BIBLIOGRAPHIC INFORMATION

Title	Legal Position In Relation To Competition In Malaysia
Source	http://www.jftc.go.jp/eacpf/05/AOTS/malaysia_cheong.pdf
Author 1	Cheong May Fong
Author 2	NA
Author 3	NA
Publication/Conference	NA
Edition	NA
Document Type	Article
CPI Primary Subject	Law and Order
CPI Secondary Subject	; ; ;
Geographic Terms	Malaysia;

Abstract

Malaysia does not have specific legislation regulating competition as yet. Except for provisions on general competition practices for the communications and multimedia industry, there is no comprehensive regime governing competition. There are a number of related trading and consumer statutes which impact on competition and there are statutes which attempt to introduce the concept of competition and the term “competition” is used in these statutes. In relation to the acquisition of mergers and takeovers, there are guidelines and a code which apply but these also do not address competition issues. This paper seeks to briefly survey these laws and concludes with some observations.

LEGAL POSITION IN RELATION TO COMPETITION IN MALAYSIA

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Introduction

Malaysia does not have specific legislation regulating competition as yet. Except for provisions on general competition practices for the communications and multimedia industry, there is no comprehensive regime governing competition. There are a number of related trading and consumer statutes which impact on competition and there are statutes which attempt to introduce the concept of competition and the term "competition" is used in these statutes. In relation to the acquisition of mergers and takeovers, there are guidelines and a code which apply but these also do not address competition issues. This paper seeks to briefly survey these laws and concludes with some observations.

Recognising the Need for a Malaysian Competition Policy and Law

The Eighth Malaysia Plan recognizes the need for competitiveness in the Malaysian economy. Section 16.32 (Chapter 16 Distributive Trade) states:

> During the Plan period, efforts will be made to foster fair trade practices that will contribute towards greater efficiency and competitiveness of the economy. In this context, a fair trade policy and law will be formulated to prevent anti-competitive behaviour such as collusion, cartel price fixing, market allocation and the abuse of market power. The fair trade policy will, among others, prevent firms from protecting or expanding their market shares by means other than greater efficiency in producing what consumers want.

The need for a comprehensive competition law has been acknowledged and the Malaysian Ministry of Domestic Trade and Consumer Affairs has been working on a draft for the proposed law in the last few years.

The Existing Legal Position

1. No specific statute yet to provide for a comprehensive competition regime.
2. General competition practices provisions in the *Communications and Multimedia Act 1998* which governs the communications and multimedia industries
3. A number of statutes regulating trading activities which protects the consumer and has indirect and consequential impact in encouraging competition or restraining anti-competitive conduct.
4. In relation to the acquisition of take-overs and mergers, the Guidelines of the Foreign Investment Committee and the Malaysian Code of Take-overs and Mergers apply but do not address competition issues.
5. Some statutes which attempt to introduce the concept of competition in specific sectors and the word "competition" is used in their provisions, there is no further provision to clarify its application.

1. The *Communications and Multimedia Act 1998* (The *CMA)*

The *CMA* came into effect on 1 April 1999 and was enacted in response to technological developments which have brought major changes in communications, trade and industry, entertainment and recreation, giving rise to the convergence of telecommunications, broadcasting and information technology industries.[1] These industries are now regulated by the Malaysian Communications and Multimedia Commission[2] which was established by the *Malaysian Communications and Multimedia Commission Act 1998.*[3] The Commission's functions set out in section 16(1) include the two major areas of economic regulation and consumer protection. In relation to economic regulation, besides the role of licensing, its function includes the promotion of competition and the prohibition of anti-competitive conduct. Sections 133-144 Chapter 2 Part IV of the *CMA* are the first "specific-type" competition law provisions in Malaysia. Two major concepts utilized in this competition regime are the concepts of "substantial lessening of competition" and "dominant position". The relevant provisions are as follows:

> S 133: A licensee shall not engage in any *conduct* which has the *purpose* of *substantially lessening competition* in a communications market.

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[1] The *CMA* repealed the *Telecommunications Act 1950* (Act 20) and the *Broadcasting Act 1988* (Act 338) which formerly controlled telecommunication and broadcasting services in Malaysia.

[2] See the Communications and Multimedia Commission's website at http://www.cmc.gov.

[3] Act 589. This Act came into effect on 1.11.1998. However, the Commission only assumed responsibility on 1.4.1999 when the *CMA* came into effect.

S 139(1): The Commission may direct a licensee in a *dominant position* in a communications market to cease a *conduct* in that communications market which has, or may have the *effect* of *substantially lessening competition* in any communications market, and to implement appropriate remedies.

S 140(1): A licensee may apply to the Commission, prior to engaging into any *conduct* which may be construed to have the *purpose or effect* of *substantially lessening competition* in a communications market, for authorization of the *conduct*.

The Commission has published two guidelines to clarify and explain the concepts used. Both Guidelines have been published which took effect from 1 February 2000.[4]

(i) ***The Guideline on Substantial Lessening of Competition***

This Guideline proposes a three-step approach in determining matters concerning "substantial lessening of competition". First, the Commission will make an initial assessment of the impact of the conduct on the level of competition. Secondly, the communications market must be defined. Thirdly, once the market has been defined, the Commission will determine whether the situation justifies action under the *CMA*. The significance of any reduction in the level of competition will be determined in the context of the objects and the national policy objectives of the *CMA* set out in section 3(2).

(ii) ***The Guideline on "Dominant Position***

This Guideline also contains a similar three–step approach in determining whether a firm is in a dominant position in a communications market. After an initial assessment of the relevance of the dominant position criteria to the issue at hand and after defining the communications market, the Commission will determine whether a particular licensee is in a dominant position in that market.

The Guidelines set out two broad matters which has an impact on dominant position; that is, the formal structure of the market and also the conduct of actual or potential competitive rivals within the market. The types of behaviour which are indicative of a position of dominance are pricing behaviour and supply behaviour. In relation to the structural criteria, the following are relevant; the distribution of market share and the level of market concentration, the level of vertical integration in the market, the extent of barriers to entry, global technology and commercial trends and the degree of product or service differentiation and sales promotion. Other anti-competitive action prohibited by the *CMA* includes the prohibition on entering into collusive agreements in relation to rate fixing,

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[4] Both Guidelines can be obtained from the Commission's website stated at Note 14 above.

market sharing, boycott of a supplier of apparatus or boycott of another competitor,[5] tying or linking arrangements.[6]

Any person who contravenes any prohibition under this Act shall on conviction, be liable to a fine not exceeding RM500,000 or to imprisonment for a term not exceeding 5 years or both as well as a fine of RM1000 for every day or part of the day during which the offence is continued after conviction.[7] The Commission or a person may also seek an interim or interlocutory injunction against any conduct prohibited in Chapter 2 of the *CMA*.[8] Finally, the Commission may make rules in respect of agreements between licensees and foreign network facilities providers and/or network service providers. The rules can only be made if it was intended to prevent or mitigate (a) any conduct of the providers which will or is likely to lead to, a substantial lessening of competition in a communications market or (b) the misuse of market power in a communications market.

2. Trading and Consumer Protection Laws

(A) Consumer Protection legislation

The *Consumer Protection Act 1999*[9] - The major portion of the Act deals with guarantees in respect of supply of goods and services with some provisions on safety of goods and services and product liability. Part II of the Act (sections 8-18) regulate the conduct of traders and provide for misleading and deceptive conduct, false representation and unfair practice. Section 9 provides that a person shall not engage in conduct that is misleading or deceptive, as to the nature, manufacturing process, characteristics, suitability for purpose or quantity, both in relation to goods and services. Section 10 prohibits false and misleading representation of various aspects in relation to goods and services while section 11 relates to land. Section 12 provides for situations when a person is said to have committed an offence of misleading indication as to price. The other remaining provisions of Part II deal with conduct relating to advertising, the offering of gifts and prizes, claims of limited goods, intention to supply and future services contract.

(B) Legislation Controlling Supply and Price

***Price Control Act 1946*[10] -** Enacted to control prices of goods. The Price Controller is empowered to fix prices and charges of goods.

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[5] Section 135.

[6] Section 136.

[7] Section 143.

[8] Section 142(1).

[9] Act 599. This Act came into force on 10.9.1999.

[10] (Revised 1973). Act 121. This Act came into effect in West Malaysia on 31.12.1949 and in East Malaysia on 16.9.1963

Control of Supplies Act 1961[11] **-** The Minister has the power to declare any article or food as a "controlled" or a "rationed" article or both. Traders must obtain licenses to sell these items failing which they are liable to pay a fine. The Controller is given wide powers to enter the trading premises, to arrest, seize, investigate and prosecute for offences under the Act.

Control of Padi and Rice Act 1994[12] **-** The Director General has the duty to ensure fair and stable prices of rice for the consumers and for the farmers, and to make recommendations to the Government to promote the development of this industry.

Gas Supply Act 1993[13] **-** The Director General has the function to protect the consumers interest for gas supplied to consumer in respect of, *inter alia*, the quality of the gas supplied, the price charged, other terms of supply as well as to promote efficiency and economy of the licensee to supply gas.

(C) Legislation on Description, Weight and Measures

Trade Description Act 1972[14] **-** regulates the conduct of the traders in relation to description of products.

Weights and Measures Act 1972[15] **-** regulates the conduct of the traders in relation to the weighing and measurement of products.

3. Acquisitions of Assets, Take-overs and Mergers

Guidelines for Regulation of Acquisition of Assets, Mergers and Take-overs - This Guideline is also known as the Guidelines of the Foreign Investment Committee (FIC Guidelines) are issued by the Economic Planning Unit of the Prime Minister's Department.[16] The FIC Guidelines[17] was established based on the national interest, that is, the concern that the acquisition of assets or any

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[11] (Revised 1973). Act 122. This Act came into effect in West Malaysia on 1.7.1963 and in East Malaysia on 5.3.1964.

[12] Act 522. This Act came into effect on 7.7.1994.

[13] Act 501. This Act came into effect on 17.7.1997.

[14] Act 87. This Act came into effect on 3.11.1972.

[15] Act 71. This Act came into effect on 1.1.1981.

[16] While the legal status of the FIC Guidelines is arguable, it will be wise not to fall short of it. For cases on the position of the Guidelines, see for eg, *Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Ting & Ors* [1979] 2 MLJ 224; *David Hey v New Kok Ann Realty Sdn Bhd* [1985] 1 MLJ 167; *MAA Holdings Sdn Bhd & Anor v Ng Siew Wah & Ors* [1986] 1 MLJ 170; *Cheah Theam Swee & Anor v Overseas Union Bank Ltd & Ors* [1989] 1 MLJ 426.

[17] The Guidelines can be assessed at the website of the Economic Planning Unit of the Prime Minister's Department at http://www.epu.jpm.my.

interests, mergers and take-overs of companies and businesses incorporated or registered in Malaysia may result in greater concentration of wealth in the hands of a minority and in increasing imbalance in ownership and control. The FIC Guidelines apply to the following:

- Any proposed acquisition by foreign interests of any substantial fixed assets in Malaysia;

- Any proposed acquisition of assets or any interests, merger and take-over of companies and businesses in Malaysia, which result in ownership or control passing to foreign interests;

- Any proposed acquisition of 15% or more of the voting power of any one foreign interests or associated group, or by foreign interests in the aggregate of 30% or more of the voting power of a Malaysian company and business;

- Control of Malaysian companies and businesses in Malaysia through any form of joint venture agreement, management agreement, and technical assistance agreement or other arrangements;

- Any merger or take-over of any company or business in Malaysia whether by Malaysian or foreign interests;

- Any proposed acquisition of assets or interests exceeding in value RM5 million whether by Malaysian or foreign interests;

Malaysian Code on Take-overs and Mergers 1998 (Code) - The Code is prescribed by the Minister of Finance on the recommendation of the Securities Commission by virtue of the powers conferred under section 33(A)(1) of the **Securities Commission Act 1993**.[18] The Code came into operation on 1 January 1999 and is administered by the Securities Commission.[19] In administering the Code, the Commission shall take into account the desirability of ensuring that the acquisition of voting shares or control of companies takes place in an efficient, competitive and informed market.[20] In particular, the Commission have to ensure that the interests of minority shareholders are protected.[21] The Code contains principles and rules governing the conduct of all persons or parties involved in a take-over offer, merger or compulsory acquisition. Failure to comply with the Code will subject the persons to the powers given to the Commission which includes the imposition of penalties, direction and reprimand and directing the stock exchange to deprive access to the stock exchange's facilities, suspension of trading and listing of the corporation.

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[18] Act 498. This Act came into effect on 1.3.1993. This Act establishes the Securities Commission and to provide for matters connected therewith.

[19] Information relating to the Securities Commission and the Code can be accessed at the Securities Commission's website at http://www.sc.com.my.

[20] Section 33A(5) of the *Securities Commission Act.*

[21] See sub-section 33A(5) (c) and (d) *Securities Commission Act.*

4. Statutes making reference to "competition"

The following are a list of statutes and their respective provisions that make reference to "competition" (this term has been italicized below for ease of reference).

Energy Commission Act 2001[22]

Section 14 Functions and powers of Commission

(1) The Commission shall have all the functions imposed on it under the energy supply laws and shall also have the following functions:

(h) 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 or market power in respect of generation, production, transmission, distribution and supply of electricity and the supply of gas through pipelines;

Geographical Indications Act 2000[23]

Section 5. Institution of Proceedings for injunction and damages

(1) Any person may institute proceedings in the Court to prevent, in respect of geographical indications –

(b) any use in the course of trade which constitutes an at of unfair *competition* within the meaning of Article 10*bis* of the Paris Convention as set out in the Schedule*;*

(Article 10*bis* of the Paris Convention is set out in the Schedule as follows:)

[Unfair Competition]

(1) The countries of the Union are bound to assure nationals of such countries effective protection against unfair *competition.*

(2) Any act of competition contrary to honest practices industrial or commercial matters constitutes an act of unfair *competition*.

(3) The following in particular shall be prohibited:

1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods.

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[22] Act 610. This Act came into force on 1.5.2001.

[23] Act 602. This Act came into force on.15.8.2001.

Countervailing and Anti-Dumping Act 1993[24]

Section 35 Cumulative Assessment

> (1) Where imports of subject merchandise from more than one country are simultaneously subject to countervailing or anti-dumping duty investigations, the Government may cumulatively assess the effects of such imports.
>
> (2) Subsection (1) shall apply only if the Government determines –
>
> (c) that the cumulative assessment of the effects of the imports of the subject merchandise is appropriate in view of the conditions of *competition* between the subject merchandise, and the conditions of *competition* between the subject merchandise and the like domestic product.

Postal Services Act 1991[25]

Section 6. Functions and duties.The Commission shall carry out such functions and duties as follows:

(c) to promote competition in providing for postal services.

Electricity Supply Act 1990[26]

*S*ection 4 Functions and duties

The Commission shall carry out such functions and duties as follows:

(c) to promote competition in the generation and supply of electricity, inter alia, ensure the optimum supply of electricity at reasonable prices;

Malaysian Cocoa Board (Incorporation) Act 1988[27]

Section 8 Functions of the Board

The Board shall have the following functions:

(f) to collect, collate and disseminate information relating to cocoa and cocoa products and other substitutes for cocoa products and to promote the use of cocoa and cocoa products in competition with other materials or complementary thereto;

Conclusion

While the above provisions provides for competition, they do not further clarify nor provide any mechanism to apply the concept of competition. It appears to be left to the discretion of the relevant Commission, Board or authorities to establish policies to carry out their duties and functions as

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[24] Act 504. This Act came into force on.28.4.1994.

[25] Act 465. This Act came into force on 1.1.1992.

[26] Act 447. This Act came into force on 1.9.1990.

[27] Act 343. This Act came into force on 1.2.1989.

provided. However, the existence of these provisions bearing reference to the concept of competition in these sectors would indicate the perceived need for such a concept in the regulation of these sectors. It is also pertinent to note that these statutes are more recent statutes that came into force after 1990 as compared to the older consumer protection and trading statutes set out earlier. The latter statutes were intended to regulate trade generally and to afford consumer protection in some matters prior to the Consumer Protection Act. In relation to the acquisition of take-overs and mergers, the Guidelines of the Foreign Investment Committee and the Malaysian Code of Take-overs and Mergers apply but do not address competition issues. This existing legal position is inadequate and there is a need for a comprehensive legislation. The Ministry of Domestic Trade and Consumer Affairs is continuing its effort towards this and it was announced in July 2004 that there will be a Bill on Fair Trade Practices.

8 April 2005