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Competition Act 2010: the issues and challenges

Vince Eng Teong See

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Abstract It took more than 20 years of efforts and political will to pass the general competition law in Malaysia. Various models were considered but shelved, culminating in the adoption of the European model with such familiar terms as abuse of dominant position. Despite the passing of two Acts to provide for the substantive law and establish a competition commission to enforce it, various issues remain open, including the objective the law is intended to serve and the construction to be afforded to the substantive provisions. Certain areas were left out of the law, including two sectors and merger control. In an economy where there are many concurrent directorships the law omits interlocking directorships. The scope of the law is also open to debate, with such issues as the interaction between the general and sectoral competition laws, the *locus standi* of final consumers vis-à-vis the enterprises that infringe the law. Issues aside, the newly established commission is also faced with challenges, including its financial and policy independence, and its ability to attract subject matter experts and deal with complex legal and economic analysis. Most important of all, the commission would have to build its own competition jurisprudence with a Malaysian flair.

Keywords Competition law · Competition Act 2010 · Issues · Challenges · Malaysia

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1 Introduction

Parliament of Malaysia passed the first ever all-sector competition law sometime in the middle of the year 2010. The Competition Act 2010 (CA 2010 or the Act) came

V. E. T. See (✉)
University of Malaya Centre of Regulatory Studies (UMCoRS), Kuala Lumpur, Malaysia
e-mail: set2law@gmail.com

into force on 1 January 2012, after a grace period of around 18 months. The CA 2010 has been hailed as one of the most significant pieces of commercial legislation ever passed by Parliament of Malaysia. Such a contention is certainly tenable from both the perspectives of law and commerce for, in outlawing many agreements and practices that have hitherto been prevalent—if not regarded as *the norm*—amongst the business communities, the law poses a significant impact on commercial activities.

It took more than 20 years for Malaysia to pass its general competition law. During that period various models of competition laws were examined, culminating in the final form of the CA 2010 which is largely modeled upon the European competition law, with similarities to the UK Competition Act 1998 (UKCA 1998) and Singapore Competition Act 2004 (SCA 2004).[1] In the light of the similarities among the competition laws of these four jurisdictions, this article would attempt to compare and examine the similarities and differences.

The CA 2010 aside, there is another piece of legislation that complements it, namely, the Competition Commission Act 2010 (CCA 2010), which provides for the establishment of the Malaysia Competition Commission (MyCC or the Commission), as it is called, and its functions and powers.[2]

This article would attempt to examine various provisions in the CA 2010 and CCA 2010. Part 2 would begin by looking at the object or purpose of the Act. Part 3 will examine the scope, both substantive and territorial, of the Act. In particular, it will examine the activities in two industries that are expressly excluded from the Act, the notion of 'commercial activities' as defined in the Act, and certain agreements and conduct that are also excluded from the application of the Act. Part 4 will look more closely at the two prohibitions, namely, anti-competitive agreements and abuse of dominant position, and examine the similarities with and differences from their counterpart in the EU, UK and Singapore legislation. Part 5 will look at other relevant issues pertaining to the Act. Part 6 will briefly discuss the challenges facing the Commission while Part 7 concludes.

2 The purpose of the CA 2010

The first and foremost issue in any competition law is perhaps nothing but the purpose or object that it is intended to serve.[3] If one examines the development of the US antitrust laws he or she cannot escape the conclusion that they evolved from

[1] Donors from various countries including Japan via JICA, Germany and Australia tried to influence Malaysia into adopting their respective models of competition law. It was at one time thought that Malaysia would have a fair trade practices law that was to be modeled upon the Australian Trade Practices Act 1974, which has since been renamed the Competition and Consumer Act 2010.

[2] Some quarters queried as to why there are two pieces of legislation as opposed to one, as in the case of SCA 2004, though practically there appears to be no issue with having two pieces of legislation. After all, the US has more than three pieces of federal legislation on antitrust and two federal enforcement agencies.

[3] To avoid any confusion with the term 'anti-competitive by *object* or effect' as found in s 4 of the CA 2010, the word 'purpose' would be used here.

one of "anti-trust" to the modern pro-competition purpose.[4] As for the EU competition law, whilst the Treaty itself is silent on the purpose various Commissioners have reiterated that protection of consumer interests is the primary aim.[5] Indeed, in some jurisdictions the competition law has more than one purpose.[6] As for the CA 2010, its purpose is gleaned from the Act itself. The Long Title of the Act 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.[7]

It is clear from the Long Title that the foremost purpose of the Act is not the protection of consumer welfare, whatever this may be defined. It appears that the foremost purpose of the Act is rather to promote economic development. As to how the intended economic development may be achieved it is apparently via the promotion and protection of the competition process. The word 'thereby' seems to suggest that protection of consumer interests is simply a by-product of the purpose of the Act. Indeed, it is debatable whether protection of the interests of consumers is achieved by promoting and protecting the process of competition, or through economic development, though it would be hard to identify the correlation between economic development and protection of consumer interests. Thus, it appears to be

[4] Bork (1978), p. 50 ('Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or several? If by several, how is he to decide cases where a conflict in values arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.'); Bork (1966:7) ('Despite the obvious importance of the question to a statute as vaguely phrased as the Sherman Act, the federal courts still in all the years since 1890 have never arrived at a definitive statement of the values or policies which control the law's application and evolution.'); Fox and Sullivan (1987:936) ('As antitrust enters the final years of its first century, we take stock. What are the origins of the law? Where is it now, and where is it going?').

[5] Monti (2011) ('…to ensure effective competition between enterprises by conducting a competition policy which…has the protection of consumer interest as its primary concern'); Kroes (2005) ('Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources.'); Almunia (2011) ('Competition policy in Europe is about encouraging entrepreneurship and innovation, the creation of jobs and the placing in the market of innovative products and services that bring choice and competitive prices for the consumer.')

[6] Section 2 of the Australian Competition and Consumer Act 2010 (**ACCA 2010**), for instance, provides: 'The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.' Section 1.1 of the Canadian Competition Act 1985, on the other hand, contains five purposes: 'The purpose of this Act is to maintain and encourage competition in Canada in order to *promote the efficiency and adaptability of the Canadian economy*, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.' (emphasis added) In terms of drafting, the Long Title of the CA 2010 appears to resemble more of the object stated in the ACCA 2010 by the use of the word 'by' which finds its equivalent 'through' in the object of the ACCA 2010.

[7] Emphasis added.

more tenable that the protection of consumer interests would be achieved by promoting and protecting the competition process.

The construction to attach to the Long Title is, however, coloured by the words in the Preamble which states:

> 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*:[8]

If one examines the Preamble carefully and compares it with the Long Title, it should appear clear that the Preamble comprises words that are more familiar to a competition statute, including such words as efficiency, innovation, competitive prices, improvement in the quality of products and services, wider choices for consumers and anti-competitive conduct. Further, by reading the Preamble as a whole one may also wonder whether there is any contradiction between the Preamble and the Long Title. This appears to be so for not only does the Preamble contain words that are more pertinent to modern competition law and concepts that underpin the law, but it also expressly states that the purpose is to prohibit anti-competitive conduct, whereas the purpose as stated in the Long Title appears to be one of economic development.

There is also room for an alternative interpretation of the Long Title. It is perhaps a common stand amongst most established competition authorities in the world that competition law is meant to protect consumer welfare though it may have more than one purpose. Based on this premise, it is possible to argue that, literally, there seem to be three purposes mentioned in the Long Title—promotion of economic development, promotion and protection of competition process, and protecting the interests of consumers. The next query that arises is are these three purposes of equal weight or is one of them more important than the others? From the Canadian legislation it is clear that it is common for the competition law of one country to have multiple purposes. The Canadian Competition Act 1985 thus propounds five elements as its purposes and all of them appear to rank equal among themselves.

Statutory provisions aside, it remains to be seen how the newly established MyCC would interpret the Act and identify the *primary* purpose of the Act.[9] It remains to be seen what the purpose of the Act is, whether it has more than one purpose, and whether one purpose may be primary while the others subsidiary or consequential.[10] This issue

[8] *Ibid.*

[9] Statements made to the press seem to suggest that the MyCC regards promotion and protection of consumer interests as the foremost purpose of the Act: The Edge Malaysia (2011).

[10] Nevertheless, it should be stressed at this point that the High Court of Australia has on numerous occasions emphasized the need to take into account the purpose of the Act when construing a particular provision. For instance, Kirby J in *Visy Paper Pty Ltd v ACCC* (2003) 216 CLR 1, 24 [70] stated: 'It is in the context of such legislative opacity and unwieldiness that it is essential…to adopt a construction of the TPA that achieves the apparent purposes of that Act by furthering the objectives of Australian competition law. Keeping such purposes in mind helps to shine the light essential to finding one's way through the maze created by the statutory language.' Surely, the CA 2010 may not be so perplexing in its literal provisions as the ACCA 2010 but it has certainly created some maze for academics.

is also somehow related to the exemption criteria for anti-competitive agreements as will be seen below.[11]

3 Scope of application

Although the CA 2010 is supposedly an all-industry competition law, there are a number of exclusions. In general, these exclusions may be grouped into three categories, namely: (i) activities regulated by two statutes; (ii) the definition of the term 'commercial activities'; and (iii) certain agreements and conduct.

3.1 Regulated industries

The commercial activities of two industries are expressly excluded from the scope of the CA 2010, namely, commercial activities 'regulated by' the Communications and Multimedia Act 1998 (CMA 1998) and Energy Commission Act 2001 (ECA 2001).[12] While most people have taken such exclusions to mean a blanket exclusion of the two industries, one should be careful in drawing a line between the commercial activities that are so *regulated* by these two statutes and those that fall outside of them for a company that operates businesses in any of these two industries may well have some businesses that fall outside of the ambit of the statute concerned. In other words, there may be business activities that are not regulated by one of the two statutes, in which case they would fall within the scope of the CA 2010.[13] The basis for the exclusion of commercial activities regulated by these two Acts was apparently that the two Acts contain provisions on competition regulation. While this may be true vis-à-vis the CMA 1998, it seems harder to say the same vis-à-vis the ECA 2001 as the so-called competition regulation provisions in the ECA 2001 are nothing but skeletal.[14]

[11] Section 5; unless specified otherwise, all references herein to sections in a statute shall refer to the CA 2010.

[12] Section 3(3).

[13] An example would be the sale of mobile phones by the telcos. Whether they are sold through a telco's own centres or authorized retail shops, the contract of sale is often between the telco and the buyer. This is so as most of the mobile phones—particularly the latest and fashionable ones—are often bundled with a 24-month subscription with the service provider. It is thus debatable whether the sale of the mobile phone, though bundled with subscription, is a commercial activity 'regulated' by the CMA 1998 or whether it falls within the scope of the CA 2010.

[14] The provisions governing competition in the CMA 1998 are found in sections 133–144. The CMA 1998 is modeled upon the Australian law, in contrast with the CA 2010. Similar to the CA 2010, the CMA 1998 also contains provisions on anti-competitive agreements and conduct that substantially lessens competition. Further, the Malaysian Communications and Multimedia Commission (**MCMC**) have published guidelines on the competition provisions. For a write up on the competition provisions in the CMA 1998, refer See (2010). As for the ECA 2001 only sections 14(h) and 23 that purportedly deal with competition. The Energy Commission has hitherto not issued any guidelines or regulations on competition. The equivalent of this item of exclusion is para 5, Third Schedule of the SCA 2004.

3.2 Definition of 'commercial activity'

These two statutes aside, the CA 2010 applies to all sectors and all levels of trade and business, including professions such as lawyers, accountants, and doctors. However, the application of the Act is confined to 'commercial activities' which are defined in the CA 2010 to exclude: (i) any activity, directly or indirectly, in the exercise of governmental authority, (ii) any activity conducted based on the principle of solidarity, and (iii) any purchase of goods or services not for the purposes of offering goods or services as part of an economic activity.[15]

In respect of (i), a line should again be drawn between commercial activities and non-commercial activities operated by some semi-governmental or statutory bodies; it is only the non-commercial activities that are excluded from the scope of the CA 2010.[16] In other words, it is the *functions* of the entities that matter, as opposed to the nature of the entities.[17] This is a significant provision as there are many government-owned entities or government-linked companies in Malaysia. In the course of drafting the Act, there were debates as to whether such government-owned entities and government-linked companies should be excluded from the scope of the CA 2010 on the basis that such entities are part of the government and their activities are carried out pursuant to government directives and policies. As such, if it is the government policy that such entities be involved in some anti-competitive activities they should be spared from the brunt of the CA 2010. The government finally decided in favour of an inclusive approach to bring such entities within the scope of the CA 2010. That was a sensible decision as most of these government-owned entities and government-linked companies are actually major or lead players in their respective markets. Excluding them from the scope of the CA 2010 would effectively have carved half, if not more, of the country's markets out of the scope of the Act. Further, excluding such entities from the scope of the Act would effectively have given them a *carte blanche* to be involved in anti-competitive activities, particularly abuse of their dominant positions due to their predominant positions in the respective markets.

As for the principle of solidarity in (ii), it is basically taken from the EU competition jurisprudence.[18] As to how this principle will be applicable in the Malaysian context remains to be seen, particularly in relation to private insurance schemes, of which there are myriad types, as well as the State pension schemes for civil servants and the newly-introduced pension schemes for privately-employed individuals.[19]

[15] Section 3(4).

[16] An example may be *Perbadanan Kemajuan Negeri Selangor* (PKNS or Selangor State Development Board) which is a State-owned entity which carries out some State development functions while being engaged in development and sale of real properties.

[17] Case T-155/04 *SELEX Sistemi Integrati SpA v Commission* [2006] ECR II-4797; Whish (2009:83).

[18] There is no statutory definition of the term though it is *understood* to refer to such principles as expounded in the European competition jurisprudence.

[19] The draft guidelines of the MyCC simply reproduce the words without any elaboration or explanation.

Paragraph (iii) perhaps deserves some academic discourse. Literally, this paragraph means that any final consumption of goods or services is excluded from the scope of the CA 2010. In other words, the *final consumers* should not have a right to relief under the CA 2010. As will be seen in relation to the right of private action below, it is debatable whether this paragraph is sensible.[20]

3.3 Certain excluded agreements and conduct

The third group of agreements or conduct that is excluded from the scope of the CA 2010 is found in the Second Schedule of the Act. There are three of them. The first excluded activities include 'an agreement or conduct to the extent to which it is engaged in an order to comply with a legislative requirement.'[21] There are a number of such activities sanctioned by the law. One example is professional fee-fixing in the legal profession in the form of the legal fees for conveyancing work rendered.[22] It should nevertheless be pointed out that it has been held in the EU that for an agreement or conduct to fall outside of Articles 101 and 102 it must be shown that it is either required by the national legislation or the latter creates a legal framework which itself eliminates any possibility of competitive activity.[23] However, it has also been held that Articles 101 and 102 may nevertheless apply if the national legislation does not preclude businesses from engaging in autonomous competitive conduct.[24] Further the national legislation that is alleged to have eliminated competition is to be applied restrictively.[25] Thus, it would appear that to amount to a 'legislative requirement' under the CA 2010, nothing short of an Act of Parliament or subsidiary legislation made thereunder will suffice and there must be some elements of State compulsion so as to leave the private entities with no alternative but to collude. As such, businesses should ensure that mere *directions* from the relevant Ministries or government departments that businesses come together and be involved in some anti-competitive activities—whether initiated or condoned by government officers—should be backed up by a law, as opposed to some *administrative policies* or *directives* that are not legally enforceable.

[20] See Part 5 RELEVANT ISSUES, below.

[21] Para (a), Second Schedule; the equivalent of para (a) is para 2, Third Schedule of SCA 2004.

[22] Solicitors' Remuneration Order 2006.

[23] Case C-359/95 P & C-379/95 P *Commission and France v Ladbroke Racing* [1997] ECR I-6265 para 33; case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969 para 130; case T-513/93 *CNSD v Commission* [2000] ECR II-1807 para 58.

[24] Case C-359/95 P & C-379/95 P *Commission and France v Ladbroke Racing* [1997] ECR I-6265 para 34; case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969 para 130; case 209/78 to 215/78 and 218/78 *Van Landewyck v Commission* [1980] ECR 3125 para 126; case T-513/93 *CNSD v Commission* [2000] ECR II-1807 para 59.

[25] Case 209/78 to 215/78 and 218/78 *Van Landewyck v Commission* [1980] ECR 3125 para 130–133; case T-513/93 *CNSD v Commission* [2000] ECR II-1807 para 60.

3.4 Extra-territorial jurisdiction

Much like most other modern competition laws in the world, the CA 2010 contains provisions that allow the MyCC to deal with anti-competitive commercial activities—both within and outside of Malaysia—that have an effect on competition in Malaysia.[26] To apply the Act to any commercial activity transacted outside Malaysia, such activity must have an effect on competition in any market in Malaysia.[27]

4 Two prohibitions

Having looked at the introductory matters, this part examines the substantive provisions.

4.1 Anti-competitive agreements

Conventionally, a comprehensive competition law has three pillars: anti-competitive agreements, abuse of dominant position or monopolization, and merger control.[28] As it stands now, the CA 2010 is short of being a comprehensive law for it merely contains two pillars—without any merger control.[29] Despite the lack of merger control, the CA 2010 poses a deep impact. Section 4(1) contains a general prohibition that prohibits any horizontal or vertical agreement between enterprises that has 'the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.'[30] In particular, four groups of horizontal agreements are deemed to have such an anti-competitive object, namely, price-fixing (whether purchase or selling price), market-sharing, limiting or controlling production, market access, technical or technological development or investment, and bid-rigging.[31] Comparing the list of agreements that are deemed anti-competitive in four jurisdictions, one could see the difference as in the following table.

It is clear from Table 1 above that while the EU (and also the UK) and Singapore provisions are identical in that the lists contain both agreements that are anti-competitive *by object and by effect* and both lists refer to five types of agreements, s 4(2) of the CA 2010 simply enumerates four groups of agreements that are deemed

[26] Section 3(1)(2).

[27] Section 3(2).

[28] There is one more—State aid control—in the EU competition law.

[29] This is, however, not without precedent. The US antitrust laws began with the Sherman Act 1890 which contains sections 1 and 2 only. It took the EU more than 30 years after the Treaty of Rome 1957 to introduce merger control. It should, however, be pointed out that an anticipated merger may still be challenged as being an anti-competitive agreement, or even as an abuse of a dominant position: case 6/72 *Europemballage & Continental Can v Commission* [1973] ECR 215, though it appears unlikely the latter case would be relied on in the presence of a merger control regime.

[30] Terminology-wise this is equivalent to Art 101 of the Treaty on the Functioning of the EU (**TFEU**) or formerly Art 85 of the Treaty of Rome (the EEC Treaty). Substantively, it also appears to be equivalent to s 1 of the US Sherman Act 1890 and s 45 of the Australian Competition and Consumer Act 2010.

[31] Section 4(2).

Table 1 Anti-competitive Agreement

Section 4(2) CA 2010 Anti-competitive by object	Art 101(1)/s 2(2) UKCA 1998 Anti-competitive by object or effect	Section 34(2) SCA 2004 Anti-competitive by object or effect
(a) Fix, directly or indirectly, a purchase or selling price or any other trading conditions;	(a) Directly or indirectly fix purchase or selling prices or any other trading conditions;	(a) Directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) Share market or sources of supply;	(b) Limit or control production, markets, technical development, or investment;	(b) Limit or control production, markets, technical development or investment;
(c) Limit or control:	(c) Share markets or sources of supply;	(c) Share markets or sources of supply;
(i) Production;	(d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;	(d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
(ii) Market outlets or market access;[a]	(e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.	(e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
(iii) Technical or technological development; or		
(iv) investment; or		
(d) perform an act of bid rigging,		

[a] There is some explanation in the MyCC's draft guidelines, at para 5.3.3

anti-competitive by *object*. It is arguable that this is a better drafting for s 4(2) singles out those agreements that are, based on established experience, per se anti-competitive.[32] On the other hand, s 4(1) provides for a catch-all, general prohibition of agreements that are anti-competitive, whether by object or by effect. The separation of agreements that are deemed anti-competitive by object and those that are anti-competitive by effect arguably provides a sense of certainty among businesses and amounts to a refinement of the EU competition law based on settled jurisprudence. By having the catch-all provision in s 4(1) it also gives the MyCC the leeway to develop its own jurisprudence over time and to hold other kinds of agreements to be anti-competitive by object where pertinent.[33]

Another significant difference between s 4(2) of the CA 2010 and its counterpart is, while paragraphs (a) to (c) of Art 101(1) (and thus s 2(2) of the UKCA 1998 and s 4(2) of the SCA 2004) find their counterpart in s 4(2), paragraphs (d) and

[32] Surely, it is not absolutely correct to use the term *per se* (which is a term adopted in the US antitrust laws) for in the EU competition jurisprudence, no matter how anti-competitive by object or by effect an agreement is, it is nevertheless in principle entitled to an exemption under Art 101(3): case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595 para 85; Whish (2009:118). In the US antitrust jurisprudence, once an agreement is held to be *per se* anti-competitive there is no exemption whatsoever.

[33] One type of such agreement may be vertical resale price maintenance, following the position of the European Commission. Indeed, the MyCC has in its draft guidelines signaled its strong stance against resale price maintenance: para 5.14–5.16.

(e) dealing with discriminatory pricing and terms and tying respectively are notably missing from s 4(2). It is undeniable that while discriminatory pricing and terms and tying may be part of an agreement entered into between the two parties thereto, they usually come about as a result of the possession of some market power by one of the parties to the agreement. As will be seen in the discussions below, discriminatory pricing and terms and tying are incorporated in the provisions on abuse of dominant position.[34] The difference perhaps marks the intention of the Act to focus on such practices only in situations where there is presence of a dominant position. However, it does not follow from the absence of such provisions from s 4(2) that they can never be condemned as part of an anti-competitive agreement for s 4(1) does provide for such an agreement to be prohibited if it has an effect on the relevant market.[35] The difference between pursuing an anti-competitive claim under s 4(1) and s 10(2) is perhaps the different market share thresholds under the two sections—a lower threshold for the former while a higher entry threshold for the latter.

One agreement that is deemed anti-competitive by object that is not expressly found in the EU, UK and Singapore competition laws is bid-rigging. Bid-rigging occurs where bidders who bid or tender for a contract or project come together either to determine who gets the deal or to agree on the bid price.[36] While, as the European Court of Justice (ECJ) has held times and again, that the list of agreements in Art 101(1) is not exhaustive, and would thus include bid-rigging s 4(2) of the CA 2010 has made it a prominent feature.[37]

There is also a difference in terms of terminology between s 4(1) of the CA 2010 and Art 101(1). Art 101(1), as interpreted by the European courts, takes the stand that in order to trigger its application the effect on the relevant market must be 'appreciable' while s 4(1) adopted the word 'significant'. Literally, it is tenable to argue that the former carries a more economic sense while the latter is more commonly found in legal text. Whether there was any reason for the drafters of the CA 2010 to adopt the word 'significant' and whether the difference in terminology is likely to pose any difference in economic and legal analysis remains to be seen. It is arguable that there should be no difference for whether a particular agreement has an effect on the relevant market—be it appreciable or significant—is simply a matter of economic analysis.[38]

Further, the term 'agreement' is statutorily interpreted widely to include an arrangement, understanding, concerted practices, and a decision of a trade

[34] Section 10(2).

[35] Indeed, it is common for the authorities to prosecute such practices under both ss 1 and 2 of the Sherman Act and Art 101 and 102 of the EU competition law.

[36] OECD, *Detecting Bid-rigging in Public Procurement.*

[37] Bid-rigging is a prominent feature in the business world in Malaysia. It permeates almost every market and every industry, including bidding for properties foreclosed pursuant to a court order. Bidding for such foreclosed properties is ironically always held at the bailiff's office at the High Court.

[38] Whilst a devil's advocate may attempt to argue that there is a difference between the two, economists may regard them as two sides of the same coin. Indeed, case law and literature seem to use both terms interchangeably: case 5/69 *Volk v Vervaecke* [1969] ECR 295; Whish (2009:138); European Commission Notice on agreements of minor importance *(de minimis)* OJ [2001] C 368/07.

association.[39] This marks a refinement based on the EU competition jurisprudence. Prior to the passing of the CA 2010, price-fixing, market-sharing, and bid-rigging were common practices in many industries, ranging from hauliers to car maintenance services to even haircuts, particularly where decisions on prices are made by trade associations. With s 4(1) many of the so-called 'recommended prices' will run fouled of the law from now on.

The so-called hardcore cartels aside, there are, however, other kinds of more benign agreements, whether horizontal or vertical, that require more subtle analysis of their effects on the relevant market. Such agreements would include horizontal co-operation agreements such as joint research and development, joint purchasing, joint production, commercialization, and standardisation agreements. It is undeniable that while competitors should pursue their commercial policies independently, competition law does not dictate that they must do so individually every time and at every occasion. Indeed there are many forms of horizontal co-operation agreements that bring about synergies or combine different expertise of producers or distributors.[40] The anti-competitiveness, if any, of these agreements would have to be assessed based on their *effect* on the relevant market.[41]

As for vertical agreements, the common ones include resale price maintenance, exclusive dealings, franchise, single branding, exclusive market allocation, exclusive customer allocation, and tying. Such agreements are not necessarily anti-competitive by object, save perhaps resale price maintenance,[42] but will have to be assessed based on their effects on the relevant market. Compared to horizontal co-operation agreements, competition authorities of the world tend to be more tolerant vis-à-vis agreements that contain vertical restrictions as they reflect commercial realities as well as bring about certain economic efficiencies that would otherwise not be achieved.[43] Further, vertical agreements involve parties that operate at two different levels of production or distribution and that reduces the likelihood of direct collusion, unlike horizontal co-operation which involves direct competitors.

Substantive provisions aside, the CA 2010 also follows Art 101(3) in that an anti-competitive agreement may be entitled to either an individual or block exemption.[44] Much like the exemption criteria embedded in Art 101(3), the exemption criteria are also four-pronged, as seen in the table below comparing them with the four criteria in Art 101(3) and s 41 of the SCA 2004.[45]

It is clear from Table 2 that the criteria for a block exemption in the SCA 2004 are more or less identical to those in Art 101(3). As between the criteria in s 5 and

[39] Section 2.

[40] One example that is currently heatedly debated, particularly among politicians, is the Malaysia Airlines-Air Asia-Air Asia X joint collaboration.

[41] Section 4(1) provides for this possibility.

[42] As indicated by the MyCC in its draft guidelines: n 34 above.

[43] Case C-234/89 *Delimitis v Herninger Brau AG* [1991] ECR I-935; also para 5.11 of the MyCC draft guidelines.

[44] Sections 6 (individual exemption) and 8 (block exemption) respectively.

[45] Section 41 of the SCA 2004 applies to *block* exemption only. There appears to be no statutory provision on the criteria for individual exemptions which are implicit in the provisions for notification for guidance and notification for decision (sections 43–46, SCA 2004).

Table 2 Exemption Criteria

Section 5 CA 2010 Applicable to both individual and block exemptions	Art 101(3)/s 9 UKCA 1998[a] Applicable to both individual and block exemptions	Section 41 SCA 2004 Applicable to block exemptions only
(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[b] (d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services	'…which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while *allowing consumers a fair share of the resulting benefit*, and which does not:[c] (a) impose on the undertakings concerned restrictions which are not indispensable to the *attainment of these objectives*;[d] (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.'	Criteria for block exemptions 41. Section 36[e] shall apply to any agreement which contributes to: (a) improving production or distribution; or (b) promoting technical or economic progress, but which does not: (i) impose on the undertakings concerned restrictions which are not indispensable to the *attainment of those objectives*;[f] or (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

[a] Section 9 of the UKCA 1998 provides

'This section applies to any agreement which

(a) contributes to

(i) improving production or distribution, or

(ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; but

(b) does not

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question

[b] Emphasis added

[c] *Ibid*

[d] *Ibid*

[e] Which deals with block exemptions

[f] Emphasis added

Art 101(3), on the other hand, it is possible to argue that they are in *pari materia* for paragraph (a) effectively contains the efficiency requirement;[46] paragraph (b) the

[46] Which is equivalent to 'improving the production or distribution of goods or to promoting technical or economic progress'.

indispensability or "necessary evil" principle;[47] paragraph (c) the proportionality principle;[48] and no elimination of substantial competition in paragraph (d).[49] There is nevertheless one significant difference, at least in legal terms or literally speaking, between s 5 and Art 101(3) and that is the requirement of giving consumers a fair share of the resulting benefit found in the latter.[50] The conspicuous absence of this requirement adds to the doubts as to whether the purpose of the CA 2010 is to serve consumer welfare or something else.[51] The ECJ has consistently held that mere efficiency gains to the parties to an otherwise anti-competitive agreement are not sufficient to render the agreement exempted under Art 81(3) but the parties must go one step further to show that consumers do derive a fair share of the resulting benefit.[52] With the stark omission of such a requirement it suffices to say that s 5 might have inadvertently and perhaps precariously lowered the threshold required for an agreement to enjoy an exemption. While lawyers and economists often contend that it is hard to measure, let alone demonstrate, such resulting benefits to consumers, particularly where the agreement has yet to be performed and there are many factors that may affect the performance of the agreement post-execution that are beyond the control of the parties to the agreement, it would make a mockery of a competition law to drop such a patently significant requirement—both legally and policy-wise.[53] Notwithstanding this express omission, it is possible to argue that the requirement that consumers be given a fair share of the resulting benefit is implicit in paragraph (c) read together with paragraph (a). It appears that the term 'the benefits provided' in paragraph (c) refers to the words 'technological, efficiency or social benefits' in paragraph (a). Since 'social benefits' should include consumer benefits[54] and since economic principles dictate that technological or efficiency benefits would only benefit a market player if such benefits either bring about lower prices, higher output, wider choices, or new or better products so as to draw in more demand resulting in more profits, the statutory omission of reference to giving consumers a fair share of the resulting benefit does not appear to pose any

[47] Equivalent to paragraph (a) of Art 101(3).

[48] However, there may be some overlap with another paragraph: see next paragraph.

[49] Equivalent to paragraph (b) of Art 101(3).

[50] One should note that this requirement is also missing from s 41 of the SCA 2004. Since the SCA 2004 does not have something like the Long Title and Preamble of the CA 2010 which state the purpose of the Act, it throws further into question whether the SCA 2004 is statutorily intended to serve consumer interests. However, various statements issued by the Competition Commission of Singapore (**CCS**) appear to have affirmed the pro-consumer interest stand. See, e.g., Teo (2009); Mr Teo is the former Chief Executive of the CCS.

[51] See Part 2 THE OBJECT OF THE CA 2010, above.

[52] Case T-168/01 *GlaxoSmithKline v Commission* [2006] ECR II-2969 para 118, 122, 309.

[53] Another possible argument to support this contention comes, perhaps, from the words 'the attainment of these objectives' (found in paragraph (a) of Art 101(3) and also in s 41(b)(i) of the SCA 2004). Clearly, Art 101(3) makes it explicit that giving consumers a fair share of the resulting benefit is one of such 'objectives'. The answer to this argument is such an objective is missing from s 41 of the SCA 2004 and it does not seem to stop the CCS from stating expressly that promotion of consumer interests is the purpose of the SCA 2004.

[54] This appears so whether the term 'social benefits' is taken literally (as consumers form part of the society), or in the economic sense of social welfare (which includes consumer welfare).

substantive effect on the intent and practical aspect of s 5. This argument is further supported, perhaps implicitly, by the word 'proportionate' in paragraph (c) which seems to demand that any anti-competitive measures in an agreement should be proportionate to the benefits generated. Since an anti-competitiveness assessment hinges on the balance between pro-competitive benefits to consumers, on the one hand, and anti-competitive effects on them, on the other hand, the word 'proportionate' must necessarily imply that the consumers must not be deprived of their fair share of the benefits arising from such anti-competitive measures. By insisting that such anti-competitive measures embodied in an agreement not be disproportionate to the benefits provided, it is clear that the drafters in allowing certain agreements which include some anti-competitive measures had in mind the corresponding benefits to consumer welfare. It is thus clear that, by inserting the element of proportionality, the drafters envisaged a requirement that is similar to the EU requirement of allowing a fair share of the resulting benefits to consumers.

There is one more issue to take on s 5, however. As drafted, there appears to be some kind of overlap between paragraphs (c) and (d). Cases have shown that the ECJ has interpreted paragraph (b) of Art 101(3) to mean that the anti-competitive measures must not eliminate competition substantially or, in other words, they must be proportionate.[55] It could be that Parliament thought the proportionality principle would address the consumer benefit requirement, failing, however, to consider the overlapping effect with paragraph (d).

Another point worth noting about the exemption criteria in s 5 is paragraph (a) mentions the words 'social benefits'. Not only are such words notably missing from the counterpart of s 5 in Art 101(3) and also s 41 of the SCA 2004, they are not given any statutory definition either.[56] One possible explanation for the presence of these words in s 5(a) may be linked to the so-called "primary" purpose of the Act, namely, promotion of economic development.[57] If it is right to say that promotion of economic development is the primary purpose then it would seem in principle right to include benefits to the society as a whole as a criterion to the exemption for the promotion of economic development benefits the society as a whole and 'social benefits'—if taken to mean social welfare in economic terms—would include benefits to both consumers and producers. The only problem with this contention is one wonders how an agreement entered into between two private contracting parties would give rise to social benefits in the sense of promoting the welfare of both the producers and consumers, unless Parliament intended that so long as there is a net total benefits—regardless of how the producers and consumers share their portions—in which case it serves to reinforce the argument that the primary

[55] The term 'proportionality' was, for instance, used in the case of T-191/98 etc. *Atlantic Container Line AB v Commission* [2003] ECR II-3275, para 1456.

[56] The MyCC's draft guidelines simply state at para 2.3 'Social benefits are non-economic and could cover many kinds of benefit including: social stability [and] social goals specified in other legislation.'

[57] Long Title, the CA 2010.

purpose of the Act is the promotion of economic development as opposed to the promotion of consumer interests.[58]

Substantive part aside, a few words should perhaps be said about the procedural aspect of an application for an individual exemption. There are basically two types of exemptions under the CA 2010, namely, individual and block exemptions.[59] As mentioned above, the criteria for an exemption in s 5 are applicable to both.[60] Procedurally, there is also a large difference between the CA 2010, on the one hand, and its counterpart in the EU, UK and Singapore. Prior to the modernization regulation that came into force on 1 May 2004 the process of application for an exemption at the EU level was to the European Commission. This had resulted in massive work for the European Commission that led to the implementation of the modernization regulation under which there is no longer any application for individual exemption and every agreement will have to be self-assessed.[61] As for the UKCA 1998 and SCA 2004 they are similar in this respect in the sense that there is the procedure for notification for guidance and notification for decision. The CA 2010, on the other hand, learning from the experience of the EU adopted a different approach. As it is drafted, s 6(1) states an enterprise '*may apply* to the Commission for an exemption with respect to a particular agreement from the prohibition under section 4.'[62] In other words, the option appears to lie with the parties to an agreement. The CA 2010 does not, however, state what agreement or categories of agreements need or need not apply for an exemption, nor does it state the market share threshold above which the parties must apply or under which the parties need not apply for an exemption. Further, in contrast to the UKCA 1998 and SCA 2004, the CA 2010 does not provide for the procedure for such applications.[63] Similar to its counterpart, the CA 2010 provides that the grant of an individual exemption may be subject to conditions or obligations and may be limited in duration and may even take effect retrospectively.[64] The MyCC also retains the discretion to cancel an individual exemption, vary or remove or impose additional conditions or obligations.[65]

[58] In a typical graph with the conventional supply and demand curves, any shift in one curve is likely to affect the portions of consumer welfare and producer welfare in inverse proportion, resulting in different sizes of the portions representing consumer welfare and producer welfare respectively. Some authors have argued that the words 'social benefits' are intended to take care of certain anti-competitiveness as part of the New Economic Policy, initially framed in 1960 s as part of the affirmative policy of the government in addressing the so-called socio-economic imbalance among various races. While this might sound intuitively and politically appealing the theoretical underpinning—legal, economic or otherwise—to this contention remains yet to be seen, though some support may be found in the draft MyCC guidelines as mentioned above: n 63 above.

[59] Similar to the UKCA 1998 and the SCA 2004.

[60] Similar to Art 81(3) and s 9 of the UKCA 1998, whereas s 41 of the SCA 2004 is applicable to block exemptions only.

[61] Whish (2009:247).

[62] Emphasis added.

[63] Except some reference in MyCC's draft guidelines: para 4 and 7. In contrast with individual exemption there is actually a statutory procedure for the grant of a block exemption: section 9.

[64] Section 6(4)(5).

[65] Section 7(1).

4.2 Abuse of dominant position

Anti-competitive agreements aside, the CA 2010 also prohibits abuses of dominant positions. Much like the provisions on anti-competitive agreements, the Act provides for a general prohibition against abuse of dominant position, and a non-exhaustive list of specific instances of abuses of dominant positions. The intent and purpose of such provisions is to create a more-level playing field, whether between competitors at the same level or between two enterprises operating at two different levels of production or distribution chain, so that competitors will not be excluded from the market through anti-competitive means, leaving the market with fewer players and, thus, fewer competitive choices for consumers, to the detriment of consumers.

In contrast with the provisions on anti-competitive agreements, the prohibition of abuse of dominant position is found in s 10 only. Section 10(1) lays down the general prohibition of 'engaging, whether independently or collectively, in any conduct which amounts to an abuse of dominant position in any market for goods or services.' Thus, s 10(1) adopts the EU abuse of dominant position jurisprudence under which it is possible for an enterprise to not only abuse its dominant position individually but also together with other dominant players.

It is apparent from Table 3 above that Art 102 states that an abuse of a dominant position is an abuse within the meaning of Art 102 'in so far as it may affect trade.' In other words, there is an express reference to an effect on trade. The same reference is found in s 18(1) of the UKCA 1998. However, the reference to an effect on trade is not found in s 10(1) of the CA 2010.[66] Does it follow from this omission that there need not be any effect on trade (or 'market' in the case of the CA 2010) for an abuse of dominant position to come within the statutory ambit? An alternative construction may be that the absence of reference to effect on trade means that certain abuses may indeed be held to be abuses by *object*. If the latter construction were to be adopted it would mean that there could well be two groups of abuses of dominant positions—one by object and the other by effect.[67]

As for the list of specific abuses of dominant positions, it is worth comparing s 10(2) with its counterpart in the EU, UK and Singapore legislation.

One conspicuous difference between s 10 and Art 102, on the one hand, and s 47(2) of SCA 2004, on the other hand, is the missing 'unfair price' from the latter. As for limiting or controlling production, market access or technical or technological development, its equivalent may be found in the EU and Singapore legislation. One small but perhaps significant difference between s 10 and its counterpart is that the former refers to limiting or controlling 'market outlets or market access', while the latter simply refers to 'market.' There are some interpretation issues with s 10(2)(b)(ii). Presumably, limiting market access refers to the market access of competitors but it is debatable whether limiting or controlling market outlets refers

[66] Nor in s 47(1) of the SCA 2004.

[67] The latter construction appears rather unlikely as almost all abuses are conduct that is prohibited due to their effect on the relevant market. The drafters may wish to proffer an explanation for the mysterious omission.

Table 3 Effect on Trade

Section 10(1) CA 2010	Art 102	Section 18(1) UKCA 1998	Section 47(1) SCA 2004
An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.	Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market *in so far as it may affect trade* between Member States.[a]	Subject to section 19[b], any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited *if it may affect trade* within the United Kingdom.[c]	Subject to section 48[d], any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited.

[a] Emphasis added

[b] Section 19 of the UKCA 1998 deals with matters that are excluded from s 18

[c] Emphasis added

[d] Section 48 of the SCA 2004 deals with matters that are excluded by virtue of the Third Schedule thereof

to the outlets of competitors, the dominant player itself, or either, or both. If a dominant player abuses its position so as to limit or control the market access of its competitors that is an abuse and the same may be said where it limits or controls its competitors' market outlets. However, it is debatable whether it is an abuse of its dominant position if it limits or controls its own market outlets. In any event, if it is in a dominant position and it wants to entrench its dominant position it is questionable whether strategy-wise it would want to limit or control its market outlets.[68] Further, if such a dominant player abuses its position so as to limit or control the market outlets of its competitors, it would by the same token amount to limiting its competitors' market access and, hence, its competitors' market (Table 4).[69]

Next, s 10(2)(b)(iv) also regards limiting or controlling investment to the prejudice of consumers as a form of abuse. One wonders whether this has something to do with foreign direct investment (FDI) which is a prominent issue in Malaysia. However, FDI is more of a macroeconomic issue for the FDI that comes to Malaysia is primarily in the manufacturing sector and, as such, one wonders if it has anything to do with microeconomic trade issues which are more pertinent to competition law. Alternatively, assuming it is to do with the situation where a dominant player abuses its position so as to limit or control investment by its competitors for the sole purpose of maintaining its incumbency, this would usually come in the form of either limiting or controlling market access (in terms of market strategy) or technical or technological development of new technologies or products (in terms of

[68] Save perhaps in the form of exclusive geographical allocation in a vertical restraint.

[69] While a similar wording is found in s 4(2) and while the MyCC has issued draft guidelines thereon, no guidelines have been issued in respect of s 10(2)(b).

Table 4 Abusive Practices

Section 10(2) CA 2010[a]	Art 102/s 18(2) UKCA 1998	Section 47(2) SCA 2004
(a) Directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer; (b) Limiting or controlling: (i) Production; (ii) Market outlets or market access; (iii) Technical or technological development; or (iv) Investment, to the prejudice of consumers; (c) Refusing to supply to a particular enterprise or group or category of enterprises; (d) Applying different conditions to equivalent transactions with other trading parties to an extent that may: (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 which 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; (e) Making the conclusion of contract subject to acceptance by other parties of supplementary *conditions*[b] which by their nature or according to commercial usage have no connection with the subject matter of the contract; (f) Any predatory behaviour towards competitors; or (g) *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*[c] have a reasonable commercial justification for buying up the intermediate goods or resources to meet its own needs.	(a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) Limiting production, markets or technical development to the prejudice of consumers; (c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary *obligations*[d] which, by their nature or according to commercial usage, have no connection with the subject of such contracts.	(a) Predatory behaviour towards competitors; (b) Limiting production, markets or technical development to the prejudice of consumers; (c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or (d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

[a] The list of abuses of dominant positions is not exclusive due to the words '[w]ithout prejudice to the generality of sub-section (1), an abuse of dominant position may include…' It is thus possible to argue that with some minor re-wording of sub-section (2), s 10(1) is perhaps superfluous other than the point on collective abuse of dominant position

[b] Emphasis added

[c] *Ibid*

[d] *Ibid*

technology), or limiting or controlling output, in which case it would be amply covered by sub-paragraphs (i), (ii) and (iii) of s 10(2)(b). Nevertheless, one significant feature of s 10(2)(b) is it is probably the only substantive provision that expressly refers to 'prejudice to consumers.'[70]

Section 10(2)(c) is a statutory recognition of refusal to supply as a form of abuse. Paragraph (d) finds its equivalent in paragraph (c) of the EU and Singapore legislation. However, while the latter merely refers to placing other trading parties at a competitive disadvantage, the former sets out three situations in which differential treatment may amount to a discriminatory abuse of dominant position. Sub-paragraph (i) clearly recognizes the potential effect on both market entry and expansion. Sub-paragraph (ii) incorporates the no-less-efficient-competitor principle. Sub-paragraph (iii), on the other hand, is statutory codification of the principles that are perhaps exemplified by such cases as *Hilti v Commission*,[71] *Virgin/BA*,[72] and *Napp Pharmaceutical Holdings Ltd*[73] where an act of a dominant player in a market had been held to be capable of amounting to an abuse if it would produce an anti-competitive effect whether on the same market, an upstream or downstream market. Section 10(2)(e) finds its equivalent in paragraph (d) of the EU and Singapore legislation. The only difference is while the latter adopts the term 'supplementary obligations' the former adopted 'supplementary conditions.' While there should be no difference from the competition law perspective, some devil's advocates may well argue that for such supplementary obligations to amount to tying, they must come within the meaning of contractual conditions that are fundamental the breach of which would entitle the innocent party to terminate the contract and claim for damages. Paragraph (f) finds its counterpart in the Singapore legislation but not in the EU or UKCA 1998. While it amounts to a statutory recognition that predatory behavior against a competitor may amount to an abuse of a dominant position, it appears that such a principle could well be encompassed in s 10(1).

Paragraph (h) stands in contrast to other paragraphs in the same sub-section (2) in the sense that while the others deal with the selling side of a commercial activity, paragraph (h) deals with the buying side. One issue to take up with paragraph (h) is that by the words 'does not have a reasonable commercial justification for buying up' the paragraph appears to impose a duty on the part of the dominant enterprise concerned to disprove that it has not abused its dominant position. In other words, it is debatable whether the way it is framed means that paragraph (h) has a different burden of proof compared to the other paragraphs.[74]

In sum, it does not follow from the longer list of abuses in s 10(2) that it is therefore more comprehensive than the provisions on abuse of dominant position in other jurisdictions for the ECJ has held on numerous occasions that the list in Art 82

[70] Contrast the exemption criteria for anti-competitive agreements in s 5.

[71] Case 53/92 P [1994] ECR I-667.

[72] OJ [2000] L 30/1.

[73] [2001] UKCLR 597.

[74] The express provision of arguably such a duty also needs some reconciliation with the provision on justification or 'defence' in s 10(3).

is not exhaustive.[75] Rather, the list represents some sort of codification of the EU abuse of dominant position jurisprudence.

As to the determination of the existence of a dominant position, s 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 occupy, a dominant position in that market. While how this sub-section would be construed remains yet to be seen it is arguable that if the market share is not to be regarded as *conclusive* it follows from there that the MyCC may *assume* that above a certain level, an enterprise occupies a dominant position unless proven otherwise. In other words, a statutory presumption may well exist in certain cases.[76]

As to the defence to an abuse of a dominant position, s 10(3) provides that a dominant firm may take 'any step which has [a] reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor.' While its counterpart in the EU, UK and Singapore does not provide for a statutory defence, s 10(3) appears to have generalized the principles found in the cases. There is no statutory definition as to what amounts to a 'reasonable commercial justification' or 'reasonable commercial response' and how much is 'reasonable'. Thus, while s 10(3) has generalized the principles in the case law, there remains the room for the MyCC to interpret the provision and apply it to cases.[77]

5 Relevant issues

The substantive issues relating to the two prohibitions aside, there are also several other issues—theoretical and practical—relating to the construction and application of the CA 2010.

First, the Act applies to an 'enterprise'—which is defined to mean any entity carrying on commercial activities—and it remains unclear whether it includes individuals as there is no further definition of the word 'entity'.[78] It has been held in various EU cases[79] that the term 'undertaking'—the equivalent of the term 'enterprise' in the CA 2010—covers individuals. This issue is important as many

[75] As seen in such cases as case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-000 (14 Oct 2010) (where the ECJ recognized margin squeeze as an independent form of abuse of dominant position).

[76] The only question is what would the minimum percentage be in order to amount to a dominant position.

[77] It has been pointed out to the author that in the EU competition jurisprudence to amount to an objective justification, a decision must be 'proportional'. It is not entirely clear whether a 'reasonable commercial justification' is the same as an 'objective justification' and whether 'reasonable' necessarily imports proportionality. It is worth noting that while the MyCC has issued draft guidelines on anti-competitive agreements, no guidelines have been issued on abuse of dominant position. The MyCC probably has taken the same position as that in the EU where the European Commission had merely issued a discussion paper: European Commission (2005).

[78] The MyCC's draft guidelines simply reproduce the definition of 'enterprise' in the CA 2010.

[79] Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] ECR I-1627.

retailers remain in the form of either sole proprietorships or partnerships that are not incorporated legal entities. Hence, unless the term 'enterprise' is interpreted in the same vein as its EU equivalent, many anti-competitive agreements such as price-fixing, market-sharing and bid-rigging may well go on with impunity.[80]

Second, the definition of the term 'enterprise' also encompasses the doctrine of single economic entity. In the CA 2010 the term 'single economic unit' is adopted. As defined, a parent and subsidiary company are regarded as a single enterprise if, despite their separate legal entities, they form a single economic unit within which the subsidiary does not enjoy real autonomy in determining its actions on the market.[81] One question that arose among many practitioners is, what if two sister companies within the same group agree to fix prices or output? Would these two sister companies come within the doctrine of single economic unit? Should the definition of 'enterprise' be expanded in relation to the doctrine of single economic unit to cover this situation? There are a few reasons why these questions appear to have been misconceived.[82] First of all, one should understand the rationale underlying the doctrine of single economic unit. The doctrine was first devised to encompass the situation where a large parent company formed a subsidiary and instructed the latter to enter into some cartel activities with its competitors. When investigated and prosecuted by the competition authority, the parent company attempted to wash its hands off by contending that since the act was committed by its subsidiary and by virtue of the legal doctrine of separate entities, the parent company should be let off the hook. Justice and common sense would obviously deny such a contention. The doctrine of single economic unit was thus devised to encompass such a situation and to bring liability to the higher level of a group of companies. In other words, liability is imposed at the higher level of the holding company so as to raise awareness of the need to comply with competition law. Secondly, it is also rare in practice for a group of companies or conglomerate to have two sister companies that compete on the same product market, though it is not theoretically impossible. Having such sister companies that compete on the same product market would simply mean self-cannibalisation. Even if there are two sister companies that compete on the same larger, relevant product market, it is likely that the sister companies would be competing on two different, smaller relevant sub-product markets.[83] Hence, where the two sister companies decide to collude on prices or output they are regarded by competition law as belonging to the same economic unit and thus their joint act is not subject to competition law scrutiny.

[80] Though such an issue will not be significant vis-à-vis abuse of dominant position for it is rare to have retailing individuals with dominant positions in the modern business context, save exceptionally where for some peculiar reasons the relevant geographical market or relevant product market is narrowly defined.

[81] Section 2.

[82] The author was asked this question by partners of some leading law firms here.

[83] An example would be Toyota. Within the group there are three brands—Lexus, Toyota and Daihatsu. Though all of them compete in the same passenger car market, they compete at three different sub-levels or sub-product markets—Lexus on the luxury car market, Toyota the common passenger car market, and Daihatsu primarily the compact car and commercial vehicle market.

Third, while an anti-competitive agreement is 'prohibited' the CA 2010 appears to be silent as to the consequential effect of such prohibition on the agreement, i.e. whether it renders the agreement unenforceable, or null and void, and whether severance would be permissible.[84] Presumably this would go back to the general contractual principles.

Fourth, section 3(4) of the CA 2010 provides that '[f]or the purposes of [the CA 2010], "commercial activity" means any activity of a commercial nature but does not include—(c) any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity.' This paragraph could well be interpreted to mean that the final consumers are excluded from the scope of application of the Act as they do not purchase goods or services for the purpose of offering them as part of an economic activity. There are a few issues to take on with this exclusion. There is no doubt that the rationale (or at least one of them) of competition law is to protect consumer interests.[85] However, contrary to and distinct from ordinary consumer protection laws, competition law does not protect the ultimate consumers directly.[86] While recognizing that consumers are the ultimate beneficiaries of competition law, they are protected indirectly under competition law. It is this argument that perhaps underlies s 3(4)(c) of CA 2010. The first issue to take up is where, for instance, there is a cartel of retailers, there can be two groups of purchasers—the *intermediate* consumers (like businesses which buy and resell or which buy for consumption in the production of other intermediate or final goods or services) or *final* consumers (whether companies or individuals who buy for their own consumption). In the case of the intermediate consumers, they can take a civil action in court against the cartel members under s 64. However, by virtue of the definition of 'commercial activity', the final consumers could well be preempted from resorting to s 64. If cartel activities are so heinous that there is a need to have competition law and provide for a civil relief, it is questionable whether the final consumers should be denied such relief. Secondly, s 64(1) entitled 'Rights of private action' clearly provides that any person who suffers loss or damage *directly as a result of* an infringement shall have a right of action for relief in civil proceedings in a court against any enterprise which is or has at the material time been a party to such infringement. Sub-section (2) further provides that the action may be brought by any person referred to in sub-section (1) regardless of whether such person dealt directly *or indirectly* with the enterprise. Thus, if a number of producers entered into a cartel and artificially jacked up the prices and some final consumers bought goods from these producers, it is clear that they suffered loss or damage *directly* as a result of an infringement. Let's turn the scenario a bit. If the cartelist producers sold material the price of which had been artificially jacked up to a downstream manufacturer who incorporated the input material into some final products which had to be correspondingly priced higher because of the cartel, it is nevertheless

[84] This is in contrast with the EU, UKCA 1998 and SCA 2004 provisions: Art 101(2), s 2(4) and s 34(3) respectively.

[85] As per Whish (2009:19) 'It is of course correct in principle that competition law should be regarded as having a "consumer protection" function: ultimately the process of competition itself is intended to deliver benefits to consumers.'

[86] *Ibid.*

arguable that final consumers who bought the final products from the downstream manufacturer suffered loss or damage *directly* as a result of the infringement by the cartel members and, in this scenario, they can nevertheless sue the cartelists though they dealt *indirectly* with them.[87] Thirdly, the definition in s 3(4)(c) is also arguably irreconcilable with some provisions relating to abuse of dominant position. Section 10(2)(a) proscribes directly or indirectly the imposition of unfair purchase or selling price or other unfair trading condition on any supplier or customer as an abuse of dominant position. It has been said that there are two forms of abuses in the EU abuse of dominant position jurisprudence, namely, exploitative and exclusionary abuses, and unfair prices or trading conditions belongs to the former. While in practice there appears to have been no case where this provision in Art 82 has been invoked it remains theoretically a possibility. Thus, where a consumer—be it intermediate or final—has been subject to some unfair pricing or trading conditions amounting to an abuse of dominant position under s 10(2)(a) it is debatable whether the final consumer should be denied his right to seek relief under s 64(1) by virtue of the definition in s 3(4)(c). This line of argument should by analogy apply to s 10(2)(b), particularly sub-paragraph (ii) for it is more often than not the final consumers who would suffer as a result of limiting or controlling market outlets or market access by a dominant enterprise. Indeed, the same argument may apply *mutatis mutandis* to tying under s 10(2)(e)—often coupled with a refusal to supply—for a consumer who is subject to a tying practice may well be either an intermediate or final consumer. Fourthly, paragraph (c) of s 3(4) notably has no equivalent in the UKCA 1998 and SCA 2004. Thus, the civil court may have a hard time trying to reconcile s 3(4)(c) and s 64 when the law is enforced. One way to avoid this dilemma is to construe the words '[f]or the purposes of this Act' to mean 'for the purpose of Part II of this Act' so as to limit the application of s 3(4) to the prohibited anti-competitive practices only. This would not only deal with the problem mentioned above but also leave final consumer' rights under s 64 untouched.

The fifth issue is the stance of the MyCC in relation to predatory pricing. While there is no express reference to this term, it is arguable that it is included in the concept of predatory behavior towards competitors.[88] It is undeniable that predatory pricing is a form of abuse that is inherently difficult to prove, whether legally or economically. It is further complicated by the fact that the US and EU antitrust jurisprudence has parted way on this issue—the US courts insist on proof of recoupment[89] while the ECJ has held otherwise.[90]

The sixth issue is whether there should be a limit to the financial penalty imposed. In the EU the modernization regulation limits the fine to not exceeding 10 % of the total turnover in the preceding business year of each undertaking and

[87] For a discussion on the interaction among cartelists, direct and indirect purchasers: Petrucci (2008).

[88] Section 10(2)(f).

[89] *Matsushita v Zenith Radio* 475 US 574 (1986); *Brooke Group Ltd v Brown Williamson Tobacco* 509 US 209 (1993).

[90] Case C-202/07 P *France Telecom SA v European Commission* [2009] ECR I-2369 para 37.

association of undertaking participating in an infringement.[91] In Singapore the law states that the fine to impose may not exceed 10 % or such other percentage of such turnover of the business in Singapore for each year of infringement for such period, up to a maximum of 3 years as the Minister may prescribe.[92] The CCS has by its guidelines limited the penalty to 3 years.[93] The CA 2010, on the other hand, provides that the financial penalty shall not exceed 10 % of the worldwide turnover of an enterprise over the period during which an infringement occurred.[94] In other words, the CA 2010 does not impose any temporal limit on the amount of fine that may be imposed. Presumably, an enterprise found to have committed an infringement can be fined for the whole duration of its involvement. As far as businesses are concerned this can be daunting as any involvement in cartel activities, for instance, for a period of 10 years could well result in a fine for the whole decade. The policy argument for this kind of provision is clearly to deter businesses from being involved in cartel activities. Such a draconian provision may, however, be debatable vis-à-vis abuse of dominant position where the abuses are more often than not less clear cut and whether an enterprise was dominant at any particular point in time can also be questioned as market share fluctuates from time to time.

Seven, as drafted the CA 2010 provides that any party aggrieved by the decision of the Commission may appeal to the Competition Appeal Tribunal (CAT). Section 44 provides that the CAT 'shall have *exclusive* jurisdiction to review any decision made by the Commission…'[95] Unlike the SCA 2004 there is no provision in the CA 2010 for further appeal or appeal on a point of law to the civil courts. There are presumably different categories of issues that can be brought up in an appeal, namely, findings of facts by the Commission, pure legal issues, and mixed legal and economic issues. In respect of findings of facts, such as whether the representative of an alleged cartelist was present at a meeting where the alleged price-fixing took place, this issue can perhaps be reviewed by the CAT on appeal.[96] Assuming that the CAT made the same factual finding as the Commission below but the finding was patently erroneous due to contradictory documentary evidence, it is arguable that a party aggrieved by the finding is deprived of his right to appeal further as a result of s 44. As for pure legal issues, such as whether an order of the Commission is within the scope of s 40(1), this is arguably within the scope of the review jurisdiction of the CAT as it should constitute part of the decision made by the Commission. However, where the CAT and Commission come to a debatable legal interpretation the aggrieved party may well be deprived of any further relief unless he could make out a case for judicial review. Where there is a dispute as to a

[91] Art 23(2) of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (16 December 2002) ('Modernisation Regulation').

[92] Section 69(4) of the SCA 2004.

[93] CCS (2007).

[94] Section 40(4).

[95] Emphasis added.

[96] Even this point is not absolutely clear and is subject to statutory interpretation as s 44 refers to 'any decision' and it is debatable whether a finding of fact constitutes a 'decision'.

mixed legal and economic issue, such as the definition of the relevant market, the same predicament as seen in relation to pure legal issues above perhaps applies *mutatis mutandis*.

The last issue is concerned with civil claims brought by the victims of an anti-competitive agreement or conduct. The SCA 2004 puts in an automatic statutory stay of civil proceedings commenced by such victims in four sets of circumstances, namely, (i) where there is an investigation pending before the CCS; (ii) where there is an appeal to the Competition Appeal Board; (iii) where there is an appeal to the High Court; and (iv) where there is an appeal to the Court of Appeal.[97] There is, however, no such automatic statutory stay in the CA 2010. While many practitioners representing large businesses have voiced their dissatisfaction with the lack of a statutory stay of civil proceedings, it is clear that it represents a legal principle or policy decision as opposed to any commercial consideration. To stay the civil proceedings pending the outcome of the State-led investigation is tantamount to saying that the State must be right at all times and private citizens must always abide by the State action and, perhaps *in*action. While it is undeniable that there is a risk of inconsistent decisions between the Commission and civil courts, one cannot deny the fact that there are occasions where there is a genuine breach of competition law and there are victims who have suffered damages but due to incompetent investigation or prosecution of cases no finding of infringement is made, when a different outcome would have been the case in a privately-initiated claim in the civil court.[98] In as much as competition law is meant to reduce or eliminate monopolization through anti-competitive means, it is debatable if the State itself should "monopolize" the power of pursuing anti-competitive claims or abuse its "dominant" position. Surely, this is an area where the judiciary will have to look into to see if there is a need for a new procedure to deal with competition law claims or whether they can be dealt with as part of the case management practice.

6 Challenges

Substantive issues aside, the foremost challenge facing the MyCC is probably its ability to attract suitable and qualified manpower to handle its cases, from the investigation stage to adjudication. The commissioners aside, all its officers from the Chief Executive Officer (CEO) all the way down are ordinary civil servants.[99] Being a statutory body, the CCA 2010 provides that the MyCC may from time to time appoint and employ such number of employees as it thinks necessary and upon such terms as it considers appropriate for carrying out the purposes of the

[97] Section 86; the appeal relates to an appeal brought upon the decision of the CCS.

[98] Experience from other jurisdictions with mature competition law enforcement has shown that antitrust enforcement is always complex and complicated and many enforcers have even robed in private practitioners to help them resolve complex legal and economic issues. The ACCC, for instance, usually engages senior counsel to lead major cases.

[99] The civil service in Malaysia is not particularly well paid compared to, for instance, the neighbouring Singapore. At the time of writing, the MyCC has merely around seven officers manning a small office, though it is expected to move to a larger office and more officers are expected to join then.

competition laws.[100] However, the same provision also at the same time ties the hands of the MyCC on the remuneration package that it may offer to potential employees.[101]

Manpower issue aside, the MyCC's independence may also be open to debates. There are essentially two aspects to its independence: policy independence and financial independence.[102] There are a few issues to analyse vis-à-vis policy independence. The first is the constitution of the MyCC. Under the CCA 2010 the Commission is comprised of a Chairman, four members representing the government, and a maximum of five other members from the private sector. The first batch of commissioners comprise of a retired Chief Judge of Malaya as the Chairman, followed by the Attorney General, one appointee from the Economic Planning Unit of the Prime Minister's Department, the Secretary-General of the Ministry of International Trade and Industry, the Secretary-General of the Ministry of Domestic Trade, Cooperatives and Consumerism (the Ministry to which the MyCC is accountable), and five other individuals.[103] As half of the commissioners are either current or retired civil servants their inclination in their decision-making would be crucial in determining the independence of the Commission. Further, the CCA 2010 expressly provides that the Minister 'may, in writing, give to the Commission *directions of a general character*, relating to the *performance* of the functions and powers of the Commission and the Commission *shall give effect* to such directions.'[104] It remains to be seen what kinds of directions the Minister would give in time to come and how *general* such directions may be.[105] Policy independence aside, the financial independence of the MyCC is also crucial to its ability to operate independently and impartially. Being a statutory body the MyCC's budget comes from the federal government, particularly at the inception. To ensure

[100] Section 22(1) of the CCA 2010.

[101] Section 22(2) of the CCA 2010 provides that the Commission 'may, *with the approval of the Minister*, determine the conditions of service of its employees.' (Emphasis added) The CCA 2010 does, however, permit the MyCC to appoint such agents, experts or consultants as it deems fit to assist the MyCC in the performance of its functions: s 17(2)(d) of the CCA 2010; there is thus a likelihood that the MyCC may 'outsource' its work when it should be given the power to offer suitable remuneration package that matches the private sector as the Communications and Multimedia Commission does.

[102] Though these two may be intertwined.

[103] The members of the Commission are appointed by the Prime Minister upon the recommendation of the Minister of Domestic Trade. There was no apparently public explanation as to the fulfillment of each of the five individual members from the private sector other than the statutory basis for their appointment which, according to s 5(1)(c) of the CCA 2010, simply states '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.' Indeed, the same paragraph states 'not less three but not more than five other members'; it is thus debatable whether there was a need to appoint to the maximum of five individual members at the inception, not to mention the low, unconvincing statutory threshold of the appointment of commissioners. Indeed, of the five individual members three of them have legal background, though not in relation to competition law strictly.

[104] Section 18(2) of the CCA 2010; emphasis added.

[105] It may well touch upon the decision of the MyCC in relation to taking up a complaint and commencing investigation, deciding not to prosecute a matter after the initial investigation, deciding to investigate further and to prosecute where necessary, or the ultimate finding of an infringement or otherwise.

its financial independence, the MyCC will have to find its own sources of funding. The CCA 2010 does provide that the Commission shall have the power to among others impose a penalty for the infringement, and impose fees or charges for services rendered by the Commission. As to where the fine and fees levied go to upon collection remain in contention. Section 27 of the CCA 2010 provides for the establishment of a fund called the Competition Commission Fund which is administered and controlled by the Commission, and such sums as may be provided by Parliament from time to time to the Commission, fees and charges imposed by the Commission and 'all other *moneys*…which may in any manner become payable to…the Commission in respect of any matter *incidental to its functions and powers*' shall go to this Fund.[106] It is debatable whether the word 'moneys' includes fines imposed by the Commission. It is arguable that since meting out fines is incidental to its functions and powers, the fines imposed and collected by the Commission should come within the term 'moneys' and thus go to the Fund. Another provision that should be taken into account is s 62(5) of the CA 2010 which provides that all sums of '*money* received by the Commission *under this section* shall be paid into the Federal Consolidated Fund.'[107] Since this section also refers to the term 'money' and since it deals with 'compounding of offences' it is arguable that the term 'money' should be construed widely both in the CA 2010 and CCA 2010 to cover fines imposed by the Commission. By the same argument, it is arguable that since a competition law infringement is strictly not an offence, the fines imposed pursuant to a finding of an infringement should not go to the Federal Consolidated Fund but should instead go to the Competition Commission Fund. If this is the correct construction of s 62(5) of the CA 2010 and s 27(2) of the CCA 2010 the Commission should have sufficient funds for its daily operations as well as hiring of experts without being dependent on the federal government for handout.

Another challenge facing the Commission is nothing but to refrain from taking the formalist approach as opposed to the economic approach when analyzing a case. Hardcore cartels aside the Commission should avoid taking the black letters of the law too strictly and should be guided by economic analysis though it is undeniable that it is a law and the decision is ultimately a legal one. This would, however, depend on the ability of the Commission to hire proper, qualified experts, whether competition lawyers or economists.[108] In short, despite the significance of economic analysis, one should not forget that it is ultimately a *law*—the competition law—and the competition authority will have to come to a legal decision[109] and ensure that its decisions are consistent, while taking into account the policies of the day when rendering its decisions.[110]

[106] Section 27(2)(a)(b) and (f) of the CCA 2010; emphasis added.

[107] The Federal Consolidated Fund means the government coffer; emphasis added.

[108] Surely, this is to a large extent affected by the control the Commission has over the funds it has or collects.

[109] Bishop and Walker (2010:4) para 1–003 ('It should be stressed that empirical techniques are an aid to the legal process of evaluating competitive effects, not an end in themselves; empirical evidence can be used to support an argument but does not constitute the argument itself.').

[110] As Whish (2009:19) points out, 'competition policy does not exist in a vacuum: it is an expression of the current values and aims of society and is as susceptible to change as political thinking generally.'

7 Conclusions

The substantive construction issues and challenges facing the Commission aside, there are other more fundamental matters that are either not dealt with in the CA 2010 or remain in the gray area.

One competition law concern that is not addressed in the CA 2010 is interlocking directorate. Interlocking directorate may arise in a number of situations. It may, for instance, arise where the same director sits on the boards of two competitors. It may also arise where there is a joint co-operation between two competitors and pursuant to the agreement, some directors of the two competitors sit on each other's board as well as their own company's board. The law prohibiting interlocking directorate may be found in the antitrust laws of the US, Japan and Indonesia.[111] Interlocking directorate affects competition in two dimensions. The first has to do with the establishment and operation of cartels. With the overlapping set of directors sitting on the boards of horizontally competing companies it is tantamount to having a 'single economic entity' save no common ownership. The situation of horizontal competitors aside, an interlocking directorate may also take place where the same director sits on the board of one company and the board of the parent company of a subsidiary which competes with the first company. The second dimension is indirect collusion or concerted practice through exchange or sharing of commercially sensitive information. While the CA 2010 is modeled upon the EU competition law and is, thus, taken to include the competition law principles that prohibit the exchange of commercially sensitive information between competitors, and while the term 'agreement' is defined widely to include concerted practice, there will be a conflict between company law and competition law where there is an interlocking directorate for, while competition law prohibits the exchange or sharing of commercially sensitive information between competitors, company law dictates that directors be entitled to every piece of information concerning the company.[112] Where there is a co-operation agreement between two competitors, the agreement may be subject to competition analysis to determine its anti-competitiveness. However, experience tells us that such analysis is confined to the anti-competitive effects, if any, of the agreement on consumers. Competition analysis, in the absence of any specific provision against interlocking directorate, hardly goes to query the anti-competitive effect, if any, of it. Insofar as it is imperative that businesses are to operate independently with their own commercial strategies, commercially sensitive information and strategies would slip through the eyes of competition authorities where there are common directors sitting on the boards of two competitors, and more so where there is no co-operation agreement between them at all. This is a difficult area for competition law to tackle for, while competition law prohibits sharing or exchange of information between competitors and their officers, directors of a company have the right to have the relevant information for their deliberations.

[111] Respectively s 8 of the Clayton Act; article 13 of the Anti-monopoly Law 1947 of Japan; Article 26 of Law No. 5 of 1999 concerning prohibition of monopolistic practices and unfair business competition.

[112] The EU competition law does not prohibit interlocking directorate and there appears to be no case law so far on this issue.

In other words, it is a conflict between competition law, on the one hand, and company law, on the other hand.[113] It is even thornier when it comes to operational issues, for without access to detailed figures and data, the directors are effectively hands-strapped. In the situation where there is no co-operation agreement so that there is no issue of competition law analysis by the authority, directors simply have the right to have access to whatever information they require in order for them to perform their duty properly and such right is theoretically unrestricted.[114]

As it stands now the CA 2010 does not have a merger control. One argument in support of the policy decision to keep merger control out, at least for the time being, is that when the Sherman Act 1890 was passed it did not contain a merger control either. Further, it took the EU more than 30 years before the Merger Regulation was introduced after the Treaty of Rome 1957 introducing the then Articles 85 and 86.[115] While this is essentially a policy issue, the downside of having no merger control is the State will have no pre-emptive measures to deal with market structures. This is particularly significant in countries with a small population and economy or where the economy is highly concentrated or oligopolistic.[116] It remains to be seen when the government will introduce a merger control, whether in the form of a separate Act of Parliament or by amending the current CA 2010.[117]

As stated above, activities regulated by the two pieces of legislation, namely, the CMA 1998 and ECA 2001, are expressly excluded from the scope of the CA 2010. This effectively carved two industries out. However, there remain two outstanding issues. First, these two sectoral regulators are not known to be rigorous. Second, there are bound to be instances where it is debatable whether a particular agreement or conduct falls within the ambit of the sectoral regulation or the CA 2010. As such, Parliament inserted a provision to deal with the so-called interworking relationship with sectoral regulators.[118] As the government develops sectoral policies from time to time, it will have to consider carefully whether to confer more sectoral regulations on the relevant authorities or otherwise. It is rather early to predict the usefulness of s 39 of the CCA 2010.

[113] The same analogy may be made with the tension between competition law, which encourages more and wider access, and intellectual property law, which restricts access, on the other hand.

[114] Indeed, the notion of interlocking directorate should arguably be expanded to cover officers for more often than not, particularly where there is collaboration between competitors, it is not so much of what the directors know for they do not run the business from time to time, but what the officers who do the day-to-day ground work know and share among themselves!.

[115] See n 29 above.

[116] An example may be New Zealand which has a small population of 4 million and most of the industries have fewer than four players, as informed by an officer of the New Zealand Commerce Commission (**NZCC**) when the author attended a workshop hosted by the ASEAN Experts Group on Competition (**AEGC**).

[117] The stand of the government of the day is that it is committed to introducing merger control but the time to do so remains a myth.

[118] Section 39 of the CCA 2010 which provides: '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.'

While it is undeniable that the CA 2010 has modeled itself largely upon the EU competition law, at least substantively and literally, with the use of such terms as abuse of dominant position,[119] there are many differences between Malaysia and the EU—politically, economically and legally. In particular, there is no issue of market integration in Malaysia and, as such, the EU cases where parallel trade was held anti-competitive may have to be examined with a pinch of salt. The Commission would thus have to tread with caution when "implanting" the EU competition jurisprudence. It may indeed be prudent for the Commission to look beyond the EU and have some comparative analysis of the various approaches of some other mature competition jurisdictions. Further, the Commission would have to constantly remind itself that competition law and economics is a dynamic subject and it should thus refrain from being too formalistic in its approach, save perhaps in relation to hardcore cartels. After all, the burden rests on the shoulders of the MyCC to develop a competition law with a Malaysian flair.

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[119] See Nowag (draft); Julian has kindly asked me to review his draft.