COMPETITION LAW IN MALAYSIA

A Digest of Recent Developments[1]

In Malaysia, the Competition Act 2010 (Act 712) came into force in 2012. Since then, there has been a number of notable developments in this area of law. The first half of this article explains the legal and enforcement framework of competition law in Malaysia. Relevant statistics and enforcement decisions of the Competition Commission are also presented for a better understanding of the same. Further, recent judicial decisions such as *Competition Commission v MAS-Air Asia* Application for Judicial Review No: WA-25-82-05/2016 [2019] 6 CLJ 623 and *MyEG v Competition Commission* Application for Judicial Review No: WA-25-81-03/2018 are also analysed. These cases represent the recent developments of competition law by the courts, specifically on the interpretation of the provisions in the Competition Act 2010. This article sets out the regulatory concerns surrounding the competition law framework in Malaysia and how these concerns may be addressed.

Dato' Seri Mohd Hishamudin **YUNUS**
LLB (Hons), LLM (London School of Economics and Political Sciences),
Diploma in International Commercial Arbitration (CIArb (UK));
Barrister-at-law (Lincolns Inn), Advocate and Solicitor (Malaysia);
Member, CIArb; Fellow Asian Institute of Alternative Dispute Resolution;
Chairman, Malaysian Competition Commission;
Member, Judicial Appointments Commission;
Member of Human Rights Commission of Malaysia (SUHAKAM);
former Judge of the Court of Appeal, Malaysia.

I. Introduction

1 Competition law in Malaysia operates to prohibit anti-competitive agreements such as price-fixing, bid rigging, market sharing, and the abuse of a dominant position in any market for goods or services in order to protect the competition process and thereby the interest of consumers. It has been approximately seven years now

1 First published in the *Journal of the Malaysian Judiciary*: July [2019] JMJ 138. Reproduced with permission. The author would like to thank Marcus Lee Min Lun for his excellent research work and sedulous assistance in the writing of this article.

since the Competition Act 2010[2] ("Competition Act") and Competition Commission Act 2010[3] ("Competition Commission Act") were gazetted on 10 June 2010 and came into force on 1 January 2012. It was a timely decision for Malaysia to move towards complying with international regulatory standards and other regulatory requirements set out in international trade arrangements.[4]

2 Throughout the years, the Malaysian Competition Commission, as the independent commission established under the Competition Commission Act,[5] has been striving to perform its statutory functions in, amongst others, implementing and enforcing competition law, addressing issues concerning competition law and policies *vis-à-vis* the Malaysian economy, and educating the general public regarding the advantages of a competitive consumer market.[6] Whilst doing so, the Competition Commission has made a number of enforcement decisions that attracted great public interest. Some of the decisions were even brought to the courts for adjudication in recent years. These judicial decisions are worthy of discussion as they provide more certainty and clarity to the provisions of the Competition Act.

3 The first half of this article discusses the legal framework of competition law in Malaysia for the benefit of general readers; the latter half touches on recent developments of competition law in Malaysia, which would be more appealing to competition law practitioners, legal scholars and law students.

II. Competition law in Malaysia: At first glance

4 The purposes of enacting the Competition Act can be seen from its long title, which states:

2 Act 712.

3 Act 713.

4 Malaysia, as a member State of the Association of South East Asian Nations ("ASEAN"), had agreed to implement competition policy and law by 2015 according to the ASEAN Regional Guidelines on Competition Policy that were completed by the ASEAN Experts Group on Competition. Malaysia, in enacting competition policy and law, was also consistent with the policies of the World Trade Organization and the European Union.

5 The members of the Competition Commission are appointed by the Prime Minister upon the recommendation of the Minister. The members of the Commission shall include a chairman, four members representing the Government, and three to five other qualified members as determined by the Minister.

6 The functions and powers of the Competition Commission are enumerated in ss 16 and 17 of the Competition Commission Act 2010 (Act 713).

> … 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.

5 During the Second Reading of the Competition Bill 2010, the then Minister of Domestic Trade, Co-operatives and Consumerism, Dato' Seri Ismail Sabri bin Yaakob, in his parliamentary speech, elaborated on the purposes of introducing the Competition Bill 2010:[7]

> The introduction of Competition Bill 2010 is for the purposes of ensuring the existence of healthy competition in the market. It is a suitable step to handle anti-competition practices and to prepare the companies in facing challenges from globalization and liberalisation. This Bill is seen to be able to give protection and benefits to the consumers in Malaysia in preparing a diversity of goods and services at a more competitive price …

6 The Minister also stated that the Competition Bill was drafted by considering the available competition laws in the US, UK, European Union, Singapore and Australia as referencing points; and that the international best practices were incorporated into the Competition Bill. He added that the Ministry still prioritised specific characteristics and needs of the country's economy, in particular the concept of a small and open economy.[8] In other words, the Competition Act is a piece of legislation that was tailored to suit the local practices and policies of the Malaysian economy; thus, it may not have adopted all the common competition policies in other economies due to disparate objectives.

7 In this regard it is worth noting that the Court of Appeal in *Labuan Ferry Corp Sdn Bhd v Chin Mui Kien*[9] held that:

> It is plain and obvious that the object underlying the Competition Act is to protect the interests of the consumers by prohibiting anti-competitive conduct. It is meant to regulate conduct among competitors, as the title to the Act suggests. It is not meant to regulate monopolies of essential products or services. Most importantly, the Act does not prohibit monopolies, nor does it regulate them.

8 The Competition Act is wide enough to cover any commercial activity both within and outside Malaysia, subject to certain conditions and exceptions. Section 3(2) of the Competition Act provides that the Act is also applicable to any commercial activity transacted outside Malaysia if it has an effect on competition in any market in Malaysia. However, the Competition Act is not applicable to any commercial activity regulated

7 *House of Representatives Hansard* (20 April 2010) at pp 127–128.
8 *House of Representatives Hansard* (20 April 2010) at p 129.
9 [2018] 3 MLJ 256; [2018] 2 CLJ 142 at [59].

under the legislation specified in the First Schedule to the Act, but these excluded sectors are nonetheless regulated by their respective authorities established by law, as follows:

Legislation in First Schedule	Regulators
Communications and Multimedia Act 1998[10]	Malaysian Communications and Multimedia Commission
Energy Commission Act 2001[11]	Energy Commission
Petroleum Development Act 1974[12] and the Petroleum Regulations 1974[13] in so far as the commercial activities regulated under this legislation are directly in connection with upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia.	Prime Minister
Malaysian Aviation Commission Act 2015[14]	Malaysian Aviation Commission

9 "Commercial activity" is defined in s 3(4) to mean "any activity of a commercial nature" but does not include the following:

> (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.

10 The exclusion in s 3(4)(a), especially the adoption of the term "indirectly", may lead to ambiguity and the contention as to whether the Competition Act is applicable to government concessions and tenders. However, the Competition Commission takes the position that winners of government tenders cannot claim immunity under s 3(4) of the Competition Act. And s 4(2)(d) of the Competition Act does prohibit any act of bid rigging by the companies bidding for government contracts.

10 Act 588.
11 Act 610.
12 Act 144.
13 PU (A) 432/1974.
14 Act 771.

11 Another exclusionary provision is s 13 of the Competition Act, which states that the prohibitions of anti-competitive agreement and abuse of a dominant position under Pt II of the Act are not applicable to matters specified in the Second Schedule, as follows:[15]

> (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.

12 The Competition Act is designed to prohibit all forms of business cartels through anti-competitive agreement,[16] and to prohibit any abuse of a dominant position by an enterprise (or by a group of enterprises acting collectively).[17]

III. Prohibition of anti-competitive agreement

13 Section 4(1) of the Competition Act 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". Based on the literal reading of s 4(1), the phrase "object or effect" of the agreement must be read disjunctively. In other words, if, say, the *object* of an agreement is to restrict competition in the market, the Competition Commission is not required to show that such agreement carries an anti-competitive *effect* in order to arrive at a finding of infringement. "Significant" in s 4(1) means the agreement must have more than just a trivial impact, and the Competition Commission would assess the impact of such agreement in relation to the identified market in deciding whether or not the threshold has been achieved.[18] The subsequent sub-s (2) is a deeming provision, which provides for the types of prohibited horizontal agreements which are deemed to have the object in s 4(1), such as price-fixing, market sharing, controlling production,

15 Competition Act 2010 (Act 712) Second Schedule.
16 Competition Act 2010 (Act 712) s 4.
17 Competition Act 2010 (Act 712) s 10.
18 Malaysia Competition Commission, *Guidelines on Anti-Competitive Agreements* (published on 2 May 2012) at para 3.4.

market access, technological development or investment, or bid rigging.[19] It is noteworthy that the term "agreement" is defined under s 2 to mean "any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices". This wide definition of "agreement" is intended to prevent colluding enterprises from evading liability by claiming the non-existence of a formal agreement in writing or by claiming that the agreement is void due to some legal deficiency such as lack of consideration.

14 Another noteworthy point would be the definition of "enterprise", where it states in s 2 that a parent and subsidiary company shall be regarded as one single enterprise if they both form a single economic unit within which the subsidiaries do not enjoy real autonomy. This is important because infringement of s 4(1) requires at least two enterprises; thus, if a parent and subsidiary company are considered as one under the definition of enterprise, then s 4(1) is inapplicable. However, if the parent and subsidiary company are part of the cartel with other several enterprises, then, s 4(1) shall be applicable. This is yet another practical feature of the Competition Act, which focuses on substance rather than on form.

15 Any enterprise being party to an agreement that contravenes s 4 is then liable for infringement of the prohibition.[20] An enterprise found to be liable under s 4 may seek to relieve its liability for the infringement based on the following reasons under s 5:

> (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.

16 The enterprise seeking to rely on s 5 bears the burden of proving to the Competition Commission that all the four elements are fulfilled conjunctively. If a particular enterprise is uncertain as to whether a forthcoming prohibited agreement meets all the s 5 requirements, it may first apply to the Competition Commission for an individual exemption

19 Competition Act 2010 (Act 712) s 4(2).
20 Competition Act 2010 (Act 712) s 4(3).

before entering into such agreement.[21] The Competition Commission would then assess the application against the s 5 requirements before deciding whether to grant an individual exemption by an order published in the *Gazette*, subject to conditions and duration specified by the Commission. Similarly, under s 8 of the Competition Act, the Competition Commission may also grant relief of liability under s 5 to a prohibited category of agreements known as the "block exemption". For example, in 2014, the Commission granted the Competition (Block Exemption for Vessel Sharing Agreements and Voluntary Discussion Agreements in Respect of Liner Shipping Services) Order 2014,[22] which allows liner operators to discuss and agree on operational arrangements relating to liner shipping services, and to exchange and review commercial issues, supply and demand forecasts, international trade flows and industry trends. Apart from individual and block exemption, an enterprise may, at any stage after the commencement of investigation by the Competition Commission, invoke s 5 to seek relief of liability from the Commission.

IV. Prohibition of abuse of dominant position

17 Section 10(1) prohibits an enterprise from engaging in any conduct that amounts to an abuse of a dominant position in any market for goods or services. An enterprise is said to be in a "dominant position" if there exists 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".[23] This definition means that for purposes of our competition law, the dominant position of an enterprise is not measured solely by its market share; s 10(4) of the Competition Act even expressly provides for such an understanding. Before the Competition Commission assesses whether an enterprise is dominant, it would first determine the relevant market in accordance with the *Guidelines on Market Definition*.[24] Generally, market share above 60% would be indicative that an enterprise is dominant, but the Commission would also consider other constraint factors such as competitors and price regulation.[25]

18 Further, the Competition Act also provides a list of scenarios which may amount to abuse of a dominant position, such as imposing unfair prices or trading conditions, controlling production, market

21 Competition Act 2010 (Act 712) s 6.
22 PU (A) 195/2014.
23 Competition Act 2010 (Act 712) s 2.
24 Published on 2 May 2012.
25 Malaysia Competition Commission, *Guidelines on Abuse of Dominant Position* (published on 26 July 2012) at paras 2.9–2.13.

access, technological developments or investment to the prejudice of consumers, refusing to supply, predatory behaviour towards competitors, *etc*.[26]

V. Mergers and acquisitions: Loophole in the law?

19 Unlike many other jurisdictions, the Competition Act does not have an express provision that prohibits mergers and acquisitions that are anti-competitive. Based on Hansard, this omission was intentional: it was so intended by the lawmakers after taking into consideration views from agencies such as the Central Bank of Malaysia and the Securities Commission Malaysia. The rationale behind this omission was for the purpose of encouraging growth in the capital market in Malaysia, and it was consistent with the country's policy to encourage mergers and acquisitions of businesses in order to strengthen the domestic economy and to advance global corporate competitiveness.[27]

20 Arguably, there is still room for the Competition Act to be applicable, where s 4(1) may kick in, when a merger or acquisition agreement has the effect of an anti-competitive agreement; ss 10(1) and 10(2) may also be applicable when the merger or acquisition amounts to an abuse of a dominant position. However, enforcement actions based on these angles, although they may be pursued when there is clear evidence of abuse of a dominant position, may not be the best of options. In the author's humble opinion, it is best to have clear and express provisions of law forming the basis of any regulatory and enforcement actions. Especially in assessing mergers and acquisitions from competition law perspectives, the Competition Commission would probably need to issue guidelines, clarifying the formula or methods employed to measure the impact such merger or acquisition has on the level of competition. For example, in Singapore, the Competition and Consumer Commission of Singapore issued guidelines to set out the analytical framework it employs to assess mergers and acquisitions, and merger parties may also rely on the same guidelines for self-assessment.[28]

21 After more than half a decade, it is about time for the Competition Commission to study and consider the option of making a recommendation to the Minister for an amendment to the Competition Act and to expressly regulate anti-competitive mergers and acquisitions in Malaysia.

---

26 Competition Act 2010 (Act 712) s 10(2).

27 *House of Representatives Hansard* (20 April 2010) at p 129.

28 Competition and Consumer Commission of Singapore, *CCCS Guidelines on the Substantive Assessment of Mergers 2016* (effective 1 December 2016).

VI. Enforcement framework under Competition Act

22 The Competition Commission may undertake interim measures against the enterprises in question during the course of an investigation and before making any conclusive finding.[29] However, the Commission may only exercise this option when there exist reasonable grounds to believe that any prohibition under the Competition Act has been infringed or is likely to be infringed, and the Commission considers it necessary and urgent to act for the purpose of:

(a) preventing serious and irreparable damage, economic or otherwise, to a particular person or category of persons; or

(b) protecting the public interest.

23 If and when such a case arises, the Commission has a wide discretion to give such direction as it considers appropriate and proportionate, but it has to comply with the procedural requirements under ss 35(4) and 35(5). Upon the completion of an investigation, if the Competition Commission proposes to make a decision that there is an infringement, it has to inform such enterprises of the reasons for the Commission's proposed decision and penalties.[30] The affected enterprises may submit written and oral representations before the Competition Commission makes a finding of infringement (or non-infringement) under s 40 of the Competition Act. In the event of a finding of infringement, the Competition Commission shall require the infringement to cease immediately and may specify the required steps for the enterprises to follow. Moreover, the Commission may impose a financial penalty, but the amount of penalty shall not exceed the statutory maximum of 10% of the worldwide turnover of an enterprise over the period during which an infringement occurred.[31] In deciding the amount of financial penalty, the Competition Commission would consider aggravating factors,[32] mitigating factors[33] and other factors such as gravity of infringement, turnover of the market involved and duration of the infringement, *etc*.

24 However, there are also instances where the Commission had issued a proposed decision and, after the Commission had considered

29 Competition Act 2010 (Act 712) s 5.
30 Competition Act 2010 (Act 712) s 36.
31 Competition Act 2010 (Act 712) s 40(4).
32 Aggravating factors include obstruction or lack of co-operation during the investigation stage, continuance of infringement after commencement of investigation and involvement of board members in the infringement.
33 Mitigating factors include a low degree of infringement, co-operation during the investigation stage, and any compensation made to victims of the infringement.

the written and oral representations of the enterprises concerned, issued a finding of non-infringement.

25 The Competition Act also provides for a leniency regime that allows for a reduction of up to a maximum of 100% of the penalties, provided that the infringing enterprise meets two conditions:[34]

> (a) [it] admitted its involvement in an infringement of any prohibition under s 4(2); and
>
> (b) [it] provided information or other form of co-operation to the Commission which significantly assisted, or is likely to significantly assist, in the identification or investigation of any finding of an infringement of any prohibition by any other enterprises.

26 The leniency regime is only applicable for an admission of infringement of a prohibition against a horizontal agreement under s 4(2), and not for any other infringement involving either a vertical agreement under s 4(1) or an abuse of a dominant position under s 10. As for the second condition on "significant assistance", the Competition Commission would determine whether the enterprise in question provided significant assistance based on the facts of each case, the stage of investigation and the state of knowledge of the Commission.[35]

A. Statistics

27 The statistics in relation to enforcement actions by the Competition Commission since its inception are reproduced as follows:

No.	Description	Total cases
1	Complaints received by the Competition Commission	547
2	Cases referred to the Competition Commission by the Minister	14
3	Investigations initiated by the Competition Commission	74
4	Number of proposed decisions	11
5	Number of undertakings issued	6
6	Number of fines issued	10
7	Number of decisions of non-infringement	9

Statistics as of June 2019

34 Competition Act 2010 (Act 712) s 41.

35 Malaysia Competition Commission, *Guidelines on Leniency Regime* (published on 14 October 2014) at para 2.5.

28 In addition to the above, it has to be noted that 70% of the complaints dealt with by the Competition Commission were of non-competition concerns and therefore did not fall under the Competition Commission's jurisdiction.

B. Competition Appeal Tribunal

29 Furthermore, a person aggrieved or whose interest is affected by a decision of the Competition Commission may file an appeal to the Competition Appeal Tribunal ("CAT").[36] According to s 45 of the Competition Act, the CAT shall consist of a president, and seven to 20 members to be appointed by the Prime Minister. The president of the CAT shall be a sitting judge of the High Court as nominated by the Chief Justice of the Federal Court. The CAT may affirm, reverse or vary the decisions of the Competition Commission, remit the matter to the Commission or give such direction or make any decision which the Commission could itself have given or made.[37] Although the CAT has "exclusive jurisdiction" to review any decision made by the Competition Commission and the CAT's decision is stated to be "final and binding on parties to the appeal",[38] such decision may still be subject to judicial review by the High Court by way of a judicial review application by the aggrieved party.[39] It is the supervisory jurisdiction of the High Court to review the decision by an inferior tribunal (including the CAT) when the decision is alleged to be tainted with error of law, irrationality, procedural impropriety or unreasonableness.[40]

C. Interesting decisions by Competition Commission

30 Since its inception, the Competition Commission has conducted a good number of investigations and enforcement decisions, some of which are fascinating to learn. At the outset, under our competition law framework, it is clear that the Competition Commission bears the burden of proving any infringement of the Competition Act by enterprises. This basic principle of law is supported by foreign authorities such as *Pang's Motor Trading v Competition Commission of Singapore*[41] and *Napp*

36 Competition Act 2010 (Act 712) s 51.
37 Competition Act 2010 (Act 712) s 58(2).
38 Competition Act 2010 (Act 712) ss 40 and 58(3).
39 *Competition Commission v Competition Appeal Tribunal* Application for Judicial Review No: WA-25-82-05/2016.
40 *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; *Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629.
41 [2014] SGCAB 1.

Pharmaceutical v Director General of Fair Trade.[42] The standard of proof is that of a balance of probabilities.

31 One of the earliest cases involved the Cameron Highlands Floriculturist Association ("CHFA"). This is an industry association comprising members of the floriculture industry at Cameron Highlands. They are distributors and wholesalers of cut flowers. On 28 February 2012, the members of CHFA agreed during an association meeting to increase the selling price of flowers by 10%. The Competition Commission launched an investigation and found a case of infringement of competition law. In this case, the minutes recorded at the CHFA meeting were direct and clear evidence of the infringement. By agreeing to increase the price of flowers by 10%, the members of CHFA had entered into an anti-competitive horizontal agreement to fix the price of flowers at a higher level in the market; thus, it was deemed to be an infringement under s 4(2) of the Competition Act.

32 On 24 October 2012, the Competition Commission issued a proposed decision to CHFA, requiring the latter to comply with the following remedial measures:

> (a) CHFA to cease and desist the infringing act of price-fixing;
>
> (b) CHFA to provide an undertaking that its members shall refrain from any anti-competitive practices;
>
> (c) CHFA to issue a public statement on the abovementioned remedial measures in the newspapers; and
>
> (d) once a final decision is made by the Competition Commission under s 40 of Competition Act, and CHFA fails to comply with the abovementioned remedial measures, a RM20,000 financial penalty would be imposed and an additional RM1,000 per day penalty will be imposed for each day of non-compliance.

33 Subsequently, the Competition Commission issued its final decision that affirmed the proposed decision, except for the part relating to financial penalty. This final decision was rather lenient, but there was wisdom in it considering the Competition Act was in its infancy.

34 Another interesting case involved the Malaysia Indian Hairdressing Saloon Owners Association ("MIHSOA"). Its members are owners and operators of barbershops in Malaysia. On 30 January 2013, members of MIHSOA decided to increase the price of haircut services by

42 [2002] CAT 1.

RM2. MIHSOA's chairman issued a public statement stating that action may be taken against those members who fail to follow this decision. Following that, the Competition Commission's investigation revealed an infringement of s 4(2)(a) by engaging in an anti-competitive practice through a horizontal agreement with an object of price-fixing.

35 Eventually, the Competition Commission accepted an undertaking by MIHSOA and its members under s 43 of the Competition Act, as follows:

(a) MIHSOA and its members to conduct an extraordinary general meeting with an agenda to withdraw the price-fixing decision made on 30 January 2013.

(b) MIHSOA and its members to direct and ensure that each of its members, including the current committee members of MIHSOA, do not engage in any anti-competitive conduct in the future.

36 Upon accepting an undertaking under s 43, the Competition Commission shall close its investigation without making any finding of infringement and imposition of penalty.[43] Such an accepted undertaking shall be subjected to public inspection.[44]

37 In cases of price-fixing, the agreement to fix prices leaves no room for individual enterprises to assess their own operational costs, how much of a price increase there should be, and who is to bear the price increase (whether themselves or consumers). Competition law prohibits such an exercise as it allows parties to increase prices across the board by a predetermined amount that maximises profitability without any competition.

38 In December 2013, about 24 ice manufacturers in Kuala Lumpur, Selangor and Putrajaya decided to collectively raise the price of edible tube ice by RM0.50 per bag and the price of block ice by RM2.50 per big block. These enterprises were found to have infringed s 4(2)(a) by entering into a horizontal agreement that had the object of fixing the selling prices of edible tube ice and block ice within Malaysia. The Competition Commission imposed financial penalties of various amounts on the 24 enterprises, and the computation of financial penalties followed these steps:

43 Competition Act 2010 (Act 712) s 43(2).
44 Competition Act 2010 (Act 712) s 43(4).

(a) to determine the basic amount of financial penalties as a proportion of the relevant turnover earned from the edible tube ice and/or block ice during the infringement period;

(b) to increase the financial penalties by taking into account aggravating factors, or, to decrease the amount by considering mitigating factors; and

(c) to verify that the computed financial penalties are not more than 10% of the enterprises' worldwide turnover.

39 In 2017, seven tuition and daycare centres operating in Subang Jaya, Selangor infringed s 4(2)(a) read together with s 4(3) of the Competition Act by agreeing, during two meetings, to fix and increase the fees of tuition and daycare services. Although these enterprises did not belong to a common association and their level of participation in the meetings varied respectively, they were caught under the broad definition of "agreement" under Competition Act. In law, an agreement could be found whereby competitors attending a business lunch listen to a proposal for a price increase without objection.[45] The Competition Commission of Singapore also states that "mere participation by an undertaking in a meeting with an anti-competitive purpose, without expressing manifest opposition to or publicly distancing itself from, the same is tantamount to a tacit approval of that unlawful initiative".[46]

40 Some of the enterprises argued in their oral and written representations that they were unaware that their conduct of "standardizing and fixing" tuition and daycare fees had infringed the Competition Act. However, ignorance of the law will not exonerate anyone from liability under the law. When a law has been gazetted, the public is deemed to have notice of the same.[47] Any argument by an enterprise founded on ignorance of the law is therefore unsustainable.

41 Apart from the above interesting decisions by the Competition Commission, there are two other high-profile cases of infringement, one involving s 4(2)(b) and the other involving s 10 of the Competition Act.

45 Malaysia Competition Commission, *Guidelines on Chapter 1 Prohibition: Anti-Competitive Agreements* (published May 2012) at para 2.2.

46 *Fixing of Monthly Salaries of New Indonesian Foreign Domestic Workers in Singapore* CCS 500/001/11 (30 September 2011) at [52].

47 *Puncak Niaga (M) Sdn Bhd v Syarikat Sidhu Adek Beradek Sdn Bhd* [2015] 8 MLJ 586; *Gemilang Mirza v Public Prosecutor* [2014] 11 MLJ 300.

D. Competition Commission v Competition Appeal Tribunal[48] *("MAS-Air Asia")*

(1) Background facts

42 The background of the parties is as follows:

(a) Both Malaysia Airline System Berhad ("MAS") and AirAsia Berhad ("AirAsia") are public listed companies providing domestic and international flight services.

(b) Fly Firefly Sdn Bhd ("Firefly") is a wholly-owned subsidiary of MAS that provides low-cost flight services domestically and to Southern Thailand, Singapore and Sumatera, Indonesia.

(c) Airasia X Sdn Bhd ("AAX") shares common directors and shareholders as AirAsia, and it is the long-haul low-cost affiliate carrier of AirAsia.

43 Based on the above, MAS and Firefly, and AirAsia and AAX, both form single economic entities falling within the definition of "enterprise" under s 2 of the Competition Act.

44 On 9 August 2011, MAS and AirAsia entered into a "Collaboration Agreement". The salient features of this agreement are embodied in cll 1, 3, 5 and 9, which provide, *inter alia*, the following:

(a) MAS is to focus on being a full-service premium carrier and to review Firefly operations. AirAsia is to focus on being a regional low-cost carrier, whilst AAX is to focus on being a medium-to-long haul low-cost carrier.

(b) The parties agree to establish a framework to explore the possibilities for mutual co-operation in accordance with the terms and conditions as stipulated in the Collaboration Agreement.

(c) The overarching principles for the collaboration include "to become abler to compete effectively with other industry players". Both parties are to negotiate "in a reasonably hastened duration" to achieve the principles of the Collaboration Agreement.

(d) Each party intends to "focus, or re-focus as the case may be, on its respective core competencies in the business segment

48 Application for Judicial Review No: WA-25-82-05/2016 [2019] 6 CLJ 623.

in which its original business model was or would have been optimized".

(e) A "Joint Collaboration Agreement" ("JCC") was established under the Collaboration Agreement for purposes of administering and overseeing the collaboration, and to kick start the collaboration process under cl 9.

45 On the very same day, a share swap arrangement was made whereby Tune Air Sdn Bhd (the largest shareholder of AirAsia) held a 20.5% stake in MAS, and Khazanah Nasional Berhad (the largest shareholder of MAS) held a 10% stake in AirAsia. After the execution of the Collaboration Agreement, Firefly withdrew its operation from the routes from Kuala Lumpur to Kuching, Kota Kinabalu, Sandakan and Sibu. Subsequently, on 30 December 2011, MAS (also on behalf of AirAsia) sent a letter to the Competition Commission notifying it of their intention to seek an exemption under the Competition Act in respect of the Collaboration Agreement. Having received complaints regarding this collaboration between MAS and AirAsia, the Competition Commission launched an investigation and informed both parties of the same on 4 April 2012 through a notice under s 18 of the Competition Act.

46 While the investigation was ongoing, parties to the Collaboration Agreement entered into a "Supplemental Agreement" to cease the operation of cll 5.2, 5.3 and 5.4 of the Collaboration Agreement, and to disband the JCC. Subsequently, the Competition Commission issued a proposed decision pursuant to s 36(1) of the Competition Act, which found that MAS and AirAsia had, *prima facie,* infringed s 4(1) read together with s 4(2)(b) of the Competition Act by entering into the Collaboration Agreement which had the object of sharing the market in air transport services in Malaysia. After considering the written and oral representations by MAS and AirAsia, the Commission, on 31 March 2014, concluded that there had been a s 4(2)(b) infringement, and imposed a RM10,000,000 financial penalty on MAS and AirAsia respectively. Dissatisfied with the Commission's decision, both MAS and AirAsia appealed to the CAT. On 4 February 2016, the CAT unanimously allowed the appeal and set aside the Commission's decision upon ruling that there was no infringement of s 4(2) of the Competition Act based on the terms of the Collaboration Agreement. Eventually, the Competition Commission filed a judicial review application, mainly for an order of *certiorari* to quash the CAT's decision and to reinstate the Competition Commission's decision.

(2) Decision of the High Court

47 The dispute before the High Court was essentially premised on the interpretation and application of s 4(1) read together with s 4(2)(b) as its deeming provision under the Competition Act. The relevant provisions are as follows:

> **4.** (1) A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.
>
> (2) Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to—
>
> (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;
>
> (b) share market or sources of supply;
>
> (c) limit or control—
>
> (i) production;
>
> (ii) market outlets or market access;
>
> (iii) technical or technological development; or
>
> (iv) investment; or
>
> (d) perform an act of bid rigging,
>
> is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

48 The Competition Commission made a finding of fact that MAS and AirAsia had entered into a market sharing agreement, and therefore proceeded to make a finding of liability: that MAS and AirAsia had infringed the prohibition under s 4(1) read with s 4(2)(b) of the Act. In so finding, the Commission had relied on the deeming provision under s 4(2)(b) which states:

> (2) Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to—
>
> …
>
> (b) share market or …;
>
> …
>
> is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

49 The CAT set aside the Competition Commission's decision mainly because of the latter's reliance on the deeming provision without

giving any reason or analysis in identifying and concluding the object of the Collaboration Agreement and also its failure to identify the relevant market for the matter. The High Court set aside the CAT's decision on the ground that the CAT had taken into account irrelevant considerations and misapplied s 4(2) of the Competition Act because the provision clearly does not require the Commission to identify the relevant market before relying on the deeming provision. The High Court stated:[49]

> 93 The imposition to identify the relevant market is not the prerequisite in invoking the deeming provision under the subsection 4(2). Here, the Tribunal has taken into account irrelevant consideration as well as misapplied subsection 4(2).
>
> 94 Further, by imposing the requirement to identify the relevant market, the Tribunal is putting words in the clear wordings of the statute, particularly under subsection 4(2) of the Competition Act 2010. This have the effect of usurping the powers of the Parliament.

50 In coming to its decision, the High Court relied on authorities such as *Dr Koay Cheng Boon v Majlis Perubatan Malaysia*[50] and *Public Prosecutor v Sihabduin bin Haji Salleh*[51] and clarified that "the wordings of subsection 4(1) and 4(2) are unambiguous, plain and clear and as such it must be given their natural and ordinary meanings".[52] Therefore, based on a literal reading of s 4, the Competition Commission only has to prove that the Collaboration Agreement has the object (or effect) of significantly preventing, restricting or distorting competition in order to establish an infringement of s 4(1). The law does not expressly require the Commission to provide any reason and analysis for the purposes of identifying the relevant market. Further, both the terms of the Collaboration Agreement and the factual background before MAS and AirAsia entered into the Collaboration Agreement may be examined in determining whether there exists an anti-competitive object.

51 The CAT had determined that a simplistic use of a deeming provision upon the airline business may not be proper due to the widespread practices of airlines undertaking alliances and code sharing as well as doing maintenance on behalf of others. However, it is respectfully submitted that this assertion lacks legal basis and sound reasoning. The

49 *Competition Commission v Competition Appeal Tribunal* Application for Judicial Review No: WA-25-82-05/2016 [2019] 6 CLJ 623 at [93]–[94].
50 [2012] 3 MLJ 173.
51 [1980] 2 MLJ 273.
52 *Competition Commission v Competition Appeal Tribunal* Application for Judicial Review No: WA-25-82-05/2016 [2019] 6 CLJ 623 at [65].

High Court clarified the legal prerequisites of invoking s 4(2) as a deeming provision, as follows:[53]

> 86 On this issue of deeming provision, sub-s. 4(2) is an express statutory provision and a presumption of law enacted by Parliament to assist the Commission in carrying out its duty to prove an infringement of sub-s. 4(1). It is obligatory to invoke this deeming provision if the prerequisite fact has been established. In the present case, the prerequisite fact is that the agreement has the object to share market.

52 It is submitted that the court has accorded s 4 of the Competition Act the correct interpretation and demonstrated how the CAT had misconstrued the same.[54] In other words, the court's ruling is to the effect that once it was established by the Competition Commission that the horizontal agreement had the object of sharing the market in air transport services in Malaysia, then, by virtue of limb (b) of s 4(2), the prohibition under s 4(1) was violated. There was a violation of s 4(1) because the deeming provision of s 4(2) kicks in automatically and the object of "significantly preventing, restricting, or distorting competition" is deemed to exist by operation of law for the purpose of establishing the infringement under s 4(1). There was nothing more that the Commission needed to prove for the purpose of establishing a violation of s 4(1).

53 The court further considered other relevant facts and evidence before concluding that MAS and AirAsia had infringed s 4(1) of the Competition Act, such as the request to seek an exemption from the Competition Commission and the Supplemental Agreement entered into by both parties which gave rise to inference of knowledge on the part of both parties of the anti-competitive object of the Collaboration Agreement. This approach is different from the CAT's approach which seemed to focus strictly on the written terms of the Collaboration Agreement and its enforceability, thus running counter to the broad definition of "agreement" as discussed in the earlier part of this article. Failure by the CAT to take into account the factual matrix of the case compelled the court to rule that the CAT's decision was tainted with error of law and unreasonableness, leading to the quashing of the same.

54 It is submitted that this pivotal decision has afforded legal certainty to the interpretation and operation of s 4(1) read with s 4(2), having due regard to the text of the law and Parliament's intention to

---

53 *Competition Commission v Competition Appeal Tribunal* Application for Judicial Review No: WA-25-82-05/2016 [2019] 6 CLJ 623 at [86].

54 For a critical analysis of the Competition Appeal Tribunal's decision, see "The MAS-AirAsia Case: Testing the Relevance of EU Competition Principles in Malaysia" [2017] 2 MLJ lxxxvi.

put in place a deeming provision specifically for horizontal agreements with an anti-competitive object. In assessing whether an anti-competitive object exists, the Competition Commission is not confined to only the text of the agreement in question, but can also assess the surrounding facts and circumstances of each case. This decision has also become a point of reference for a better understanding of the s 4(2) deeming provision in the Competition Act.

E. MY EG v Competition Commission[55] *("MyEG")*

(1) Background facts

55 MY EG Services Berhad ("the First Applicant") is involved in the business of development and implementation of the electronic government services project and the provision of other related services for the Government of Malaysia. It has a wholly-owned subsidiary known as MY EG Commerce Sdn Bhd ("the Second Applicant"), which has a principal business of providing auto insurance intermediary services and other related ancillary services. Both companies ("MyEG") are considered as a single "enterprise" under s 2 of the Competition Act.

56 In Malaysia, all temporary foreign workers who are under the Pas Lawatan Kerja Sementara ("PLKS") are required to renew their PLKS annually in order for them to continue employment. The renewal of PLKS is carried out through the Immigration Department of Malaysia ("IDM"). In 2011, the First Applicant proposed the provision of an online PLKS renewal system in two phases. The first phase was for domestic helpers only, and the second phase for all foreign workers.

57 The first phase was implemented on 11 June 2011. On 24 February 2012, the First Applicant signed an agreement with the Government of Malaysia to provide PLKS renewal services for domestic helpers and renewal stickers. The duration of agreement was four years, backdating from June 2011. On 27 July 2012, the Ministry of Home Affairs ("MOHA") notified the First Applicant that the second phase of the concept was approved and it would be implemented by way of a Proof of Concept ("POC") period for three months.

58 On 17 November 2014, MOHA issued a letter to the First Applicant and IDM, stating that MOHA made a decision for the First Applicant to implement the POC for online renewal of PLKS for all foreign workers from all sectors. From 5 January 2015 onwards, the First

55 Application for Judicial Review No: WA-25-81-03/2018.

Applicant became the sole service provider for PLKS renewal on behalf of IMD because all the manual counters were closed by IDM. All PLKS renewal applications have to be made through the First Applicant.

59 Foreign workers must purchase three mandatory insurance policies for PLKS renewal, they are:

(a) Foreign Workers Insurance Guarantee ("FWIG");

(b) Foreign Workers Hospitalisation and Surgical Scheme ("FWHS"); and

(c) Foreign Workers Compensation Scheme ("FWCS").

(Collectively, "Mandatory Insurances".)

60 Mandatory Insurances are purchased mainly through agents, and employers with a large number of foreign workers would purchase directly from insurance companies.

61 On 5 November 2008, the Second Applicant entered into an agency agreement with RHB Insurance Berhad to act as its agent to transact Mandatory Insurances. On 10 November 2015, the First Applicant also became an agent for a few other insurance companies. As agents, they were paid a sum of commission for every transaction for Mandatory Insurances. This was where the issue started: the complaint was that MyEG provided preferential treatment to applicants who purchased Mandatory Insurances through MyEG's online system. The preferential treatments and their consequences are elaborated in the following paragraphs.

62 On 24 June 2016, the Competition Commission determined that MyEG infringed s 10(2)(d)(iii) of the Competition Act and made the following findings:[56]

(i) that MyEG had abused its dominant position by not ensuring a level playing field or applying different conditions to equivalent transactions with its competitors to an extent that it has harmed competition in the market for the sale of the Mandatory Insurances for online PLKS renewal applications in which MyEG, through its subsidiary MyEG Commerce, is a participant;

(ii) a fine of RM2,272,200-00 is imposed on MyEG;

(iii) MyEG is to cease immediately from imposing different conditions to equivalent transactions in the processing of Mandatory Insurances for online PLKS renewal applications;

56 *MY EG Services Bhd v Competition Commission* Application for Judicial Review No: WA-25-81-03/2018 at [32].

> (iv) MyEG is to provide an efficient gateway for ALL its competitors in the market for the sale of the Mandatory Insurances and allow the other competitors to compete at the same level within 60 days from 24 June 2016;
>
> (v) MyEG is to provide an undertaking in the form and manner acceptable to the Commission, to be fully compliant with PIAM's rules and regulations within 60 days from 24 June 2016; and
>
> (vi) in the event MyEG does not comply with the above directions, the Commission is at liberty to impose higher daily penalty for the subsequent period of non-compliance.

63 MyEG then appealed to the CAT pursuant to s 51 of the Competition Act. On 28 December 2017, the CAT affirmed the Competition Commission's decision, except for finding (e). Additionally, the CAT imposed a daily penalty of RM7,500 from 25 June 2016 till the date of the CAT's decision. Subsequently, MyEG filed a judicial review application against the CAT's decision.

(2) Decision of the High Court

64 The court set out four conjunctive elements for an infringement of s 10(2)(d)(iii) to be established in this case:[57]

> (i) Whether MyEG constitutes an 'enterprise' within the definition section 2;
>
> (ii) Whether MyEG is in a 'dominant position' within the definition section 2;
>
> (iii) Whether MyEG is 'applying different condition to equivalent transactions to other trading parties' within paragraph (d) of subsection 10(2); and
>
> (iv) Whether the acts of MyEG have 'harm competition' in the market which they are participating, whether upstream or downstream.

65 The court then examined each element and answered them in the affirmative. In doing so, elements (i) and (ii) were straightforward, but elements (iii) and (iv) were more contentious. The court contributed greatly by clarifying how these elements should be assessed.

66 For element (iii), MyEG argued that the CAT had misinterpreted the phrase "equivalent transaction" by stating that the purchase of Mandatory Insurances by employers whether directly from MyEG or from other insurance companies or agents "would amount to equivalent

57 *MY EG Services Bhd v Competition Commission* Application for Judicial Review No: WA-25-81-03/2018 at [48].

transactions i.e. same transaction". The court held that in construing the phrase "equivalent transaction", it was duty-bound to ascertain the legislative intent by reference to the words appearing in the provision itself.[58] Since the phrase was not defined in s 2 of the Competition Act, the court was permitted to ascertain the ordinary meaning of the words/phrase by reference to the dictionary.[59] By employing this interpretation, the court referred to the dictionary meaning of "equal" (which means "the same", whether in size, amount, number, *etc*), and held that the CAT did not commit any error in concluding that "equivalent transaction" simply means "same transaction".

67 The court also agreed with the CAT that MyEG was "applying different conditions" to equivalent transactions because a purchaser of Mandatory Insurances directly from MyEG received automatic verification, whereas there was a separate verification requirement if the purchase was made from other parties. Other findings of fact, such as MyEG making it compulsory for end users to purchase FWIG through MyEG only, and adopting automatic verification in respect of MyEG insurers leading to faster approval for PLKS renewal compared with non-MyEG insurers, all amounted to "applying different conditions". The court held that these findings by the CAT were not irrational or unreasonable.

68 For element (iv), MyEG argued that the phrase "harm competition in any market" must mean "harm to consumers" because the objective of the Competition Act is to protect consumers. Following that, MyEG argued that the CAT had made an error by failing to consider that the Competition Commission had not proven that MyEG's conduct was "harmful to consumers". However, the court disagreed with this line of argument because Parliament had used the phrase "harm competition in any market", and the court must therefore give effect to such wordings and not change the statutory words.[60] In other words, the CAT and the Competition Commission were not required to prove any harm to consumers in establishing element (iv). Furthermore, the court viewed that automatic verification for MyEG related insurance companies and the imposition of additional steps of verification for non-MyEG insurance companies did in fact harm competition. MyEG's conduct amounted to an abuse of a dominant position in the upstream market to induce end users to use its services in the downstream market, putting other agents and insurance companies at a competitive disadvantage.

58 *Krishnadas Achutan Nair v Manivam Samykano* [1997] 1 MLJ 94.
59 *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah* [1994] 1 MLJ 156; *Public Prosecutor v Sa'ari bin Jusoh* [2007] 2 CLJ 197.
60 *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia* [1994] 2 MLJ 114.

69 As a conclusion, the court dismissed MyEG's judicial review application and the CAT's decision remains valid. More importantly, the court made the right observation by stating that MyEG as the dominant concession holder in the upstream market has to grant equal access to its facilities and promote competition in the downstream market. It is the author's humble view that the High Court, supported by the right authorities, has accorded the right interpretation to s 10(2) of the Competition Act. The court's interpretation of phrases such as "equivalent transactions" and "harm competition in the market" serves as a good guidance for future application or enforcement of the same legal provision.

VII. Conclusion

70 Recent developments in competition law show the courts' appreciation of the wordings and phrases adopted in the Competition Act, and simultaneously giving effect to the real intention of the Parliament by according the wordings and phrases their ordinary meanings. Moreover, from both the judgments in *MAS-AirAsia* and *MyEG*, it is clear that the courts emphasised greatly on the object and purpose of the Competition Act. Stemming from this emphasis, the courts ensured that the judgments are consistent with the object and purpose of Competition Act, which is to protect consumers by ensuring healthy competition in the market.

71 As one can learn from the above cases, competition law in Malaysia remains as an emerging area of practice with emerging regulatory concerns and issues. Hence, judicial decisions and decisions of competition tribunals, whether from within Malaysia or foreign jurisprudence, would be of useful guidance for the development of competition law in our country. As time goes on, competition law in Malaysia continues to crystallise and grow together with the resolution of its emerging issues.