The Dominance and Monopolies Review

Second Edition

Editor
Maurits Dolmans

Law Business Research

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EDITOR'S PREFACE

Since the last (and indeed first) edition of this book, the law on monopolies and abuse of dominance has undergone evolutionary rather than revolutionary changes. Many of the sectors that regulators focused on in the past few years (most notably the digital economy, telecommunications and energy) unsurprisingly continue to be the subject of regulatory and judicial scrutiny. From the vantage point of 2014, the growing internationalisation of regulators' antitrust priorities and focus has continued, with intensifying enforcement in China and India and emerging economies. Books such as *The Dominance & Monopolies Review* make common trends both more apparent and capable of being comparatively analysed.

This editorial picks out three developments. First, while authorities in different countries may select similar or even the same cases, the substantive analysis may still diverge, and insufficient attention appears to be given to comity. Second, internationalisation of antitrust enforcement has given rise to globalisation of lobbying efforts, which can feed a potentially dangerous politicisation of antitrust policy especially in large and visible cases. Antitrust enforcement should be based on cold facts and the rule of law. Third, to end on a positive note, the means of resolving these types of case is shifting: settlements with, and commitments to, antitrust regulators are used increasingly to obtain more rapid and practical results where parties show an interest in avoiding protracted litigation.

As some of the more significant abuse cases in the past year underline, the European Commission and the US Federal Trade Commission (FTC), as well as authorities such as those in India and China, have a tendency to focus on similar issues and even the same cases. The *Google* case is one example; the issue of standard essential patents (SEPs) is another. This should be no surprise in an increasingly global and interdependent economy, in particular in worldwide markets for new technology, and where antitrust authorities exchange information and cooperate in the International Competition Network and organisations such as the OECD.

Despite the parallel focus, there remain divergences in analysis. This was thrown into relief by the different conclusions reached by the various authorities and courts in their analysis of Google's search business. In January 2013, after 19 months, the FTC

closed its investigation into Google's business practices. As to the most important issues, including the complaint that Google had changed its search algorithm to demote rivals, and Google's alleged practice of promoting its own vertical properties, the FTC found that Google's practices improved its products and were pro-competitive.[1] Indeed:

> *The totality of the evidence indicates that, in the main, Google adopted the design changes that the Commission investigated to improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to that purpose. While some of Google's rivals may have lost sales due to an improvement in Google's product, these types of adverse effects on particular competitors from vigorous rivalry are a common by-product of 'competition on the merits' and the competitive process that the law encourages.*

Also:

> *Google's primary goal in introducing this content was to quickly answer, and better satisfy, its users' search queries by providing directly relevant information.*

Given the huge political pressure on the FTC to bring a case, this was a courageous decision. Nor was the FTC alone, since courts in Germany and Brazil came to the same conclusion.[2] The European Commission took a different approach: it agreed on the first point, concluding that:

> *the objective of the Commission is not to interfere in Google's search algorithm.*[3]

In contrast, however, it raised preliminary concerns with regard to the allegedly favourable display of links to Google's specialised search services on the ground that these links might divert traffic from rivals,[4] and it extracted commitments from Google (see below). Some other antitrust authorities seem poised to go even further, and appear

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1 'Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc. FTC File No. 111-0163 (3 January 2013)' (FTC Google Search Statement), at www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf. 'FTC to Make Announcement Concerning Its Investigation of Google', FTC press release of 3 January 2013, at www.ftc.gov/news-events/press-releases/2013/01/ftc-make-announcement-concerning-its-investigation-google. While the author represented Google in the EU case, this analysis reflects personal views only and this editorial was not written at the client's request nor discussed with Google.

2 *Verband Deutscher Wetterdienstleister e.V. v. Google*, Reference No. 408 HKO 36/13, Court of Hamburg, 11 April 2013; *Buscape v. Google*, judgment of the 18th Civil Court of the State São Paulo – Case No. 583.00.2012.131958-7 (September 2012).

3 Commissioner Almunia, statement of 5 February 2014, http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm.

4 Press release of 25 April 2013, 'Antitrust: Commission seeks feedback on commitments offered by Google to address competition concerns', IP/13/371.

determined to decide against Google on both points whatever the evidence. It is striking that leading antitrust authorities would come to such different conclusions, especially since the evidence of 'diversion' was thin, and the evidence that the goal is to improve search services is so clear. Where the FTC noted, for instance, that

> *other competing general search engines adopted many similar design changes, suggesting that these changes are a quality improvement with no necessary connection to the anti-competitive exclusion of rivals*

the EC or certain other authorities would counter simplistically that firms with a dominant position have a special responsibility and are not allowed to practise what non-dominant firms are free to do, ignoring the point that if non-dominant firms successfully engage in the same conduct, they cannot be found to leverage dominance, and *prima facie* seek to improve products or achieve efficiencies. Dominant firms should be allowed to do so too. Competition on product improvement is in the consumers' interest.

As the *Google* case unfortunately illustrates, manipulation of public opinion is increasingly a factor in highly visible and large antitrust proceedings. The global level and intensity of lobbying by complainants in this case is unprecedented, with competitors using trade associations to advocate views with an appearance of objectivity.[5] Publishers (with commercial goals that include objectives unrelated to the issues in the case, such as the quest for ancillary copyright for news snippets) are seen to use news fora they control to stir up public opinion and mobilise politicians. Lobbyists have long mustered support from US senators, but a new development is the lobbying of members of the European Parliament – including even its president – who may think that placating publishers or lobbyists helps them in elections. Parliamentarians are heard to speak out publicly with strong convictions, as if they have carefully evaluated the facts, the law, and the economic policies. But antitrust enforcement should be a cold-headed judicial or investigative process, with decisions based on facts, law and economics, not politics. If this politicisation continues (and if the European Courts do not curb it), it could muddy the boundary between consumer welfare and manipulated political goals, potentially turning important assessment tools such as marketing tests into opinion polls, and undermining the rule of law. That would not be in the consumer interest.

At the time of writing, at least, vice president Almunia has stood up against attempts to steer him away from confirming the *Google* commitments (see below). But in

5 Nick Mathiason, 'Microsoft in row over lobby tactics', *The Observer* (UK), 23 September 2007. www.theguardian.com/business/2007/sep/23/money.digitalmedia; Robert A Guth and Charles Forelle, 'Microsoft Goes Behind the Scenes', *Wall Street Journal*, 24 September 2007, http://online.wsj.com/news/articles/SB119059784609936938; www.telegraph.co.uk/technology/8184065/Dark-forces-gunning-for-Google.html; Vlad Saviv, 'What is FairSearch and why does it hate Google so much?' 12 April 2013, www.theverge.com/2013/4/12/4216026/who-is-fairsearch; Greg Keizer, 'Microsoft not fooling anyone by using FairSearch front in antitrust complaint against Google', 9 April 2013, www.computerworld.com/s/article/9238267/Microsoft_not_fooling_anyone_by_using_FairSearch_front_in_antitrust_complaint_against_Google.

highly visible cases, there is a concern that populist, political or protectionist temptations will cloud the clarity of analysis that should be the norm in antitrust investigations. In some countries, there are even more worrying hints of unreliable procedures, lack of protection of confidential information, potentially arbitrary process and decision-making and inadequate substantive analysis. Apart from political opportunism and a populist streak in policy choices, some authorities appear tempted to free ride on others' efforts and to outshine each other by extracting greater remedies than their colleagues whatever the merits of the case. There is in some cases also an apparent desire to protect local players against foreign firms, rather than focusing solely on consumer interest. These are dangerous developments. With the increasing proliferation of competition laws, greater attention to facts and the rule of law is required. The need for comity – and specifically greater respect for decisions by authorities in the country of origin of the defendant with respect to worldwide practices – is stronger than ever (provided of course that due process is followed, and national bias is avoided in the country of origin).

The *Google* case is interesting also in that it illustrates another trend – a positive one this time. To meet the EU concerns, Google offered commitments to resolve concerns and avoid long drawn-out proceedings and appeals. Having gone through three iterations, the commitments look likely to be adopted by the summer of 2014 (four years after the opening of formal proceedings).[6] Standards is another area where settlements played a significant role. In early 2013, the US FTC announced that Motorola LLC had agreed to a Consent Order to address allegations that it had reneged on its FRAND obligations not to pursue injunctions against users of Motorola's SEPs who were supposedly willing licensees.[7] The European Commission followed suit in early 2014, accepting commitments offered by Samsung (patterned on Google's agreement with the FTC).[8] The commitments lay out how SEP holders might approach their obligations with regard to willing licensees so as to avoid being found to have violated antitrust rules (as will, it is hoped, the Court of Justice's preliminary ruling in *ZTE v. Huawei*).[9] The common approach taken by both the FTC and the European Commission signals (as

6 Press release of 5 February 2014, 'Antitrust: Commission obtains from Google comparable display of specialised search rivals', IP/14/116.

7 'Agreement Containing Consent Order, In the Matter of Google Inc', FTC File No. 121-0120 (3 January 2013).

8 'Antitrust: Commission accepts legally binding commitments by Samsung Electronics on standard essential patent injunctions' (29 April 2014), available at http://europa.eu/rapid/press-release_IP-14-490_en.htm; EC MEMO/14/322, 'Antitrust decisions on standard essential patents (SEPs) – Motorola Mobility and Samsung Electronics – Frequently asked questions' (29 April 2014), available at http://europa.eu/rapid/press-release_MEMO-14-322_en.htm; 'Case Comp/C-3/39.939 – Samsung Electronics, Enforcement of UMTS standard essential patents, Final Commitments' (3 February 2014), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1502_5.pdf; and Commitment Decision (29 April 2014), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf.

9 Case-170/13, *Huawei Technologies v. ZTE*, OJ 2013 C. 215/5.

vice president Almunia recently commented) a significant moment of convergence.[10] It is expected that this convergence will be mirrored in jurisdictions such as India and China, where issues around essential patents have recently also become the subject of investigation and litigation.[11]

The use of commitments and settlements in dominance and monopoly proceedings is to be welcomed, especially in dynamic markets, as it may lead to expeditious and efficient resolution of issues. In Europe, after the 'procedural modernisation' embodied in Regulation 1/2003,[12] the Commission has so far settled two-thirds of its abuse cases by way of commitments.[13] The advantages from the defendants' perspective (at the cost of trustee oversight and a binding decision that can be enforced even if breaches are technical and have no negative impact on competition) are that fines are avoided; there is no factual finding of abuse that can be used as a basis for private damage claims; no legal precedent is established; firms are not embroiled in decade-long appeal proceedings; and parties avoid disputes about implementation of otherwise vague and generally worded remedy orders that can poison the relationship with the authorities. From the plaintiffs' perspective, these points can be seen as disadvantages (especially the absence of precedent when new types of abuses are alleged), but this may be outweighed by the advantage that a solution is found relatively quickly. Consumers benefit as well.

This is not to say that settlements are always beneficial, as already mentioned in last year's editorial. There is a risk of regulatory hold-up, where an antitrust authority extracts concessions in unprecedented cases, using the threat of excessive fines, long and expensive proceedings, extensive discovery, political decision-making, absence of adequate judicial review and expensive follow-up private damage claims as leverage. Not all commitments are truly 'voluntary' in this light. This does not apply to the same extent in the US, where parties have a more real choice of whether to use a negotiated procedure, in view of the role of the courts in infringement proceedings.

In the past 10 years, commitments have thus come to occupy an important and generally efficient position in the enforcement process in both the United States and, particularly, the EU. The process is, however, far from perfect. In Europe, the Commission has in practice reversed the sequence of the procedure prescribed by Regulation 1/2003: instead of first issuing a preliminary assessment and then negotiating commitments, it

10 Speech of 20 September 2013, 'Competition Enforcement in the knowledge economy', SPEECH/ 12/629. For an overview of the minor policy differences, see Koren W Wong-Ervin, Federal Trade Commission, 'Global Approaches To Standard-Essential Patents', 6 May 2014.

11 In the recent case of *Huawei v. InterDigital, Inc*, and the NDRC's ongoing investigations of Qualcomm and Interdigital, Inc in China, and, in India, the CCI's investigation in *Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ)*, 50/2013, 12 November 2013; and *Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson*, 76/2013, 16 January 2014.

12 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (Regulation 1/2003), OJ L 1, 04.01.2003.

13 Of the 43 cases the Commission has dealt with since 1/2003 came into effect, 28 were settled by way of commitments and 15 by way of prohibitions.

tends to do the reverse. This has meant that defendants do not know the Commission's theory of harm in sufficient detail, and are more or less groping in the dark about how to address the Commission's concerns (although they will generally know at a high level from State of Play meetings what the overall issues are). Without a focused theory of harm, not only is legal certainty and clarity eroded, but there is also a risk that the Commission may move beyond what is strictly required to remedy its concerns, and instead seek to achieve political goals. On balance, however, the practice of accepting commitments is to be welcomed as a practical and realistic way of addressing concerns in the interest of consumers in a timely manner while reducing the expense and risks of full enforcement. It is hoped that authorities elsewhere will emulate this example, without succumbing to the temptation of regulatory hold-up.

I would like to thank all of the contributors for taking time away from their busy practices to prepare their insightful and informative contributions to this second edition of *The Dominance & Monopolies Review*. I am personally grateful for the assistance of my colleague Max Kaufman of the Brussels office. I look forward to seeing what evolutions or, indeed, revolutions, 2014 holds for the next edition of this book. Especially eagerly awaited are the European Court's judgment in *Intel* (conditional pricing) and the European Commission decision in *Gazprom*, and the US authorities' reviews of conditional pricing, and of the practices of patent assertion entities (PAEs) and privateers, which are directly relevant also for the EEA and other jurisdictions.

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Cleary Gottlieb Steen & Hamilton LLP
London
June 2014

Chapter 14

MALAYSIA

Tay Beng Chai and Lynette Yee Eun Ping[1]

I INTRODUCTION

The Competition Act 2010 (the Competition Act) was gazetted on 10 June 2010 and came into force on 1 January 2012. Much of the Malaysian law is modelled on EU competition law. Prior to this, Malaysia did not have a comprehensive set of rules to govern competition across all economic sectors. The Competition Act applies to any commercial activity both within and outside Malaysia provided the commercial activity transacted outside Malaysia has an effect on competition in any market in Malaysia. The Competition Act, however, does not apply to the communications and multimedia sector governed by the Communications and Multimedia Act 1998, and the energy sector governed by the Energy Commission Act 2001.

The Competition Act follows the Malaysian Prime Minister's unveiling of the New Economic Model in 2010, which aims to double Malaysia's per capita income through eight Strategic Reform Initiatives, one of which includes promoting a competitive domestic economy.

The Malaysia Competition Commission (MyCC) is an independent body established under the Competition Act to enforce said Act. Its main role is to protect the competitive process for the benefit of businesses, consumers and the economy.

Part II of the Competition Act prohibits anti-competitive practices such as anti-competitive agreements (Section 4) and abuses of dominant position (Section 10). Malaysia does not currently have merger control provisions.

The following are expressly excluded from the Part II prohibitions:[2]

a agreements or conduct that are engaged in to comply with a legislative requirement;

1 Tay Beng Chai is a managing partner and Lynette Yee Eun Ping is an associate at Tay & Partners.

2 Section 13 and the Second Schedule of the Competition Act.

b collective bargaining activities or collective agreements in respect of employment terms that are negotiated between parties and include both employers and employees; and

c an enterprise entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly insofar as the prohibitions in Part II would obstruct that performance of the particular tasks assigned to it.

There has not been any decision involving the interpretation of the exclusions. However, the MyCC has issued a report on the fixing of prices or fees by professional bodies and has concluded that price-fixing made by the state (through legislation) or professional bodies specifically empowered by the legislation would fall under Section 13 and Paragraph (a) of the Second Schedule of the Competition Act. It was further reiterated in the report that the Competition Act prohibits price-fixing by professional bodies that do not have any lawful authority to do so unless they can satisfy the elements under Section 5 for an exemption.[3]

To date, the MyCC has published four final guidelines: on market definition, anti-competitive agreements, the complaints procedure and abuses of dominant position. The guidelines can be found on the MyCC website. In addition, the MyCC has also issued two draft guidelines (i.e., Guidelines on Financial Penalties and Guidelines on Leniency Regime) and these guidelines are open for public consultation. The MyCC also published a handbook on competition law for the general public, compliance guidelines and a guide for businesses.

The Competition Act does not provide for notification for guidance or notification for decisions. Parties entering into anti-competitive agreements may, however, apply for an individual exemption. They will need to show net economic benefit that could not be reasonably achieved without the agreement and that such an agreement will not eliminate competition completely in respect of a substantial part of goods or services.

II YEAR IN REVIEW

The Competition Act has only been in force since 1 January 2012. Since the Act came into force, the MyCC has wasted no time in enforcing the law.

In the first six months of 2012, the MyCC received seven official complaints in respect of suspected anti-competitive practices in the business sector. Out of the seven, two were from consumer groups while the rest were from enterprises affected by suspected anti-competitive conduct by other businesses.

In December 2012, the MyCC issued its first final decision against the Cameron Highlands Floriculturist Association (CHFA) for contravening Section 4(2) of the Competition Act. CHFA was found to have engaged in an anti-competitive agreement

3 Available at www.mycc.gov.my/files/publication/market_review_Executive_Summary_on_Professional_Bodies_Study.pdf.

to increase the prices of flowers by 10 per cent. However, no financial penalties were imposed on CHFA's members.

In the second half of 2013, the MyCC issued final directions against the Pan-Malaysia Lorry Owners Association (PMLOA), its members and related lorry enterprises. The final directions given to PMLOA, its members and related lorry enterprises are as follows:

a to refrain from entering into any form of communications or to facilitate any communications concerning pricing for services provided by lorry enterprises;

b to amend and remove from PMLOA's and its members' constitutions any provision concerning any discussion and determination of any chargeable prices; and

c to submit the amended constitution within 60 days from the date of issue of the notice.

Furthermore, the MyCC has also issued one final decision and two proposed decisions thus far. The first concerned the aviation sector, wherein the MyCC found that Malaysian Airline System Berhad (MAS) and AirAsia Berhad (AirAsia) had infringed Section 4(2)(b) of the Competition Act by entering into a Comprehensive Collaboration Framework, with the object of sharing markets in the air transport services sector within Malaysia. A final decision has just been issued and the parties are planning to appeal this decision to the Competition Appeal Tribunal.

A proposed decision was issued in relation to the steel industry, Megasteel Sdn Bhd (Megasteel), which is the only domestic producer of hot rolled coils that is also engaged in the downstream production of cold rolled coils. It was alleged that Megasteel's practice of charging or imposing a price for its hot rolled coils is disproportionate to the selling price of its cold rolled coils, which amounts to a margin squeeze under Section 10(1) of the Competition Act. Megasteel has submitted its written representation to the MyCC and is currently waiting for an oral representation date.

The second proposed decision was issued to 26 ice manufacturers, who were found to have infringed Section 4(2) of the Competition Act by entering into an agreement with the object of fixing directly or indirectly the selling price of edible tube ice and the price of block ice in certain regions of Malaysia.

An individual exemption application was made by a multinational food company to exempt its pricing policy called the Brand Equity Protection Policy (BEPP). The MyCC found elements of resale price maintenance and requested the applicant to remove its pricing policy contained in the BEPP. The application for individual exemption was subsequently withdrawn.

Block exemption applications were made by five trade bodies; the Life Insurance Association of Malaysia (LIAM), the Association of Malaysian Hauliers and a joint application by the Malaysia Shipowners Association, the Shipping Association of Malaysia and the Federation of Malaysian Port Operators Council.

In December 2013, the MyCC granted a conditional block exemption order (BEO) for liner shipping agreements. The duration of the BEO is three years, and after two years the MyCC may review the exemption should there be a need. Section 10, which prohibits abuses of dominant position, is not part of the BEO, hence parties to a liner shipping agreement can still be found liable for an infringement if they are found

to be abusing their dominant positions in the liner shipping market. The BEO also does not cover inland carriage of goods and warehousing of goods.

MyCC has also looked into the domestic broiler market and after conducting a market review and taking into consideration the views and feedback received, including those derived from its public consultation exercise, the MyCC has concluded that there is no conclusive evidence of any forms of anti-competitive conduct in the domestic broiler market for Peninsular Malaysia.

III MARKET DEFINITION AND MARKET POWER

MyCC has chosen a market share of 60 per cent as indicative of significant market power suggesting possible dominance.[4] This figure is at the higher end of the scale among jurisdictions around the world, reflecting the fact that Malaysia's economic landscape is fairly oligopolistic in a number of sectors.

A higher threshold is naturally less disruptive to the status quo and should be welcomed by businesses. This 60 per cent figure is purely indicative as an enterprise with more than a 60 per cent market share may not be considered dominant and conversely an enterprise with a share of less than 60 per cent could be considered dominant. This is because there are myriad factors at play, for example, potential competitors, low barrier of entry into the business and few buyers with economic power equal to the dominant supplier. It would also be possible for an enterprise with a 20 to 30 per cent market share to be considered as dominant if it is protected by a patent or a new technology.

Section 10 of the Competition Act refers to an enterprise engaging independently or collectively in conduct that amounts to an abuse of dominance. Economic analysis is important in market analysis.

The term 'market' has been defined in Section 2 of the Competition Act 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 and services that are substitutable for, or otherwise in competition with, the first-mentioned goods or services'.

MyCC uses the hypothetical monopolist test[5] (HMT), which is also known as the 'small but significant and non-transitory increase in price' (SSNIP) test. The conceptual approach of HMT defines the relevant market as 'the smallest group of products (in a geographical area) that a hypothetical monopolist controlling that product group (in that area) could profitably sustain at a price above the 'competitive price' (i.e., a price that is at least a small but significant amount above the competitive price).

The MyCC will use a price range of 5 to 10 per cent to represent an SSNIP and it has become the goal of market definition to find the smallest market in which a hypothetical monopolist could impose an SSNIP. Applying the HMT involves the following steps:

4 Page 4 of the Guidelines on Chapter 2 Prohibitions.

5 Page 2 of the Guidelines on Market Definition.

a step one: start with a hypothetical monopolist of the focal product (i.e., the product that is under investigation);

b step two: would a hypothetical monopolist of a market for the focal product find it profitable to sustain a price for the focal product of 5 to 10 per cent above the competitive level? If yes, then this market definition is the relevant product market for competition purposes because all the products that compete with the focal product around that price have been identified. The market definition is completed. If no, then this means that there are other products that compete with the focal product and these products should be included in the definition of the relevant market; and

c step three: the question for step two is repeated and if the answer is yes, then the relevant market is the market for the focal product plus the close substitutes. If no, then add the next closest substitutes and repeat the question until the point is reached where a hypothetical monopolist could sustainably maintain the price at 5 to 10 per cent above the competitive price.

An important issue to consider is whether the hypothetical monopolist could sustain the SSNIP price. This will depend on the nature of the relevant market. As a general guide, the MyCC will only include products in the relevant market that consumers could switch to within 12 months.

The geographic scope of the market is defined using the same framework used to analyse the product market. Defining the geographic market starts by identifying a relatively narrow geographic area, called the focal area. This is the narrowest area in which the group of products identified in the product market definition compete (e.g., whether in a town or suburb). Then the question is asked: could a hypothetical monopolist of the group of products identified in the relevant product market, operating in that focal area, profitably increase the price by 5 to 10 per cent above the competitive price? If yes, then this is the geographic market because consumers will not buy elsewhere and producers outside the region will not supply the focal area. If no, this means that buyers are able to go to neighbouring areas to buy or sellers would come into the focal area to sell in response to the higher price and these neighbouring areas should be included in the geographic market definition.

IV ABUSE

i Overview

Dominance in itself is benign and an enterprise is not prohibited from being dominant. Economic theories expound efficiency and innovation to benefit consumers and therefore a dominant player who is efficient and innovative is not penalised.

Looking at it another way, Chapter 2 is not about protecting inefficient competitors or competitors in general. It is about protecting the competitive process, which is the cornerstone of competition law. It is therefore always important to ask how a dominant enterprise got to where it is and how it stayed there. Is it through abusive conduct or through efficiency and innovation?

As provided by Section 10 of the Competition Act, a dominant enterprise may abuse its dominant position by:

a directly or indirectly imposing an unfair purchase or selling price or other unfair trading conditions on a supplier or customer;

b limiting or controlling production, market outlets or markets access, technical or technological development, or investment, to the prejudice of customers;

c refusing to supply to particular enterprises or groups or categories of enterprises;

d discriminating by applying different conditions to equivalent transactions such that it discourages new market entry or market expansion or investment by an existing competitor, seriously damages or forces a competitor that is just as efficient out of the market, or harms competition in the market in which the dominant enterprise operates or in any upstream or downstream market;

e forcing conditions in a contract that have no connection with the subject matter of the contract;

f any predatory behaviour towards competitors; or

g buying up scarce supplies of goods or services where there is no reasonable commercial justification.

This, of course, is a non-exhaustive list of actions that may constitute an abuse of dominant position. Abusive conduct can be divided into two categories: exclusionary and exploitative abuses.

ii Exclusionary abuses

Exclusionary abuses are predatory acts that prevent competitors from competing, which leads, whether directly or indirectly, to higher prices, lower quality products, less innovation, etc. Exclusionary conduct will be assessed in terms of its effects on competition. This refers to the impact of the conduct on the competitive process and not the effects on competitors. It is believed that effective competition drives inefficient enterprises out from the market and this move will benefit consumers. Therefore, the fact of dominant enterprises engaging in such competitive conduct will not amount to an abuse of a dominant position.

MyCC adopts an effects-based approach in assessing a potential abuse of a dominant position. By adopting this approach, the MyCC ensures that conduct that will benefit the consumers is not prohibited, which creates a good economic outcome consistent with the aims of the Competition Act. The effects-based approach does not, however, apply to horizontal agreements between enterprises that have the object of undertaking anti-competitive conduct. Malaysia adopts the concept of collective dominance.

In general, the MyCC will use two main tests for assessing anti-competitive effects. First, does the conduct adversely affect the consumers? And second, does the conduct exclude a competitor that is just as efficient as the dominant enterprise? Below are some non-exhaustive examples of exclusionary abuses described in the MyCC's guidelines.

Predatory pricing

While consumers may benefit from enterprises setting low prices, a dominant enterprise may set prices below cost price to drive other as-efficient competitors out from the

market. Consumers will lose out in the longer term when the dominant enterprise subsequently raises the prices back to the original level or to an even higher price. When considering whether a dominant enterprise is charging below cost prices, a number of different costs may be used. From a competition law perspective, the concern is whether a dominant enterprise's price is reasonable across the whole relevant output and not just the last unit of output.

Price discrimination

Where the same product is sold at different prices and the difference in price is unrelated to the cost of the products, this has been seen as an exclusionary abuse. While there are benefits to charging a particular group of consumers cheaper prices (e.g., a low-income group) it can also adversely affect competition if a dominant enterprise charges low prices in a particular area to drive out its competitors. Charging one buyer more than the other buyer may affect the competition in the downstream market, particularly if the dominant enterprise has a subsidiary downstream.

Exclusive dealing

An exclusive dealing arrangement between a dominant seller and a buyer can foreclose the market where the arrangement is such that other buyers are not able to obtain products from the seller or that competitors of the dominant seller are prevented from supplying to the buyer concerned.

Loyalty rebates and discounts

MyCC recognises that loyalty rebates and discounts are generally pro-competitive. However, a dominant enterprise may be able to use loyalty rebates and discounts to foreclose a market to competitors by using selective discounts or rebates.

Refusing to supply and sharing of essential facilities

Refusal to supply can cover a number of different kinds of refusal such as a refusal to supply certain products to buyers, a refusal to license intellectual property rights and a refusal to grant access to essential infrastructure necessary for the supply of certain products. The remedy for a refusal to supply is to force the supplier to supply at a reasonable consideration. However, forcing supply may reduce the supplier's incentive to invest in the product and the MyCC will have to determine the extent to which suppliers can be forced to supply while still maintaining an incentive for such innovation.

Buying up scarce intermediate goods or resources

This abuse happens when a dominant competitor in a downstream market buys all the scarce supplies needed by its competitors. This has the effect of increasing the competitors' cost of production or it may have the effect of preventing them from supplying at all.

Bundling and tying

The main issue is the possibility that an enterprise that is dominant in one market will try to leverage its dominance in another market by indulging in this practice. Bundling can also be used to implement predatory pricing, with one of the products in the bundle set below cost price to make other producers of that item unable to compete.

iii Exploitative abuses

Exploitative conduct is where an enterprise has the ability to maintain a price above the competitive level for some time without worrying about whether the consumers will switch to other products or that new competitors will enter the market. The MyCC will only be concerned about excessive pricing where there is no likelihood that market forces will reduce dominance in a market.

V REMEDIES AND SANCTIONS

i Sanctions

Enterprises found to have abused their dominant position may be subjected to a financial penalty of up to 10 per cent of their worldwide turnover over the period during which the infringement occurred.[6]

Bodies corporate that commit an offence under the Competition Act, such as destroying documents or tipping off, will be subjected to a fine not exceeding 5 million ringgit or in the event it is a subsequent offence, the fine will not exceed 10 million ringgit. Individuals who commit an offence under the Competition Act will be subject to a fine not exceeding 1 million ringgit or imprisonment for a term not exceeding five years, or both. In the event it is a subsequent offence, that individual may be given a fine not exceeding 2 million ringgit or imprisonment for a term not exceeding five years, or both.

ii Behavioural remedies

During the investigation, the MyCC may impose interim measures as provided in Section 35 of the Competition Act. These interim measures may be imposed if the MyCC reasonably believes that an infringement has occurred or is likely to occur and the measures are necessary as a matter of urgency to prevent serious and irreparable damage or to protect the public interest.

MyCC may direct the enterprise to suspend the effect of and desist from action in accordance with any agreement that is suspected of infringing the Competition Act, to desist from any conduct that is suspected of infringing the Competition Act, or to do or to refrain from doing any act with the exception of payment of money.

Prior to giving a direction, the MyCC will serve a written notice to the enterprise and the enterprise will be given a period of at least seven days to make written representations. Any direction given will cease to have any effect when the MyCC completes the investigation and issues a decision or within 12 months from the date of the direction, whichever is earlier.

The Competition Act allows the enterprise to propose an undertaking, which may be accepted by the MyCC subject to the conditions imposed. Once the MyCC accepts the enterprise's undertaking, it will cease its investigation and the MyCC has the power to enforce those conditions upon the enterprise.

6 Section 40(4) of the Competition Act.

VI PROCEDURE

i Investigation

Malaysia's competition regulator will have an inquisitorial role whereby the MyCC may conduct any investigation on any enterprise if it has reason to suspect that the enterprise has infringed or is infringing any prohibitions under the Competition Act. The MyCC may also investigate any suspected infringement on the direction of the Minister of Domestic Trade and Consumer Affairs or upon complaint by a person. The complaint has to specify the person against whom the complaint is made and details of the alleged infringement or offence.

The Competition Act grants to the MyCC and its officers the same investigatory powers as those of a police officer in relation to police investigations as provided under the Criminal Procedure Code. The MyCC has the power to direct any person to provide or produce any information or document that is relevant or to provide a statement to the MyCC to explain any document or information requested. In addition to the above, the MyCC also has the power to:

a retain documents and have access to records, books, accounts or other items for the purposes of carrying out its functions or powers under the Competition Act; and

b enter premises under a warrant issued by the magistrate, or in urgent cases the officer may enter the premises without a warrant to search, seize and seal any record, book, account, document and computerised data including searching suspicious persons.

ii Decision

After the completion of its investigation, if the MyCC proposes a decision that there has been an infringement, it may issue a notice setting out the reasons for its decision, penalties and informing the enterprise that it may submit written or make oral representations to the MyCC.

The MyCC may conduct a hearing for the purposes of determining whether the enterprise has infringed the prohibitions under Part II of the Competition Act. The hearing can either be held in public or in a closed session if there is confidential information involved. The MyCC may invite the enterprise concerned and other third parties to such a hearing.

If the MyCC has made a decision that there is no infringement of the prohibition under Part II, the MyCC will issue a notice to any person affected by the decision stating the reasons for the decision. If, however, the MyCC comes to a conclusion that there is an infringement, it will:

a require the infringement to be ceased immediately;

b specify steps that are required to be taken by the infringing enterprise;

c impose a financial penalty; or

d give any other direction as it deems appropriate.

iii Enforcement of decision or direction

If the enterprise fails to comply with a direction or a decision given by the MyCC, the MyCC may bring proceedings before the High Court and the High Court can make orders requiring the enterprise to comply with the direction or decision, which may include interest payments at the normal judgment rate. Any breach of an order of the High Court shall be punishable as contempt of court.

iv Leniency regime

As is the case in the European Union, competition law in Malaysia has a leniency regime of up to 100 per cent immunity from any penalties that would otherwise be imposed on an enterprise. This leniency regime is available for enterprises who admit their involvement in an infringement and provide information or other forms of cooperation to the MyCC that significantly assist in the identification or investigation of an infringement of the Competition Act. The different levels of reduction percentages depend on a few factors such as whether the enterprise was the first to bring the infringement to the MyCC's attention, the stage of investigation when the infringement was admitted and when the information was provided.

v Appeal

The Competition Appeal Tribunal has exclusive jurisdiction to review any decision made by the MyCC. The MyCC's decision on whether there is an infringement and any penalties or interim measures can be reviewed by the Competition Appeal Tribunal, by way of a notice of appeal in writing made by an enterprise that is aggrieved or whose interest is affected by the decision.

Pending a decision of the appeal by the Competition Appeal Tribunal, the decision by the MyCC will remain valid, binding and enforceable except where a stay of the decision has been granted by the Tribunal. The Competition Appeal Tribunal decides its own procedure on hearing the appeal and the decision is made on the basis of a majority of members. The Competition Appeal Tribunal will also have the powers of a subordinate court under the Subordinate Courts Act 1948 [Act 92] with regard to the enforcement of attendance of witnesses, hearing evidence on oath or affirmation and punishment for contempt.

The Competition Appeal Tribunal may confirm or set aside the decision, or any part of it that is the subject of the appeal and may:

a remit the matter to the MyCC;
b impose or revoke, or vary the amount of financial penalty;
c give directions or steps that the MyCC could itself have given; or
d make any decision that the MyCC could have made.

A decision of the Competition Appeal Tribunal is final and binding on the parties to the appeal.

VII PRIVATE ENFORCEMENT

Section 64 of the Competition Act provides that any person who suffers loss or damage directly as a result of an enterprise abusing its dominant position will have a right of action for relief in civil proceedings in a court. This private action may be brought by the person regardless of whether he or she has dealt directly or indirectly with the infringing enterprise. The commencement of such an action is not dependent on successful prosecution or a finding of infringement by MyCC.

VIII FUTURE DEVELOPMENTS

It is clear that the MyCC intends to be robust in its approach to enforce the Competition Act. At the moment, the MyCC Research Grant Programme (RGP) is open for applications to carry out studies on competition issues in the Malaysian economy. The MyCC's CEO, Shila Dorai Raj, is of the view that the RGP-funded research studies are expected to provide a clearer picture of the competitiveness of enterprises in the Malaysian economy.

There have been no discussions on plans to introduce merger control in the near future.

Appendix 1

ABOUT THE AUTHORS

TAY BENG CHAI

Tay & Partners

Beng Chai has over 25 years of extensive corporate and commercial experience in Malaysia and Singapore. He has been the managing partner of the firm since inception.

He founded Tay & Partners in 1989 and established both the Johor Bahru and Kuala Lumpur offices. His major professional specialisation includes M&A, equity capital markets, private equity, FDI Malaysia and regional mergers and acquisitions. His other practice areas include competition law, and regulatory and commercial agreements. He is also a founding partner of ATMD Bird & Bird LLP, Singapore.

He graduated with a bachelor of laws degree (LLB (upper second-class honours)) from the National University of Singapore in 1985. He was admitted as an advocate and solicitor to the Singapore Bar in 1986 and as an advocate and solicitor of the High Court of Malaya in 1989. Beng Chai is also a fellow of the Singapore Institute of Arbitrators.

LYNETTE YEE EUN PING

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Lynette graduated from the University of Manchester, United Kingdom with an LLB (upper second-class honours) in 2010 and took the Bar Professional Training Course (BPTC) at Manchester Metropolitan University. She was admitted as a barrister-at-law to the Bar of England and Wales in July 2011 and is a member of the Honourable Society of Lincoln's Inn, London. She was admitted as an advocate and solicitor of the High Court of Malaya in 2012.

Lynette practises exclusively in the corporate division, where the scope of her practice encompasses corporate, commercial, aviation and competition law. To date, she has experience in mergers and acquisitions and initial public offerings. She also has experience of conducting legal due diligence, licensing compliance, general advisory works and has developed in-depth research skills.

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