

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

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

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

In this regard, both IP and competition laws are intended to promote efficiency. There is considerable overlap in the goals

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

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

⁶ Dabbah (n 1) 1.

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

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

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

2. OBJECTIVES OF IP LAW AND COMPETITION LAW

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

infancy²⁴ or weak implementation or absence of policies to deal with the IP-competition relationship.²⁵ Second, competition law seeks to draw a line between permissible business strategies and abuse of IPRs - a line that often blurred by horizontal

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

To date, there is yet to be any standard international guidelines or rules concerning the relationship between IPRs and competition law. However, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) specifically tackles the abuse of IP rights, which contains certain competition law provisions in Articles 8(2), 31(k), and 40. Article 8(2) of the TRIPS Agreement stipulates that, '[A]ppropriate measures, provided that they are

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

5. COMPETITION LAW IN MALAYSIA: COMPETITION ACT 2010

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

- (a) Any activity, directly or indirectly in the exercise of governmental authority;
- (b) Any activity conducted based on the principle of solidarity; and
- (c) Any purchase of goods or services not for the purposes of offering goods or services as part of an economic activity.

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

A. ANTI-COMPETITIVE AGREEMENT

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

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

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

effect of significantly preventing, restricting, or distorting competition in any market for goods or services. Section 4(2) of the CA 2010 stipulates that horizontal agreement between enterprises be deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services when the agreement is proved to the object to:

- (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;
- (b) share market or sources of supply;
- (c) limit or control production, market outlets or market access, technical or technological development, or investment; or
- (d) perform an act of bid rigging.

In this respect, agreements are prohibited only e nle tr

irkstha cb (r-1.(r)-1(a)-6)-0.1 Tf-0.005-13.7 -10.3 (tin)-10..6 ()] tinigm3 (a)if10
os /TT410.3 Gu6 (a)-5 ((i)d8.42 (r)e 0.4 (p)1 (7(a)-5 ((i)n8.42 (r)e 0.4 ((se)0.7 (

⁴⁹ *ibid*, s 3(3) and First Schedule.

⁵⁰ *Ibid*, s 2.

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

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

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

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

B. ABUSE OF DOMINANT POSITION

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

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

⁵⁷ 'Guidelines Chapter 2 Prohibition Abuse of Dominant Position',

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

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

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

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

© Soc 010 (1) 315 (2) 17 2. 0802 034 (p) (k) (r) 6 (1) 3 ((ra)-8) (8) 0c (t) ha) R216. (3) (4) (e) w (E9) - (w) F915. 7 (a) pl (3. 0 (p) (w) - 9c) 8-4. 717 ((t) cr 0 (b) 91) h (Tf

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

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

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

Although the Guidelines have yet to address areas which the

Anderman SD (ed), *The Interface between Intellectual Property Rights and Competition Policy* (Cambridge University Press 2007)

Apostolopoulos H, 'Anti-Competitive Abuse of IP Rights and Compulsory Licensing Through the International Dimension of the TRIPS Agreement and the Stockholm Proposal for its Amendment' (2007) 6 Rich. J. Global L. & Bus. 265
<<https://scholarship.richmond.edu/global/vol6-5.fact> <</Attallvol

chPartnership/Regional-Competition.aspx> Accessed 12 July 2019

United Nations Conference on Trade and Development (UNCTAD), 'Examining the interface between the objectives of competition policy and intellectual property' (2016) <https://unctad.org/meetings/en/SessionalDocuments/ciclpd36_en.pdf> Accessed 12 July 2019

Wealthy Care Consortium Sdn Bhd v Ketua Pegawai Eksekutif Suruhanjaya Persaingan Malaysia (MyCC) & Satu Lagi [2019] 1 LNS 1684

World Bank, 'Malaysia: Overview' (September 2016) <<http://www.worldbank.org/en/country/malaysia/overview>> Accessed 10 June 2019

World Bank, 'Trade Agreements Boost Productivity and Growth, Contributing to Malaysia's Successful Development, World Bank Says' (World Bank Press Release, 30 June 2016) <<http://www.worldbank.org/en/news/press-release/2016/06/30/trade-agreements-boost-productivity-and-growth>> Accessed 10 June 2019

