WK11 & 12

COMPETITION LAW

MGM3352

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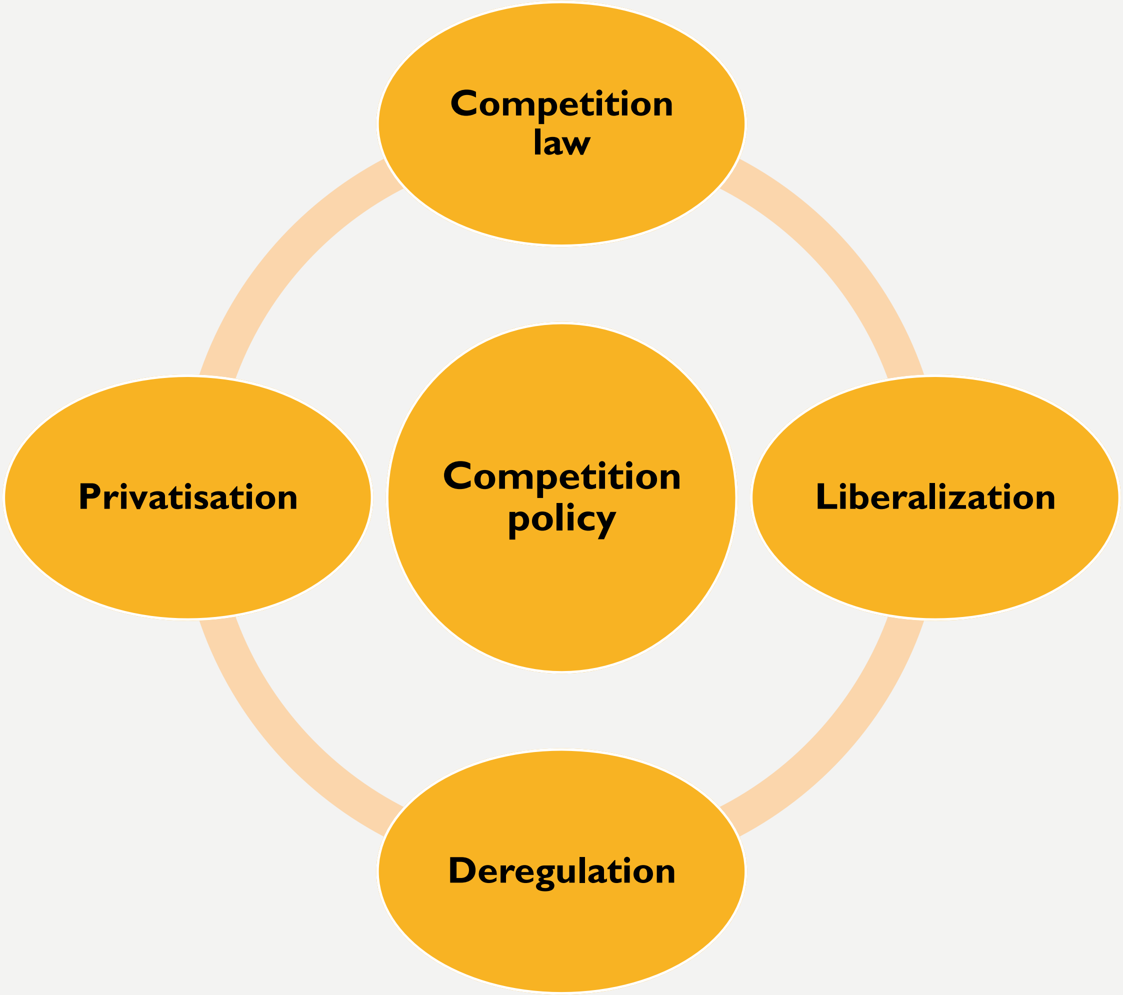
CONTENT

- Competition and market
- Scope of application of competition law
- Horizontal and vertical agreements and exceptions
- Abuse of dominant position and exceptions
- Effects of anti-competition towards businesses

COMPETITION AND MARKET

- Competition policy encompasses competition law and economic policies that facilitate the free flow of resources to their most valued users (Sivalingam, 2004)
- Competition law promotes and maintains competition in the market. It regulates the behavioural and structural conduct of players in the market through anti-monopoly prohibitions, concerted conduct laws and merger laws (Safinaz et. al, 2012)



De-monopolisation, liberalisation and privatisation result in lower prices, better products and greater efficiency because players need to compete with each other to remain as a player in the market (Safinaz, et al, 2012)

The Four Market Structures

	Perfect Competition	Monopoly	Monopolistic Competition Brand	Oligopoly
Number of Firms	Many	One	Many	Few
Type of Product	Identical	Unique	Differentiated	Either
Ease of Entry	Easy	Blocked	Easy	Hard
Examples	Commodities Rice	Government Utilities	Brands Clothing Restaurants	Manufacturing Cars Computers

Pooley, 2014

A complex system

- There is no clear definition of competition
- Competition policy is a complex system
- To get the goals achievable from a competition policy, one better comprehends how competition works.
- Understanding competition cannot be arrived deductively from the model of perfectly competitive markets composed of rational self- interested agents with perfect willpower; competition is better understood inductively through empirical research.

Maurice E.S "What is Competition" (p.52) in
Daniel Zimmer (eds.), 2012. The Goal of Competition.

HOW DOES COMPETITION POLICY EMERGED?

- Unfair practices of big business that control the market: Monopoly (earlier days in the USA, "monopolies" a.k.a "trusts" → Anti-monopoly law; Anti-trust law; Competition law

A monopoly when:

~ One company controls all / almost all of the supply of a product

~ Result: little / no competition in that industry; prices raised higher

eg: Standard Oil Company (est. 1870)

: In 1911 the US Supreme Court held the company practice violated the anti-monopoly law

& ordered the company to break itself up into smaller companies. No more one company dominate or control the oil industry.

(Ref.: David Burns 2009,2020 **The fight against monopolies / trusts** at *http://www.fasttrackteaching.com)*

SCOPE OF APPLICATION OF COMPETITION LAW

- Covers enterprises (private / GLC) which engages in a commercial activity relation to goods & services
- Also applies to commercial activities outside Malaysia (which has effect in any market in Malaysia)

Exemptions:

- First Schedule of Competition Act 2010:

- Commercial activity regulated under the Communications & Multimedia Act 1998, Energy Commission Act 2001, Petroleum Development Act 1974 (in so far activities directly in connection with upstream operation) & Malaysian Aviation Commission Act 2015

- Any agreement / conduct complying with legislative requirement
- Collective bargaining activities/agreements in respect of employment terms & conditions
- Enterprise entrusted with operation of services of general economic interest/ having character of a revenue-producing monopoly

"COMMERCIAL ACTIVITY"

s.3 (4):..means any activity of a commercial nature but does not include—

(a) any activity, directly or indirectly in the exercise of governmental authority;

(b) any activity conducted based on the principle of solidarity; and

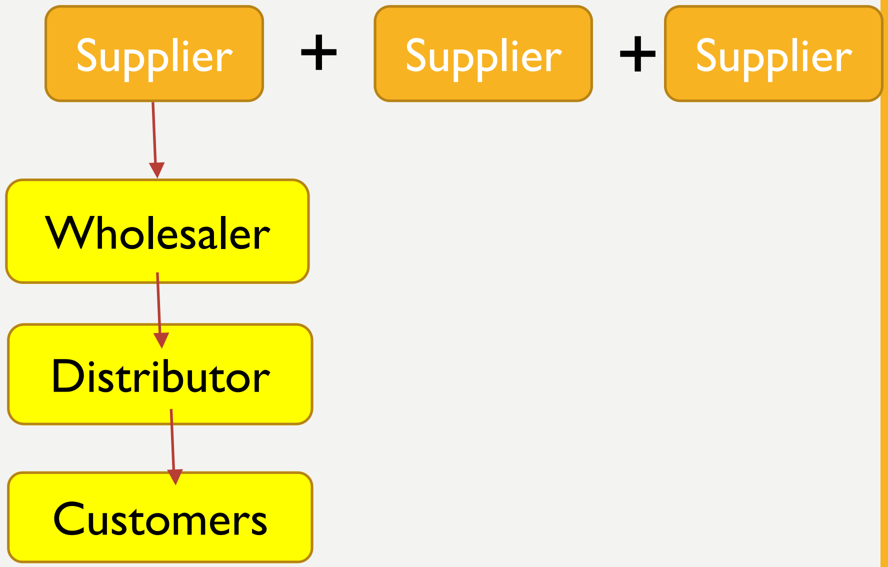
(c) any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity.

Anti-competitive Practices

HORIZONTAL AND VERTICAL AGREEMENTS AND EXCEPTIONS

“horizontal agreement” means an agreement between enterprises each of which operates at the same level in the production or distribution chain;

“vertical agreement” means an agreement between enterprises each of which operates at a different level in the production or distribution chain.



PROHIBITED H & V AGREEMENT

- S. 4: … insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.

- Horizontal Agreement Significantly…
  - Fix a purchase price/ any trading conditions
  - Share market / sources of supply
  - Limit / control
    - production
    - Market outlets/market access
    - Technical /technological development
    - investment
  - Bid rigging

PRICE FIXING

- Price fixing in a horizontal agreement is illegal
- There is no corresponding prohibition for vertical agreements
- Resale price maintenance (e.g., fixing resale prices or setting a minimum resale price) in a vertical agreement is not illegal per se. But may still be viewed negatively by MyCC and investigated into.

Eg:

i) Malaysian Airline System Berhad (**MAS**), AirAsia Berhad (**AA**) and AirAsia X Sdn. Bhd. (**AAX**) (**Collaboration Agreement**)

ii) the Cameron Highlands Floriculturist Association (**CHFA**)

iii) the Pan-Malaysia Lorry Owners Association (**PMLOA**)

iv) the Giga Shipping Sdn. Bhd. and Nexus Mega Carriers Sdn. Bhd. agreement

v) the Malaysia Indian Hairdressing Saloon Owners Association (**MIHSOA**),

EG OF CLOSING OF INVESTIGATION BY UNDERTAKING (S.43)

COMPETITION ACT 2010

Undertaking by the Malaysia Indian Hairdressing Saloon Owners Association (Reg No. 698) to the Competition Commission

Persons giving this undertaking

This undertaking is given to the Competition Commission ('the Commission') by the Malaysia Indian Hairdressing Saloon Owners Association (Reg No.698) ('MIHSOA') of No.67A Jalan Landak Off Jalan Pudu, 55100 Kuala Lumpur for the purposes of section 43 of the Competition Act 2010 ('the Act').

Background

(2) The MIHSOA is an association registered under section 7 of the Societies Act 1966 (Act 335) on 3 July 2001 with Registration Number 698. The MIHSOA's address is at No.67A, Jalan Landak Off Jalan Pudu, 55100 Kuala Lumpur. The MIHSOA members consist of owners and operators, aged 18 and above, who operate barber shops in Malaysia.

(3) Member enterprises of the MIHSOA provide haircut services to their clients in order to enhance their appearance. Their services include shampooing, trimming, cutting and styling hair. Some barbers will offer scalp treatments, fit hairpieces and provide face shaving for clientele consisting mostly of men.

(4) On 1 February 2013, the former Chairman of the MIHSOA, the late Mr. K.Kaviarasan issued a statement which was published in major newspapers in Malaysia that the member enterprises of the MIHSOA in a meeting dated 30 January 2013 had decided to raise the price of haircut services by RM 2.00 effective 1 February 2013. In his statement, the late Mr. K.Kaviarasan said that the MIHSOA will enforce the decision to increase haircut services by RM2.00 and will not hesitate to take action against those member enterprises who fail to follow the decision of the said meeting.

PERSATUAN PENGUSAHA JURUGAYA RAMBUT INDIA MALAYSIA (Reg. No. 698)
மலேசிய இந்தியர் சிகை அலங்கார நிலைய உரிமையாளர்கள் சங்கம்
No. 67A, Jalan Landak, Off Jalan Pudu, 55100 Kuala Lumpur Tel : 03-9226 2300 E-mail : ppjrim@gmail.com

(5) Following the statement made in the major newspapers, the Commission conducted an investigation on this matter. The results of the investigation revealed that the MIHSOA member enterprises including its committee members had engaged in an anti-competitive practice by entering into a horizontal agreement that had the object to fix the price of haircut services offered by them and thereby infringing section 4(2)(a) of the Act.

Commencement of undertaking

(6) This undertaking comes into effect when:

(i) the undertaking is executed by the MIHSOA and its member enterprises; and

(ii) the Commission accepts the undertaking so executed.

(7) Upon the commencement of this undertaking, the MIHSOA and its member enterprises undertake to assume the obligations set out in paragraph 8 below.

Undertaking

(8) The MIHSOA and its member enterprises undertake that it will:

(i) Conduct an Emergency General Meeting ('the EGM') with an agenda to withdraw the decision made on 30 January 2013 that the members of the MIHSOA will raise the price of haircut services by RM 2.00 effective 1 February 2013; and

(ii) Direct and ensure that each of its member enterprises including the current committee members of the MIHSOA do not engage in any anti-competitive conduct in the future.

Acknowledgments

(9) The MIHSOA acknowledges that:

(i) as per section 43(3) of the Act, the Commission will make this Undertaking available for public inspection by publishing it on the Commission's website at www.mycc.gov.my;

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(ii) the Commission will, from time to time, make public reference to the Undertaking including in news media statements and in the Commission's publications; and

(iii) this Undertaking in no way derogates the rights and remedies available to any other person arising from the alleged conduct.

Executed by

The Malaysia Indian Hairdressing Saloon Owners Association (Reg No. 698) on behalf of its member enterprises

[redacted]

President/~~Secretary~~
Name: [redacted]
I/C Number [redacted]

PERSATUAN PENGUSAHA JURUGAYA RAMBUT INDIA MALAYSIA
NO: 67A, JALAN LANDAK
OFF JALAN PUDU
55100 KUALA LUMPUR

This....30.......day of..January...2014

ACCEPTED BY THE COMPETITON COMMISSION.

[redacted]

Tan Sri Dato' Seri Siti Norma Yaakob
Chairman

TAN SRI DATO' SERI SITI NORMA YAAKOB
Chairman
Malaysia Competition Commission

This....30.......day of January..2014

Please refer to MyCC website for others

BID RIGGING

In public procurement, involves contractors & firms conspiring to increase the prices / lower the quality of goods & services in a bidding process. Not genuinely competing against each other to win a tender.

Why is it prohibited?

It unlawfully prevents or reduces competition in a marketplace. There would be wastage of public resources (government will pay higher price for a contract, which actually could be lower price) & erodes public confidence in the tender process.

Relief of liability

5. Notwithstanding section 4, an enterprise which is a party to an agreement may relieve its liability for the infringement of the prohibition under section 4 based on the following reasons:

(*a*) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;

(*b*) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;

(*c*) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and

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

Also, an enterprise may apply to the commission for an exemption

- If granted,referred to as "individual exemption" (s.6)

~ conditional exemption

s. 8: Block exemption, with conditions, can also be granted to particular category of agreements

EXCEPTIONS

Also, an enterprise may apply to the commission for an exemption

- If granted, referred to as "individual exemption" (s.6)

~ conditional exemption

s. 7: This exemption can be cancelled if the Commission is satisfied that—
(a) there has been a material change of circumstance since the Commisssion granted an individual exemption; or
(b) an obligation has been breached,

s. 8: Block exemption, with conditions, can also be granted to particular category of agreements

Exempt from the prohibition under section 4, maybe with condition / obligation (s.8(3))

Members of the public are allowed to give submission to MyCC at least 30 days from the date of publication of the proposed block exemption (s.9)

ABUSE OF DOMINANT POSITION AND EXCEPTIONS

DOMINANCE IN A MARKET

- Dominance in a market is not problematic unless there is an abuse of its dominance
- Dominant enterprise has a special responsibility to ensure that its conduct does not impair competition in the relevant market.

“dominant position” means a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors (s.2 Competition Act 2010)

ABUSE OF DOMINANT POSITION

- S. 10: an enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of dominant position in any market for goods or services.

a
directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer

b
Limit /control to the prejudice of consumers
- Production
- Market outlets/access
- Technical /technological development
- investment

c
refusing to supply to a particular enterprise or group or category of enterprises

d
Apply different conditions to equivalent transactions with other trading parties that may
- Discourage new market entry/investment/ expansion of competitor
- Force from market / seriously damage an existing similarly standing competitor
- Harm competition in any market which tt dominant entp is participating

e
making the conclusion of contract subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contract

f
any predatory behaviour towards competitors

g
buying up a scarce supply of intermediate goods or resources required by a competitor, with no reasonable commercial justification

EXCEPTIONS: Not An Abuse Of Dominant Position

s. 10(3) an enterprise in a dominant position is NOT prohibited from taking any step which has **reasonable commercial justification or represents a reasonable commercial response** to the market entry or market conduct of a competitor :

The enterprise can justify its conduct on either grounds above

s.10(4) The fact that the market share of any enterprise is above or below any particular level **shall not in itself be regarded as conclusive** as to whether that enterprise occupies, or does not occupy, a dominant position in that market.

S. 10(3) Case study MEGASTEEL SDN. BHD

Following a complaint from Melewar to MyCC in October 2012 that Megasteel had allegedly breached Section 10(1) of the Competition Act 2010, MyCC investigated Megasteel.

In November 2013, MyCC announced a proposed decision saying Megasteel had breached the law by abusing its dominant position by charging or imposing a price for its hot rolled coil that was tantamount to a margin squeeze, and that a financial penalty of RM4.5 million was to be imposed on Megasteel.

However, MyCC cleared Megasteel of all allegations on April 15 2016.

Melewar intended to file an appeal against MyCC's decision on June 16, 2016, but later withdrawn the appeal on June 21, 2016.

FOR IMMEDIATE RELEASE
NEWS/ECONOMY DESK

NEWS RELEASE

THE MyCC HAS CLEARED MEGASTEEL SDN. BHD. FROM ANY INFRINGEMENT UNDER THE COMPETITION ACT 2010

KUALA LUMPUR, 18 April 2016 - The Malaysia Competition Commission ("MyCC") has issued a Finding of Non-Infringement in relation to the conduct of Megasteel Sdn. Bhd. ("Megasteel"). MyCC had initiated an investigation in October 2012 upon receipt of a complaint relating to the alleged abuse of dominant position by Megasteel, an infringement of Section 10(1) of the Competition Act 2010.

The complainant alleged that Megasteel as the sole supplier of Hot Rolled Coil ("HRC"), an essential material to produce Cold Rolled Coil ("CRC"), is charging higher than the international price of HRC. The complainant also alleged that Megasteel is competing in the CRC market and often undercuts its price.

After deliberating on the written and oral representations submitted by Megasteel, the MyCC has conducted further analysis and came to the conclusion that Megasteel neither abuse its dominant position nor practice margin squeeze in the relevant markets. The MyCC therefore finds that there is no infringement of the Competition Act 2010 by Megasteel.

The Notice of the Decision will be uploaded on the MyCC website. For more information on the case or on the MyCC, kindly log on to www.mycc.gov.my.

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For media enquiries, please contact:
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Corporate Communication Unit
Malaysia Competition Commission

MyCC's reasons for non-infringement finding, includes:

i- Wrong analysis of relevant market : Megasteel is found not a dominant supplier of HRC consumed in Malaysia. Immaterial that it is the sole producer of HRC then, because of the availability of cheaper imported HRC.

Ii- Steel market is distorted due to dumping issue: MyCC was looking narrowedly at the upstream & downstream products market. It had not considered dumping of steel products (HRC) by international producers from China & Indonesia at much cheaper price as compared to HRC domestic markets.

iii- No margin squeeze: Megasteel is not dominant in CRC but the complainant. Megasteel de minimis presence will not have any effect on CRC price in Malaysia, or no ability to drive CRC producers out of the market

Ref: Lexology: Tay & Partners, April 21 2016

Second Schedule

[Section 13]

Activities not subject to Chapters 1 and 2 of Part II

Chapters 1 and 2 of Part II of this Act shall not apply to—

(a) an agreement or conduct to the extent to which it is engaged in an order to comply with a legislative requirement;

(b) collective bargaining activities or collective agreements in respect of employment terms and conditions and which are negotiated or concluded between parties which include both employers and employees or organisations established to represent the interests of employers or employees;

(c) an enterprise entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition under Chapter 1 and Chapter 2 of Part II would obstruct the performance, in law or in fact, of the particular tasks assigned to that enterprise.

EFFECTS OF ANTI-COMPETITION TOWARDS BUSINESSES

CASE STUDY: DAGANG NET

The Malaysia Competition Commission (MyCC) has fined Dagang NeXchange Bhd unit Dagang Net Technologies Sdn Bhd (Dagang Net) a total of RM10.3 million for the abuse of its dominant position by engaging in exclusive dealing.

- What is the business?

Dagang Net is the government's sole service provider in the provision of online trade facilitation services for Sistem Maklumat Kastam under the National Single Window (NSW).

The NSW is an electronic-based ecosystem that enables customs related documents and transactions to be transferred electronically between the trading communities and regulatory authorities in Malaysia via a single point of entry.

- Why is it being fined by MyCC? How does MyCC determine it is violating the Competition Act 2010?

-after a thorough investigation and due process, Dagang Net had infringed Section 10(1) of the Competition Act 2010 by engaging in exclusive dealing through the imposition of exclusivity clauses on software providers of the NSW from October 2015 to November 2017.

-It harms competition in the market because it prevents software providers from providing similar services to end users in the upcoming uCustoms system

-MyCC concluded that the imposition of the exclusivity clauses constitutes an abuse of Dagang Net's dominant position in the relevant market, which leaves its competitors at a competitive disadvantage when entering the uCustoms market.

- What is the consequence of MyCC decision?

-to cease and to refrain in the future, from engaging in exclusive dealing that may disrupt competition in the provision of trade facilitation services.

-the directors and senior management executives of the company to enrol in competition law compliance training at their own expense.

GROUP TASK- Choose any TWO problems below, one of which should a case study from Malaysia

- **Provide a case study of prohibited horizontal agreements**
- **Provide a case study of prohibited vertical agreements**
- **Provide a case study of abuse of dominant positions**

In your case study, please include:

i. **What is the business?**

ii. **Why is it being fined by the authority*? How does the authority determine it is violating the Competition law?**

iii. **What is the consequence of the authority's decision?**

iv. **If there is an appeal by the infringer, whether the appeal is accepted by the authority?**

* The authority is from any jurisdiction having Competition law. Malaysian authority is MyCC.

*** Prepare a 10 minutes slide presentation. To be presented during next Tuesday class.**

** Total (12 marks) : 8 marks for the task accomplished + 4 marks for good teamwork*