

State-Owned Enterprises, Market Competition and the Boundaries of Competition Law in Malaysia

(*Syarikat Milik Negara, Persaingan Pasaran dan Sempadan Undang-undang Persaingan di Malaysia*)

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ABSTRACT

This article examines the challenges and opportunities of subjecting Malaysian State-Owned Enterprises (SOEs) to its main competition legislation that is the Competition Act 2010. This article first highlights the nature of economic activities which is a crucial element in determining that an SOE actually participates in the market. Despite the contentions that SOEs have a unique character, and should be excluded from normal regulation of competition, this article argues that competition law is important in addressing the problems brought about by Government or State's involvements in businesses. This article finds that while the Competition Act 2010 does not apply a blanket exemption to SOEs, there are many hurdles in applying the law to them. Based on the literature analysis in the earlier part of this article, this article finds that some of these hurdles are justified especially if they are connected to the notion of natural monopoly. Where there are not connected, extending the check and balance mechanisms against the market activities of the SOEs will be crucial. This article shows that the avenues to realise it still exist but are limited.

Keywords: Competition law and policy; public policy; economic regulation; Malaysian political economy; constitutional law

ABSTRAK

Makalah ini mengkaji cabaran dan peluang untuk memakai perundangan utama persaingan di Malaysia iaitu Akta Persaingan 2010 kepada syarikat milik negara di Malaysia. Makalah ini memulakan langkah dengan menerangkan sifat aktiviti ekonomi yang merupakan satu elemen penting dalam menentukan sesebuah syarikat milik negara benar-benar berpartisipasi dalam sesuatu pasaran. Di sebalik hujahan bahawa syarikat milik negara adalah unik dan sepatutnya dikecualikan daripada regulasi persaingan yang normal, makalah ini menekankan bahawa undang-undang persaingan penting untuk menghadapi masalah yang disebabkan oleh penglibatan kerajaan atau negara dalam perniagaan. Makalah ini mendapati walaupun Akta Persaingan 2010 tidak memakai pengecualian menyeluruh kepada syarikat milik negara, terdapat banyak halangan dalam pemakaian undang-undang kepada kelompok tersebut. Berdasarkan analisa literature pada bahagian awal makalah ini, didapati sebahagian daripada halangan ini mempunyai justifikasi kerana berkait dengan konsep monopoli semula jadi. Namun jika ia tidak berkait, tindakan memanjangkan mekanisme semak dan seimbang terhadap aktiviti pasaran syarikat bukan kerajaan adalah mustahak. Makalah ini menunjukkan cara merealisasikan mekanisme tersebut wujud tetapi ia terhad.

Kata kunci: Undang-undang dan polisi persaingan; polisi awam; regulasi ekonomi; ekonomi politik Malaysia; undang-undang perlembagaan

INTRODUCTION

Malaysia's economy is a mixture of private enterprises and SOEs. The presence of the latter complements a certain degree of planned economy adopted by the Malaysian Government as part of the efforts to bring industrialisation to the country. In fact, SOEs have played a significant role in pushing the Malaysian economy to the level that it enjoys now. The term Government-Linked Companies (GLCs) is used more popularly in Malaysia which, despite the various ways of defining an SOE in different legal contexts, may refer to the latter (i.e. SOE). The Putrajaya Committee on GLC High Performance (PCG) has defined

GLCs as companies that have a primary commercial objective and in which the Malaysia Government has a direct controlling stake (Putrajaya Committee on GLC High Performance 2017) (Abdul Rahman 2014). The controlling stake can be in the form of ownership of the company by the Government, or in terms of the ability of the Government to appoint the company's Board members and senior management or make major decisions such as contract awards, strategy, restructuring and financing, acquisitions and divestments) for the company either directly or through a Government-Linked Investment Company (GLIC) (Abdul Rahman 2014).

The establishment of SOEs has its own rationales, both political, economic and social. Politically, SOEs are the best entity to be entrusted with operating in strategic sectors. It has been argued that in Indonesia, telecommunications is an SOE sector because of its strategic nature (Latipulhayat 2010). Others include energy, oil and gas, and utilities. Economically, SOEs are the most important vehicles for national champions. National champion is a theory in international economics where domestic firms will be more efficient if they merge into one or two large national competitors (Md Amin 2014; Porter 1990). The presence of SOEs is thus to promote the competitiveness of national business establishments preventing the economy, particularly its strategic sectors from being controlled by foreign companies (Md Amin 2014). SOEs (including Malaysian GLCs) fit well with the definition of national champions because of their size, significant market shares and global expansions (Md Amin 2014). The presence of GLCs is so important that the only firm listed in 2000 Forbes List as of May 2016 is Petronas which is fully owned by the Malaysian Government (Forbes 2017). Socially, the establishment of SOEs is associated to maintaining social cohesion as the establishment of SOEs reflects the developments in the political economy of the country that is Malaysia. It is a well-known fact that many SOEs were created and operated to further the affirmative action policy that favours the Bumiputeras (indigenous ethnicities) (Case 2011). At the same time criticisms have been levelled against GLCs and the Government's backing given to them. The use of public money to fund the various GLC projects that make losses, and the unfair competition between GLCs and local private enterprises in "generic" markets have spurred scepticisms among the public about the GLCs putting the need to regulate them in the market to question.

Against the backdrops of the pros and cons of having SOEs in the market, this article seeks to investigate the role competition law in addressing the market concerns arising from the issue. This article will first examine the role that can be played by competition law particularly the Competition Act 2010 (CA 2010) in providing checks and balances against anti-competitive behaviour of the SOEs in Malaysian. This article will then investigate the limits to the application of competition law rules against SOEs (it must be noted that these limits are not specifically meant for SOEs). Then the article will propose the strategies to enhance the applicability of competition law particularly the CA 2010 to SOEs.

WHY COMPETITION LAW MATTERS?

The starting point to answer the above question is the privatisation of the sectors respecting public services and goods. Privatisation of these sectors was supposed to lead to deregulation due to the undesirable cost of regulation. At this point, privatisation seeks to re-orient the privatised entities towards profit-making and greater efficiency.

Despite such drive, market failures can have impact on the society (social costs). This gives a reason for government intervention which can happen through regulation. The experience in the UK has shown that privatisation has led to new generation of regulations (Baldwin, Cave & Lodge 2012). These regulations facilitated the founding (licensing) of some of the very important SOEs in Malaysia operating the privatised elements of the services within the relevant sectors. For example, the Water Services Industry Act 2006 coincided with the corporate restructuring of the water industry in Malaysia which witnessed the provision of licenses to various water companies in Malaysia. The Control of Padi and Rice Act 1994 was passed to replace the National Padi Authority (*Lembaga Padi Negara*) with Padiberas Nasional Berhad (BERNAS).

It has been argued that the involvement of the Government may not solve the problem associated with market failures because private organisations (including non-profit) have greater incentives to address the social costs and they can do so more efficiently (Trebilcock & Iacobucci 2003). In contrast, the involvement of public bodies in correcting market failures may be welcomed but it can create a different problem: self-interested political intervention which will add on to the burden borne by the society (Trebilcock & Iacobucci 2003). All these reflect how competition law may become relevant. Instead of commanding and controlling the market players, competition law takes the approach of market-harnessing control, influencing rather than dictating the market in providing adequate services to consumers and the public (Baldwin et al. 2012).

In Malaysia, the SOEs participate extensively in the market particularly in certain services sectors. In fact, the presence of SOEs is not felt only in privatised and public services such as transportation, education, utilities and health. Malaysian SOEs also have their footprints in finance and insurance, housing and even vegetable farming and distribution. One question that remains is to what extent competition law should apply to the SOEs particularly in their competitive relations with other market players.

Businesses with links to the State are prone to behaving anti-competitively (Fox & Healey 2014; Sappington & Sidak 2003). Because of their socio-economic (rather than economic efficiency) pursuits, SOEs are inclined towards expanding output and revenue but maximising profit is not high on their agenda (Sappington & Sidak 2003). This creates an "incentive" for them to erect barriers in the market disadvantaging private competitors (Fox & Healey 2014). Nevertheless, not all instances of monopoly can be effectively addressed by competition law. In a situation of natural monopoly, competition law may not be the best solution (Waterson 1988). Natural monopoly means the production of a good requires huge economies of scale that a monopoly can be expected to expand output competitively but without competition because the later can be too costly to the society (Baldwin et al. 2012).

Injecting competition norms into the market against the SOEs in each and every aspect of their operations can

be risky for political reasons. As such, many argue that strategic sectors such as defence and finance should be exempted because opening them to private including foreign players can give rise to national security concerns. The costs of subjecting SOEs to competition law are far lesser than the costs that such law will bring particularly in terms of the reduced sovereign entitlements enjoyed States (Fox & Healey 2014). However, the experience in more developed jurisdictions particularly the European Union suggests that where the market is opened up even for the strategic sectors, the State benefits from the enhanced efficiency and innovation (Fox & Healey 2014). A question may arise however as to what is the effect of extending this logic to the enforcement of competition law against the SOEs. This article attempts to answer the question below.

Finally, efforts to liberalise the market in which SOEs participate may come from external forces. The TPP and other FTAs symbolise these efforts.¹ Where State Parties commit themselves to liberalising obligations, SOEs may no longer be able to capitalise on their special status and have to refrain from discriminatory conduct, paving the way for more competition in the market. There is a concern however. Local private competitors may be excluded from reaping the benefits of liberalisation. This is because the direct beneficiaries of FTAs are enterprises of other State Parties to agreements. In fact, there has been an instance where liberalisation could harm smaller local companies which could not compete with larger foreign firms. When PETRONAS ended the restriction on licenses in a certain segment of the upstream oil and gas market, opening it to foreign bidders, local companies complained that the measure could drive them out from the market unfairly (The Edge Financial Daily 2011). Some job categories could be exempted from the liberalisation commitment benefitting the SOE or its subsidiaries. This is on top of the availability of competitive neutrality and other protection afforded by FTAs to foreign companies. Here competition rules can be useful because it can ensure market fairness as between local players themselves (especially when the SOEs compete with private enterprises) as well as between local players and foreign players. However, sectoral rules may come into play due to the sectoral limits of the CA 2010 on this issue, which will be discussed below.

COMPETITION ACT 2010 AND SOES IN MALAYSIA

Malaysia passed its first competition legislation (i.e. the Competition Act) in 2010. The Competition Act 2010 (the CA 2010) came into force in 2012. The CA 2010 only regulates market behaviour but not market structure. It prohibits anti-competitive agreement (Chapter 1 Prohibition) and abuse of dominant position (Chapter 2 Prohibition).

Chapter 1 prohibition can be useful in the event that an SOE enters into an anti-competitive agreement with other SOEs or non-SOE market players. As shown below, the prohibition of hard core cartels (horizontal anti-

competitive agreements such as price fixing and market allocation) has already been implicated against SOEs. Abuse of dominant position which is prohibited by Chapter 2 of CA 2010 can be even more serious with regards to SOEs. Due to the advantage in terms of size, readily-available resources, the special status and treatment granted, and the link SOEs have with the Government, SOEs may benefit from the market imbalances. These imbalances can affect against their (SOEs) private/non-government-linked competitors or similar competitors of their subsidiaries which may participate in a different level of production chain (downstream or upstream). The CA 2010 can have limited impact in addressing the issue of the size of SOEs. The CA 2010 has no provisions on mergers.² Thus market expansion of SOEs that can be detrimental to competition may still slip the radar of competition law except in the aviation sector and unless the SOEs are involved in anti-competitive behaviour. The CA 2010 also does not prohibit monopoly per se. Being dominant alone is not illegal. The dominant position has to be abused before Chapter 2 can be invoked.

The CA 2010 is SOE-neutral i.e. does not provide a blanket exemption to SOEs. The CA 2010 emphasises on whether an entity is involved in a commercial (or economic) activity such that the legal status, ownership or financing of that entity will be irrelevant (the functional approach to competition law). This approach originates from the EU law (it has to be noted that the CA 2010 was modelled after the EU competition law).

However, it is noteworthy that the EU situations are different from Malaysia. While the two EU treaty provisions that lay down the prohibitions of anti-competitive agreement and abuse of dominant position (Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU)) have similarities with their Malaysian counterparts (Sections 4 and 10 of the Competition Act 2010), the EU competition legal provisions are part of wider economic (and political) integration initiatives which include the establishment of the Internal Market. Ensuring fair competition is found in the preamble to the Treaty on the Functioning of the EU (TFEU). The TFEU also provides that the establishment of competition rules which is one of the competence areas of the EU is necessary for the functioning of the Internal Market.³ A symbiotic relationship exists between ensuring unimpeded competition and breaking the intra-EU barriers that hinder movement of goods, movement of services, movement of capital and movement of people. More specifically there is an obligation imposed on EU Members against discrimination which are an integral part of the operating rules of the Internal Market.⁴

Malaysia, on the other hand, has a Constitution (known as the Federal Constitution) that guarantees equality with considerable exceptions (i.e. through Article 8 of the Federal Constitution), but the Federal Constitution does not have clear constitutional economic provisions that require the removal of internal barriers to trade and business. There is also yet any obligation

imposed by the Constitution on the Government to ensure non-discrimination particularly in the economy and the removal of internal trade barriers. The continuance of pro-Indigenous (Bumiputera) affirmative action policies is an antithesis of such an obligation. The differences between the EU and Malaysian contexts should not be taken as too peculiar. There are abundant literatures that disfavour a “one size fits all” approach to competition law (Bakhoun 2011; Kingsbury 2012). But it is wrong to say that these differences can make Malaysia sleep on its distinctive political, economic and social landscapes. Attempts have been made to make the Government more accountable, which include the establishment of the Malaysian Productivity Corporation (MPC) but these attempts only produce soft law mechanisms that does not bind the Government in its interaction with market players. In the EU, Member States are required to disapply their national legislation if it contravenes Articles 101 and 102 (Fox & Healey 2014).⁵ However, in Malaysia, the failure of Government agencies to comply with the Competition Act 2010 cannot be legally challenged unless the agencies are involved in commercial activities. The MyCC though has the power to issue an advice to other Government agencies particularly through policy papers, is not in any position to force, censure or punish the later.

It remains to be seen whether these differences will influence the ways in which competition law will impact on SOEs in Malaysia. What is important is that the functional approach has broken new grounds in the Malaysian corporate legal framework by imputing similar legal duties on public and private owned business entities.

This can already be seen in the MAS-AirAsia case. In that case, the Malaysian Airline System (MAS) which is the national air carrier for Malaysia (which is also an SOE) was found by the Malaysian Competition Commission (MyCC) to have infringed the Competition Act 2010 by engaging in anti-competitive agreement (MyCC 2014). AirAsia, MAS (through its subsidiary Firefly) and AirAsia X entered into a collaboration agreement that resulted in a share swap between the owners of AirAsia and MAS (the owner of MAS is Khazanah Nasional which is the investment arm of the Malaysian Government) but what became the centre of attraction was the consequence of the agreement: MAS withdrew from some local routes giving advantage to AirAsia while AirAsia X withdrew from long haul destinations which benefited MAS. The collaboration agreement was ruled as illegal amounting to market allocation (market allocation is deemed to have an anti-competitive object under the 2010 Act) and fines were imposed (MyCC 2014).

The MAS-AirAsia case is highly controversial as the Competition Appeal Tribunal overturned the MyCC’s decision⁶ and the MyCC has sought a judicial review. Nevertheless, it shows that competition law was applied against a scheme which might come from the Government who sought to strengthen the market presence of an SOE in a strategic industry. This is despite the fact that the Government wanted the SOE to maintain a niche market

alongside its private competitors (MAS as a full service premium carrier, AirAsia as a regional low-cost carrier and AirAsia X as a medium-to-long haul carrier).

THE IN-BUILT LIMITS TO THE APPLICATION OF COMPETITION ACT 2010 TO SOES

There are in-built limits to the application of the CA 2010 to SOEs. The existence of these limits is not always unjustified. As has been discussed above, there are concepts such as natural monopoly that restrains the use of competition law against a monopoly. However, the limits, in their various forms need to be understood. This article attempts to characterise the grounds that exclude the application of CA 2010 against SOEs. There are three grounds for the exclusions:

- i. sectoral exclusions
- ii. non-commercial activity limitations
- iii. limitations based on the Second Schedule of the CA 2010

SECTORAL EXCLUSION (SECTION 3(3) AND THE FIRST SCHEDULE)

The application of the CA 2010 can be limited if the commercial activities of SOEs (and other entities) are regulated by another legislation specified in the First Schedule of the CA 2010 itself.⁷ The State (through the Minister) can decide the activities that should be appropriately excluded from the CA 2010 with the condition that they are regulated by legislations specified in schedule. The telecommunication, energy and oil and gas sectors can benefit from this because the Communications and Multimedia Act 1998, the Energy Commission Act 2001 and the Petroleum Development Act 1974 are included in the First Schedule to the CA 2010. SOEs within these sectors such as PETRONAS and Telekom Malaysia (TM) whose economic activities are governed by those legislations will be excluded from the CA 2010 but only to the extent of those activities. Examples of those activities are oil and gas exploration which is regulated by the Petroleum Development Act 1974 and acquisition and operation of power plants which is regulated by the Energy Commission Act 2001. The most recent legislation that has been included into the First Schedule is the Malaysian Aviation Commission (MAVCOM) Act 2015 which creates MAVCOM. It contains competition provisions similar to those of the CA 2010. The expansion of the definition of “agreement” in the MAVCOM Act 2015 to include “airline code sharing”, “alliance”, “partnership” and “joint venture agreement” suggests that should MAS engage in similar conduct as in the MAS-AirAsia case, it may be dealt with by the MAVCOM Act 2015 but not the CA 2010 as the general competition legislation.

There have been critics of such double standard for certain industries where critics demand explanation on the reason why certain industries are excluded but others are

not (Oh 2014). Recently, statutes containing competition provisions have been passed by the Malaysian Parliament but the statutes are not listed in the First Schedule of the CA 2010 (the Financial Services Act 2012 and the Islamic Financial Services Act). It is not clear if the MyCC has jurisdiction with regards to the activities governed by these statutes. Truly, the statutes may establish their own regulatory agency that oversee the implementation of the competition provisions within those statutes. Nevertheless, competition regulation can be tailored to the needs of the sectoral players which go beyond protecting regulation in the market and this is how the regulatory vigour can be watered down. Further, the statutes can expand the power of the Executive to exempt enterprises from competition law in a less objective way. The MAVCOM Act 2015 has a provision that gives power to the Minister to exempt an enterprise from a competition prohibition even after a finding of infringement (in the case of the MAVCOM Act 2015 it has to be on the ground of public interest consideration) (Abdul Rahman & Ahamat 2016).⁸ This may create legal uncertainty considering the difficulty of finding an objective definition for the term “public interest”.

NON-COMMERCIAL ACTIVITY LIMITATIONS

The CA 2010 only regulates commercial activities. A commercial activity refers to the offering of a good or a service in a given market. Hence under the CA 2010, activities which are not commercial are not subject to the prohibitions contained therein.⁹ One of those activities is activity in the exercise of governmental authority.¹⁰ Governmental authority here refers to something which does not belong to the sphere of economic activity or which is connected with the exercise of the powers of a public authority (Ahamat & Abdul Rahman 2015; European Court of Justice 2002). SOEs can capitalise on its functional linkages to the State and by so doing may claim that their activities are not commercial. From their own nature, the core business of SOEs should have a bearing on the discharging of public interest responsibilities which form part of the essential functions of the State such as national security, defence, maintenance of law and order etc. The approximation of this limitation to SOEs is further strengthened by the term “indirectly” that appears in the relevant provision of the CA 2010.¹¹ The provision reads “any activity, directly or indirectly in the exercise of governmental authority”. Such term indicates that any entity including privately-owned may act on behalf of the Government and be excluded from liabilities under the CA 2010. The SOEs which are responsible for discharging public authority duties such as the provision of basic infrastructure, aviation safety, environmental services, health, etc. may be excluded from the obligations under the Competition Act 2010.

Defining what amounts to governmental authority will be crucial. One of the attempts that has been made is to draw a comparison with the notion of governmental

acts (*acta jure imperii*) under international law whereby if a particular act can only be done by the State, it will be governmental but if it can be done by both the State and individuals, it will not be governmental (Ahamat & Abdul Rahman 2015). Another method is based on the notion of “services of general economic interest” (SGEI) which will be discussed below. However, as the 2010 Act takes a functional approach, only the relevant aspect of the conduct that fulfils the criteria of governmental authority will be excluded. Those which are not, will still be subject to competition rules.

One problem that can be highlighted regarding the governmental authority exclusion is, how the CA 2010 addresses the issue of SOEs acting as regulators and market players simultaneously. Some SOEs may find itself in such a scenario. BERNAS which is a market player in the rice sector also regulates the grading of paddy produced by local paddy farmers (ChePa, Yusoff & Ahmad 2016) and is also entrusted with the payment of price subsidy to the farmers (Vengedasalam et. al 2011). PETRONAS is a market player in the oil and gas market but at the same time is the licensing authority for upstream oil and gas operations (Sahu 2015). As mentioned above, legal intervention by MyCC into the regulatory realms of other authorities in Malaysia is unlikely. Political measures aside, the situation can be remedied by MyCC’s persistence in enforcing the CA 2010. This will be further discussed below.

Non-economic purchase is another type of non-commercial activities that may relate to SOEs. Section 3(4) (c) of the CA 2010 provides that any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity are excluded. This purchase may include procurement activities by SOEs but not all procurement activities qualify for this exception. Under the EU law, as can be seen in *FENIN v Commission*, in order to determine that the purchase of goods or services is not part of an economic activity, a question will be asked that is, does the activity subsequent to the purchase is a commercial activity? If the answer is affirmative, it will be a commercial activity and the CA 2010 will apply (EU Court of First Instance (CFI) 2003: paragraph 36). For example, if an SOE purchases a (construction) service to construct a road, such purchase is not part of an economic activity but if the purchase is to construct shopping outlets, it may be one.

While this question is yet to be answered in the Malaysian context, it must be noted that SOEs’ procurement procedures are complex and should have been subject to reforms under the GLC Transformation Program 2005/6 Initiative (Putrajaya Committee on GLC High Performance 2006). Should they fail to fulfil the criteria as non-economic purchases they may be subject to competition reviews (but they may still be excluded under other types of exclusions). There is significant repercussion if procuring SOEs have a dominant position in the market or have subsidiaries that compete with smaller private-owned competitors on the upstream or downstream markets. Their procurement procedures should not culminate in any of the

categories of abusive conduct spelt out by Section 10 of the CA 2010. What SOEs may need to be cautious is that market discrimination is one of those categories.¹² Favouritism that may be displayed by SOEs to certain parties can be caught by the prohibition of market discrimination hence becomes an abuse. This however will require other conditions to be met once an investigation is launched but their further elaborations cannot be undertaken by this article due to time and space constraints.

LIMITATIONS BASED ON THE SECOND SCHEDULE

Apart from sectoral limitation and non-commercial activity limitations, the CA 2010 imposes on itself limits based on the matters specified in the Second Schedule.¹³ The matters are (1) entrustment with the carrying out of the function of services of general economic interest, (2) collective bargaining between workers and employers, and (3) the pursuit of a legislative requirement. In linking them to SOEs, though an SOE engages in a commercial activity, competition rules will not apply to them if the activity falls under any of those matters. Those which are the most popular with SOEs are services of general economic interest (SGEI) and the pursuit of a legislative requirement.¹⁴

Services of General Economic Interests (SGEI) Enterprises which are entrusted by Government to carry on tasks within those services will be excluded from the 2010 Act. Services of general economic interest are those which are not economically viable if universally provided but must reach all consumers without interruption. The examples of SGEI are postal service, utilities and certain elements in the transport sector. The presence of SOEs in the market such as Pos Malaysia (postal services) and Tenaga Nasional Berhad (TNB) (electricity) can be rationalised if their special status allows them to cross-subsidise for the unprofitable segments of the market (such as supply of the related services to rural areas like Sabah and Sarawak), something which can hardly be done by private enterprises.

A question however can be raised: what if a private enterprise is so financially strong that it can provide those services without government intervention? With freer movement of services and advantage in the home market, foreign private enterprises particularly those from developed economies may find it easy to invest in the unprofitable markets while maintaining control elsewhere. In terms of economic efficiency, this should be lauded. However, for a country with the western and eastern parts separated by an ocean like Malaysia, there is a need to bring far-flung communities to the mainstream to ensure social cohesion. There is also a need to bridge the gap between economically developed regions like the Klang Valley, Penang, and South Johore (bordering Singapore), and the less developed ones such as North-east Peninsula (West Malaysia), Sabah and Sarawak. In the EU it has been argued that despite the liberalisation drive, universal services “remain nationally determined: whilst the actual

good itself (the railway, postal or telecommunications network, etc.) could be supplied by the market subject to minimal state interference, it is the distribution of the good, which the political community determines collectively to be desirable, that could not be achieved by the market alone but requires the state to step in by way of regulation or direct provision” (emphasis added) (Boeger 2007: 334). In other words, the distribution of the universal services continues to make the SOEs relevant especially when development and economic progress in the country is unequally balanced.

The Pursuit of a Legislative Requirement Apart from SGEI, SOEs can be excluded from the CA 2010 on another ground in the context of the Second Schedule that is if they are engaged in conduct in compliance with a legislative requirement. The link between this limit of competition rules and the market reforms of SOEs can be seen from this angle: the CA 2010 gives the power to the Parliament to pass a law to authorise SOEs with the performance of certain conduct and that conduct will escape the prohibitions under the CA 2010. The SOEs’ activities that could fall under this category are market activities mentioned in the Control of Padi and Rice Act 1994 which include selling and processing of paddy. Should these activities be designated as the monopoly rights of a particular SOE, they may be excluded from the prohibitions under the CA 2010.

STRATEGIES TO APPLY COMPETITION LAW TO SOES

Despite the in-built limitations of the CA 2010 affecting SOEs, there are possible ways for the law to be deployed against them in the event that they infringe the 2010 Act. They (the approaches) refer to the substantive approach and institutional approach.

THE SUBSTANTIVE APPROACH

The substantive approach involves dealing with the substantive competition rules in a manner that allows the behaviour of the SOEs to be subject to competition scrutiny. This may happen in two ways: (1) the excluded portions of the SOE activities are separated from those which can be subject to the supervision of competition law, and (2) the issue of monopolisation by SOEs is addressed.

Separating the Excluded and Non-Excluded SOE Activities The in-built limits of the CA 2010 can establish two different sets of economic activities for the SOEs i.e. those which are excluded and those which are not excluded. Where the Government is generous enough to accord wide exclusions to the SOEs, these exclusions may suffer from ill-defined terms used in the relevant provisions of the CA 2010. The ambit of the excluded activities may also be difficult to be ascertained, hence the effectiveness of the CA 2010 can be questioned. In this regard, it is still useful to identify the market reserved for

the SOEs i.e. the market in which the excluded activities are found. This is because those activities still have some merits for consideration in the analysis of competition in the market in which the CA 2010 applies to SOEs and non-SOEs alike. Lessons can be learnt from the EU.

In the Deutsche Post case, the EU competition regulatory body (European Commission – EC) drew upon the cross-subsidisation by Deutsche Post AG (a German SOE) which occurred as a result of its participation in both over-the-counter parcel services (universal services) and mail-order-parcel services (non-universal services participated also by private-owned companies) (European Commission 2001; Sappington & Sidak 2003). The private-owned competitors complained that Deutsche Post set prices too low in the mail-order-parcel services triggering an investigation on predatory behaviour (European Commission 2001: paragraph 3; Sappington & Sidak 2003). In deciding whether there was cross-subsidisation, the EC analysed the cost of delivering both services and the revenue generated from them and established whether the earnings from the services are enough to recoup the losses from the non-universal services (European Commission 2001: paragraph 6; Sappington & Sidak 2003). The EC considered that since the earnings from the non-universal services exceeded the stand-alone cost of providing the services, there was cross-subsidisation (European Commission 2001: paragraph 8; Sappington & Sidak 2003). The EC found that Deutsche Post infringed Article 82 (now 102 TFEU) for predatory pricing (European Commission 2001: paragraph 48; Sappington & Sidak 2003).

The Deutsche Post case seems to point to some kind of a “neighbour” principle in the analysis of competition infringement particularly the infringement of Chapter 2 (abuse of dominant position). The case shows that though competition law might not apply to certain activities of SOEs, the product reserved for the beneficiary of the exclusion(s) was still analysed by the competition regulator. In this case the behaviour of the German SOE in the product market in which there is competition with privately owned competitors and in which the EU competition law applied was investigated. The costing and pricing strategies of the German SOE in the reserved (excluded) product were considered in establishing its predatory behaviour in the non-reserved (non-excluded) product.

The above case relates to the exclusion based on services of general economic interest (SGEI). The question now, can the same finding be extended to other exclusions including sectoral exclusion. Under the sectoral exclusion, an SOE may have products (which include services) covered and not covered by the sectoral exclusion. Products or services covered by the sectoral exclusions are governed by different legislation and may be subject to the jurisdiction of different regulatory agencies. With regards to products or services not covered by the different legislation, the MyCC may investigate the behaviour of the “beneficiary” SOE. It is natural that division of labour will apply here or the notion of concurrent jurisdiction

may entitle both MyCC and sectoral regulators to enforce the law but by referring to the Deutsche Post, subjecting the covered products competition analysis by the MyCC should be allowed. The same can be argued with regards to legislative requirement exclusion. But can the same reasoning be extended to exclusions on the ground of the SOE not engaging in a commercial activity? This article argues that it cannot. This is because the activity covered by the exclusion is not commercial. Hence it is not comparable to the product or service rendered that is subject to competition analysis. However, the advantages gained from the non-commercial activities (including governmental) can be considered in the analysis of dominance or market power, but not abuse.

Monopolisation by SOEs One of the negativities associated with SOEs is their conduct of monopolising business opportunities including contracts, projects, and the market. As reiterated above, the CA 2010 does not have provisions that directly govern market structure due to the absence of merger provisions. On top of being devoid of merger provisions, the CA 2010 also does not clearly prohibit the act of monopolisation.

Under the CA 2010, being dominant is not illegal but the use of one’s dominant position to exclude others is prohibited. This is different from the position in neighbouring Indonesia. Article 1(1) of the Indonesian competition legislation (Law No.5 of 1999 Concerning the Ban on Monopolistic Practices and Unfair Business Competition) clearly defines “monopoly” as “the control of production and/or marketing of certain goods and/or use of services by one entrepreneur or a group of entrepreneurs”. Article 1(2) of the same law defines “monopolistic practices” as “the centralization of economic power by one or more entrepreneurs causing the control of production and/or marketing of certain goods and/or services, resulting in an unfair business competition and can cause damage to the public interests”. On the other hand, in Malaysia, the notion of abusive conduct spelt out in Section 10 of the CA 2010 consists of (1) imposing unfair prices/trading conditions, (2) controlling or limitation of production, (3) refusal to supply, market discrimination, (4) tying and/or bundling, (5) predatory behaviour and (6) buying up scarce supply of intermediate goods/resources.¹⁵

The question now is can the underlying concepts found in the Indonesian and Malaysian competition laws be comparable? This article proposes that both can be comparable with the condition that the historical, contextual, purposive and textual differences between them are clearly contrasted. In fact, controlling or limitation of production appears in the legal provisions of both jurisdictions, the EU experience has shown that this category of abusive conduct may be understood in the same way as mergers and acquisitions which strengthen the market position of the dominant firm (O’Donoghue & Padilla 2006: 214). This logic may support the contention that the prohibition of abuse of dominant position may aim at monopolisation.

THE INSTITUTIONAL APPROACH

The institutional approach answers the institutional question underlying the interlinkages between SOE reform and promotion of competition. As stated above, the MyCC cannot force government agencies to disapply measures that conflict with competition rules. This is despite the power given to the MyCC to issue inter-agency advice.¹⁶ This power should not be understood as the power to conduct a regulatory review. As stated, the MyCC could issue policy papers to the relevant Ministry under whose jurisdiction a particular SOE operates but it is up to the Ministry to accept them. The MyCC is equipped with the power to conduct market reviews and in so doing it may obtain relevant market information and analyse it. This can be a prelude to an investigation. The MyCC has power to require any person to provide information relevant to the investigation.¹⁷ However, it remains unclear whether the word person includes public servants. The practice of a regulatory or government body taking a legal action against another regulatory or government body is almost unheard of in Malaysia.

As SOEs are personally separate from the government agencies, the MyCC can proceed with investigation against SOEs even at the disapproval of the relevant agencies. However, the MyCC must have the political clout because any political intervention may stymie the progress of the investigation. It is worth noting the PIAM case (PIAM refers to the General Insurance Association of Malaysia) which is still on-going at the time of the writing of this article. Although that case does not involve an SOE, it shows the determination of the MyCC in enforcing competition law amidst inter-agency pressures. In that case despite the condemnation of the Bank Negara Malaysia (Central Bank of Malaysia) of the proposed decision finding an infringement of Chapter 1 prohibiting anti-competitive agreement (Bank Negara Malaysia 2017), the MyCC proceeded to the next stage of the investigation while agreeing to review any new evidence if needs arise (Yunus 2017). But there is no signal of withdrawal by the MyCC.

CONCLUSION

SOEs have distinct position and status because of the unique character of the Malaysian economy. The quest for enhancing market efficiencies in Malaysia requires competition law to play a role in correcting anti-competitive market structure and disciplining market players against anti-competitive behaviour. In this regard, competition law particularly the CA 2010 should apply to SOEs in their competitive relationship with other competitors in the market. The CA 2010 does not have specific exclusions for SOEs showing that the law avoids carving out SOEs in toto. There are limits to the applicability of the CA 2010 to SOEs which have been discussed in this article. Some of the limits directly relate to the special nature of the activities

specifically undertaken by SOEs including acting as natural monopolists. However, the ill-defined terms in the CA 2010 can blur the demarcation of the limits to which SOEs should be subject to competition rules. This can lead to political capture and worse still special interest capture.

This article proposes certain mechanisms to subject SOEs to the CA 2010. They refer to the substantive and institutional mechanisms. They (the mechanisms) are still closely linked to the limits or exclusions above. Certain types of exclusions may have greater and more objective justifiability than the others. Clearer guidelines are necessary as they allow the relevant regulatory bodies to consider the differences between the limits or exclusions. The best thing is to make the exclusions more objective. This is because a lot of interests including the interests of workers, shareholders and stakeholders are involved in the idea of subjecting Malaysian SOEs to the CA 2010. However, the trend is towards greater liberalisation. The world's political economy is affected by this, hence, changes affecting the SOEs become imminent. Reforming the conduct of SOEs in the market is crucial as it may enable SOEs to adapt to the changes. And the country will benefit if Malaysian SOEs enhance their international competitiveness.

ENDNOTES

- ¹ One of the important FTAs is the Trans-Pacific Partnership Agreement (TPP). The scope of competitive neutrality within the TPP includes the prohibition on SOEs from discriminating or deciding not on sound commercial basis with regards to their procurement and other transactions. Further, the TPP does not allow the Malaysian Government to give non-commercial assistance to SOEs if they relate to production or sale of goods and cross border supply of services and such production and sale cause adverse effects to interest of other Parties (to the TPP). There are however circumstances in which SOEs may depart from competitive neutrality.
- ² The Malaysian Aviation Commission (MAVCOM) Act 2015 which governs the aviation sector has merger provisions. See Division 4 of the MAVCOM Act 2015.
- ³ TFEU, art 3(1)(b).
- ⁴ TFEU, arts 18, 19, 36.
- ⁵ See C-198/01, *Conorzio Industrie Fiammiferi v Autorita Garante della Concorrenza e del Mercato*, 2003 ECR I-8093-94.
- ⁶ The MyCC decision has been reversed by the Malaysian Competition Appeal Tribunal (CAT) and the MyCC has appealed against the CAT decision to High Court at the time of the writing of this article. Notwithstanding this, the author finds merit in the MyCC decision.
- ⁷ Competition Act 2010, s. 3(3).
- ⁸ MAVCOM Act 2015, s. 59(2).
- ⁹ Competition Act 2010, s. 3(4) of the CA 2010.
- ¹⁰ Competition Act 2010, s. 3(4)(a).
- ¹¹ Competition Act 2010, s. 3(4)(a).
- ¹² See Competition Act 2010, s. 10(2)(d).
- ¹³ Competition Act 2010, s. 13.
- ¹⁴ Competition Act 2010, Second Schedule. Note that all three elements are not listed in stipulated order because SGEI is greater emphasis.

- ¹⁵ Competition Act 2010, s. 10(2)(a)-(g)
- ¹⁶ Competition Commission Act 2010, s. 16(a). The provision provides that one of the functions of the MyCC is to advise the Minister or any other public or regulatory authority on all matters concerning competition.
- ¹⁷ Competition Act 2010, s. 18.

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