

## Competition Law Enforcement in Malaysia: Some Recent Developments

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**Abstract:** The enactment of the Competition Act 2010 represents a significant step forward in the implementation of competition policy in Malaysia. The Malaysian Competition Commission has been fairly successful in its enforcement activities, especially in price fixing cases involving trade associations. It has also investigated and issued proposed decisions in a number of high profile cases involving MAS, AirAsia, and Megasteel. Future challenges are likely to involve investigation into more complex anti-competitive cases, review of government regulations with impact on competition, possible introduction of merger controls and regional integration.

Key words: Competition Law, Competition Policy, Malaysia  
JEL classification: K21, L40, L41

### 1. Introduction

Competition policy in Malaysia took a significant step forward with the enactment of the Competition Act 2010 (CA2010).<sup>1</sup> The Act is essentially Malaysia's first comprehensive national competition law (or antitrust law). With the enactment of the law, Malaysia now has an important instrument of competition policy. The key objective of the competition law is to "promote economic development by promoting and protecting the process of competition." A key aspect of this goal is consumer welfare which is to be enhanced by prohibiting anti-competitive business conduct. The CA2010 together with the Consumer Protection Act 1999 (CPA1999) can be regarded as the two main pillars of consumer protection in Malaysia.<sup>2</sup> Both laws are, in a sense, complementary – the CA2010 focusing on the supply-side while the CPA1999 on the demand-side (OECD 2010).

It has taken Malaysia more than two decades to implement a comprehensive national competition law. However, whilst the enactment of the CA2010 is in itself a major achievement, a true measure of its success lies in the efficacy of its enforcement. The enforcement process of competition law cannot be taken for granted. Thailand, one of the earliest countries in the Southeast Asia region to enacted a competition law (in 1999), has not made much progress in enforcing the law (McEwin and Thanitcul 2013).

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<sup>1</sup> The late Dato' Mahani had a long-standing interest in industrial and trade policies. Competition policy featured in her work as an important factor for productivity growth. This essay is dedicated to her, a kind colleague and friend. An earlier version of the essay, published as Lee (2013), was made possible with financial support from FOMCA.

<sup>2</sup> Other laws that protect consumers include the *Trade Descriptions Act 1972*, the *Hire-Purchase Act 1967*, the *Weights and Measures Act 1972*, the *Direct Sales Act 1993*, and the *Money Lenders Act, 1951*.

Other countries, such as Indonesia and Singapore, have established a good enforcement track record.

This essay is written with the goal of understanding the nature of the Competition Act 2010 as well as evaluating its track record of enforcement. In doing so, it will also highlight some of the key challenges that lie ahead. The essay is organised as follows. Section 2 provides an introduction to the Competition Act 2010. The enforcement of the Act by the Malaysian Competition Commission is reviewed in Section 3. Future challenges related to competition policy are discussed in Section 4. Section 5 concludes.

## **2. Competition Policy and the Competition Act 2010**

### *2.1 Competition, Competition Policy and Competition Law*

Competition between sellers is considered to be desirable from the point of view of economics. In markets characterised by a high degree of competition, rival firms strive to attract buyers by offering quality products at attractive prices. Such firms also strive to innovate in an attempt to offer products that are superior to their competitors'. The desirability of competition aside, it is not something that can be taken for granted to exist naturally in markets all the time. There are markets in which there are only few sellers - each with large market shares.<sup>3</sup> In such markets, the sellers can collude to raise prices to the detriment of consumers. Such market failures, which have been long recognised in the economics literature, provide the justification for competition policies. Competition policies are government policies that are aimed at promoting the process of competition in markets. There are many means by which competition can be promoted. These include opening domestic markets to competition from foreign products (improving market access) and the reduction of tariffs on imported products (trade liberalisation). Aside from these, one competition policy measure that is crucial to the promotion of competition is the implementation and enforcement of a competition law.

A competition law is essentially a piece of legislation that contains legal provisions that prohibits sellers (firms) from using business practices that can potentially reduce competition and harm consumer welfare. This is achieved by either prohibiting any business conduct or behaviour that reduces competition and/or prevents markets from being dominated by a few sellers with large market shares. The key provisions within a typical competition law would contain provisions on:<sup>4</sup>

- a) Horizontal agreements between competitors that would reduce competition such as cartel behaviour or collusion in the form of price-fixing, output restriction and bid rigging.
- b) Vertical agreements between upstream (e.g. wholesaler) and downstream (e.g. retailer) firms that are harmful to competition.
- c) Abuse of dominance/monopolisation involving unilateral action by a dominant firm that is harmful to competition, either through exploiting its market power or by suppressing competition.

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<sup>3</sup> The extreme case would be a natural monopoly where the lowest average cost is obtained in the market when only a single firm supplies the entire market.

<sup>4</sup> See World Bank (1999) for basic discussions on the general structure of competition laws.

- d) Merger controls that impose approval requirements for horizontal and vertical mergers that exceed a stipulated post-merger size threshold.

### 2.2 *The Competition Act 2010*

Malaysia's competition law, the Competition Act 2010 (hereafter, CA2010), was gazetted on 10 June 2010. It came into effect on 1 January 2012. The CA2010 contains provisions on anti-competitive horizontal and vertical agreements (Section 4) as well as abuse of dominance (Section 10).

In Section 4 of the CA2010, anti-competitive horizontal agreements that are *per se* illegal include price fixing, controlling of market share/production/distribution and bid rigging. However, even though such acts are prohibited, enterprises that are involved in such business practices may be relieved from any penalty (provided the benefits to society exceed their costs). Individual exemptions (for particular agreements) or block exemptions (for categories of agreements) may also be applied. This implies that there may be room for some flexibility in the enforcement of anti-competitive horizontal agreements. The various anti-competitive vertical agreements (e.g. resale price maintenance agreements, exclusive agreements, tie-in sale agreements etc.) are not stated in the Act.<sup>5</sup> Instead, these are clarified in the guideline on anti-competitive agreements. The prohibitions on abuse of dominance in Section 10 of the Act include imposition of unfair transaction price, refusal to supply, predatory pricing and entry deterrence strategies, amongst others.

Even though the CA2010 shares similar characteristics with competition laws from other countries (in terms of the range of anti-competitive conducts that are prohibited), there are some key differences. One such difference is the absence of any provision on mergers. Of the five ASEAN countries that have implemented competition laws to date, Malaysia is the only country that has chosen not to include merger controls in its competition law.<sup>6</sup> Thus, Malaysia's competition law can be described as favoring a primarily behavioural (conduct) approach. The other uniqueness of the CA2010 is the exclusion of commercial activities under the jurisdiction of the Communications and Multimedia Act 1998 (CMA1998) and the Energy Commission Act 2001 (ECA2001). This is surprising as even though there are competition-related provisions in both the CMA1998 and ECA2001, these are relatively less developed and, to the author's knowledge, rarely enforced.

### 2.3 *Institutions and Activities for Effective Competition Law Enforcement*

The Malaysia Competition Commission (MyCC) is the key enforcement agency for the Competition Act 2010. It was established with the enactment of the Competition

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<sup>5</sup> A possible reason for this is that there are often strong efficiency-based arguments supporting vertical agreements. This is the reason why vertical agreements are often subject to rule of reason rather than being classified as *per se* illegal in many competition laws. Note that in the guidelines on anti-competitive agreements issued by MyCC, it is stated that "Vertical agreements, in general, are less harmful to competition than horizontal agreements."

<sup>6</sup> The other ASEAN countries with comprehensive national competition laws are Indonesia, Singapore, Thailand, and Vietnam. Thailand has merger controls in its competition law, but it has not been used (ASEAN 2010).

Commission Act 2010 (CCA2010) and began its operations in June 2011. The CCA2010 provides for the appointment of one Chairman and up to a maximum of nine commission members (four from the Government and between three to five members from the public). All members of the Commission are appointed by the Prime Minister upon the recommendation of the Minister of Domestic Trade, Co-operatives and Consumerism (hereafter, the Minister). The influence of the Minister extends beyond the appointment of Commission members. The CCA2010 states that the Commission is “responsible to the Minister” and that the Minister may give directions of a general character (consistent with provisions of competition laws) to the Commission (Section 18). Furthermore, whilst Parliament may allocate lump sum funding for the Commission from time to time, MyCC’s expected annual expenditures requires the Minister’s authorisation (Section 30). The initial launching grant for MyCC was around RM10.5 million (MyCC, 2012). A total of RM3.1 million was spent as operational expenditure in MyCC’s first year of operation (covering a period of six months). Prior to the Competition Act coming into force (on 1 January 2012), MyCC focused its activities on three key areas, namely, advocacy work, capacity building and drafting of operational guidelines.

Advocacy-related activities are clearly important to create awareness amongst the various stakeholders such as consumers, NGOs, industry associations and the media. In its 2011 annual report, MyCC reported that it carried out 34 advocacy programmes in 2011. The emphasis on advocacy work is certainly well-placed and consistent with evidence from countries that have successfully implemented and enforced competition law such as Indonesia.

Competition law is fairly unique in terms of its heavy emphasis on economics. The analytical frameworks and empirical methodologies that are used for understanding the various anti-competitive business practices and the impact on consumers are derived from industrial organisation economics, a field within economics that focuses on the study of imperfect competitive markets. This aspect of competition law implies that there is a need for greater emphasis on the recruitment of staff with expertise in economics. The MyCC has thus far put some efforts into capacity building in this area by drawing from the expertise of UNCTAD, EU and competition agencies from more mature jurisdictions (such as Australia, Indonesia, Japan and Singapore).

Guidelines play an important role in operationalising the enforcement of CA2010. Thus far, four guidelines have been issued on: (i) market definition, (ii) anti-competitive agreements, (iii) complaints procedures, and (iv) abuse of dominant position. The guideline on market definition provides clarifications on the approaches that MyCC will use in defining markets when investigating possible anti-competitive cases. A key method that it will use is the “Hypothetical Monopolist Test” – a concept involving a hypothetical monopoly firm’s ability to raise prices by 5-10 per cent above the competitive price. In the guideline on anti-competitive agreements, further clarifications are provided on the types of agreements (e.g. resale price maintenance tying etc.) that would be considered to be anti-competitive as well as the relevant market share thresholds (20-25 per cent) for such agreements to be considered as having significant impacts. The guideline on abuse of dominance focuses on clarifying the various types of business conduct that are considered to be abuse of dominance. The various factors that will affect assessment of

abuse of dominance such as product differentiation, scale economies, etc. are also discussed in the guideline.

Another important institution in the enforcement of competition law in Malaysia is the Competition Appeal Tribunal. The role of the Tribunal is to adjudicate cases where an appeal has been filed to review the decision of MyCC. In this regard, the Tribunal has a legal status equivalent to the High Court where its judgement is final and binding. In relation to this, a key aspect of the set-up of the Tribunal is that the president of the Tribunal has to be a High Court judge. To the author's knowledge, no case has been appealed at the Tribunal thus far.

### **3. Enforcement of the Competition Act 2010**

Based on MyCC's first year (2012) track record in its enforcement of the CA2010, its approach can be described as "gradualist". Based on the agency's press releases, MyCC has investigated a number of cases of possible infringement of the CA2010 during this period.<sup>7</sup> Of these cases, only one case has been concluded with a decision citing infringement, namely the case involving the Cameron Highlands Floriculturist Association (CHFA). Other cases are also discussed in this section to illustrate the type of possible infringements that are currently being investigated (formally and informally) in Malaysia. Some of these cases are still on-going while others have been cleared from any infringement of the CA2010.

#### *3.1 Case 1: The Cameron Highlands Floriculturist Association (CHFA)*

The Cameron Highlands Floriculturist Association (CHFA) is an industry association with 150 members involved in the floriculture industry in Cameron Highlands. A key activity of members of the association is the sale of cut flowers to distributors and wholesalers in Malaysia. On 4 March 2012, a local daily reported an announcement by the president of the CHFA that attending members of the Association's meeting on 28 February 2012 had unanimously agreed to raise the selling price of flowers by ten per cent. The proposed price increase was to take effect on 16 March 2012. This act was deemed to have violated Section 4(2) of the CA2010 which deals with anti-competitive horizontal agreements. In making such an agreement, sellers (CHFA) were essentially regarded as being involved in a concerted attempt to fix the prices of flowers at a higher level in the market.

From the consumers' point of view, such a price increase would likely to have passed on to them by the wholesalers and retailers. This would adversely affect consumers in two ways. For consumers who would continue to purchase flowers (for lack of alternatives), they would have had to pay higher prices – therefore gaining less from their purchases. For others, flowers may no longer be affordable – resulting in fewer flowers being consumed (another form of welfare loss).

Following the media report, MyCC initiated a formal investigation into the case. A letter was first issued to CHFA in May 2012 notifying the Association of the violation and

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<sup>7</sup> The discussions on the cases in this section is based on information contained in public documents available at MyCC's website.

requesting an explanation for the action. The key justification for the price increase provided by the CHFA was the substantial increase in input prices (ranging from 8 to 50 per cent) since 2008 (the last time prices were increased). Clearly, the explanations given by CHFA's reply in June 2012 did not provide sufficient reason for MyCC to cease its investigations. This is probably due to the fact that any (horizontal) agreement involving price fixing under the CA2010 is *per se* illegal, meaning the act in itself is illegal without the need for any mitigating reasons. Furthermore, the act would have had significant impact on consumers' welfare given that members of the Association are estimated to supply more than 90 per cent of the total temperate cut flowers produced locally (valued at around RM80million in 2011). The minutes of the Association's meeting were used as the main evidence for the infringement.

As a result, on 24 October 2012, MyCC issued a "proposed decision" to CHFA with a number of remedial actions. The proposed decision essentially provides the party under investigation (CHFA) to respond to the proposed remedies and penalties (if any). These proposed remedial measures in this case were as follow:<sup>8</sup>

1. The CHFA shall cease and desist the infringing act of fixing prices of flowers.
2. The CHFA shall provide an undertaking that its members shall refrain from any anti-competitive practices.
3. The CHFA shall issue a public statement on the above mentioned remedial actions in the mainstream newspapers.
4. Once a decision is made by the MyCC under Section 40 of the CA2010 and the CHFA fails to comply according to the directions stated above, a financial penalty amounting to RM20,000 may be imposed. An additional RM1,000 will be imposed for each or part of each following day that the CHFA fails to comply.

A final decision was subsequently announced on 6 December 2012. The final decision essentially re-affirmed the remedial measures in the proposed decision with the exception of the final penalty (item 4). The MyCC's approach in the CHFA case has been described by the agency's CEO as "soft" due to the agency's focus on advocacy and remedial measures (rather than financial penalties) – perhaps given that the Act had only come into force recently. The remedial measures imposed in the CHFA case also probably reflects a strategic move by MyCC to gradually build its reputation and credibility based on cases that do not run the risk of being over-turned by the Competition Appeal Tribunal. In addition, the CHFA case appears to be a case which did not require substantial investigative resources (which is likely to be scarce within MyCC at that point in time). Finally, it is likely that the MyCC will need to further monitor CHFA's conduct in the future given the possibility of a tacit agreements on prices.

### 3.2 Case 2: The MAS-AirAsia Share Swap and CCF Agreement

A case that attracted significant media interest was the MAS-AirAsia share swap case. On 9 August 2011, Malaysia's national carrier, Malaysia Airlines (MAS), announced its intention to undertake a share (equity) swap with the country's leading low-cost carrier,

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<sup>8</sup> Direct quote from MyCC's press release dated 24 October 2012.

AirAsia. Under the proposed deal, Khazanah Nasional Berhad (which owns 69% of MAS) would issue shares to Tune Air Sdn Bhd (which owns 26% of AirAsia) in exchange for shares in AirAsia. The proposed share swap would have resulted in a cross-shareholding between the two airlines. Tune Air would end up with a 20.5 per cent stake in MAS while Khazanah would have a 10 per cent stake in both AirAsia (regional low cost) and AirAsia X (long haul low cost). In addition to the share swap, both parties also signed a “Comprehensive Collaboration Framework” (CCF) - an agreement with the goal of seeking cost savings and increase in revenues in the areas of aircraft purchasing, engineering, ground support services, cargo services, catering and training among the three airlines.<sup>9</sup>

The proposed share swap did raise a number of concerns even though efficiency gains were put forward as a justification for the deal. One concern is the impact of the deal on competition in the airlines industry. Prior to the share swap, it had been observed that both airlines competed intensely in the domestic and regional air routes. For example, MAS and its Firefly subsidiary compete with AirAsia in the domestic market while AirAsia and AirAsia X compete with MAS in the international market. The share swap and CCF may have had at least two possible impacts on competition. First, it may reduce the degree of price competition. Second, MAS and AirAsia may coordinate to consolidate their operations by focusing on different sectors. This would have adversely affected competition by reducing the number of operators in the different market segments. For example, the STAR reported that “The CCF would effectively see MAS concentrate on being a full-service premium carrier, AirAsia a regional low-cost airline and AirAsia X for the medium-to-long haul low-cost sector.”<sup>10</sup> In so far as this involves closure of some service routes, approval from the Ministry of Transport is required (which further complicates the case).

Under the above hypothetical scenarios, consumers would end up having fewer choices (in terms of carriers, schedules) and pay higher airfares. In terms of possible infringement of the CA2010, this would depend on the nature of the proposed collaboration irrespective of whether these were undertaken informally or formally (the CCF agreement). The swap deal in itself does not constitute an infringement of the CA2010. However, any agreement that has the effect of restricting (price) competition would be a violation of Section 4(1) of the Act. If there is an agreement to “share” the market, this would constitute a violation of Section 4(2). In addition, if any party (with significant market share) set airfares above the competitive level, such an action may be interpreted as an “exploitative conduct” – which in turn constitutes a violation of Section 10 (Abuse of Dominance) of the Act.

MyCC initiated a formal inquiry into the case in early January 2012. A formal complaint on the case was filed by the Federation of Malaysian Consumers Associations (FOMCA) on 24 February 2012. However, on 2 May 2012, both MAS and AirAsia terminated the share swap deal and CCF – due possibly to the resistance from MAS’s workers union and negative political comments. It is not known whether the share deal and CCF was abandoned due to their potential violation of the CA2010. Both MAS and AirAsia, however,

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<sup>9</sup> As reported in “MAS, AirAsia collaboration has obvious benefits”, STAR, 26 April 2012.

<sup>10</sup> “MAS, AirAsia collaboration has obvious benefits”, STAR, 26 April 2012.

have expressed their interest to continue collaborating in areas of mutual interest such as aircraft maintenance and procurement.

On 6 September 2013, MyCC issued a proposed decision that found MAS and AisAsia as having infringed Section 4(2)(b) of the CA2010 by engaging in market sharing. In the proposed decision, a fine of RM10 million each was imposed on both MAS and AirAsia. A final decision is expected to be delivered by the end of 2013.

### *3.3 Case 3: Pan-Malaysia Lorry Owners Association and Lorry Enterprises*

The case involving the Pan-Malaysia Lorry Owners Association (PMLOA) and lorry enterprises is very similar to that of CHFA. Investigation into price fixing by PMLOA was initiated by a media report on the decision by the Central Committee of the Association on 7 September 2013 to raise transportation charges by 15 per cent. The action taken by MyCC was swift. By 20 September 2013, MyCC had issued a proposed interim measure to stop PMLOA and lorry enterprises from carrying out the price increase. Two weeks later, on 4 October 2013, PMLOA directed its members to refrain from increasing their prices (as recommended earlier). A final direction was subsequently issued by MyCC on 23 October 2013 that compelled PMLOA to undertake the following:<sup>11</sup>

- a) To refrain from entering into any form of communications or to facilitate any communications concerning pricing for services provided by lorry enterprises;
- b) To amend and remove from PMLOA's and its members' Constitutions any provision concerning any discussion and determination of any chargeable prices; and
- c) To submit the amended Constitution within sixty (60) days from the date of the notices issued today."

The PMLOA case clearly indicates that MyCC has accumulated enforcement experience and confidence to investigate and act on price fixing cases involving trade associations. The fact that PMLOA had attempted to fix prices indicates that the level of awareness in the business community may still be low. However, this is likely to change as MyCC steps up its enforcement in this area in the near future.

### *3.4 Case 4: Megasteel Sdn Bhd*

Another important case in the enforcement of CA2010 is the abuse of dominant position by Megasteel Sdn Bhd (hereafter, Megasteel) in the Cold Rolled Coil market. Investigation into the case was initiated by a complaint by a rival company, Melewar Industrial Group Berhad, in August 2012. Two vertically related markets are relevant in the case, namely, the upstream Hot Rolled Coil (HRC) market and the Cold Rolled Coil (CRC) market. Megasteel, which was the only producer in the HRC market was found to under-price its own CRC product in such a way that "the monthly margins (between CRC and HRC prices) earned by Megasteel were all insufficient for the recovery of its monthly costs of transforming HRC into CRC".<sup>12</sup> This has been interpreted as "margin squeeze" by MyCC with the intention of driving out Megasteel's competitors in the downstream market.

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<sup>11</sup> MyCC press release dated 23 October 2013.

<sup>12</sup> MyCC press release dated 1 November 2013.

Within the IO literature, such practices are related to predator pricing in which products are sold at prices below variable costs to drive competitors out of the market (Motta, 2004). In this case, Megasteel was deemed to have used its vertically integrated structure to undertake predatory pricing in the downstream CRC market. A fine of RM4.5 million was imposed by MyCC in the proposed decision announced on 1 November 2013.

### *3.5 Other Cases Mentioned in the Media*

A number of other possible anti-competition cases have been highlighted by the media. One case that has received some mention in the media is the cement industry. In late July 2012, the Master Builders Association Malaysia (MBAM) issued a statement urging MyCC to look into the possibility of collusion amongst cement producers to increase the prices of cement in early August 2012. If true, this would have violated Section 4(2) of the CA2010. The MyCC subsequently came out with a statement saying an investigation is only warranted if there is evidence of collusion to fix prices. This aside, the agency has put the industry under watch. This may not be surprising given that the cement industry has been investigated for collusion in many developing countries including Brazil, Egypt, India, and Philippines. This is partly due to nature and structure of the industry i.e. relatively standardised (homogeneous) product, high levels of seller concentration, high fixed costs and the high cyclical nature of the industry. In the case of Malaysia, MyCC appears to be unable to proceed further with the case due to lack of concrete and direct evidence of collusive practices in the industry.

Another industry that was examined by MyCC for anti-competition is the poultry industry. In a media report dated 25 October 2012, the culling of around five million of old layer hens had resulted in a shortage of eggs and an increase in the price of eggs by about two to five sen per egg.<sup>13</sup> According to a representative from the Federation of Livestock Farmers' Association (FLFA), this action which involved the culling of less productive older hens was a response to the rise in the price of feedstock. Subsequently, MyCC issued a statement on 1 October 2012 that it would probe into the possibility of whether such an action involved collusion amongst industry members to control the production of chicken eggs. Such an action would constitute a violation of Section 4(2) of the CA2010. To date, there is no indication of whether MyCC has commenced a formal investigation into the case.

Another market in the poultry industry that was also examined by MyCC is the broiler market which essentially involves the commercial production and distribution of chicken meat. Partly in response to public concerns about high retail prices, MyCC undertook a market review study of the broiler market in Malaysia. The study was conducted to determine whether the broiler market contains features that could adversely affect competition. In contrast to investigations of anti-competitive conduct/behaviour such as price fixing, the market review provides an opportunity for a "structural" review of markets. This is an especially important activity given the lack of provisions on merger control in the CA2010. Aspects of the market that were studied included the vertical (upstream-downstream) structure of the industry, types of vertical agreements/

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<sup>13</sup> The Star (2012) "Culling leads to egg shortage", 25 October 2012.

contracts, degree of concentration at different stages of the supply chain as well as the extent of price transmission between the wholesale and retail components of the market. An 'issues paper' was published on 16 July 2012, followed by an interim report on 21 December 2012. In a press release dated 8 February 2013, MyCC announced that it had not found any conclusive evidence of any form of anti-competitive conduct in the broiler market in Peninsula Malaysia. In the same press release, it was further noted that the study was constrained by data availability. No final report of the market review has been published to date. Despite this, the exercise is likely to have been useful for a number of reasons. First, the market review exercise can provide an opportunity for MyCC to enhance its investigation capabilities. Second, it also provides an avenue for MyCC to provide recommendations to the government on issues related to competition – a function provided for in Section 16(a) of the Competition Commission Act 2010. For example, in the interim report of the market review for the broiler market, it was recommended that the Ministry of Domestic Trade, Co-operatives and Consumerism (MDTCC) monitor and ensure that price competition is not dampened by the Ministry's price control in terms of a "permitted maximum" retail price. Such an advisory function has had significant influence and impact in a number of successful competition regimes such as Indonesia and South Korea. This is particularly important in cases where Government regulations and policies may have adverse effects on the degree of competition in markets.

Finally, a recent case that has attracted some media attention involves Nestle's product pricing in Malaysia. In May 2012, FOMCA filed a complaint at MyCC against Nestle alleging that the company's pricing policy under its Brand Equity Protection Policy (BEPP) was a form of pricing fixing. Under the BEPP, the prices that retailers charge for Nestle's selected products are fixed by the company. The company had argued that pricing under the BEPP was limited to "loss leader selling activities by some retailers in which products can be sold at a loss to attract customers to buy other products at regular prices".<sup>14</sup> Nestle went on to lodge an application for an individual exemption to exclude the BEPP from the CA2010. The application was subsequently withdrawn when MyCC voiced its concern that the BEPP could be regarded as a form of Resale Price Maintenance which infringed Section 4(1) of the CA2010. MyCC has also requested that Nestle cease its pricing policy under BEPP. However, Nestle has indicated that it would seek to raise the issue with the Ministry of Domestic Trade, Cooperatives and Consumerism (MDTCC).<sup>15</sup> It would be interesting to see whether MDTCC would intervene in the case if it is approached by Nestle.

#### **4. Future Challenges**

Competition law enforcement is clearly at a nascent stage in Malaysia. Significant challenges lie ahead on the road towards effective enforcement of the Competition Act 2010. Extensive advocacy work needs to be sustained though much had been carried out during the interim period before the Act was enforced. Cases such as the CHFA and PMLOA illustrate the need to further educate the public and business communities on

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<sup>14</sup> New Straits Times (2012), "Nestle 'not engaged in price-fixing'", 22 May 2012.

<sup>15</sup> Free Malaysia Today (2013), "Nestlé to take up pricing policy issue with ministry", 26 February 2013.

competition law. The fact that almost all cases have been initiated by MyCC itself rather than the public filing complaints may imply that there may still be a lack of knowledge and understanding of the CA2010 in these communities. Thus far, the local media has played an important role in highlighting possible anti-competitive cases albeit often unintentionally. Further advocacy work involving the media should be a key area of focus for advocacy activities in the future.

Capacity building will be crucial for successful enforcement of the CA2010 in the future. The problem of staff recruitment is likely to be compounded by the rigid salary structure with remuneration rates that parallel the civil service. Furthermore, as more stringent and harsh penalties are imposed in the future – migrating from advocacy to deterrence modes – the cases investigated are likely to be more complex and require more expertise. This is likely to be accompanied by more appeals at the Competition Appeal Tribunal where MyCC's decisions could be challenged. Specialised knowledge in areas such as competition law and industrial organisation (economics) is likely to be increasingly important.

With the successful handling of the CHFA and PMLOA cases, the MyCC has had a good start towards building a good reputation. As discussed earlier, future cases are likely to be more challenging as evidenced by some of its recent activities involving the MAS-AirAsia share swap, broiler market review and abuse of dominance by Megasteel. The careful choice of cases to investigate is likely to be crucial in MyCC's efforts to build its reputation and credibility as well as to garner public support. Whilst greater public awareness is important for the identification of potential anti-competitive business practices, it will also have the effect of businesses taking greater care in hiding anti-competitive activities such as price fixing and bid-rigging. These issues notwithstanding, anti-competitive horizontal agreements are likely to be important cases to investigate especially in markets for essential goods and services.

Compared to competition laws in other countries, Malaysia's CA2010 is unique in terms of the absence of merger controls. Whilst this may not be a bad thing for a new agency with limited resources (including expertise), it deprives MyCC of a more direct influence over changes in market structure that may be adverse to competition. The absence of merger controls may also lessen opportunities for MyCC to build up expertise and knowledge of various markets and industries in the country. Such expertise and knowledge can be partly obtained through conducting market review studies. However, MyCC's recent experience suggests that data and information constraints encountered in market reviews may be severe. Therefore, the Malaysian government should consider implementing mergers controls in its competition regime in the future.

A key contribution that MyCC can make in the future is the review of government regulations and policies that may have an adverse impact on competition. This is possible under the present legal (CCA2010) and institutional (links to MDTCC) setup. In undertaking such activities, MyCC can play a greater role in competition policy (of which competition law is one component) in Malaysia. As such reviews are likely to engage other ministries and regulatory agencies, political will power is likely to be crucial to ensure that cooperation is extended to MyCC and its recommendations are acted upon. This is a delicate task - while seeking to make its views heard and acted upon within the

executive body, it needs to also safeguard its independence within the present institutional setup (where the MDTCC and its Minister has some influence).

Finally, as ASEAN moves towards a single market in the future (2015 and beyond), there is likely to be a need for further coordination of enforcement activities as well as harmonisation of competition laws (Lee and Fukunaga 2013). The Malaysia-Singapore express bus price fixing case that was successfully prosecuted by the Singapore Competition Commission in 2009 is an example of cross-border anti-competitive activities. The harmonisation of competition law in the ASEAN region will also be important to reduce transactions costs in cross-border business activities including mergers and acquisitions.

## 5. Conclusions

The enactment of the Competition Act 2010 (CA2010) represents a major step forward in competition policy in Malaysia. The enforcement of competition law in the country is at a relatively early stage as the CA2010 only came into effect on 1 January 2012. Despite this, the Malaysia Competition Commission (MyCC) has had some early success especially in price fixing cases involving industry associations. Future competition cases are likely to be more complex especially when proposed remedial measures are escalated. In this regard, enhancement in advocacy work and capacity building are likely to be key areas of focus. Careful choice of cases to investigate (in terms of type of infringements and markets involved) is likely to be crucial in MyCC's effort to build its reputation and credibility as well as to garner public support for its activities. The MyCC should also consider broadening its activities to encompass regular reviews of government policies and regulations that may have an adverse impact on competition. This would place MyCC in the company of successful competition agencies in more mature competition law regimes such as Indonesia and South Korea. New challenges are likely to emerge as ASEAN moves towards greater regional integration.

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