

10. THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW: LEGAL DEVELOPMENT IN MALAYSIA

Khadijah Mohamed*

ABSTRACT

The aim of this paper is to examine the interface between competition law and intellectual property rights (IPRs) in Malaysia and assess the likely impact on Malaysia's Competition Act 2010 (the Act) that came into force in 2012. The study focuses on the newly introduced provisions of Malaysian competition law; regulation of the existing IPR system and their convergent role by taking into consideration only characteristics useful to explain their interaction in the relevant market. The discussion includes the argument that if competition law and IPRs are complementary means of promoting innovation, technical progress, and economic growth to the benefit of consumers, however, they are pursued by different instruments. The study finds that the Competition Act 2010 does not stipulate explicitly any provisions that relate to IPRs matters. However, Section 4 of the Act prohibits anti-competitive agreements, which have the object or effect of significantly distorting competition in the market and Section 10 of the Act prohibits abuse of dominant position, which may also cover practices concerning IPRs. Thus, a balance between the need to protect IPRs and the need to promote freedom of competition must be maintained. In preserving the monopoly resulting from the exclusive IPRs, the study suggests that durations of some IPRs such as patents or industrial design should be reviewed as to

whether they need to be shortened, or whether certain conditions need to be attached before the period of protection can be extended.

Keywords: *abuse of dominant position, anti-competitive agreements, intellectual property rights and competition law interface, legal development, monopoly*

1. INTRODUCTION

Competition law has received phenomenal attention in recent years. The field experienced a geographical expansion particularly in developing countries as a result of economic transformation which rank competition law very high on their national agenda.¹ The main objective of competition laws is to foster free and fair competition amongst companies and to protect consumers from unfair business practices.

To date, there are more than 120 countries² in the world with competition laws with the most developed and advanced legislations found in the European Union (EU) and the United States (US). Malaysia has introduced competition laws of its own with the enactment of the Competition Act 2010 (CA 2010) which came into force on 1 January 2012. The main thrust of this Act is to promote a competitive market environment and provide a level playing field for all players in the market.³

The urgency to implement such an Act was due to multiple reasons, the most important is to promote and encourage foreign direct investments (FDI) into the country. The government realised that FDI had declined because of

* Dr. Khadijah Mohamed is currently an Associate Professor at the School of Law, Universiti Utara Malaysia. She obtained her LL.B (Hons) and LL.M degrees from Universiti Kebangsaan Malaysia and her PhD in Law and Postgraduate Certificate in Research Training from Newcastle University, United Kingdom. She also qualified as an Advocate & Solicitor (High Court of Malaya) (currently non-practising). She teaches legal research methodology, intellectual property law, employment law as well as ethics, law and CSR both at undergraduate and postgraduate programmes.

¹ Maher M. Dabbah, *International and Comparative Competition Law* (Cambridge University Press 2010) 275; Carlos M. Correa,

'Intellectual Property and Competition Law – Exploring Some Issues of Relevance to Developing Countries' (2007), International Centre for Trade and Sustainable Development (ICTSD) Series: 21, 1
<https://dphu.org/uploads/attachements/books/books_4058_0.pdf> accessed 27 May 2019.

² Roger J. Van den Bergh, *Comparative Competition Law and Economics* (Edward Elgar Publishing Limited 2017).

³ Competition Act 2010 (Malaysia) [hereinafter CA 2010], Preamble.

previous industrial policies providing protectionism over selected sectors and giving rise to anti-competitive behaviour.⁴ The Act generally provides a comprehensive competition law at the national level that cuts across all economic sectors.

Since the rules governing competitions exist throughout the majority of industrialised world, competition laws are generally aimed at ensuring all market participants comply with the principles of free and fair competition. In all jurisdictions that have adopted such forms of competition law to date, the law however differs significantly in their domestic or regional circumstances but still share some important similarities.⁵

Nevertheless, since there is no universally accepted standard on what is competition law all about, the debate on the goals of competition law, the role it plays in an economy or society and even the discussion considering the interface between competition laws and neighbouring fields, in particular, intellectual property rights (IPRs), remains relevant.⁶ Intellectual property (IP) laws generally offer rights of exclusive use and exploitation to provide a reward to innovator, to provide an incentive to other innovators and to bring innovative information to the public that might otherwise remain as trade secrets.

In this regard, both IP and competition laws are intended to promote efficiency. There is considerable overlap in the goals of the two systems of law because both are aimed at promoting innovation and economic growth. However, the different mechanisms that each law employs to achieve this goal have sometimes been viewed as a potential source of conflicts.⁷ In order to provide guidance on how competition issues may arise from matters relating to IPRs, the Malaysian Competition Commission (MyCC), an independent body established to enforce the CA 2010, has issued the Guidelines on Intellectual Property Rights and Competition Law (MyCC IPRs Guidelines) on 5 April 2019⁸. The Guidelines which are to be read together with other MyCC guidelines, set out illustrations to explain scenarios in the context of IPRs-related dealings or conducts which may be prohibited under CA 2010.

This study therefore attempts to examine the interface between competition law and policy with IPRs in Malaysia and assess the likely impact on Malaysia's CA 2010. The legislation, which is modelled on the EU and the UK competition regimes, is beginning to generate interesting case law.⁹ As such, this paper will analyze the interface between the goals of IPRs and competition law in order to understand their relationship and how business practices related to IP may create competition-related concerns. The discussion will not cover the complex legal and economic issues involved in competition law but will focus on legal

⁴ Economic Planning Unit, Tenth Malaysia Plan 2011-2015 (Prime Minister's Department, Putrajaya, Malaysia, 2010)9, 68-69; Jeeva Arulampalam, 'The Competition Act and Anti-Profiteering Act to Change the Way Business is Conducted' *The Star* (Kuala Lumpur, 23 April 2011)..

⁵ Dabbah (n 1) 3; Correa (n 1) 1; Interaction between Regional Competition Law Systems and National Enforcement, United Nations Conference on Trade and Development (UNCTAD) (2013) <<http://unctad.org/en/Pages/DITC/CompetitionLaw?ResearchPartnership/RegionalCompetition.aspx>> accessed 12 July 2019.

⁶ Dabbah (n 1) 1.

⁷ Steven D. Anderman (ed), *The Interface between Intellectual Property Rights and Competition Policy* (Cambridge University Press 2007).

⁸ 'The MyCC Guidelines on Intellectual Property Rights and Competition Law' (Malaysia Competition Commission)

<<https://www.myc.gov.my/guidelines/the-myc-guidelines-on-intellectual-property-rights-and-competition-law>> accessed 27 May 2019.

⁹ See for example earlier decisions by the Malaysian Competition Commission (MyCC) against Cameron Highlands Floriculturist Association in 2012 (Case No: MyCC/0003/2912) and against Malaysian Airline System Berhad, AirAsia Berhad and AirAsia X Sdn. Bhd. in 2014 (Case No: MyCC.0001.2012). In recent years, those parties who were not satisfied with MyCC decisions started brought their case to the court as can be seen for instance in *My E.G. Services Berhad & Anor v Competition Commission* [2019] 1 LNS 1579, *Wealthy Care Consortium Sdn Bhd v Ketua Pegawai Eksekutif Suruhanjaya Persaingan Malaysia (MyCC) & Satu Lagi* [2019] 1 LNS 1684, *Lee Ting San Lorry Transport Sdn Bhd v Ketua Pegawai Eksekutif Suruhanjaya Persaingan Malaysia (MyCC) & Satu Lagi* [2019] 1 LNS 1600.

development in Malaysia within the scope of CA 2010 and the newly introduced of MyCC IPRs Guidelines.

2. OBJECTIVES OF IP LAW AND COMPETITION LAW

IP laws were enacted to protect the inventors of new inventions and creators of original works from the unscrupulous exploitation of their work without compensation. The objective is to enable right-holders to secure economic remuneration for their effort in creating useful products of knowledge, creativity and technology.¹⁰ Maggolino for instance stresses that IPRs derive from the universal right to 'own oneself' and the consequential universal right to 'own the fruits of one's own labor', such as intellectual goods.¹¹ As a result, these rights enable the owners to control and exclude others from using and reproducing their works. Economists claim that IPRs help to promote both long and short-term efficiency of economic growth in two ways:

- (i) By preventing others benefiting from the IPRs and allows creators to keep exclusive rewards from their work or invention will promote long-term dynamic efficiency; and

- (ii) Provides a legal mechanism for the efficient exploitation and dissemination of new ideas through licensing (which promotes short-term allocative efficiency).¹²

In many countries including Malaysia, exclusive or monopoly rights are provided for in the relevant IP law statutes. These rights are granted to enable the innovators and creators to use their invention or creation exclusively. By granting legal exclusivity to exclude others (negative rights), rather than a positive right to use the protected matters, IPRs confer to their holders the ability to exercise market powers.¹³ This acts as an incentive to stimulate others to be involved and be appreciative of innovation and creativity.¹⁴ Conversely, it is argued that, by subjecting intellectual assets to the exclusive control of the owner, they may, to a certain extent allow them to behave in an anti-competitive manner in order to maximize their returns on their intellectual products.¹⁵ It is at this stage that the conduct of IP right-holders might be of concern to competition law.

Competition law is a body of legal rules and standards, which aim to protect the process of competition: dealing with market imperfections and restoring desirable competitive conditions in the market.¹⁶ In contrast to IP law, the premise of competition law is to promote fair trade, healthy competition and ultimately consumer welfare in the market.

¹⁰ See William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2003).

¹¹ Mariateresa Maggolino, *Intellectual Property and Antitrust: A Comparative Economic Analysis of US and EU Law* (Edward Elgar Publishing Limited 2011) xviii.

¹² Ian R. McEwin, 'The Interoperation of Intellectual Property and Competition Law Rules and Principles' World Intellectual Property Organization Roundtable on Intellectual Property and Competition Law For Certain Asian and Pacific Member States (Singapore, 14-16 September 2011) <https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_rt_ip_sin_1/1/wipo_rt_ip_sin_11_ref_rulesandprinciples.pdf> accessed 27 May 2019.

¹³ Richard F.D. Corley *et al*, 'The Interface between Competition Law and Intellectual Property Law: Present Concerns and Future Challenges Facing Industry Canada (Report)' (2006) Competition

Bureau Canada <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02285.html#sec1>> accessed 27 May 2019.

¹⁴ Imaz Azmi, 'Some Thoughts on the Interface between Copyright and Competition Policy – The Malaysian Perspective' (2003) 2 Current Law Journal xvii; Khadijah Mohamed, 'Trademark Counterfeiting: Comparative Legal Analysis on Enforcement within Malaysia and the United Kingdom and at their Borders' (DPhil thesis, Newcastle University, 2012) 40 & 76.

¹⁵ See Azmi (n 14); Sumanjeet Singh, 'Intellectual Property Rights and Their Interface with Competition Policy: In Balance or in Conflict?' (Communication Policy Research South Conference, Xi'an, China, 12 December 2010)

<<https://ssrn.com/abstract=1724463>> accessed 10 June 2019; Supreet Kaur, 'Interface between Intellectual Property and Competition Law: Essential Facilities Doctrine' (4 April 2011) <<http://ssrn.com/abstract=1802450>> accessed 27 May 2019

¹⁶ Dabbah (n 1) 12-13.

Competition laws have traditionally tended to focus on the achievement of static allocative and productive efficiencies by preventing the inappropriate accumulation or exercise of market power with respect to existing products or services.

It also aims at promoting competition as a means of market response and consumer preference to ensure effective and efficient allocation of resources and to create an incentive for the economy for innovation.¹⁷ These laws are based primarily on the theory that consumers benefit by getting the best product at the lowest price through competition and that society's productive resources are best allocated and utilised by subjecting companies to the rigors of a competitive market.¹⁸

In most countries, competition laws share three main prohibitions:

- (a) Anti-competitive agreements or other coordinated activities such as an agreement between competitors, customers or suppliers that limit competition such as to use only one kind of technology;
- (b) Abuse of dominant position by monopolization or attempted monopolization such as a dominant firm with market power resulting from an IPR tying an unrelated product; and
- (c) Concentrations between companies that may substantially lessen competition (anti-competitive mergers between competing companies).

Thus, competition law in this context should not be considered as a tool for forging market structures, the initial

distribution of market opportunities, or the early allocation of incentives to compete and innovate. Instead, competition law is a means of prosecuting the behaviours of those firms that worsen the performance of the existing market, that is, those behaviours that, given the endowments of preliminary firms, prevent market's outcome that should follow from the natural interaction between demand and supply.¹⁹

3. THE RELATIONSHIP OF IPR AND COMPETITION LAW IN DEVELOPING COUNTRIES

IP protection and competition law are generally viewed at odds with each other. It is stated that monopoly rights conferred by IP poses a risk of abuse of the market power created by exclusivity tending to suppress competition, raise prices and reduce output and quality.²⁰ On the other hand, competition law seeks to avoid the abuse of such market control by IP right-holders. As such, competition authorities regulate near monopolies and commercial agreements with the aim of maintaining effective competition in the markets. This regulation occasionally results in limits being placed on the free exercise of the exclusive rights conferred by IP laws.²¹ The United Nations Conference on Trade and Development (UNCTAD) points out that competition law and policy, especially in the developing world, strives to make markets contestable, with the ultimate objective of enhancing consumer welfare.²²

Commentators claimed that there are two main concerns on how these IPRs and competition law interact in the context of developing countries. First, effective substitutes to IPR-protected products may not be readily available²³ due to either lack of legislation or because the law is still at its

¹⁷ Koyya Dhana Raju, 'Interface between Competition law and Intellectual Property Rights: A Comparative Study of the US, EU and India' (2014) 2(3) *Intel Prop Rights* 115.

¹⁸ Petronas Competition Law Guidelines, 5 <www.petronas.com.my/about-us/.../Competition-Law-Guidelines_R6.pdf> accessed 10 June 2019.

¹⁹ Maggolino (n 11) xvi.

²⁰ 'Examining the interface between the objectives of competition policy and intellectual property - Note by the UNCTAD Secretariat'

(UNCTAD, 2016)

<https://unctad.org/meetings/en/SessionalDocuments/ciclpd36_en.pdf> accessed 12 July 2019.

²¹ Anderman (n 7).

²² UNCTAD (n 20).

²³ Raju (n 17) 122; Luc Peepkorn, 'IP Licenses and Competition Rules: Striking the Right Balance' (2003) 26(4) *World Competition: Law & Economics Review* 539.

infancy²⁴ or weak implementation or absence of policies to deal with the IP-competition relationship.²⁵ Second, competition law seeks to draw a line between permissible business strategies and abuse of IPRs - a line that often blurred by horizontal agreements, exclusionary licensing restrictions, tie-in agreements, excessive exploitation of IPRs and other selling practices.²⁶

Correa contended that such challenges are particularly complex in developing countries because IPRs in most of these countries have been broadened and strengthened in the absence of an operative body of competition law. This contrasts with developed countries where the introduction of higher levels of IP protection has taken place in normative contexts that provide strong defenses against anti-competitive practices.²⁷

Taking this view into account, Gal stated that:

[...] the mere adoption of a competition law is a necessary but not sufficient condition for it to be part of market reform. Just as ecological conditions determine the ability of a flower to bloom, so do some preconditions affect the ability to apply a competition law effectively.²⁸

It is also claimed that even in developing countries where competition law exists, clear criteria or guidelines to deal with the anti-competitive acquisition and use of IPRs have not been established. Besides, enforcing agencies generally lack the financial and human resources, as well as the legal

mechanisms required for effective application of laws to correct anti-competitive distortions. This may be particularly true in situations where IPRs are involved, as enforcing agencies normally have no expertise in this area.²⁹

However, Adam and Alder suggest that authorities in developing countries may choose to adopt a stricter approach towards dominant firms which practice anti-competitive transactions.³⁰ Dominant position is explained in *United Brands Company and United Brands Continental BV v Commission of the European Communities*³¹ as:

... a position of economic strength enjoyed by the enterprise which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

It is argued that, due to their political institutions, developing countries often have highly concentrated markets and monopolies with at times only one or two companies offering a certain product or service and not exposing themselves to competition. Therefore, there is a danger of dominant companies taking advantage of their position by charging higher prices to inferior products and foreclosing potential competitors. Adam and Alder assert that the laws against abuse of dominance can influence the distribution of assets, power, and business opportunities. In terms of IP, they suggest that governments need to calculate carefully how much ownership they want to transfer to firms to give

²⁴ Nasarudin Abdul Rahman and Haniff Ahamat, 'Competition Law and the Malaysian Financial Sector' (2015) 172 *Procedia Social Behavioral Sciences* 74.

²⁵ Dabbah (n 1) 332; Correa (n 1) 1; Raju (n 16) 122.

²⁶ Raju (n 17) 122; Keith E. Maskus and Mohamed Lahouel, 'Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and A WTO Agreement' (World Bank Global Conference on Developing Countries and the Millennium Round, Geneva, 20-21 September 1999).

²⁷ Correa (n 1) 1; Dabbah (n 1) 332.

²⁸ Michal S. Gal, 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries' (2004) New York University

Law and Economics Research Paper Series Working Paper No. 02-03, 20 <<https://ssrn.com/abstract=665181>> accessed 27 May 2019.

²⁹ Mohamed (n 14) 61; Correa (n 1) 1.

³⁰ Michael Adam and Simon Alder, 'Abuse of Dominance and Its Effects on Economic Development' in Hassan Q and George L (eds), *The Effects of Anti-Competitive Business Practices on Developing Countries and Their Development Prospects* (UNCTAD, 2008) <https://unctad.org/en/Docs/ditclp20082_en.pdf> accessed 12 July 2019.

³¹ *United Brands Company and United Brands Continental BV v Commission of the European Communities*, Case 27/76 [1978] ECR 207.

sufficient incentives to invest. It must be assessed for what sectors a monopoly should be allowed, how broad it must be, for what period it is granted, and if concessions can be renegotiated after a certain time or when circumstances have changed.³²

To date, there is yet to be any standard international guidelines or rules concerning the relationship between IPRs and competition law. However, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) specifically tackles the abuse of IP rights, which contains certain competition law provisions in Articles 8(2), 31(k), and 40. Article 8(2) of the TRIPS Agreement stipulates that, '[A]ppropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of IPRs by right-holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.' This provision recognizes the right of a Member State to apply the exercise of IPRs to competition laws in three situations: (i) the abuse of IPRs by right holders; (ii) practices that unreasonably restrain trade; and (iii) practices that adversely affect international technology transfer.³³

Article 31(k) acknowledges that compulsory licensing may be a remedy available to correct such anti-competitive practices. It waives certain conditions in cases of compulsory licensing of patents to remedy anti-competitive practices. This Article is the only part of the TRIPS compulsory licensing rules that incorporates a waiver of the condition that compulsory licenses must be issued 'predominantly' for the supply of the

domestic market. Thus, a complainant who seeks a compulsory license under Article 8(2), to rectify abuse of a patent, will remain exempt from both the duty to negotiate and restrictions on exports, provided that some judicial or administrative authority deems the patentee's conduct anticompetitive.³⁴

Article 40 (2) of the TRIPS Agreement obviously allows developing countries to follow their own conceptions about competition law and IPRs.³⁵ This Article permits Member States to specify practices or conditions in legislation granting licensing agreements that may constitute an abuse of IPRs with adverse effects on competition in the relevant market. This is crucial to ensure the right balance between competition and the protection of IPRs. Taken together, Articles 8(2), 40(1), and 40(2) would apply to anti-competitive practices relating to all different types of IPRs covered by the TRIPS Agreement. Consequently, governments should take reasonable steps to discourage or regulate these practices.

4. OVERVIEW OF IP LAW AND COMPETITION LAW IN MALAYSIA

In majority of developing countries including Malaysia, IP law developed slightly earlier than competition law. The Malaysian IP regime for instance has in compliance with the TRIPS Agreement. Malaysia has acceded to the World Intellectual Property Organisation (WIPO), the Paris Convention for the Protection of Industrial Property, the

shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.'

<https://www.wto.org/english/docs_e/legal_e/27-trips.pdf> accessed 28 July 2019

³² Adam and Alder (n 30).

³³ Pedro Roffe and others, *Resource Book on TRIPS and Development* (Cambridge University Press 2005) 551.

³⁴ Haris Apostolopoulos, 'Anti-Competitive Abuse of IP Rights and Compulsory Licensing Through the International Dimension of the TRIPS Agreement and the Stockholm Proposal for its Amendment' (2007) 6 *Rich. J. Global L. & Bus.* 265
<<https://scholarship.richmond.edu/global/vol6/iss3/4>> accessed 12 July 2019.

³⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereafter TRIPS Agreement], art 40(2). 'Nothing in this Agreement

Berne Convention for the Protection of Literary and Artistic works, as well as the Patent Cooperation Treaty.

IP protection in Malaysia comprises of copyright, patents, trademarks, industrial designs, geographical indication and layout designs of integrated circuits. The list of statutes that governing these IPRs include the Copyright Act 1987, Patents Act 1983, Trademarks Act 2019 (came into force on 27 December 2019), Industrial Designs Act 1996, Geographical Indications Act 2000, and Layout-Designs of Integrated Circuits Act 2000.

Historically, Malaysia is a newly industrialized market with a relatively open economy. Since 1970s, Malaysia's economy has transformed from a producer of raw materials into a diversified economy and currently becoming a leading exporter of electrical appliances, electronic parts and components, palm oil, and natural gas.³⁶ While primary production such as rubber and palm oil remain important, Malaysia has increasingly emphasized on export-oriented manufacturing to fuel its economic growth.

Acknowledging the importance of international trade to its economic growth and development, Malaysia has been a member of the World Trade Organization (WTO), an intergovernmental organization, which regulates international trade, since its establishment on 1 January 1995. As a member of the WTO, Malaysia adopted and introduced various policies, trade agreements and foreign direct investments (FDI) to pursue efforts towards creating a more liberalizing and fair global trading environment, which in large part contributed to the successful diversification of the economy.

Since the early 1990s, Malaysia has been involved in free trade negotiations, both at the regional and bilateral levels. To date, Malaysia has engaged with 22 Free Trade Agreements (FTA) which include a new generation of regional agreements such as the Regional Cooperation Economic Partnership (RCEP), the Trans-Pacific Partnership Agreement (TPPA) and the European Union Free Trade Agreement (EUFTA).³⁷ The FTAs generally aimed at providing means to achieve quicker and higher levels of liberalization that would create effective market access between the participants of those agreements.³⁸

Business and trade need a predictable and fair environment to make long-term investments. The government believed that FTAs could also bring benefits through reforms in new areas that were not included in past agreements, such as competition policy, harmonization of IP standards across the region, government procurement, investment-state disputes, and investment policies.³⁹ In fulfilling its obligations under such FTAs, Malaysia has enacted legal reform in relevant fields to ensure their consistency across laws, regulations and other measures. The recent progress on legal structure reforms to address unfair trade practices include the competition and IP laws. However, since the CA 2010 does not stipulate explicitly any provision which relates to IP except the MyCC IPRs Guidelines, any matters in relation to IP in Malaysia is still governed under the purview of the Intellectual Property Corporation of Malaysia (MyIPO).

It is found that both competition and IP laws play a significant role in safeguarding competitive markets to generate economic efficiency and consumer welfare. While IPRs confer a legal monopoly to creators on their works for a limited period, the reward to innovate may encourage them to offer

³⁶ 'Malaysia: Overview' (World Bank, March 2019)

<<http://www.worldbank.org/en/country/malaysia/overview>> accessed 10 June 2019.

³⁷ 'Free Trade Agreements by Country/Economy: Malaysia' (Asia Regional Integration Center - Asian Development Bank, 2016) <<https://aric.adb.org/fta-country>> accessed 27 May 2019.

³⁸ 'Malaysia's Free Trade Agreements' (Malaysian Ministry of International Trade and Industry, 20 May 2016)

<<http://fta.miti.gov.my/index.php/pages/view/4?mid=23>>

accessed 10 June 2019; 'Trade Agreements Boost Productivity and Growth, Contributing to Malaysia's Successful Development, World Bank Says' (World Bank Press Release, 30 June 2016)

<<http://www.worldbank.org/en/news/press-release/2016/06/30/trade-agreements-boost-productivity-and-growth>> accessed 10 June 2019.

³⁹ *ibid.*

an extended range of choice of goods and services with cheaper prices for consumers. This will enable consumers to make choices between competing entrepreneurs and their selling goods and services. In this respect, IPRs are seen having the same final purpose as competition law, which is to encourage consumer protection and productivity in the market⁴⁰ despite the potential conflicts due to the means used by each system to achieve this objective.⁴¹

5. COMPETITION LAW IN MALAYSIA: COMPETITION ACT 2010

The Malaysian CA 2010 aims to deal with anti-competitive behaviour among businesses to ensure fair play in the market and protecting consumer welfare by promoting economic development of the country.⁴² The Competition Commission Act 2010 provides for the administration and establishment of the Malaysian Competition Commission (MyCC) and appointment of its Commissioners. On 1 April 2011, the MyCC was established with the purpose of enforcing the CA 2010. It comprises of representatives from both the public and private sectors who have experience in business, law, economics, public administration, competition law and consumer protection. The MyCC safeguards the mechanism of free and fair competition in commercial markets for the benefit of consumer welfare, efficiency of enterprises and economic growth.⁴³

The CA 2010 applies to enterprise which is defined in section 2 as any entity carrying on commercial activities relating to goods or services. This definition is wide and would include, for example, companies, partnerships, trade associations, individuals operating as sole traders, state-owned

corporation, and non-profit-making bodies. In supporting the objective of promoting the competition process, rather than any specific players in the market, the MyCC had clearly sent a message that even government-linked companies are not immune. For example, on 31 March 2014, it imposed a financial penalty of 10 million Malaysian Ringgit (MYR) each on Malaysia Airlines (MAS) and AirAsia for market allocation.⁴⁴

Similar to competition laws adopted in the EU, the CA 2010 contains prohibitions on anti-competitive agreements (Chapter 1 of the Act) and abuse of dominance (Chapter 2 of the Act), but it does not provide for competition law regulation on merger control. The CA 2010 prohibits:

- (a) Anti-competitive agreement which means agreement (a horizontal or vertical agreement) which has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services in Malaysia;⁴⁵ and
- (b) Any conduct by enterprises which amount to an abuse of a dominant position in any market for goods or services in Malaysia⁴⁶.

The scope of the CA 2010 applies to all commercial activities, both within or undertaken outside Malaysia that have an effect on competition in any market in Malaysia.⁴⁷ 'Commercial activity' under the Act means any activity of a commercial nature but does not include:⁴⁸

⁴⁰ Gesner Oliveira and Thomas Fujiwara, 'Intellectual Property and Competition as Complementary Policies: A Test Using an Ordered Probit Model' (2007) <http://www.wipo.int/export/sites/www/ip-competition/en/studies/study_ip_competition_oliveira.pdf> accessed 10 June 2019.

⁴¹ Anderman (n 7) 1.

⁴² CA 2010 (n 3), Preamble.

⁴³ General information on the Malaysian Competition Commission (MyCC) can be found at its official website <<https://www.myc.gov.my/>> accessed 10 June 2019.

⁴⁴ *Malaysian Airline System Berhad, AirAsia Berhad and AirAsia X Sdn. Bhd.* (No. MyCC.0001.2012). The decision of MyCC however was overturned on 4 February 2016 when the five members of the Competition Appeal Tribunal (CAT) unanimously decided that the MyCC misinterpreted prohibition against market-sharing agreement under s 4(2)(b) of the CA 2010.

⁴⁵ CA 2010 (n 3), s 4.

⁴⁶ CA 2010 (n 3), s 10.

⁴⁷ *ibid*, s 3.

⁴⁸ *ibid*, s 3(4).

- (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 or services as part of an economic activity.

However, there are four sectors that are excluded from the application of the CA 2010 Act namely, the industries in communications, energy, petroleum and aviation⁴⁹, therefore, there will be no issue or conflict between IP and competition laws in these sectors.

A. ANTI-COMPETITIVE AGREEMENT

Similar to the provisions of Article 101 of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU), chapter 1 of the CA 2010 prohibits horizontal and vertical agreements between enterprises that have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services. Provisions in agreements that infringe the CA 2010 will be unenforceable, as such provisions are considered illegal pursuant to the Contracts Act 1950 (Malaysia).

The term 'agreement' is deliberately defined in a broad manner and includes any form of contract (written and oral), arrangement or understanding between enterprises, whether legally enforceable or not, and includes a decision by an association (such as trade and industry associations) and concerted practice.⁵⁰

Section 4(1) of the CA 2010 provides that anti-competitive conduct includes any horizontal or vertical agreement. The provision prohibits any horizontal or vertical agreement between enterprises where the agreement has the object or

effect of significantly preventing, restricting, or distorting competition in any market for goods or services. Section 4(2) of the CA 2010 stipulates that horizontal agreement between enterprises be deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services when the agreement is proved to 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 production, market outlets or market access, technical or technological development, or investment; or
- (d) perform an act of bid rigging.

In this respect, agreements are prohibited only if they have or are likely to have a significant restriction or distort competition in any market for goods or services in Malaysia. The MyCC has interpreted the term 'significant' to mean that the agreements must have more than a trivial impact. The Guidelines on Chapter 1 Prohibition Anti-competitive Agreements (Guidelines on Chapter 1) provide that the MyCC will generally not consider agreements between competitors in the same market whose combined market share does not exceed 20 per cent of the relevant market to have a 'significant' effect on competition, provided that such agreements are not hard-core cartels.⁵¹

Identification of relevant market is integral in any competition inquiry as stressed by the Malaysian Competition Appeal Tribunal in *MAS-AirAsia case* (Appeal No. TRP 1-2014; TRP 2-2014) where the Tribunal referred to the decision of Case 6/72 *Europemballage and Continental Can Corporation v Commission* [1973] ECR 215 that:

⁴⁹ *ibid*, s 3(3) and First Schedule.

⁵⁰ *Ibid*, s 2.

⁵¹ 'Guidelines on Chapter 1 Prohibition Anti-competitive Agreements,' Malaysia Competition Commission [hereinafter

Guidelines on Chapter 1], para 3.4

<<https://www.myc.gov.my/guidelines/guidelines-on-anti-competitive-agreements>> accessed 27 May 2019.

The definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products.

The Tribunal also made significant remark that the Malaysian competition law in Section 4(2) of the CA 2010 uses a deeming provision to establish cases of anti-competition while many other jurisdictions use market impact cases to do the same (at para 90). The Tribunal was on the view that a simplistic use of the deeming provision upon airlines business may not be proper due to the widespread practices among airlines to undertake alliances and code sharing as well as doing maintenance of aircrafts on behalf of others. This arises from the fact that such businesses are capital intensive and thus utmost level of efficiency is expected.

(i) Horizontal Agreement

Section 2 of the CA 2010 defines a horizontal agreement to mean an agreement between enterprises each of which operates at the same level in the production or distribution chain. The MyCC's Guidelines on Chapter 1 explains further that, a horizontal agreement would include an agreement at any stage of the production and distribution chain, including an agreement between input producers such as suppliers of agricultural products and between manufacturers, wholesalers or retailers.⁵² The prohibition on anti-competitive horizontal agreements applies to these enterprises operating at the same level in the production or distribution chain.

Even though the term 'object' is not defined in the CA 2010, there are certain horizontal agreements between enterprises which are deemed as having the object of significantly restricting competition and the MyCC does not need to examine or prove any anti-competitive effects of such agreements. Agreements that are deemed anti-competitive under Section 4(2) of the Act include those which fix, directly

or indirectly, a purchase or selling price or any other trading conditions; share markets or sources of supply; limit or control production, market outlets or market access, technical or technological development or investment; or perform an act of bid rigging.

As such, horizontal agreements to engaging in cartel practices are deemed anti-competitive as they have the object of significantly preventing, restricting, or distorting competition. As 'agreement' includes both written and oral agreements, any communication between competitors about price might constitute an agreement.

(ii) Vertical Agreement

Section 2 of the CA 2010 defines a vertical agreement to mean an agreement between enterprises each of which operates at a different level in the production or distribution chain (for example, manufacturer and distributor). Usually, it involves one enterprise at the upstream level supplying an input to an enterprise downstream. While competitors in a horizontal agreement compete with each other, enterprises in a vertical agreement usually have a joint interest in ensuring the final product or service is competitive.⁵³ Anti-competitive vertical agreement usually exists where one of the parties (either the buyer or seller at different stages of the production and distribution chain) has enough market power to have some influence over the other party to the contract.⁵⁴

A vertical agreement may involve price fixing or non-price fixing. Agreement involving price restriction, where an upstream seller imposes a fixed or minimum price that a downstream buyer must re-sell, is deemed as anti-competitive.⁵⁵ This is a form of resale price maintenance (RPM) which the Commission will take strong stance against. Any other form of RPM includes maximum pricing or recommended retail pricing. For example, a manufacturer fixes the price for which its products are sold at the retail level. In this respect, where a manufacturer sets a price which is to be followed by its wholesaler, distributor and retailer,

⁵² Guidelines on Chapter 1 (n 51), para 2.7.

⁵³ *ibid*, para 3.11.

⁵⁴ Guidelines on Chapter 1 (n 51), para 3.12.

⁵⁵ *ibid*, para 3.15.

these distribution channels do not compete on price, thus hurting competition.

For example, on 1 June 2016, the MyCC has determined in *Containerchain (Malaysia) Sdn. Bhd.* (Case MyCC Ref No: 700.2.005.2013) that the company has infringed the prohibition of Sections 4(1) and 4(2) (a) of the CA 2010 by entering into vertical concerted practices with four Container Depot Operators (CDOs) companies.⁵⁶ The MyCC found that Containerchain has significant market power in the relevant market in which the vertical agreements entered into with the CDOs companies by way of concerted practices had enabled the fixing of price and the imposition of the rebate (para 37 of the decision).

The concerted practices resulting in the increase of the depot gate charges imposed on their customers from MYR5 to MYR25 and the four CDOs collectively offer a rebate of RM5 on the depot gate charges to haulers. The conduct has infringed Section 4(1) of the CA 2010 (paragraph 207 of the case). The MyCC further determined that the four companies have also infringed Section 4(2) (a) of the CA 2010 by entering into a horizontal agreement to fix the depot charges.

B. ABUSE OF DOMINANT POSITION

Chapter 2 of the CA 2010 prohibits an enterprise, whether independently or collectively, from engaging in any conduct that amounts to an abuse of a dominant position in any market for goods or services in Malaysia. This prohibition is substantially similar to Article 102 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU), and the concept of joint dominance from case law in other jurisdictions is expressly included within the Act. It should be noted that where there is collusion between enterprises, this may also be caught by Chapter 1 of the CA 2010, which prohibits horizontal and vertical agreements that

restrict competition. As there is no need to establish dominance in a Chapter 1 infringement, collective dominance cases are expected to be rare.

On 26 July 2012, the MyCC published Guidelines Chapter 2 Prohibition Abuse of Dominant Position in assisting enterprise from engaging (whether independently or collectively with other enterprises) in any conduct which amounts to an abuse of a dominant position in any market for goods or services in Malaysia⁵⁷. Establishing an infringement under chapter 2 of the Act is a two-step process: the MyCC will assess whether the enterprise that is being complained about is dominant in the relevant market in Malaysia; and, if so, the MyCC will assess whether the enterprise is abusing its dominant position.⁵⁸ Examples of the situation where a dominant enterprise may abuse its position are:⁵⁹

- (i) Directly or indirectly imposing an unfair purchase or selling price or other unfair trading condition on a supplier or customer;
- (ii) Limiting or controlling production, market access, technical or technological development or investment, to the prejudice of consumers;
- (iii) Refusing to supply to a specific group of enterprises; or
- (iv) Any predatory behaviour towards competitors.

An enterprise is said to be dominant if it has significant market power in a relevant market in Malaysia.⁶⁰ Generally, the Commission considers a market share above 60% to be indicative that an enterprise is dominant⁶¹. Other factors will also be considered in assessing dominance. Factors that will be taken into consideration by the Commission when determining whether there is dominance are not limited to market share of the enterprise, but dominance will also be

⁵⁶ The list of cases on competition issues in Malaysia determined by the MyCC <<http://www.mycc.gov.my/legislation/case>> accessed 27 May 2019.

⁵⁷ 'Guidelines Chapter 2 Prohibition Abuse of Dominant Position', Malaysia Competition Commission [hereinafter Guidelines on

Chapter 2] para 1.1. <<https://www.mycc.gov.my/guidelines>> accessed 27 May 2019.

⁵⁸ *ibid* para 1.2.

⁵⁹ *ibid* para 1.3.

⁶⁰ Guidelines on Chapter 2 (n 57) para 2.1.

⁶¹ *ibid* para 2.2.

assessed from the ability of an enterprise to act without concern about competitor's responses or to dictate the terms of competition in the market.⁶² However, market share is usually the starting point in assessing dominance.⁶³

Section 2 of the CA 2010 defines the term 'market' as 'a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.' To define a 'relevant market' means to identify all the close substitutes for the product under investigation, and products can be substituted both on the demand and on the supply side.

The concept of abuse of dominance is not defined in CA 2010 but the MyCC Guidelines Chapter 2 Prohibition Abuse of Dominant Position provides two main situations of abuse of dominant position:⁶⁴

- (a) Exploitative conduct, such as excessive pricing that may result from structural conditions in the market whereby the dominant enterprise is able to set a high price to exploit consumers where there is no or low likelihood of new entrants in the relevant market. In determining whether the prices are excessive, the MyCC will in principle, consider the actual price set in relation to the costs of supply and other factors such as the dominant enterprise's profitability.
- (b) Exclusionary conduct, which refers to the ability of an enterprise to dictate the level of competition in a market by preventing efficient new competitors from entering or significantly harming existing equally efficient competitors either by driving them out of the market or preventing them from effectively competing.

Section 10(2) of the Act provides a non-exhaustive list of conduct that may constitute an abuse of dominant position.

⁶² *ibid* para 1.5.

⁶³ *ibid* para 2.13.

⁶⁴ *ibid* para 2.4 & 3.1.

⁶⁵ Case No. MyCC/002/2012, para 45.

Chapter 2 of the MyCC Prohibition Guidelines Abuse of Dominant Position indicates that an enterprise, which is dominant in one market, can abuse that dominance in a separate market. For example, where a dominant company which sells an essential input to downstream enterprises sets up a subsidiary in the downstream market and then refuses to sell the input to the other buyers in the downstream market or initiates a margin squeeze. In *Megasteel Steel Sdn Bhd*,⁶⁵ the MyCC stated that a company having a dominant position in the upstream level is not an infringement as long as it does not abuse its dominant position in compliance with the CA 2010 in the downstream level that it is participating.

6. IP LAW AND ITS INTERACTION WITH COMPETITION LAW IN MALAYSIA

The exclusive rights derived from the IP are codified in various statutes such as copyrights, patents, and trademarks. These rights grant a legal monopoly to creators on their works for a limited period of times, after which those works will be in a public domain and can be used by all free.

IP law deals with the protection of exclusive rights for creators and innovators to profit from the value of their original work.⁶⁶ The exclusion at the core of IP may nonetheless be punished under the competition law. The law scrutinizes activity that restricts competition because such conduct could lead to higher prices, lower output and often less innovation.⁶⁷ Similarly, by their nature, agreements between IPRs holders and licensees restrict competition. However, IP licensing in Malaysia is considered to be generally pro-competitive subject that whether the applicable conditions have the object or effect of restricting competition such as price restrictions or fixing floor prices, exclusivity and territorial or other limitations, or conditions which foreclose market entry. The following situations are examples of when IPRs holders may impose limitations such as:

⁶⁶ Richard Whish and David Bailey, *Competition Law* (7th ed, Oxford University Press 2012) 19.

⁶⁷ Michael A. Carrier (ed), *Intellectual Property and Competition* (Edward Elgar Publishing Ltd. 2011) 1.

(i) Quantity restrictions which limit the number of products that can be sold;

This is a common clause whereby a licensor limits the licensee's authority to produce goods to a particular purpose or customers. If the licensor and licensee are competitors, field of use restrictions or customer's restrictions could be perceived as an illegal tool to facilitate market sharing or customer allocation.⁶⁸

(ii) Royalty payments which determine the royalties that can be received;

A licensor will usually require the licensee to pay royalties for use of the patent. The licensee may be required to make lump-sum payments, and in some situations, the parties may agree upon a profit-sharing scheme. The licensor may ask for a payment 'up-front' before production begins. A licensor may stipulate that the licensee must pay a minimum amount of royalties in a given period in order to encourage it to exploit the patented process.⁶⁹

(iii) Grant-backs by which licensees extend rights to use improvements to licensors; and

A grant-back provision in an IP license agreement is an agreement by a licensee to grant back to the licensor any intellectual property rights that the licensee may later develop or acquire with respect to improvements to the technology, which is subject to the license⁷⁰. It could raise potential competition law concern particularly where the licensor has market power and such grant back is exclusive in nature (i.e. licensee does not retain the right to use or license the new technology).

(iv) Territorial restrictions which confine licensees to certain areas.⁷¹

Often the licensor will grant to the licensee an exclusive right to manufacture and sell the goods in a particular territory and

agree to refrain from granting similar rights to anyone else there; in this situation the licensor retains the right to produce the goods in the territory itself which is known as a 'sole' license. A sole license may be distinguished from an 'exclusive' license, where the licensor also agrees not to produce the goods in the licensee's territory itself, which gives the licensee more protection than in the case of a sole license. The licensee's position may be further reinforced by the licensor agreeing to impose export bans on its other licensees preventing them, or requiring them to prevent their customers, from selling into the licensed territory.

Apart from the imposition of export bans, there are indirect ways of achieving the same end such as where a maximum quantities clause can limit the amount that a licensee can produce to the anticipated level of demand on its domestic market.⁷² Some other potentially anti-competitive practices in the field of IPRs include enforcement of a fraudulently obtained patent, sham litigation, design changes and predatory innovation, group boycotts and concerted refusals to license IPRs and vertical price-fixing of copyrighted and trademarked goods.⁷³ Refusing to grant licences in the MyCC IPRs Guidelines for example provides that while an IPR owner has the right to refuse to grant a licence for the use of its IPR, such refusal may be abusive if, for example, a dominant enterprise's technology or product is indispensable to a derivative product in a secondary market.

7. CONCLUSIONS

In contrast to the IPRs regime, competition law is relatively new in Malaysia. The enactment of the CA 2010 represents a major step forward in competition policy in Malaysia. While the CA 2010 is unique compared to competition laws in other countries in terms of the absence of merger controls, it is definitely a game changer for Malaysian players in the technology industry. For example, in 2018, the Communications and Multimedia Minister announced that fixed broadband prices were expected to drop by at least 25

⁶⁸ Whish and Bailey (n 66) 772.

⁶⁹ *ibid* 772.

⁷⁰ *ibid* 777.

⁷¹ *ibid*.

⁷² Whish and Bailey (n 66) 771.

⁷³ McEwin (n 12).

per cent by year end following the implementation of the Mandatory Standard on Access Pricing (MSAP), which requires that infrastructure providers give access to their networks at regulated prices. It is reported that government intervention has resulted in more than 30 per cent reduction in broadband prices for entry-level packages.⁷⁴

Although the Guidelines have yet to address areas which the CA 2010 arguably may have a greater impact, such as the franchise industry or technology transfer and R&D agreements, the Guidelines serve as a basic guide for arrangements involving IPRs as they provide greater clarity on how the MyCC views the interaction between IPRs and competition law. IPR owners may also use the Guidelines to reduce the risks of being negatively impacted by the prohibitions, and to protect themselves against anti-competitive activities of their potential or actual competitors.

In examining the interaction between competition law and IPRs in Malaysia, it is worth to note that both Sections 4 and 10 of the CA 2010 and the MyCC IPRs Guidelines prohibit agreements that have the object or effect of significantly distorting competition in the market and prohibits abuse of dominant position, which may also cover practices concerning IP. As such, where there is possible issue of anti-competitive practices concerning IPRs, such issues may still subject to the provisions of CA 2010. Since the law is silent on certain issues involving IPRs in almost all areas of IP (such as refusal to licence in patents, possible dominant position for the spare parts industry in industrial designs, anti-competitive agreements in copyright and trademark), the provisions of competition law are timely to accommodate the loopholes. Thus, some provisions in the MyCC IPRs Guidelines should be taken into consideration to address this issue.

There is a need to strike a balance between IPRs and competition law by allowing the protection of the IPR holder's interest legitimately while equally protecting against abuses that may unjustifiably distort competition. For example, IPRs'

holder is therefore not entitled to exclude competitors from his rights when a license is essential for competition, or to prevent the introduction of a new product by competitors or to monopolise a secondary market.

IPRs protection, which aims at encouraging innovation and the enforcement of competition law, is meant to protect competition, are both belong to the basic economic policy and legal system of modern countries. It is a traditional view that there is inherent tension between IPRs and competition law. For example, grant of exclusivity by IP law was seen creating monopolies, whereas competition law strives to keep the markets open and competitive.

Conversely, modern understanding would review that both IPRs and competition law are complementary in encouraging innovation, new and better technologies and bring better products and services to consumers at lower price. Their basic functions and goals are consistent since they have apparent discrepancies in certain respects, which many even leads to conflicts such as the owning and exercising of rights and the proper exercising and improper exercising of rights (abuse).

Overall, IPRs protection and the enforcement of competition law (regulating acts of abusing IPRs to eliminate or restrict competition) are essentially consistent. They complement each other for the same purpose. Regulation of IPRs abuses by competition law aims at establishing a necessary check and balance mechanism. Therefore, in the context of Malaysia, formulating further guidelines on the interface between competition and IPRs policies would be considered as a long-term goal of the MyCC.

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⁷⁴ Shanthi Kandiah, 'The Asia-Pacific Antitrust Review 2019 - Malaysia: Overview' (2019) <<https://globalcompetitionreview.com/insight/the-asia-pacific->

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