA 2010; some new commissioners have since been appointed (MyCC 2014f).

[116] See section 10, CCA 2010.

[117] These include death; conviction of certain offences, or where his conduct—whether in connection with his duties as a commissioner or otherwise—has been such as to bring discredit or disrepute to MyCC, or bankruptcy; of unsound mind; absence from three consecutive meetings of the MyCC without leave in writing to the Minister or Chairman; conflict of duties; acting in contravention of competition laws; revocation of appointment by the Prime Minister (apparently without any statutory duty to state or publish the grounds); and resignation.

[118] See section 14(1), CCA 2010; three committees have since been established, namely, the Working Committee on External Guidelines, Working Committee on Publicity and Communication, and Working Committee on Advocacy (MyCC 2012d, p. 8).

commissioners or any other person as MyCC thinks fit.[119] A committee, and its members, is subject to the will and control of MyCC.[120]There is a provision for the disclosure of interests by members of MyCC and of the committees.[121]

The functions of MyCC are expressly enumerated in section 16 to include *inter alia* the function to (i) advise the Minister or any other public or regulatory authority on all matters concerning competition;[122](ii) alert the Minister to the actual or likely anti-competition effects of any current or proposed legislation and to make recommendations to the Minister, if appropriate, for the avoidance of these effects;[123] (iii) advise the Minister on international agreements relevant to competition matters and to the competition laws;[124] (iv) implement and enforce the competition laws;[125] (v) issue guidelines on the implementation and enforcement of the competition laws;[126] (vi) act as a competition advocate;[127] and (vii) consider and recommend to the Minister reforms in the competition law.[128] The MyCC powers include the power to do all things necessary or expedient for or in connection with the performance of its functions;[129] to impose penalty for an infringement;[130] and , of most significance to all enterprises and practitioners, to require the furnishing of information by enterprises to assist the MyCC in the performance of its functions.[131] MyCC is responsible to the Minister, who has the power to give MyCC, in writing, directions of a general character, consistent with the provisions of the competition laws, and which relates to the performance of MyCC's functions and powers. It is the duty of MyCC to implement such directions.[132]

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[119] See section 14(3), CCA 2010.
[120] See section 14(4) (5) (7), CCA 2010.
[121] See section 15, CCA 2010.
[122] See section 15(a), CCA 2010.
[123] See section 15(b), CCA 2010; it remains unclear if this had been taken into account when the amendment to the First Schedule of the CA 2010 was made.
[124] See section 15(c), CCA 2010.
[125] See section 15(d), CCA 2010.
[126] See section 15(e), CCA 2010.
[127] See section 15(f), (i) and (j), CCA 2010.
[128] See section 15(k), CCA 2010.
[129] See section 17(1) and (2)(j), CCA 2010.
[130] See section 17(2) (b), CCA 2010.
[131] See section 17(2)(i), CCA 2010.
[132] See section 18, CCA 2010; this power appears to be controversial as it appears to be wide enough for it to be potentially abused. News of abuse of official powers abounds in the media.

The day-to-day operation of MyCC's administrative work is under the chief executive officer, who is subject to the directions of MyCC.[133]

3.2.MyCC Website

MyCC maintains an official website. The website has changed about four times in the past two years since CA 2010 came into force. While one might wonder about the need to change the website four times in less than two years, it might look impressive as far as the key performance index (KPI) of government departments is concerned.

3.3.Enforcement Powers

The MyCC wears three hats. It is the investigator, the so-called "prosecutor" in the sense that it will bring any infringement to task, and the adjudicator. It may exercise its power of investigation in three instances—on its own initiative, upon the direction of the Minister, or upon receiving a complaint from a member of the public.[134] If a complaint is made under section 15, MyCC may make inquiries for the purpose of deciding whether it should, in its discretion, investigate the matter.[135] It may, after making initial inquiries, decide to close the case, though it must inform the complainant of its decision and the reasons for such a decision.[136] Notwithstanding its decision to continue with the investigation, MyCC may at any time decide to close it if it has received an undertaking under section 43, or "in all the circumstances the continuation of the investigation would not constitute the making of the best use of the Commission's resources".[137]

MyCC has extensive powers of investigation. A MyCC officer investigating a case has the powers of a police officer. In particular, MyCC has the power to require the provision of information, and the retention of documents; it may have access to records, books, and accounts, it has the power to search and seize with or without a warrant, it may have access to computerised data, and so on.[138] MyCC also has the power to issue

[133] See section 20, CCA 2010.
[134] See sections 14(1) (2) and 15(1).
[135] See section 16(1).
[136] See section 16(2).
[137] See section 16(3); there is a statutory duty to publish a statement on the closure of investigation and its reasons, see section 16 (4). No such statement has hitherto been made public.
[138] See sections 17-20, and 25-28.

interim measures though such measures are confined to investigations commenced upon its own initiative or upon a direction of the Minister under section 14.[139] MyCC, however, has no power to enforce its decisions or directions and must do so via the High Court.[140]

3.4.Decision Making and Penalty

Upon completion of its investigations, MyCC shall inform the enterprises concerned of its proposed decision. The proposed decision shall set out the reasons in sufficient details. This will enable the enterprises concerned to have a genuine, sufficient, and informed basis for making comment on the proposed decision and to set out remedial action.[141] The enterprise concerned has, within a time specified, to inform MyCC whether it wishes to make an oral representation and, once informed, MyCC shall convene a session for the oral representation before taking a decision.[142] Notwithstanding an enterprise's rights to request for an oral representation session, MyCC has the power to conduct a hearing at any time to determine whether an enterprise has committed any infringement.[143]

Where the MyCC makes a decision that there is no infringement it shall give a notice to any person who is affected by the decision stating the facts and its reasons.[144] Where there is a finding of an infringement, MyCC "(a) shall require that the infringement…be ceased immediately; (b) may specify steps which are required to be taken by the infringing enterprise, which appear to the Commission to be appropriate for bringing the infringement to an end; (c) may impose a financial penalty; or (d) may give any other direction as it deems appropriate".[145] MyCC must notify any person affected by the decision within 14 days and to publish the reasons for its decision.[146] Under CA 2010, MyCC has the power to impose a financial penalty not exceeding

[139] Section 35; in other words, such interim measures are not available where the investigation commenced as a result of a complaint lodged by the general public under section 15. It is debatable whether such a limitation has reduced the effectiveness of section 35.
[140] See section 42.
[141] See section 36(1)(2).
[142] See section 37.
[143] See section 38.
[144] See section 39.
[145] See section 40(1).
[146] See section 40(2)(3).

10% of the worldwide turnover of an enterprise over the period during which an infringement occurred.[147]

3.5.Leniency Programme

There is a leniency programme under which a reduction of up to 100% of any penalties imposed, may be availed of subject to the condition that the enterprise seeking such leniency has admitted its involvement in an infringement of a prohibition under section 4(2), and the enterprise provided information or other forms of cooperation to MyCC, which significantly assisted, or may have significantly assisted in identifying or investigating an infringement.[148] The leniency relief may provide different percentages of reductions depending on which enterprise was the first to blow the whistle, so to speak, and at what stage the admission was made, the information or other cooperation was provided, or any other circumstances MyCC may consider appropriate.[149]

3.6.Giving of Undertakings

Apart from its power to impose orders and financial penalties, MyCC has the power to accept from an enterprise an undertaking to do or refrain from doing anything as it considers appropriate.[150] The undertaking may be subject to conditions that MyCC may impose.[151] Where such undertakings are accepted, MyCC shall, in relation to an infringement, close the investigation without making any finding of an infringement and shall not impose any penalty.[152] This power is very helpful to MyCC investigations of cases of anti-competition agreements and of abuses of dominant positions where such power is inherently debatable, both legally and in terms of economic analysis, so that enterprises concerned can opt to provide undertakings that are likely to take away the anti-competition elements while keeping the relevant agreements valid and enforceable, and thus, avoid the stigma and consequences of an

[147] See section 40(4).
[148] See section 41(1).
[149] See section 41(2).
[150] See section 43(1); this is the equivalent of the power of the European Commission to accept "commitments".
[151] *Ibid.*
[152] See section 43(2).

infringement case. Any undertaking of the enterprise accepted by MyCC under section 43 shall be described in a public document available for inspection by MyCC.[153] The undertakings are enforceable by MyCC as if the undertakings had been set out in a decision given to an enterprise pursuant to section 40.[154]

4. Status of Enforcement

In its Strategy Plan for Competition Advocacy 2012–2014, MyCC laid down "the rationale and framework for the work programme of the Working Committee on Advocacy in this first phase of the implementation of the CA 2010."[155] Certain market sectors were put on priority, namely, food production, import and distribution, transport, health care, professional services, housing, and financial institutions.[156] Certain key stakeholders were also identified for the advocacy programme, such as all three branches of the government—both federal and state levels—enterprises and associations of enterprises, professionals and associations of professionals, consumer associations and civil society organisations, and universities and think tanks.[157] The detailed work plan is, however, not yet available.[158]

MyCC has made it public in some media statements that its priority area of enforcement is on bid-rigging although there is no report yet of any investigation on bid-rigging.[159]

Based on reports, MyCC has received a number of complaints and opened investigations on a number of cases. As of today, there has only been one final infringement decision made against a trade association though no financial penalty was imposed.[160] There has also been a proposed decision against two major airlines—the Malaysia Airlines and Air Asia—for their alleged involvement in market division.

[153] See section 43(3).
[154] See section 43(4).
[155] See MyCC (2012d), p. 5.
[156] See MyCC (2012d), p. 14.
[157]See MyCC (2012d), pp. 15-22.
[158] See MyCC (2012d), p. 29.
[159] See MyCC (2012e).
[160] See MyCC (2012f).

In the proposed decision, MyCC proposed to impose a fine of RM10 million for each airline.[161] In September 2013, MyCC issued proposed interim measures against the Pan-Malaysia Lorry Owners Association (PMLOA), its members, and related lorry enterprises for their alleged agreement to fix an increase of transport charges by 15%.[162] PMLOA has since issued, on behalf of its members, a public statement that its members had rescinded the agreement and it would leave it to its individual members to decide on the increase in charges. In May 2014, MyCC accepted undertakings offered by PMLOA.[163] In January 2014, MyCC issued proposed interim measures against some 26 ice manufacturers for their alleged agreement to increase the price of ice.[164] MyCC also found them liable for cartel activities and proposed a total fine of RM283,600 for all 26 manufacturers.[165]

5. Miscellaneous Issues

5.1.The Objectives of CA 2010

As passed by the Parliament, this law is of primary importance as it is meant to serve the underlying policy and objectives. As drafted, the Long Title of CA 2010 states:

> "An Act to promote *economic development by* promoting and protecting *the process of competition*, *thereby* protecting *the interests of consumers* and to provide for matters connected therewith."[166]

There are, thus, three elements in the Long Title. Literally reading the Long Title, it appears that by the word "by", promoting and protecting the process of competition is merely *the means* or *the tool* to promote economic development. Further, by the word "thereby", it appears that protecting consumer interests is simply the outcome, if

[161] See MyCC (2013a).
[162] See MyCC (2013b).
[163] See MyCC (2014c).
[164] See MyCC (2014a).
[165] See MyCC (2014b), with fines ranging from RM1,200 to RM106,000.
[166] Emphasis was added.

not the by-product, of the process. If so, it would appear that the objective—and there is only one—is to promote economic development.[167] If so, the objective of CA 2010 does not seem to be the promotion of efficiency although the word appears in the Preamble.[168]While efficiency is one of the *benefits* that the Parliament through CA 2010 wanted to achieve, efficiency does not seem to be *the*, or one of the, *objective(s)*. From the Long Title and the Preamble together, it seems fair to state that the objective is to promote economic development and, *for that*, to prohibit anti-competition conducts. This may cause some confusion in the interpretation and enforcement of CA 2010 since while the objective seems to touch on the economic development of the state and on macroeconomics, the guidelines issued by MyCC talk about principles and concepts that are more familiar to market economics and microeconomics. Making economic development the objective of CA 2010 also carries the risk that the implementation of competition law and policy may be made subservient to other policies, such as the wealth redistribution policy and national champions policy.[169] It is also obvious that there is no prevailing provision in CA 2010 in the event of a conflict with another Act of Parliament.[170] Assuming that the goal is economic development, it is also debatable if certain competition-related policies are geared

[167] Read also See (2012). The reader should perhaps also note that in the MyCC Guidelines on Chapter 1 Prohibition, para. 2.12, it states that "The term 'object' is not defined in the Act. In order to be consistent with the [CA 2010's] *economic goal* 'to promote economic development by promoting and protecting the process of competition'…" (emphasis added), it is curious to note that the words "thereby protecting the interests of consumers" were conveniently omitted. This adds support to the argument that the protection of consumer interests is *not* one of the objectives. The same may be observed in the Strategy Plan for Competition Advocacy 2012-2014, p. 5, and in the Final Report on the broiler market review, p. 44.

[168]The Preamble provides the following: "WHEREAS the process of competition encourages *efficiency*, innovation and entrepreneurship, which promotes competitive prices, improvement in the quality of products and services and wider choices for consumers; AND WHEREAS *in order to achieve these benefits*, it is *the purpose of this legislation* to prohibit anti-competitive conduct" (emphasis added).

[169]The national champion policy, in particular, is arguably highly anti-competitive in nature. Take, for instance, the passenger car sector: through taxation, the government policy effectively divided the market into the national car market and the foreign car market and prices of foreign vehicles attach an excise duty, which artificially makes foreign cars much more expensive than they would otherwise be in a freely competitive market. Consumers in Malaysia have to pay between 50%–200% (variable from time to time) of excise duty in order to purchase a foreign car. In a statement issued by one of the opposition politicians, Malaysia was said to have the second-highest passenger car prices in world after Singapore, which has geographical constraints but Malaysia does not, quoting sources from a website called Jalopnik. See Lim, Guan Eng (2013), *Don't make Malaysians car slaves: Taxes on cars should be re-designed anew*, as reported in *Sin Chew Daily*, 12 October 2013.

[170]This is in contrast to the CMA 1998, which does contain such a prevailing provision.

towards such goal.[171] As stated above, the amendment to the First Schedule, for example, could potentially give rise to anti-competition activities among industry players in the upstream market, not to mention the entrenchment of statutory monopoly.[172]

5.2.Control of Mergers

There is no provision at present for merger control in CA 2010. While the relevant minister and MyCC have made public statements to the effect that the government is looking into the possibility of introducing a provision for merger control, it is unclear how strong the political commitment is and when will it materialise. The argument for not introducing a merger control at the same time as the other two pillars of competition law is that when the Sherman Act was passed in 1890 it did not have a merger control either; and the same happened in Europe when the Treaty of Rome was signed in 1957. Another argument is that, in the absence of a merger control, an agreement to merge or acquire a competitor's business or assets may still be subject to analysis under section 4 or under section 10.[173] The disadvantage in not having a merger control is, there is no *ex ante* means to prevent the formation of a dominant enterprise in the market (except by alleging that the proposed agreement to merge is anti-competition or the proposed acquisition is an abuse of dominant position)[174] and any subsequent problem can only be dealt with when there is an actual abuse of dominant position. Whether to have a merger control or not depends on the political belief that there are merits in the concentration of economic power, although competition economists will come up with all kinds of arguments, whether economies of scale or otherwise, in favour of big sizes. As it stands now, merger remains within

[171] The enforcement agency appears to stress on economic development and protection of consumer interest on different occasions as convenience calls.

[172] In any event, the statutory facilitation of cartel activities certainly does not help the promotion of the competition process and consumer interests, contrary to the stand asserted by the enforcement agency.

[173] See *Europemballage Corp and Continental Can Co Inc v Commission* 6/72 [1973] ECR 217 where the ECJ seemed to take the view that, subject to market definition, Continental Can, through and together with its majority-owned subsidiary, SLW, had a dominant position over a substantial part of the Common Market on the market for light packaging for preserved food and on the market in metal caps for glass jars, as found by the Commission, and through the establishment of Europemballage as a vehicle to acquire TDV, its licensee of certain packaging technologies, committed an abuse of collective dominance.

[174] See *Europemballage Corp & Continental Can Co Inc v Comm*6/72 [1973] ECR 215.

the sole jurisdiction of the Securities Commission (**SC**). Though the SC is a member of the Interworking Committee and this committee is supposed to iron out competition issues among the six regulators—particularly those regulators without powers over competition issues—it remains unclear how competition issues in the course of a merger or acquisition may be *legally* taken into account, bearing in mind that the SC apparently has no such power, while MyCC has no jurisdiction over mergers.[175]

5.3.Exclusion of Final Consumer

Most jurisdictions have accepted thatcompetition law is intended to protect the interests of consumers, and consumers may include both intermediate and final consumers.[176] The term "consumer" is defined in CA 2010 to include both classes of consumers.[177] Despite this definition, the definition of "commercial activity" seems to exclude final consumption, and thus, final consumers, from the scope of application of CA 2010.[178] However, in principle, it is possible to have a situation where a purchaser, acting as the so-called final consumer within the meaning of section 3(4)(c) of CA 2010, imposes by virtue of its market power, an unfairly low purchase price on the supplier within the meaning of section 10(2)(a) and yet gets off scot-free simply because there is no commercial activity and, hence, it is not an enterprise as defined because it is purchasing "not for the purposes of offering the goods and services as part of an economic activity".[179] Since CA 2010 contains provisions that may be

[175] See MyCC (2012g) and MyCC (2014d).

[176] See *Kabel and MetallwerkeNeumeyer AG and EtablissementsLuchaire SA Agreement* [1975] OJ L222/34; the same may also be seen from Guidelines on Art. 81(3), para.84. *Cf. GlaxoSmithKline v Commission* T-168/01 [2006] ECR II-2969, para. 273("The legitimacy of that transfer of wealth from producer to intermediary is not in itself of interest to competition law, which is concerned *only* with its impact on *welfare of final consumer*") (emphasis added).

[177]Section 2 of CA 2010 defines the term to mean "any direct or indirect user of goods or services supplied by an enterprise in the course of business, and includes another enterprise that uses the goods or services thus supplied as an input to its own business as well as a wholesaler, a retailer and a final consumer".

[178] Refer to section 3(4)(c) of CA 2010; see Parts 2.1 and 2.6, *supra.*

[179] Examples of such a situation may include cases like C-205/03P *FENIN v Commission* [2006] ECR I-6295 and 1006/2/1/01 *BetterCare v DGFT*[2002] CAT 7. It would not be correct to assume, however, that this kind of situation happens only with a public sector purchaser. It can equally happen to a large, powerful private sector purchaser.

exploitative, it is debatable whether the term "commercial activities" should be so defined.[180]

5.4.State-Owned Enterprises

State-owned enterprises (SOEs) are present in many market sectors. They are known in general as the government-linked companies (GLCs). As a general rule, SOEs are covered in CA 2010 in so far as they carry out commercial activities, except where the activities are excluded or exempted. In other words, only the SOE activities are excluded. If the SOE activities are not commercial in nature, the SOE is not even deemed an "enterprise" by definition.[181] Three groups of commercial activities are expressly excluded from CA 2010, namely, those commercial activities regulated under the CMA 1998, ECA 2001, and certain specified upstream activities governed by PDA 1974.[182] Further, where SOEs are compelled by law to be engaged in anti-competition activities, such activities are excluded from the scope of CA 2010 by virtue of the Second Schedule.[183] Where SOEs carry out services of general economic interest, such activities are excluded from the scope of CA 2010 only insofar as the application of the law would obstruct the performance of the activities in law or in fact.[184]

One issue that is associated with SOEs is the issue of competitive neutrality. This issue may arise in at least two respects. One is where SOEs receive state favours, whether financial in nature or otherwise. Another may arise in the course of competition law enforcement. Financial favours may come in the form of tax relief, interest-free or low-interest loans, state guarantee for commercial borrowings, and others. Non-financial favours may come in the form of regulatory barriers to entry or expansion so as to protect the incumbency or monopoly status of SOEs, many of which

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[180] The existence of exploitative abuses in CA 2010 is well recognised by MyCC in its guidelines on abuse of dominant position. While section 4 (prohibition on anti-competition agreements) does not apply to final consumers due to the fact that there must be an agreement between *two enterprises*, as rightly pointed out by the European Commission in its Guidelines on Vertical Restraints OJ [2010] C130/1, para. 2 ("…these Guidelines do not apply to agreements with final consumers where the latter are not undertakings since Art. 101 only applies to agreements between undertakings"), there remains room where section 10 (prohibition on abuse of dominant position) may be applicable to a final consumer.

[181] See Part 2.1 above.

[182] First Schedule; see Part 2.1 Scope of Application.

[183] See para. (a); there appears to be no such law.

[184] See para. (c) of the Second Schedule.

are simply former state-owned monopolies turned private-owned monopolies, with the state holding on to a large ownership after privatisation. Such state favours may simply provide SOEs with a competitive advantage that their competitors do not enjoy, thus, putting the latter at a competitive disadvantage. The second set of concern may arise in the course of competition law enforcement, particularly in the context of abuse of market power. Whatever the terminology used, abuse of market power requires the presence of significant market power and it is usually determined by reference to market share. Where the law requires market power and the enforcement agency places a very high threshold, such as 60% or more of market share, many SOEs are likely to escape possible liability as it is rare to find SOEs in any market with such large market shares.[185] Nevertheless, with their large enough market shares, the SOEs may be able to "abuse" their market power without falling foul of the law.

The issue of competitive neutrality may give rise to competitive impact in a few aspects. One is the competitive scenario between large SOEs and their small and medium-sized enterprise (SME) competitors. With their large market shares and, hence, market power, these large SOEs are able to "abuse" their powers so as to establish various structural and/or strategic barriers to the detriment of their SME competitors. Further, large SOEs also have a significant lobbying power that may cause the implementation of certain regulations that would increase the cost of transaction or compliance to the detriment of SME competitors which, unlike large SOEs, do not enjoy economies of scale. Another aspect is the competitive relationship between large SOEs and foreign competitors. To protect their share of the domestic demand, SOEs are prone to seek various protectionist means to keep the competing foreign imports out of their domestic turf.[186]

[185] Any enterprise with a market share of more than 60% is likely to be the dominant player, if not the near-monopolist, in the market.

[186] One example may be the passenger car market where, through decades of protectionist excise duty programme in particular, cars of foreign origin are slapped with excise duty ranging 50%–200% (variable from time to time). Such protectionist programmes, however, did not seem to produce manufacturers that could compete in the world markets. Domestic manufacturers continue to enjoy various forms of state favours, such as cash injection in the name of conducting research and development without significant technical or technological breakthrough. Poor planning also led to unused capacity and over-hiring of unnecessary staff. While productive efficiency is not attained, consumer welfare loses out at two fronts: taxpayers' money being used to sustain otherwise non-self-sustainable manufacturers, and paying more for what they would otherwise do.

5.5.Agency

The EU competition law has established that pure agency is not considered an agreement and, as such, agents do not bear any significant risk in a transaction where they are merely auxiliary organs of their principal. Thus, any price-fixing or other forms of otherwise anti-competition agreements between the principal and the agents are not caught by the competition law.[187] CA 2010, however, does not contain any provision on agency. Even the definition of "enterprise" in section 2 does not seem to go far enough to cover the situation of agency. Further, the MyCC Guidelines on Chapter 1 Prohibition (dealing with anti-competition agreements) seem to have overlooked this issue as well. Presumably, this is due to the fact that the law on agency is found in the Contracts Act 1950. It remains to be seen how CA 2010 and the Contracts Act 1950 will jointly deal with the issue of agency in the context of competition law, and whether the law on agency in the context of competition law may form a subset of the general contract law. As pointed out earlier when discussing the objective of CA 2010, one should bear in mind that CA 2010 is not a prevailing law.

5.6.Definition of Market

The term "market" is given a statutory definition. It is defined to mean "a market in Malaysia or in any part of Malaysia…"[188] The MyCC guidelines on market definition state that because of this definition, imports to Malaysia will not be included when defining the relevant geographical market but will only be taken into account in the next stage of competition analysis.[189] However, according to one textbook, "market definition enables the competitive constraints…from *actual* competitors to be

[187]Refer to *Confederacion Espanola de Empresarios de Estaciones de Servicio(CEES) v Compania Espanola de Petroleos*C-217/05 [2006] ECR I-11987; *CEPSA Estaciones de Servicio SA v LV Tobar e HojosSl(CEPSA)* C-279/06 [2008] ECR I-6681; *Bundeskartellamt v Volkswagen and VAG Leasing GmbH* C-266/93 [1995] ECR I-3477; and *DaimlerCrysler v Commission*T-325/01 [2005] ECR II-3319. Indeed, this mirrors the doctrine of single economic unit.

[188] See section 2.

[189] MyCC (2012a), para. 3.1 states that "…the term 'market' is defined in Section 2 of the Competition Act as 'a market in Malaysia or in any part of Malaysia'. This means that other countries are not included as part of the definition of the relevant geographic market. For example, even if imports could easily come into Malaysia from Thailand for a particular product, the geographic market would not be defined to include both Malaysia and Thailand. Instead, the relevant geographic market would be defined as Malaysia and imports from Thailand would be considered in the next stage as part of the competition analysis".

identified…"[190] Take, for instance, the State of Penang, which is located north of the west coast of West Malaysia. It is close to Thailand and to northern Sumatra of Indonesia. Competing supplies could very well come from within Penang, from other states of Malaysia like Kedah or Perak, or even from southern Thailand or northern Sumatra. As such, it is questionable whether it is practical and realistic to confine the definition of market to just Malaysia or a part of it.[191] It is questionable whether these actual, competing sources should be ruled out at the first stage of defining the relevant market and only to be taken into account at the second stage. It is debatable whether the guidelines on market definition of CA 2010, in taking into account the definition of the term "market" the way they do, have *legally* messed up what is otherwise an *economic* concept.[192]

5.7.Refusal to Supply

Refusal to supply is, according to section 10(2) (c), confined to refusing to supply "to a particular enterprise or group or category of enterprises." By definition, an enterprise must carry on commercial activities that are in turn defined to exclude final consumers.[193] Surely, this provision is modeled upon the EU competition law and the EU cases have so far focused on refusal to supply to a competitor. However, it is theoretically possible to have a situation where there is only one product available within a particular relevant market and there are no substitutes available. In such a case, a refusal to supply an enterprise (which need not be a competitor) will be covered but a refusal to supply a final consumer (which is, by statutory definition, not an enterprise

[190] See Whish & Bailey (2012:28); emphasis in the original.
[191] As noted by the JFTC, "the geographical market defined by competition law may not necessarily coincide with the distinct legal jurisdiction" (ICN 2009, p.5).
[192] In this respect, it is pertinent to note that the UK Competition Act 1998 refers to "the United Kingdom", and in relation to anti-competition agreements and abuse of dominant position, it essentially refers to the UK or any part of it (see section 2(1) (7) and section 18(1)(3) thereof). The same may be observed in the Singapore Competition Act 2004 (see section 34[1] and section 47[1]), except that it is without the definition of the term "Singapore" as with the term "the UK" in the Competition Act 1998. However, in the market definition guidelines, the OFT (2004) states that the geographic market "may be national (i.e., the UK), smaller than the UK (e.g., local or regional), wider than the UK (e.g., part of Europe including the UK), or even worldwide" (para. 4.1). Even the Competition Commission of Singapore (CCS) guidelines on market definition clearly state, in relation to the geographic market, that "[s]ignificant imports of a particular product may indicate that the market is wider than Singapore" (see para. 4.1; even the paragraph number coincidentally corresponds to that of the OFT guidelines).
[193] See section 3(4) of CA 2010.

but one that may or may not be a competitor) will not be covered.[194] Nevertheless, this kind of situation is likely to be rare and its effect may be ameliorated by the catch-all provision in section 10(1).

6. Issues in Legal Practice

6.1.Legal Independence

While MyCC has taken the stand that it is an independent body tasked to enforce CA 2010, nowhere in the latter provides the legal basis for such an assertion. There are different administrative models throughout the world, ranging from the DOJ and FTC in the US and the Australian Competition and Consumer Commission (ACCC) in Australia, which are independent, to other enforcement agencies that are placed under the purview of a ministry, as in the case of MyCC. Administrative structure aside, it does not seem to follow the independent status of an enforcement agency, that it is *a fortiori* independent, and vice versa. Hence, it is the investigations, decisions, and transparency of processes of an enforcement agency that determine its independence.

6.2.Competition Advice

CA 2010 empowers MyCC to, among others, (i) advise the Minister or any other public or regulatory authority on all matters concerning competition;[195] and (ii) alert the Minister on the actual or likely anti-competition effects of any current or proposed legislation and to make recommendations to the Minister, if appropriate, for the avoidance of these effects.[196] Many trades remain in the form of monopoly or near-monopoly and, in many situations, the monopoly is an outcome of state concessions. For instance, the purchase and distribution of rice and sugar—two basic necessities—were apparently granted to and remain within the sole control of the same entity. The whole country's airports, except one, are owned by one company, an SOE.[197] Pay-for-

[194] This is related to the issue of exclusion of final consumer (Part 5.3), *supra*.
[195] See section 15(a), CCA 2010.
[196] See section 15(b), CCA 2010.
[197] Even the exceptional one is owned by the same owner that supplies the nation's rice and sugar.

television service effectively remains in the hands of one entity, with most of the world's favourite programmes made available to the public exclusively through one entity.[198] Paying toll for the use of expressways presents another monopolistic market situation. Users of expressways may either pay by cash or use the "Touch-n'Go" card, a kind of electronic payment that requires loading the card with cash value in advance and the cash value is deducted upon use of the expressways. While electronic payment has become so advanced and e-payments may be effected via any mode and any providers, electronic toll payment has hitherto been practically confined to "Touch-n-Go" only.[199] While a market review on fixing of fees and prices by professional bodies have been carried out, what is amiss is that the underlying enabling cause of such price-fixing—statutory monopoly—does not seem to have been addressed. In the absence of any proper information to the public, it is unclear whether MyCC's functions as competition advocate have been carried out. Assuming that such functions have been carried out, it remains unclear whether the advice has been taken into account and to what extent by the policy makers. Such issues are particularly compounded by the lack of transparency in the framework of CA 2010 and CCA 2010.[200]

6.3.Process of Clearance of Anti-Competition Agreements

Compared to the UK Competition Act 1998 in its original form, CA 2010 does not have a notification or decision process. CA 2010 in its infancy simply followed the EU self-assessment process after the latter's modernisation. While it might be true that having gone through half a century of decision-making process, the EU and its member states have had enough precedents, guidelines, and experience—both competition practitioners and the enforcement agencies—to conduct self-assessment, the same may not be said about a country with its competition enforcement still in its infancy. The downside of not having a clearance process is that officers of the enforcement agency will not have the opportunity to put their knowledge to practice.[201] Second, without

[198] In its press release, MyCC noted that complaints had been made to MyCC on the quality of services and unfair conditions imposed by broadcasters although these matters are not under the jurisdiction of MyCC (see MyCC 2014d).
[199] It is apparently owned by an SOE.
[200] See, for instance, note 62 above.
[201] They will not have, for instance, the opportunity to define the relevant market, to conduct market analysis to determine whether market power exists and whether an agreement is anti-competitive and so on. In principle, the same may be applicable to the prohibition of abuse of dominant position.

such decision-making process the enforcement agency is unlikely to build up its own jurisprudence based on the local legal and economic conditions.[202]

6.4.Issuance of Guidelines

The self-assessment process would be more efficient and helpful to businesses if there were sufficient precedents and guidelines. Coupled with the downsides of having no decision-making process, the guidelines issued by the enforcement agency are relatively simple and lacking in substance and guidance. In most situations where some concrete guidance from the enforcement agency would be helpful, no such statement in the guidelines can be found.[203] The lack of notification or decision process, and lack of sufficient guidelines simply forced businesses to resort to legal advice for every agreement they wish to sign or for every business conduct they wish to engage—and this has unnecessarily increased the cost of doing business.[204]

The purpose of issuing guidelines as part of enforcing the competition law is virtually a common practice worldwide. The issuance of guidelines coincides with the nature of competition law, which essentially involves using some legal methodology to deal with and correct market failures. Since market failures fall within the realm of economics, using the law to deal with such economic problems poses tremendous challenges. This explains why competition laws worldwide tend to be drafted in broad and yet meagre terms, and are in turn supplemented by guidelines.[205]With the issuance of guidelines by established competition authorities, countries with newly adopted competition laws have also been pressured to issue guidelines.

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[202] This may be attested by sheer three decisions on hardcore cartels and one withdrawal of an application for an individual exemption for Nestlé Malaysia's resale price maintenance scheme within a spate of two years. While the grounds of decision have been issued for two of the three cartel cases, no grounds of decision were made in respect of Nestlé's withdrawal though the enforcement agency was technically not obliged.

[203] Most situations will, in the words in the guidelines, simply be "assessed on a case-by-case basis." If taxpayers' money were to be spent to engage foreign consultants to work in or for the enforcement agency, whether for drafting guidelines or something more mundane, it is debatable if, from the perspective of taxpayers as the so-called consumer of the law, allocative efficiency has been attained.

[204] Surely, businesses may take the risk by assuming that either they fall within the safe harbour or their market share is not large enough to occupy a dominant position on the market.

[205] For those who are familiar with competition laws of established jurisdictions, particularly the US, EU, Japan and Australia, just to name a few, they would invariably agree that guidelines form an integral and significant part of competition law analysis and enforcement. Indeed, having guidelines to as supplementary means of enforcement of the law is not a luxury of competition law for similar experience is found in other areas of law, notably company law and securities law.

The benefits of having guidelines to supplement the law are abundant. First, they provide legal and economic certainty to businesses. There is no doubt that competition law is fraught with complex legal and economic analysis. While certain hardcore, horizontal agreements, such as price-fixing and market-sharing, are almost universally prohibited outright or *per se*, legal and economic academics and practitioners remain at loggerhead on many other issues relating to competition law, including resale price maintenance. Insofar as there are agreements that are subject to the effects or rule-of-reason analysis and since the law cannot provide satisfactory, let alone absolute, legal certainty, it is therefore in the interests of all concerned that some form of additional assurance be provided—such as in the form of guidelines. First, guidelines are even more significant in certain areas of competition law enforcement, such as on issues of abuse of market power and concentrations. Second, guidelines provide transparency to the enforcement process. While the first benefit above provides the *substantive* certainty, this second benefit provides the *procedural* certainty. It is common, at least for mature competition law jurisdictions, to issue procedures and guidelines on the enforcement aspect of the law. Not only such practice keeps market players, and their advisers, informed on the procedures involved, but also such practice instills public confidence in the enforcement agencies. Any attempt to diminish such guidelines would simply fuel public suspicion about the independence of the competition authority. Third, and perhaps the most significant of all, guidelines lessen the likelihood of abuse of official powers and the associated corruption and red tapes. Fourth, with all the three benefits in hand, the issuance of guidelines serves to reduce business transaction cost. After all, competition law seeks to achieve allocative and productive efficiencies, among others, which have an effect of reducing transaction cost.

6.5.Engaging Foreign Consultants

While a newly established competition agency may need assistance from its counterpart in countries with mature competition law enforcement, particularly on the process of investigation and procedures, engaging foreign private consultants does carry some risks. First, even within the field of economics, there are divergent views. Certain economists may be affiliated with a certain school of thought that may have

since been discredited but continue to march on with their belief. Second, it is competition *law*, not sheer economics. Thus, it is the legal provision that disposes of a case. However, different countries may have different provisions and due to the difference in the words adopted, a different outcome may entail. Third, foreign consultants may not be abreast with the socioeconomic or political–economic situation of the country or government that hires them, and they may simply transplant what they know about the law from their own countries to the recipient country. Engaging foreign consultants also carries high costs. Thus, unless such technical assistance is funded by some international organisations or provided at no cost by some foreign enforcement agencies, the need to engage foreign private consultants remains debatable.

6.6. Unfair Trade Practices

Unfair trade practices do not form part of CA 2010.[206] There are two main reasons for this. First, as far as unfair trade practices vis-à-vis final consumers are concerned, they are mainly found in the Consumer Protection Act 1999, and in a number of other legislations.[207] Second, as far as those practices vis-à-vis competitors are concerned, the relevant laws are either found in the Common Law[208] or in some legislation.[209]

7. Conclusion

While the CA 2010 represents an attempt to transplant the European competition jurisprudence and deduce the legal principles to a few pages of law, the transplant and deduction process does not seem to be a perfect one. There remain a number of legal issues to iron out as well as certain practical issues that may impinge on the enforcement of the law. While there is no doubt that the introduction of a generic

[206] This is unlike the position in Japan and Vietnam.
[207] The examples are the Sale of Goods Act 1957, Hire-Purchase Act 1967, and Weights and Measures Act 1972.
[208] An example is the law of tort on passing-off malicious falsehood or slander of goods, or conspiracy to injure a person in his trade or business.
[209] An example is the Trade Marks Act 1976.

competition law is a desirable step, the introduction of such a law merely represents a symbolic step and making the economy competitive remains a target, if not a dream.

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