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Judicial Perspectives on Competition law

-- Malaysia --

1. Abstract¹

1. Scholarship and roundtable discussion report that competition law encompasses a complex system of rules and procedure², and is fundamentally subjective, it has been submitted that the cases is based upon a public policy and can therefore include non – economic goals and purposes, such as the guarantee of procedural fairness, through the protection rights of the parties, to ensure accountability of administrative processes or to ensure consistency, from a legal perspective, in the actions of the authority reviewed by the courts ³. The competition issues in competition cases also demonstrate a close and fundamental relationship between economics and competition law, where the economics provides the substantive basis of the law.

2. This paper will highlight a “workable direction” that an emerging economy like Malaysia should adopt in decision making of competition cases. This paper will first discuss the competition authorities’ regulatory process in Malaysia. The first part will highlight the current Malaysian framework, the second part will discuss the “accepted” functions as in the developed economies, the three most important function being ensuring procedural process, applying substantive or economic principles, and bringing a certain degree of flexibility in decision making. The third part of the paper will discuss the present challenges in the Malaysian judiciary dealing with competition cases. The Judicial review process, application of economics and law and adopting the role of economic ambassador in competition decision making. The fourth part will highlights the transition best practices to Malaysian judiciary in addressing competition judicial norms.

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² OECD, 1996

³ David, et al 2014

2. Introduction

2.1. Part 1: Background of competition development in Malaysia

3. The concept of competition was perceived as a plausible “remedies” to Malaysia’s command and control economy toward a more competitive market. Therefore, policy makers in 1980s took steps to promote competition concept gradually. The first economic policy saw policy makers effort was to initiate privatization of national enterprises, and followed with the earliest experiences of liberalization of Malaysian market where the deregulation attempted to introduced and initiated through the implementation of ‘trial liberalization’ movement with the energy and telecommunication sector. This move signifies policy maker’s commitment towards ‘a way forward’ to competitive market model. The liberalization of the two sectors generated two outcomes that set the appropriate indicators and a good case study for other sectors in the Malaysian market.

4. The telecommunication market deregulation work well and saw more telecommunication companies participated in the telecommunication market. The National telecommunication company i.e. telecom Malaysia was ready to compete and share the telecommunication field with more players. Competition brought significant growth over the past decades⁴.

5. The liberalization of the telecommunication five licences was the five operators of fixed line that was awarded licence (year of award in parenthesis) were Telekom Malaysia (1987), Maxis Communications Sdn Bhd (1993), TIME dotCom Berhad, PrismaNet (M) Sdn Bhd, DiGi Telecommunications Sdn Bhd (1995) and Celcom (M)

⁴ Deregulation in Malaysia in Malaysia began its first transformation in 1983; the transformation began with Telecommunication sector in Malaysia’s earliest experience with reforms began when the government allowed private participation in supplying terminal equipments¹ that eventually set the stage for more advance telecommunications markets like radio paging and later on, mobile cellular. The major reform push was initiated in 1987 when the then national utility company, Jabatan Telekom Malaysia was replaced by Syarikat Telekom Malaysia Berhad (known as Telekom Malaysia Berhad after its 1990 listing) in a move to deregulate the industry and privatize the national telecommunication entity. The company was subsequently subjected to public listing although the government maintained until today, significant amount of shares of the company. In 1990, the company was officially listed on the main board of the Malaysia stock exchange (hence the beginning of the company’s privatization era) and its name was changed again, this time as Telekom Malaysia or TMB in short although the Finance Ministry remained as TMB’s largest shareholder. Liberalization of the sector continued especially in the fixed and cellular telephony services. In the case of the former, five licenses³ were awarded from 1993 to 1995 although the high set-up cost of investing in fixed line network stifled competition levels. As such, the national utility continued to dominate this sector although it has since then declined, with the penetration rate of fixed-line subscribers falling over the past ten years ⁴. However, as of 2007, Telekom Malaysia owned 97.9% of the market share of the fixed line market in Malaysia

Sdn Bhd (1994). The energy sector deregulation was not able to generate most of the competitive benefits as the sector was rather complex, and it was due to the capital-intensive electricity market structure. Consequently liberalization of the energy sector despite equipped with a well designed policy transformation through vertical and horizontal unbundling was not able to generate the appropriate competitive benefits⁵.

2.2. Part II Competition and Enforcement

6. The Malaysian government was fashionably late in adoption and endorsement of the competition law and policy in the country; this is because as an emerging economy, economic transition will be put in place in accordance with the Malaysian economic plan. As a result, privatisation and liberalization of the Malaysian market was put in place in the early 1980s, follow by sector deregulation in adoption of more competition to the command and control market. The gradual deregulation of certain sectors was seen as the appropriate approach as to create “culture of competition” among stakeholders warrant a major transformation of the public and private business policy.

7. The experience gained in the two sectors provided the indispensable lessons for policy makers in Malaysia. In 2010, the Malaysian government endorsed and passed Malaysia Competition Act (the act) and the Competition Commission Act 2010 and the act was enforced in 2012. The act consists of four (4) chapters on anti –competitive practices and has four (4) parts on regulation of the investigation and enforcement as well as set forth the Malaysian competition authorities or regulatory bodies for the Malaysian competition framework.

8. The sectoral experience provided the right impetus together with rapid development of borderless market, globalization and in order to promote foreign direct investment, the policymakers began to set the endogenous structure of competition law and policy in Malaysia. The competitive regulatory framework brought about the establishment of two national competition authorities i.e. the Malaysian competition Commission and the Malaysian Competition Appeal Tribunal.

9. The two acts were formulated and passed and it’s provided that the Malaysian competition commission (MyCC) is an independent body established under the Competition Commission Act 2010. Its main role is to protect the competitive process for the benefit of business, consumers and the economy. MyCC powers are provided under part III of the act. MyCC is the national competition authority to prosecute and decide the all competition matters. The Competition Commission Act 2010 empowers MyCC to carry out functions such as implement and enforce of the act, to issue guidelines in relation to the implementation and enforcement of the competition laws, act as advocate for competition matters⁶; carry out general studies in relation to issues connected with

⁵ The two sectors are excluded under the Malaysian competition Act 2010; the two sectors are under the supervision of the telecommunication and energy commission (MCMC). Refer to <http://ssrn.com/abstract=1702964> Wan Liza Md Amin.

⁶*The Commission powers to investigate an enterprise for anti -competitive practices as stipulated under section 14(1)*

The Commission may conduct any investigation as the Commission thinks expedient where the commission has reason to suspect that any enterprise has infringed or is infringing any prohibition under this Act or any person has committed or is committing any offence under this act.

(2) The Commission shall, on the direction of the Minister, investigate any suspected infringement of any of the prohibition or commission of an offence under this Act.

competition in the Malaysian economy or particular sectors of the Malaysian economy; inform and educate the public regarding the ways in which competition may benefit consumers in, and the economy of Malaysia⁷. The Commission are divided into two organizational divisions. MyCC's functions are divided between the commissions members whom hear and decide competition cases and the members are under the guidance of chairman. The second division comprises of the officers and under the leadership of the chief executive officers. This division carry out all other functions of a competition commission and act as the prosecutors, investigating officers and provides competition law and policy advocacy to all stakeholders in the country.

10. The provision of the powers to enforce the law varied from a complaint(s), ministerial instructions, and market review on any competitive practices in Malaysia. The act states the infringements, the defences and the powers to conduct investigations and powers to gather information's and documentary evidence. These provisions are more or less equivalent to many commission's powers in other jurisdictions. The Commission

Complaint to the Commission

15.(1) *The Commission may, upon a complaint by a person, conduct an investigation on any enterprise, agreement or conduct that has infringed or infringing any prohibition under this Act or against who has committed or is committing any offence under this Act.*

(2) *The complaint shall specify the person against whom the complaint is made and details of the alleged infringement or offence under this Act.*

Part IV of the competition act 201 Decision by the Commission

Interim measures

35. (1) *this section applies if the Commission has commenced but not completed an investigation under section 14.*

(2) *If the commission has reasonable grounds to believe that any prohibition under this act has been infringed or is likely to be infringed and the commission considers that it is necessary for it to act under this section as a matter of urgency for the purpose of –*

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

(b) *Protecting the public interest,*

(c) *It may give such direction as it considers being appropriate and proportionate for that purpose.*

(3) *A direction given under subsection (2) may include requiring or causing any person-*

(a) *To suspend the effect of, and desist from acting in accordance with, any agreement which is suspected of infringing any prohibition under Part II;*

(b) *To desist from any conduct which is suspected of infringing any prohibition under Part II; or*

(c) *To do, or refrain from doing, any act but which shall not require the payment of money.*

(40) *The Commission shall, before giving direction under subsection (2)-*

(a) *Serve a written notice to the person to whom it proposes to give the direction; and*

(b) *Give that person an opportunity to make written representations within a period of at least seven days from the date of written notice.*

(c) *An act to promote economic development by promoting and protecting the process of competition, thereby protecting the interest of consumers and to provide for matters connected therewith. Whereas the process of competition encourages efficiency, innovation and entrepreneurship, which promotes competitive prices, improvements in the quality of products and services and wider choices for consumers.*

And whereas in order to achieve these benefits it is the purpose of this legislation to prohibit anti-competitive conduct⁶

⁷ Please refer to the Competition Act 2010 part I, II; III, IV and the Competition Commission Act 2010

members are persons appointed on their expertise from multidiscipline from legal, most of the experts are from the industry and judicial officials.

11. The second regulatory authority established through this act is the Competition Appeal Tribunal. The tribunal members are presently retired federal and appeal court judges, retired ministries directors and officials, academic experts and the tribunal is presided by a high court judge.⁸ The Tribunal is established under the part V section 44 of the Competition Act 2010. Section 45 of the Act states:

45(1) the competition appeal tribunal shall consist of the following members:

A President; and

Between seven and twenty other members appointed by the Prime Minister on the recommendation of the Minister.

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12. The members 3 years terms and the term may be extended another 3years. The position as member judges in the tribunal will be limited a 6 years appointment. The powers and the functions of the tribunal members are to hear and decide on appeals from the commission or appeal brought by any aggrieved parties. Presently, the tribunal have five appeal applications, three parties agreed moved for settlement, one pending judicial review and one pending decision. The appeal powers are provided under section 51 of the act as stated below:

Appeal to the Commission Appeal Tribunal

Section 51 (1) A person who is aggrieved or whose interest is affected by a decision of the Commission under section 35,39 or 40 may appeal to the Competition Appeal Tribunal by filing a notice of appeal to the Competition Appeal tribunal.

(2) A notice of appeal shall be made in writing to the Competition Appeal Tribunal within thirty days from the date of the decision of the Commission and the appellants shall give a copy of the notice to the chairman of the Commission.

(3) The notice of appeal shall state in summary form the substance of the decision of the Commission appealed against, shall contain an address at which any notices or documents connected with appeal may be served upon the appellant or upon his advocate and shall be signed by the appellant or his advocate.

Powers of the Competition Appeal Tribunal⁹

57. (1) The Competition appeal Tribunal shall have power-

⁸Refer to part V of the act 2010

⁹Malaysian competition act 2010

(a) To summon parties to the proceedings or any other person attend before it give evidence in respect of an appeal;

(b) To procure and receive evidence on oath or affirmation, whether oral or documentary, and examine all such persons as witnesses as it considers necessary;

(c) Where a person is summoned, to require the production of any information, document or other thing in his possession or under his control which Competition Appeal Tribunal considers necessary for the purposes of the appeal;

(d) To administer any oath, affirmation or statutory declaration, as the case may require;

(e) Where a person is summoned, to allow to the payment for any reasonable expenses incurred in connection with his attendance;

(f) to admit evidence or reject evidenced adduced, whether oral or documentary, and whether admissible or inadmissible under the provisions of any written law for the time being in force relating to the admissibility of evidence; and '(e) to generally direct and all such matters as may be necessary or expedient for the expeditious decision of the appeal.

(2) the Competition Appeal Tribunal shall the powers of a subordinate court under the Subordinate Courts Act 1941 (Act 92) with regard to the enforcement of attendance of witnesses, hearing evidence on oath or affirmation and punishment for contempt.

(2) The Competition Appeal tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may-

(a) remit the matter to the Commission;

(b) impose or revoke, or vary the amount of, a financial penalty;

(c) give such direction, or take such other step as the Commission could itself have given or taken; or

(d) Make any other decision which the Commission could itself have made.

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

Enforcement of decision of the Competition Appeal Tribunal

Section 59¹⁰. A decision given by the Competition Appeal Tribunal may, by leave of the High Court, be enforced in the same manner as a judgement or order to the same effect, and where leave is so given, judgement may be entered in terms of the decision.

2.3. Judicial Review & Court

13. The third (3) endogenous institutional structures set in place, is the administrative relief i.e. the judicial review of the High Court instead of an appeal process. This process as Montesquieu submits that judicial review should be separated

¹⁰ Malaysian competition act 2010

from the legislative powers in order to prevent the over-concentration of powers in the hands of legislature¹¹. The judiciary role should serve to review legislation enacted by the Parliament in order to ensure that it bears the values of higher laws (the constitution)¹². Order 53 of the Rules of court 2012 provides the administrative relief.¹³

14. The civil proceeding adopted similar process of any civil matter for judicial review application. Judicial review within Malaysia context has been defined as the process by which the High Court exercises its superiorly jurisdiction over the proceeding and decision of inferior Courts, tribunal and other bodies or persons who carry out quasi-judicial functions who are charged with the performance of public acts and duties.¹⁴

15. Malaysia Administrative law is received and practised as part of the Common Law of England and by the authorisation of the Court of Judicature Act 1964. Judicial review of civil causes or matters is governed by the Rule of the High court 2012, the Specific Relief Act 1950, and pursuant to the inherent powers granted to the Courts under paragraph 1 of the Schedule to the Courts of Judicature act 1964¹⁵

16. The Court Rule 2012, laid down the procedure of judicial review application where a notice of application for leave to review the decision of tribunal. The leave will only be allowed where the applicant has shown that the tribunal decision was erroneous in law. If there was an error in law, the High court will proceed to assess the tribunal's findings and will then allowed the leave application and schedule Judicial Review hearing dates. The judicial review hearing is before one presiding judge. The judge will then proceed to hear the parties' application to review the tribunal decisions. The high court judicial review decision may also subject to appeals to court *of appeal and to the highest court in Malaysia i.e. federal Court*.

17. Practices in other jurisdiction set out their competition regulatory framework with competition commission, all parties aggrieved by the decision may file an appeal or challenged the decision by judicial review. The appeal or judicial review will be heard by the either competition appeal tribunal or the courts as appellate bodies. The policy makers adopted other developed economic model and ours are more or less in line with the Australia competition where judicial review is the mode adopted when and if the decision of the tribunal to be challenge. The Malaysian competition regulatory framework comprises of the MyCC, the Competition Appeal Tribunal and the Malaysian Court.

¹¹ He further stated that the separation of all three organs of government, with each playing a role of check on the power of two other bodies.

¹² Dr. Khairil Azmin Mokhtar and Siti Aliza Alias Judicial power in Malaysia emulates United Kingdom Laws. However, the separation of powers if discussed in Loh Kooi Choon vs Government of Malaysia (1997) 2 MLJ 187. It is stated that, the constitution is not a mere collection of pious platitudes. It is supreme law of the land embodying three basic concepts: One of them is that... no single man or body shall exercise complete sovereign power, but it shall be distributed among the executive, legislative and judicial branches of government.

¹³ This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

¹⁴ Wan Azlan Ahmad and Adri Idzham, Judicial review Handbook [2nd Edition], Lexis Nexis 2007 page 76.

¹⁵ Dr. Khairul para 24.2.3.2

However, the Malaysian competition scope is developed wider in accordance with our economic, political, and societal needs and demands.¹⁶

18. The role and functions of our court has always been exclusively confined to the legal aspects in decision making. The command and control economy have moulded the Malaysian economy and other emerging economies towards monopolistic and oligopolistic market structure. In the past the courts are traditionally and exclusively viewed as final reference of substantive law issues. The courts have maintained the exclusive role of developing laws purely within the ambit of the legal viewpoint. Though there are commercial cases and IP cases brought before the courts, the determination of the question of facts and law are most exclusively confined to the legal deductions and without economic analysis and evidence. In the past decades, decision making process have not necessitate cases which have a close and fundamental relationship between economics and competition law, where the economics provides the substantive basis of the law.

19. The Malaysian court have developed principles more along the British and Australia lines as we are part of the commonwealth country, but not entirely in accord with them. The developed principles were developed wider. Typical examples of judicial error in relation to finding facts are the following: perception by the appellate court of a plain error of principle; irrelevant considerations taken into account; so unreasonable action in findings of fact that no reasonable fact finder could have made; misapplication of establish authority or failure to apply established authority. Those are typical examples where court can say that this is not just an error of fact. There is an error of principle, so there has been therefore an error of law-which in the Malaysian system can throw the whole fact finding exercise open to review.

20. On the procedural aspects of the possibility to review Competition Appeal tribunal decision, it is difficult too generalised too much of one own's experience and one's own jurisdiction. In Malaysia appeals lie from the trial judges to appellate courts in competition as in other cases, on the questions of law. They do rely on questions of fact. Moreover, there are no jury trials in questions in civil cases. To decide when findings of facts become questions of law is an interesting and uneasy question.

21. When the courts are reviewing administrative decisions, such as the Competition Tribunal-the primary one in our case they can interfere on the basis of traditional prerogative rights or more particularly, on the basis of the relevant act or acts of Parliament which set out the grounds of review. One interesting question is whether competition cases on review establish different principles or lead to different approaches. To an extent, they do because of the very nature of the subject matter. In the competition cases, questions under review are such as markets, market power, abuse of the market

¹⁶ Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 where HRH observed: "Unfettered discretion is a contradiction in terms. ... Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen; so that the courts can see that these great powers and influence are exercised in accordance with law."

power, abuse of dominance, concerted practice, vertical and horizontal agreement, competition, consumer interest, anti competitive practices, theory of harm and many others. These are basically economic concepts. The trial judge must therefore use the basic facts to marshal his or her findings in the light of the facts and the economic evidence¹⁷. The law in Malaysia recognises that they are economic concept, embraces these and then gives to the trial judge the task of saying how they apply in the context of the statute in question. Then the court will see whether the trial judge correctly applied the economic concepts to the definition of market for example.

22. The court will judicially develop doctrines in order to define question of liability, remedies, sanctions etc. These essentially become legal questions, questions of law, though in the ambience of economic concepts. A misapplication by the tribunal of the concepts to the necessary statutory settings would be plainly an error of law, and that would lead therefore to an intervention by the appellate court. Has the trial judge, for example, misapplied economic concepts involved in the notion of market? In our country case's case, the definition of market in the statute is the simplest possible: it really virtually means market for goods and services in Malaysia. That is in part of the constitutional definition because of possible problems outside Malaysia. So it is wide but the economic concepts have to work within the framework to establish it. A trial judge can plainly misapply them when reaching the question of market definition. That is the sort of issues appellate judges have to deal with. It is fairly difficult jurisdiction on appeal, but judges do the best they can. It is true to say that there are special considerations, at least in Malaysia, that in turn on what are basically economic concepts, which may differ considerably from the average understanding of the person on the street to what they mean. The mechanism for judicial review tells a lot about how much weight and influence the authorities get versus the judge.

2.4. Judicial Perspective and Competitive Market

23. The Malaysian economic agenda as mentioned before, adopted a sequencing approach in making the transition towards a more competitive market model. The liberalization efforts in 1980s set out the platform. Malaysia had adopted a New Economic Model since its introduction by our Prime Minister 7 years ago. This economic model (Economic Transformation Plan – ETP) is a comprehensive economic transformation plan by the Malaysian government to propel Malaysia's economy into a high income economy by the year 2020 and was designed to transform Malaysia into a more inclusive, equitable and sustainable society, with no one left behind, opportunity made available for all, and the right fundamentals put in place to secure a stable and successful future. The implementation of the Malaysian Competition Act 2010 is one of the initiatives identified under the said plan and was intended to foster healthy and thriving competition in the Malaysian economy.¹⁸

24. Scholarship has revealed that enacting a competition law is typically perceived as cornerstone of liberalization and a pro-market reform. However the mere adoption of law is not sufficient for the law to be part of market reform because there is a conflict between theory and outcome that left restructuring at crossroads. Therefore, there is a need for the

¹⁷ Oecd roundtable reports

¹⁸ The ETP and speech by the MYCc member 2017

Policymakers to examine the elements and structure needed to realize the promise and benefits of a competitive market in all types market.

25. The regulatory framework had been put in place, and Malaysia is making the transition towards a more competitive market. Whether we are moving towards full transition or a “manageable” transition will depends on the type of competition policy that we would want to adopt, a practical one would be a combination of well informed and robust competition authorities not only on competition law and its regulatory process but the country economic agenda, in addition to this, a well informed consumer organization that would propagates a well rounded culture of competition in order to be able to use competition law tools to ensure that this law is not limited to promote economic development by protecting the competition process but also ensure that consumer welfare is maximised. In order to ensure it continues to play out as planned, promoting economic sustainability is a must. The new economic model has been established thus in order to ensure the economic sustainability warrants at the very least most of the endogenous conditions in our market is in place and two important measures are the “Culture of competition” and ” Culture of Compliance” among all stakeholders.

26. The year 2012 marked the year of the Competition Act 2010 enforcement date since the enforcement date there are more than 35 cases investigated by MyCC, there are two (2) appeals heard by the tribunal, and one case for judicial review before the High Court pending decision. This shows a steady increase of competition cases for anti-competitive practices in Malaysia. Indeed, it is an opportune time to take more positive measures to strengthen the third institutional structure i.e the court within the ambit of competition law fundamental norms.

27. The other part of this paper has laid down the competition law framework and its relation to economic growth of the country. This raises some important concerns such as the issue of adjudication of competition cases by Court, independent of Court relevant of competition advocacy the issue of specialize training and technical capacity building judgement enforcement and international facilitation. For now, the five (5) above concerns warrant the necessity to prepare the Courts with recent trends of different area of law, particularly economy expect of the law.

28. This is because at least from an economist’s perspective, where a view of how competition works or what processes are or are not anticompetitive, is constantly changing over time. Basically, unharmed practices today would have been regarded as harmful in the past. Who knows what view will be taken in the future? Hopefully judges equip with specialize training and technical capacity building will be able to assess what is good and what is harmful under competition law and policy. This issue rather touches upon the nature of how economics fits in to competition. A basic starting point is that virtually all competition laws are based on a notion that competition is good form from the point of view of the economy. What economic analysis or at least, what is this branch of economic analysis tries to deal with is to analyse company behaviours and how behaviours of firms affect markets. We live in a changing world: it is therefore inevitable that our view of that behaviour is constantly changing over time. Legal rules should not be out dated by economic analysis. That is an important point. Economics have an important role to play in competition policy. It is equally important, from the legal point of view, to take into account that economic analysis- the economic understanding of how competition works, how market works-is an evolving concept.

29. Competition laws are broadly worded. A new question could be appropriate here, General clauses of this kind are not satisfactory from a legal point of view. They leave

plenty of room for different interpretation as we have heard today and they do not create legal; certainty. In spite of that, this type of clauses are since long widely accepted in competition legislation. Why is it so? Well it is tradition. They may be natural in common law countries like Malaysia. For all countries, one obvious matter that more precise rules would not be flexible enough or otherwise not function well or even be impossible to draft. On the other hand, attempts have been made by legislator in some countries to create more precise legal rules. In some countries, the question can be of fundamental importance for future developments of competition law. It could be a common and great challenge for competition authorities and the court.

2.5. Judicial Challenges

30. Being fashionably late in transforming to a more competitive market has its pros and cons. The national competition authorities are able to learn and strategically plan their capacity building and enforcement training. MyCC and the Competition Appeal Tribunal have their own challenges being young regulatory authorities. Both authorities are in the process of appreciating their role i.e. MyCC as prosecutors and decision makers, whilst the Tribunal adopting the role in ensuring the all appeal decision falls within the ambit and objectives of the act, balancing the national economic policy and the competition law. Both regulatory authorities faced challenges with enforcement issues such as investigation issues, competition advocacy, range of specialised training and technical capacity building, international facilitation to ensure the cases are investigated in accordance with the objectives of the competition law in protecting competition process and consequentially protect the consumer interest. Presently, the commission seem to have better prospect to competition capacity building, training etc.

31. As mention earlier competition cases deals with substantive economic issues as the law governed businesses or companies behaviour in our market. This anti competitive conducts are stated under section 4 and section 10 of the act 2010. The law are broadly worded and therefore similar to other national competition authorities MyCC issues guidelines for all stakeholders on how to determine abuse of dominance, concerted practice, an anti-competitive vertical and horizontal agreement, bid rigging,tying,and cartel and network effects. These infringements form the cause of action in competition cases which requires the court to decide and develop the competition law in Malaysia. MyCC and Competition Appeal Tribunal do follow the same path but both these regulatory authorities' commission and tribunal members are chosen from multidisciplinary experts and specialised from economist, accountant, academician, judges and industrial experts the possibility to erred in the law and facts are arguably minimal than a judge sitting alone. A fundamental question, in highlighting the judicial challenges is what would be the role of the judiciary in the implementation of economic policy.¹⁹ First President of the Court of Appeal Paris, France submit *this fundamental question raises the wider issue of institutional role of the judiciary: whether, by and large, the judiciary has a real role to play in implementing economic policy.*

32. Certain of the statutory provisions confer rights and impose obligations on individuals. Consequently, civil actions by companies can be decided in the court on the basis of this legislation. This means that economic agents themselves can be also instrumental in implementing regulatory policy on competition. According to the

¹⁹ Guy Canivet The responsibility of the judiciary in the implementation of competition policy, first President, Court appeal, Paris (France).page 191 OECD Global Forum.

conventional definition, the duty of the judiciary is to apply the law impartially and objectively to a given state of facts. In reality this means settling disputes between two economic operators by competition authority, in other words, determining whether procedural due process has been observed and whether the substantive law has been applied correctly.

33. The function of the judiciary in competition cases is therefore twofold: 1) to resolve disputes between undertakings on the basis of competition law, awarding damages or issuing injunctions, i.e. imposing civil penalties on practices detrimental to the economy, and ii) to rule on appeals against injunctions or penalties imposed by the competition authority, i.e. to review administrative sanctions against behaviour that is detrimental to the economy. An example of what to expect the situation is slightly different among European commission where the Court of First instance has looked at joint dominance and concluded that this theoretically falls within the Act article 86. Agencies should be testing new economic learning to see how well it fits inevitably older statutes. But the Courts, if they are doing their jobs properly, will decide when to blow the whistle and say that a particular advance if it to occur at all, must be one authorised by the Congress or the Parliament or the national Assembly, as the case may be. We all accept that competition authorities themselves are trying conscientiously to stay within the proper boundaries but there comes a point where there is no substitute for disinterested outside opinion. And that is what the judiciary furnishes.

34. Addressing the (five) 5 abovementioned concerns, these raises a fine question of the difference between the judiciary's role in competition law and policy and other areas of law. Hence, judicial perspective in competition cases has to embrace a wider role in analyzing economic substantive base law. This poses a challenge as judges are not well trained in the economic perspective or basic economic concept. Indeed, during the proceeding, judges in competition law are made available to the statement or reports of economic experts from appellants and respondents however the assessment of expert evidence will be on the hands of the presiding judge in this case sitting alone in the High Court. In contrast, the Tribunal members sitting in three(3) or five (5) coram judges with members who are economics⁷ expert as member judges will be able to decide on competition issue more effectively. However, in the review the judge sitting alone to review on matters and have to make a correct judicial analysis process in the review on matters of 1a. Due to the broadly worded competition act necessitates that the presiding judge to be able to makes a correct judicious analysis on the infringement such as concerted practices that harm either upstream and downstream market in the case has the basic of theory of harm. Therefore without the correct economic perspective and deep understanding of the economic concept this assessment will not be exempt from judicial error the application of the competition law.

35. The current framework does not provide a 'workable' capacity building for the judges. Furthermore, there are no "judge led approach" in the special training and technical capacity building program specially designed for the judge in the court (special powers) designated to hear competition law cases through judicial review.

36. Official expert's reports²⁰ revealed many countries within other jurisdiction have placed the competition cases either in 'special' courts or in general jurisdiction court. Malaysia's policy makers and court administration's decision, to place the competition law cases under the special power court is an appropriate measures. As this represents

²⁰ UNCTad , Cutts and OECD official experts reports

some form of exclusivity and specialisation of the competition case hence it should provide the correct and appropriate institutional design. This design will be able to ensure the presiding judge for competition law will have the benefit of acquiring the competition law judicial competition norms as discussed above and will be able to decide other civil matters. The challenge is more towards lacks of special skills to adjudicate competition cases. This is a challenge as cases filed and schedule for judicial review in competition law demands full understanding of the three most fundamental function of decision making in competition law. This concern is further complicates as cases file and schedule for judicial review are few in numbers, hence would not provide the basis of require technical and special capacity training that a special court required for competition cases. This would be translated in lacks of advocacy and understanding of appreciation of the three most fundamental functions of decision making in competition law.

2.6. Part IV A ‘workable direction – for now

37. The fundamental three most important functions of decision making in competition cases are ensuring procedural process, applying substantive or economic principles, and bringing a certain degree of flexibility in decision making. These functions set a workable direction and platform important for ‘way forward’ for the courts in decision making on competition cases.

38. Present regulatory framework saw MyCC and the tribunal showed promising enforcement efforts with thirty (30) enterprises being investigated and 16 decisions on various market, market reviews and policy reviews have been carried out by the Commission. This contributed to ongoing judicial review in the special court proceeding. With these developments in Malaysia, it is important that appropriate endogenous conditions are in place in the regulatory framework and in particular the judiciary function in competition law.

39. It’s a common phenomenon for an emerging economy such as Malaysia to emulate other successful institutional design of competition law system. However, being fashionably late in making the transition to a more competitive market economy provided the opportunity to design an institutional framework to be in accordance to our jurisdiction’s history, legal system and political culture.

40. One would note that the economic agenda at present provide the optimal platform to put in place the upgrade and reinforcement measures if the Malaysia judiciary is to retain an economically significant enforcement role, one must asked how the court is to perform that role without (a) compromising its independence to make a merit- based decision about how to exercise its power to bring and resolved cases or use other instrument in its decision making portfolio. (b) Losing the accountability and effectiveness that requires some connection to an engagement with the legal system, economic agenda, consumer welfare, and other national policy. What measures might enable the court to avoid flawed decision making process. How the court can design technical and special training capacity programme to ensure meritorious decision making process from any intervention of other legal duties and other matters. Presented below are some possible solutions.

2.6.1. *Greater specification of adjudication of competition cases by the court.*

41. One approach is to avoid multi causes of matters of law within jurisdiction of the High Court of special powers. In the absence too many causes or matter, this will provide

the appropriate and “workable” opportunity to the court to enhance the specialised skills, expertise in areas of competition law and other courses or matter. The expertise may developed through cases and technical or specialised capacity building training as there are no expertise and economist on the bench. In addition, this will provide the platform for the court to develop effective doctrine and competition law precedents in Malaysia.

42. Institutional designs of competition law systems are determined as mentioned by the different jurisdiction history, legal systems and political culture. Hence, the court specialise in competition cases would require some form of stability and not be subjected to transfers to ensure expertise and specialisation areas of the law so as to allow the judge to enable the court to develop more Malaysia's cases on competition thus generate precedents and doctrine of competition law and policy for the nation.

43. There are two basic models of competition law systems. The bifurcated, also known as adversarial competition law regime, and integrated model, or administrative enforcement regime. In each system, the role of the court is different. In bifurcated models, the court adjudicate cases and act as enforcement decision makers, whereas in integrated models, the court functions as review bodies of competition cases decided by competition authorities or regulators. In Chile, where competition system provides that a competition authority in charge of investigating all alleged violation to the competition law, while the first level of adjudications of these cases renders within a court that is specialised in competition matters.²¹ so the Chile competition commission emulates the bifurcated model. There are other examples, other countries that have both types of models (bifurcated and integrated). The United States have both the models where in the case its bifurcated model, one of its two national competition authorities is in charge of investigating some violations of law (For example, cartel and or concentrations) and bringing these cases for enforcement action before a court of general jurisdiction. In Australia, a country whose institutional design also presents elements of bifurcated and integrated models. In the case of bifurcated model, the federal court adjudicate in the first instance the investigation of breach of competition law previously carried out by the competition agency.

44. The Malaysian model is more towards the integrated model where all competition matters will be investigated by the commission and brought to court only for review. The bifurcated elements will probably be evedent on the private action where the court will investigate and decide on competition treble damages filed by private actions.

45. In future, the policy makers will have to decide whether there is a necessity of specialised court specifically for competition law as studies have shown that the main reasons and benefits of specialised court systems are (1) the increasing specialisations of law and the growing complexity of topics and (2) the range of benefits brought about by specialisation, such as greater procedural efficiency and understanding of the law and the impact of the court’s decision on the parties and on the overall context (eg. In the market, the environment, etc).²² The proponents of court specialisation in competition law claims that conventionally the benefits of special courts go their potential efficiency, subject matter expertise, and if they are given a monopoly over the subject matter, there

²¹ Chile Competition Tribunal (TDLC)

²² Grameckow and Walsh, 2013

would be a uniformity of decisions.²³ Specialisation of courts in competition as well as in other policy areas may have at least three advantages.

- *Greater efficiency*, through specialised procedures, staff and specialised judges who are well versed in the subject matter, which leads to streamlined operations and more efficient processing.
- *Enhanced uniformity*, as a result of dealing with exclusive jurisdiction over particular areas of the law, thereby contributing to greater predictability and confidence in the courts.
- *Quality decisions*, due to greater expertise and experience in applying the law to the facts properly. (Ginsburg & Wright, 2012)

46. However the opponents of this approach raised some concerns on the volume of cases and the fear of designated judge neglecting its general jurisdiction duties and functions. Presently, Malaysia's approach in designating all competition cases to high court of special powers seem to address both issues raised by the opponents of court specialisation.

2.6.2. More transparent competition policy and role of the courts.

47. Current well-functioning court structure when carrying out the judicial control function need to adopt a wider scope of the courts roles and the market economy. This would necessitate the court to adopt a flexible approach to incorporate the singularity of competition law where the competition policy requires the court to decide upon the decisions of the commissions and tribunal considering the arguments of the parties involved (often market participants and the authority), and they solved disputes between a market participant and the competition authority on the basis of competition law. The competition law has been reported to encompass a complex system of rules and procedures, and is fundamentally subjective in the sense it is based upon a public policy and made and can therefore include non-economic goals and purposes, such as the guarantee of procedural fairness through the protection of the rights of parties, to ensure accountability of administrative processors or to ensure consistency from a legal perspective, in the actions of the authority reviewed by the court.²⁴The competition law also have a close and fundamental relationship with economics, where economics provide the substantive basis for this law. The OECD reports capture this relationship and states:

48. “ Few areas of laws draw more heavily, or more directly, on economics learning than competition or antitrust law. The reason for this is simple: in order to condemn only practices that are anti-competitive and to leave markets free otherwise, competition law needs a screening device that will single out for enforcement only practices that undermine the market. Of the many such devices available, economics is *prima inter pares*: whether a country purports to rely solely on economic criteria, or it prefers to use economic criteria along with other factors, it is a virtual certainty that economic criteria will play a central role in competition policy and enforcement.”

49. Thus, economics contribution to competition law, as well as to competition analysis, warrant the court to include additional elements i.e. the economic contributions to the law and these considerations should be evidence in the court three most important

²³ Ginsburg and Wright, 2012

²⁴ David, 2014

functions in the implementation of competition law. The three functions are ensuring procedural due process, applying substantive economic principals, and bring certain degree of flexibility. An example to illustrate the first function is through the protection of fundamental procedural rights, such as the right of privacy, to a fair and impartial hearing, and the confidentiality of information. Procedural due process ensured that competition law is implemented in objectives fashion and that the competition agency is uncountable, allowing for impartiality and consistency in the interpretation of the law. In these, court had to strike a balance between fundamental rights and those essential investigatory powers that are allocated to the competition authority.²⁵

50. The application of economic and substantive principal requires the competition legislation application in a correct and consistent manner. Through this application, courts may make allowance for the imperatives of economic principal in implementing competition law by bringing economic facts and concepts into legal reasoning where making the determinations. This functions is illustrated and developed when a court through appeal or judicial review analyse abuse of dominance cases for other anti-competitive practices. With regards the economic facts, judges have to weight to way the economic implication in terms of obligations and penalty, and the must be able to full comprehension of economic concepts if they are to take account of these implications in reaching a decision. Therefore, judicial reasoning may act as the linked between economic authorities' expertise and the market participants' rights.²⁶ The third functions in bringing certain degree of flexibility allows for the adaptation and evolution of the legal framework thorough adjudication of the cases and setting of precedent. That degree of flexibility in the implementations of competition policy and law is a function to promote their development by allowing for the application of current economic thinking into them. This maybe particularly the case for system where competition law is set mainly through judicial precedent like Malaysia.

51. Hence, a more transparent role of the court and competition law policy will bring about more transparent legal factors influencing the role of court in enforcing competition law. The legal factors are the type of legal system which maybe adversarial or inquisitorial, nature of the review and court powers

52. This transparency will generate more certainty in the roles of courts under institutional design of competition legal system to create an environment of certainty and predictability in market economies. Report and studies have revealed that Well-functioning court guarantee the security of property rights and enforcement of contracts. Security of property rights strengthen incentives to save and invest, by protecting the return from this activity. A proper enforcement of contracts induces market participants to enter into economic relationships, by this encourage the opportunistic behaviour and decreasing transaction course. This guarantee sanction by the court has a positive impact on market and economic growth. Which translate into promotions of competition, fosters innovation, contribute to the development of financial and credit market and facilitates firm growths. Furthermore, independent judicial review by the courts of the competition authorities' decision if necessary for the efficient operation of market. It is through this review, courts are uniquely positioned to assure for parties, the authorities and the public

²⁵ Please refer to the example of Mexico supreme court of justice september 2015 as reported in the resolution of competition cases by specialized and generalized court report OECD 2016 page 24.

²⁶ Abid page 25

at large that the competition law is being implemented appropriately in accordance with legal framework.²⁷

2.6.3. Technical and specialised capacity training

53. Given the complex nature of competition law to the close relationship between legal and economic principal, the judges requires technical and specialize capacity and training skills that would assist that designated judges to have experience and expertise in the interpretation of the law in order to balance to of the main functions, namely ensuring procedural due process an applying, when appropriate, substantive economic principal into their reasoning. Therefore, understanding economic facts and concepts in the interpretation of competition law is an important part of effective competition law implementation at the court level.

54. The module for technical and specialized capacity training should address the role of economics and economist in competition cases. This is because competition policy is grounded in economic. Its purpose is to preserve an environment in which, market can quick functions most effectively, according to generally accepted economic principal. Economic is not the only basis for competition policy in most country, of course, but is likely to the most significant. Economic is a science, if a relatively in exact one, that not easily understood by uneconomic. Therefore, how can lay competition enforcement community, in particular judiciary, function effectively, in such technical environment? This is evidence where competition law are broadly written in general term, however, business conduct is ambiguous on its premise, save perhaps, the 'naked' cartel arrangement, in the context of the rules governing competition. Enforcement official and the judiciary are face with the task of separating competitively harmful conduct from pro competitive, or merely benign. The enquiries are necessarily facts-intensive. Hence, the judges will have to be equip of the technical economic environment in order to undertake the difficult tasks of the assembling and understanding complex factual material and applying general and ambiguous standards in evaluating the economics substantives principals in competition matters judiciary, whether specialise or general, maybe more or less involved in the process. Hence, special capacity training of the role of economics and the relationship between law and economic in competition law would need to be provided to the judged.

55. One way in which a judge can find about the economic expect of a disputes is, to call upon an expert or group of experts who will give him the technical information he need is to appraised the main fact of the case. Thus, technical training on how to incorporate, and application of the experts report or statement into the judges decision making process would need to be highlighted. The technical expert is selected to assist the judge and intervene. In respond to a specific question from the judge, the expert may accompany the judge in the proceeding inquiry or, most often the court work alone or with the help of an assistant and submit a report to the judge. The expert may be authorised to request clarification on certain points from the party and to ask for information from third parties. The parties can also monitor the works of the experts, by appointing their own expert, who can submit their comment and reports to the judge. Indeed, the special skill should also focus on, what is the value and role of economic expert in judicial review.

²⁷ Ibid page 30

56. The role of economic is to describe, explain and predict the mechanism of creation, circulation and distribution of wealth. Economic thus differs from the law in that it does not give order and in that it is objectives, i.e based on fact. Competition law, is not exceptional in itself. Law frequently deals with technical matters for example, medical law and pattern law. However, competition law is different, not only because it apply law to economic but because it grafts economic concept onto law. It is not confined like medical law to applying the rules of civil liability to a doctor's activity. Competition law issues prohibition with reference to economist concept. For example, it prohibits abuse dominant position. This prohibition cannot be understood and applied only in its economic sense. Economic concepts thus become legal rules. The transmutation is essentially a political choice, a political act²⁸. Hence, it is absolutely necessary to recognise the distinctive nature of the economic concepts embodied in competition law. This explanation would justify the need of technical and specialize capacity training for judges a sign to hear competition cases through judicial review application.

2.6.4. To preserve necessary degrees of autonomy

57. A common assumption in the design of competition policy system is that public enforcement agency should be "independent ". Jurisdiction is said to achieve perquisite independence by ensuring that the competition authorities can make decisions free from the influence of other branches of the government. In principal, the conditions of independence improve policy outcomes by enabling enforcement agency to exercise its authority according to widely accepted competition policy principal. Judges are uniquely qualified to perform a balancing procedural and substantive principal in competition enforcement due to at least three (3) main reasons as reported in the OECD report 1996. Therefore, observant some degrees of independence will allow impartiality and consistency in the interpretation of the competition law and this independence will also ensure flexibility to the application of the law, playing a fundamental role, in the evaluation of competition law system. An independence, expert and experience judges, will be able to balance an inherent tension between the preservation of acceptable level of independent and the attainment of necessary level of accountability.

58. The suggested measures above have a common precedent condition they place a premium upon the judiciary willingness to make investment in the development and maintenance of institutional processor for taking stock of other jurisdiction pass experience and corporating its lesson into formulation of current policy. The more difficult question for the court is whether they are capable of incorporating the role of economic in their well-functioning court system an applying all the plus factors i.e the lesson from other jurisdictions. Of course, modification would have to be in line with Malaysia judicial legal structure and scope.

²⁸ This is explained by judge of tribunal of first instance, luxemberoug, Andre Potocki

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