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Competition Regulation in Malaysia

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Abstract

Malaysia does not have a national competition policy. Only two sectors, namely the energy sector and the communications and multimedia sector have made legal provisions for competition policy. The implementation of competition policies in these sectors are still at fairly nascent stages. In other sectors, competition regulation is mostly undertaken at the sectoral level via control over prices and entry conditions (e.g. permits and licenses). Most of these controls are subservient to socio-economic objectives other than of promoting the process of competition in markets. Due to the absence of formal competition policies in these sectors, regulators either do not recognize or often do not know how to deal with competition-related problems. The failures to address competition-related problems at the sectoral level hint at the insufficiency and inadequacy of sectoral regulatory reforms in the country. There is thus a need to consider implementing a national competition policy as a possible solution to such problems. Existing sectoral regulations such as price controls may have to be re-evaluated concomitantly with the implementation of competition policy. Furthermore, such a policy need to be reconciliated with other developmental needs of the country such as wealth redistribution and export competitiveness. Even if this issue can be satisfactorily addressed there remains the problem of coming up with an appropriate mix of institutions, processes and capacity for an effective enforcement of the competition law.

Competition Regulation in Malaysia

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1 Introduction

The decision to implement of any public policy requires political support in democratic and non-democratic societies. Such decisions may or may not be supported by theoretical or empirical arguments on the desirability of such a policy. Of course, society is probably better off if public policy decisions are justified by theoretical and empirical support. In the case of competition policy, its pioneering implementation in the United States were clearly an outcome business lobbying.¹ In other countries such as Japan and Germany competition policies were transplanted by occupying forces for political reasons (i.e. to demilitarize and democratize dismantle these nations).² While the early implementation of competition policies may be chiefly outcomes of political lobbying, it can be argued that the later implementation of competition policy may depend mostly on empirical evidence collected in developed countries.³ Most developing countries are latecomers when it comes to competition policy. As recent as 1964, only 24 countries had implemented competition policies. By 2003, this number had increased to 57 countries.

Malaysia has not implemented a national competition policy. Competition is regulated sectorally in Malaysia. There are weaknesses and problems associated with this approach. This paper reviews these weaknesses and problems with the purpose of arguing the need to implement a national competition policy in the country. This is achieved via a discussion of several cases relating to competition that have received media attention recently.

The outline for the rest of the paper is as follows. Section 2 presents the current state of (sectoral) competition regulation in Malaysia. This is followed by a discussion of a few recent cases of competition-related problems in Malaysia in Section 3. Section 4 concludes.

¹See Hylton (2003), pp.37-40.

²See Haley (2001).

³See for example UNCTAD (1997). Foreign aid and structural adjustment assistance have been cited as possible reasons for implementation of competition policy. The evidence is thus far ambiguous.

2 Sectoral Competition Regulation

Since independence, the economic sectors in Malaysia have been regulated primarily at the sectoral level. Regulation of competition in these sectors mainly took the form of government control over entry conditions (via licenses and permits) and in some sectors, prices. This sectoral approach to competition regulation has continued even after the implementation of a major privatization program since the mid-1980s.

However, in the regulatory reforms that took place following privatization, new regulatory agencies were established in a few sectors such as ports, airports, energy, communications and multimedia. While economic regulation (e.g. entry, prices) continued to be the main focus of regulation in these sectors, the regulatory reforms in a few sectors have expanded the scope of regulation to include competition policy. These sectors include the communications and multimedia sector and the energy sector.⁴ In the following subsections, we discuss competition regulation in greater detail in a few selected sectors.

2.1 Energy, Communications and Multimedia

The *Communications and Multimedia Act 1998* (CMA 1998) and the *Energy Commission Act 2001* (ECA 2001) contain provisions for competition policy. The mechanisms for competition regulation in the communications and multimedia sector are more advanced than those in the energy sector. We review competition regulation in greater detail in the rest of this subsection.

(a) The Energy Sector

The statement on the competition regulation function of the Energy Commission in the Energy Commission Act 2001 is fairly general:

”to promote and safeguard competition and fair and efficient market conduct, or in the absence of a competitive market, to prevent the misuse of monopoly power or market power in respect of the generation, production, transmission, distribution and supply of electricity and the supply of gas through pipelines.” (ECA 2001, p.14)

⁴Interestingly, both sectors are regulated by the same ministry, namely the Ministry of Energy, Communications and Multimedia.

At present, competition regulation in the energy sector has not advanced beyond the above broad legal provision. The Energy Commission itself can be considered to be in formative stages. It has not issued any guidelines on competition regulation in the sector.

(b) The Communications and Multimedia Sector

The Communications and Multimedia Act 1998 identifies more specific anti-competitive conducts that it considers illegal such as collusion, rate fixing, market sharing, boycott of competitor and tying. The mechanism for competition regulation in the communications and multimedia sector is slightly more advanced than that in the energy sector. The Communications and Multimedia Commission, has published three documents that serve as guidelines on competition regulation in the sector, namely:

- *Guideline on Substantial Lessening of Competition* (CMC 2000a). This document clarifies the various notions (e.g. market, potential rivalry), anti-competitive conducts (e.g. predatory pricing, foreclosure etc.) and conditions (e.g. intentionality) under which such a conduct is deemed illegal under the CMA 1998. The document also provides an analytical framework for analyzing cases where substantial reduction in competition is thought to have occurred.
- *Guideline on Dominant Position in a Communications Market* (CMC 2000b). This document clarifies the concept of dominance and the various structural characteristics (market shares, vertical integration, barriers to entry) and anti-competitive practices (pricing and supply behavior) that might be associated with the presence of a dominant firm. The guideline also makes provision for an analytical framework for determining dominant position in a market.
- *Process for Assessing Allegations of Anti-Competitive Conduct: An Information Paper* (CMC 2000c). This paper set out in greater detail the sequence of actions to be taken by the CMC when it investigates incidents and firms involving the substantial reduction in competition and presence of dominant market position.

At present, the CMC is experiencing difficulties in enforcing the competition policy elements in the CMA 1998. While it may be able to assess market structure elements (e.g. dominance), detecting anti-competitive conduct and acting upon it is difficult. This partly compounded by the lack of capacity

and experience on the part of CMC and the lack of any legal precedence in this area.

2.2 Transport Sector

Competition in the transport sector is affected by regulations imposed under three ministries, namely the Ministry of Transport (MOT), the Ministry of Works (MOW) and the Ministry of Entrepreneur Development (MET). Overall, MOT is the sector regulator and concentrates on transport infrastructure development (other than roads and highways) and their regulation. For example, port tariffs and airport tariffs are set by the Ministry with the advice of sectoral regulatory commissions.⁵ The MOW is responsible for regulating roads and highways including privatized ones (via the Malaysian Highway Authority). Tariffs for privatized roads are set by the MOW, often after consultation and approval at the Cabinet level.

The entry conditions in private commercial vehicle markets (such as commercial taxis, buses, and trucks) are controlled by the MET via the Commercial Vehicle Licensing Board (CVLB) which is responsible for the issuance of licenses in these markets.⁶ In some cases such as commercial buses and taxis, tariffs are set by the Ministry. Most of the prominent competition-related cases in recent years have occurred in commercial vehicle markets such as commercial buses and the trucking (haulage) industry.

2.3 Distributive Trade

Distributive trade encompasses the retail and wholesale distribution sectors. The sector regulator is the Ministry of Domestic Trade and Consumers' Affairs (MDTCA). The *Price Control Act 1946* empowers the Ministry to control and stabilize the prices of selected "essential" goods (such as rice, sugar and chicken) in the country. The Ministry also control entry conditions via the issuance of licenses and permits in distributive trade markets such as petroleum retail distribution, supermarkets and hypermarkets. Recent examples of MDTCA's policy affecting competition includes restrictions on the

⁵Corporatized or privatized are regulated by their own port commission which assumes an advisory capacity in relation to the MOT on matters relating to tariffs

⁶The licensing of commercial vehicles was originally the responsibility of the Transport Ministry. This function was transferred to the Ministry of Entrepreneur Development (then, the Ministry of Public Enterprises) in the early 1970s to support the NEP policies.

issuance of hypermarket licenses in major cities such as (Kuala Lumpur, Johor Bahru and Penang) and in towns with less than 350,000 population.⁷ More recently, the Ministry has also considered imposing quotas on goods displayed in supermarkets to ensure local products get adequate shelf space in such establishments.⁸

2.4 Mergers and Acquisitions

The legal framework for regulation of mergers and acquisition is provided by two statutes, namely, the *Securities Commission Act 1993* (Part IV Division 2) and the *Malaysian Code on Take-Overs and Mergers 1998*. The regulatory agency is the Securities Commission. These statutes were primarily enacted to protect investors' interest. There are no provisions in these statutes for the impact of M&As on competition. An important regulatory agency in the area of M&As is the Foreign Investment Committee (FIC) under the Economic Planning Unit in the Prime Minister's Department. Any M&A transaction involving foreign interests also needs to get FIC approval. The FIC has guidelines limiting foreign equity participation in companies registered in Malaysia. The purpose of the FIC guidelines is to ensure that the pattern of ownership and control of private enterprises in the country is consistent with government policies such as the New Economic Policy / National Development Policy. In the past, exemptions have been allowed for foreign direct investments that are export-oriented. In the wake of the financial crisis in 1997/98, the government also relaxed limits on foreign equity participation in Malaysian private enterprises. Even though the FIC guidelines focus on distributive issues, its implementation has effects on competition. Limits on foreign equity participation constrain the amount of resources that domestic firms can enlist from foreign investors to compete in the market.

3 Examples of Competition-Related Problems

In this section we discuss some of the prominent competition-related problem cases that have appeared in the Malaysian media. The purpose of such an exercise is to highlight the need to address competition-related problems in a more comprehensive, systematic and coherent manner in the country.

⁷The STAR, "No hypermarkets in smaller towns", 17 February 2004.

⁸New Straits Times, "Govt may impose quota on goods displayed in supermarkets", 17 February 2004

3.1 The Pangkor-Lumut Ferry Case

Ferry services between Lumut and the island of Pangkor are provided by two firms, namely the *Pangkor-Lumut Express Feri Sdn Bhd* (PLEF) and *Pan Silver Ferry Sdn Bhd* (PSF).⁹ A price war erupted between the two firms in January 2003. As a result, the adult round trip ticket prices plunged from RM10 in December 2002 to as low as RM1 in July 2003. The ticket prices eventually stabilized at around RM4 until 20th October 2003 when ticket prices were increased from RM4 to RM10. There was an almost immediate public outcry following this price revision. An immediate response of the ferry operators to the public's complaint was to suspend the sale of monthly passes to frequent users of their services.

The price increases were clearly an outcome of collusion between the two ferry operators to avert the adverse consequences of a protracted price war between them.¹⁰ Both firms had claimed that they incurred losses amounting to about RM10,000 per month during the price war.

The government's response to the problem has been fairly haphazard. Following the public's complaints in October 2003, the Perak state government attempted to negotiate with the ferry operators with the intention to persuade them to reduce their prices (RM7 was considered a reasonable price). This effort failed to resolve the problem. The State government has indicated that it may seek the relevant ministry's intervention in the form of issuing more licenses to create more competition.

The above case could be analyzed for anti-competitive conduct. It is not clear whether the pre price war prices (e.g. RM10) were outcomes of collusion that were subsequently unravelled by price under-cutting by one of the firms. However, the price increases in October 2003 were clearly an outcome of the exercise of market power by the two colluding firms. It can be argued that a competition law that prohibits collusion (*per se*) would have been able to deal with this problem. Alternatively, in the absence of a competition law, the government could have opted to regulate the tariff. Clearly, it is not even clear whether this later alternative is available to the government.¹¹

⁹The information discussed in this case was compiled from: (a) STAR, "Fare war bleeds ferry operators", 25th October 2003; (b) STAR, "Ferry operator seek consensus", 3rd November 2003; and (c) New Straits Times, "Legal advice sought over fare dispute", 17th December 2003.

¹⁰In the media reports the two firms were reported to have "consolidated" their operations.

¹¹For most ports, tariffs for ferry services operated by private companies are set by the

3.2 The EON-Proton Edar Case

Cars produced by the national car company, *Perusahaan Otomobil Nasional Berhad* (Proton), have been traditionally distributed domestically by two firms, namely, *Proton Edar Sdn Bhd* (Proton Edar) and *Edaran Otomobil Nasional Bhd* (EON).¹² EON was established in 1984 as the sole distributor of the national car (Proton Saga).¹³ The strategy adopted then was to separate the manufacturing activity from the distribution activity.

Proton Edar was established in 1985 and it later evolved into a joint-venture between DRB and Proton Berhad in 1993 to distribute Proton's cars (Proton Wira). Proton Edar became a wholly-owned subsidiary of Proton in 2000 and subsequently began to distribute other Proton models (Wira, Perdana and Iswara) that were previously distributed by EON. In the same year, the 10-year distribution agreement between Proton and EON ended. A new dealership agreement have since not been concluded. These changes set the stage for further intensification of the rivalry between EON and Proton Edar to distribute Proton's cars.

Problems arose with the launching of a new Proton car, namely the *Gen.2* on 8th February 2003. Not surprising, Proton chose to initially distribute Gen.2 solely through its wholly-owned subsidiary Proton Edar.¹⁴ In addition, EON will have to obtain its supply of *Gen.2* from Proton Edar! Proton has also argued that EON should restrict itself to selling "a single brand in a single showroom", referring to EON's current practice of selling Proton's cars as well as that of Audi and Chevrolet.

Anti-competitive conduct is fairly obvious in the EON-Proton Edar case. There is a severe conflict of interest due to Proton's ownership of Proton Edar. It is in Proton's commercial interest to favor its own subsidiary Proton Edar against EON. This has manifested in Proton's conduct to vertically restraint EON's competitiveness by restricting its access to a new product.

port commission and/or the Ministry of Transport.

¹²The information discussed in this case were compiled from: (a) STAR, "Officials meet Cabinet over distributorship", 12 February 2004; (b) New Straits Times, "For EON, Proton Edar, it's business amid talk of rift", 17 February 2004; (c) STAR, "Proton and EON deny report on termination of distribution deal", 17 February 2004; (d) STAR, "Mahaleel: EON will have to wait for GEN.2", 18 February 2004; (e) New Straits Times, "EON must sell Gen.2 in separate showrooms, says Proton CEO", 18 February 2004

¹³Significant shareholders include the DRB-HICOM Group, Employees Provident Fund Board, Khazanah Nasional Bhd and the Jardine Group.

¹⁴Commenting on EON's order of *Gen.2* from Proton, the CEO of Proton was reported to have said, "They can order. They can wait." and laughed.

Worse, EON's only source of supply of the new product is now its rival Proton Edar. Furthermore, Proton's insistence on the "a single brand in a single showroom" distribution policy is akin to market foreclosure to reduce inter-brand competition in the car market.¹⁵ Despite these controversies surrounding the EON-Proton Edar case, there has been no government intervention. The absence of a competition law that can deal with such problems is sorely felt. If such a law had existed and if Proton was found to be guilty of anti-competitive conduct, it may have been forced to divest its distribution subsidiary.

3.3 The Haulage Price War Case

The haulage industry was liberalized in 1997 to increase the efficiency of the haulage industry.¹⁶ With the liberalization of the sector, the number of haulage firms increased from five in 1997 to about 60 firms in 2003. The incumbent five firms are members of the Container Hauliers Association of Malaysia (CHAM) which has a total number of six firms in 2003. Most of the new entrants (about 30 firms) are members of another association, namely the Association of Malaysian Hauliers (AMH).

Following the continued entry of more new firms into the industry, a price war broke out in the industry around year 2000. By 2003, container haulage rates had fallen between 20 to 40 percent. To end the price war, the two industry associations met to agree to stop giving rebates (i.e. price cuts) to their customers with effect on the 1st January 2004. Thus far, the Commercial Vehicle Licensing Board (CVLB), the industry regulator, has not made any recent comments on the industry initiatives even though it sets price ceilings for the industry.

In the above case, industry associations have clearly made a concerted effort to stop the price war. The market share of association members is fairly significant. The six CHAM members's market share in container haulage is about 55 percent. It is probably too early to tell whether the industry associations's effort to stop the price war will work especially given the large numbers of firms involved. Furthermore, the continued practice by some firms of renting out their haulier permits to other companies and the illegal

¹⁵This may deter entry into the car market.

¹⁶The information discussed in this case were compiled from: (a)STAR, "Call to stabilise haulage rates", 22 December 2003; (b) New Straits Times, "Haulage groups agree to stop giving rebates", 19 January 2004; and New Straits Times, "Smaller Hauliers on the road to overtaking major players", 4 February 2004.

trucking of empty containers can continue to undermine the industry resolve to coordinate prices.

Since prices are regulated and the absence of a price war merely means prices are at par with the price ceiling set by CVLB, it is not clear whether the industry association seemingly “explicit collusion” can be construed as an anti-competitive conduct.¹⁷ Clearly, competition issues need to be addressed together with issue of price regulation in industries such as the haulage industry.

4 Conclusion

Regulatory reforms in Malaysia clearly has not gone far enough particularly in the area of competition policy. The existing approach of regulating competition at the sectoral level is ineffective. In sectors without a formal competition policy, competition-related problems are either not being addressed or are dealt with inadequately by regulators. There is thus a need to consider the more ambitious proposal of implementing a national competition policy. Such a policy will need to take into account other developmental needs of the country such as wealth re-distribution and export competitiveness. Even if these issues can be addressed satisfactorily, there remains the challenge of coming up with an appropriate mix of institutions, processes and capacity that will ensure that the competition policy is effectively enforced.

¹⁷Another important question is whether CHAM and AMH can be considered to be cartels.

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