

## CHAPTER 6: CONCLUSIONS

### 6.0 What Should Malaysia's Competition Framework Be?

In Malaysia, works on the development of competition policies come under the purview of the Ministry of Domestic Trade and Consumer Affairs. A 'Working Committee For Competition' has been established to determine if there is a need for a competition policy as well as to table a draft of the Competition Bill to the Cabinet.

### 6.1 Proposed Competition Framework

Based on work done so far by the working committee, it has been discussed that the aim of the competition policy should be two-fold:

1. 'To assure consumers low prices and high quality that flow from effective competition, and
2. To assure fairness – a level playing field – for the entrepreneurs who provide the vital competition<sup>73</sup>', which includes prevention of restrictive business practices and abuse of market power.

The ministry and the working committee are also inclined towards adding a third objective (to the above) that will cater for the development goals of the country, e.g.

3. 'To promote the establishment or development of domestic industries and the economic development of other sectors in the economy<sup>74</sup>'.

However, introducing the third objective is fundamentally significant decision because **it steps away from the principle of competitive neutrality and allows leeway in the form of exemptions (in the name of development) within the proposed enforcement framework of the competition bill.** The OECD and the World Bank has

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72 Edmund T. Gomez and Jomo K. Sundram, *Ibid*, page 90

73 Zahira Mohd. Ishan and Suhalla Abd. Jalil, *Ibid*, page 7.

published '*A Framework For The Design And Implementation Of Competition Law And Policy*' 'in 1998 which states that 'attempts to take into account multiple objectives in the administration of competition policy may give rise to conflicts and inconsistent results. For instance, protecting small businesses and maintaining employment could conflict with attaining economic efficiency<sup>75</sup>'. In this case, ensuring fairness and a level playing field with out rightly contradicts any ethnic economic restructuring exemptions like the mandatory *bumiputra* participation or award of government contracts to *bumiputra* companies. We suggest that a middle ground be found to accommodate national development goals, i.e. we should identify all exemptions to the draft competition bill, map these exemptions to the development goals within the economic plans (NEP/OPP) and put a time-frame for when these exemptions can be moved so that we can move toward the competitive neutrality. There will be minimal conflict using this approach because the exemptions can be moved only when the declared development objective has been achieved, for example 30% *bumiputra* participation in a particular sector. This suggested framework would make allowance for national development goals as opposed to accepting unfettered competition.

The working committee is also inclined to adopt a framework similar to that of Japan's or Korea's antitrust legislation because promotes a controlled and guided domestic competition framework that emphasises the strengthening of its domestic industrial competitive capacity. Japan's Antimonopoly Act was introduced in 1945 to dissolve the zaibatsu conglomerates, but was later weakened 1949 and 1953 due to widespread resistance. For example, 'the 1953 amendments provided a variety of exemptions from the cartel prohibitions of the Antimonopoly Act legalising certain concerted activities

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and cartels under specific circumstances. The cartel formation was permitted as a means of conducting export and import trade, allowing small and medium sized firms to realise economies of scale, and rationalising cyclical of depressed industries<sup>76</sup>. The competition policy in Japan has evolved over time, as did its industrial policy, therefore, the working committee recommends that the same approach be designed to help the Malaysian businesses build up their international competitiveness. 'For Malaysia's current competition framework purposes however, the Japanese model of that period will have to be reconciled with compatible cross-border and trade issues under WTO<sup>77</sup>'. *(Note: The scope of which will be excluded from this introductory research, which focuses more on the domestic analysis).*

Principally, the areas that should be covered in the proposed national competition can be divided into 2 groups (Christopher Maule). Briefly, they are:

- **Group 1 policies** that cover restrictive business conduct, mergers and acquisitions and price discrimination; i.e. activities that **directly** affect economic efficiency and consumer welfare.
- **Group 2 policies** that cover 'consumer policies, intellectual property, public ownership, regulation, trade and investment policy<sup>78</sup>'; i.e. activities that **indirectly** affect economic efficiency and consumer welfare. For example,
  - 'One way of disciplining market power on the supply side of the market is to strengthen the buyer side through improved information about the available sources

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75 OECD & World Bank, 'A framework for the design and implementation of competition law and policy', page 4, 1998

76 Roger Alan Boner and Alan Krueger, *Ibid*, page 31

77 Ministry Of Domestic Trade & Consumer Affairs, 'Competition in Malaysia', page 12 at the brainstorming session on commerce and competition, Equatorial Hotel Penang 25-27, January 2002

78 Christopher Maule, *Ibid*, page 10

of supply, prices and quality of products<sup>79</sup>; i.e. implementing *consumer policies* that require the suppliers to publish information about their products.

- Intellectual property rights are considered essential to promoting competition because it protects the inventors from free riders and provide them some time to recuperate the high cost of innovation. However, if the level of intellectual property protection is too high, inventors may abuse their monopolistic rights by over-pricing a product and increase their dominance over other competitors. *Intellectual property (IP) policies* already exist in Malaysia to protect the process of innovation by allowing patents to be registered. This allows enterprises to sell at prices above the marginal cost for a reasonable duration. Ironically, the problem of piracy is prevalent in Malaysia and it complicates the monopolistic effects of competition during the IP protection period because it essentially cancels out such behaviour on the extreme side. Piracy needs to be enforced more seriously alongside the IP policies.

- Some industries like education, judicial and defence systems may be run under government ownership as monopolistic industry. However, these sectors are non-profit oriented and may have tendencies to be more inefficient; therefore, these sectors should be regulated by independent agencies under *public ownership policies*.

- *Regulation policies* that protect the consumer like drug safety and standards for a product should also be introduced.

- 'While trade liberalisation is a strong pro-competitive force; its effect varies with the particular circumstances. The pro-competitive effects will be diluted by an inelastic supply of imports, currency depreciation, existence of non-tariff barriers to

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<sup>79</sup> Christopher Maule, *Ibid*, page 10

trade, non-tradable goods, legal, financial and other services that are difficult to trade, inter-firm restrictive agreements that limit market access, and the existence of international cartels<sup>80</sup>. *Trade and investment policies* need to be coordinated with competition policy so that the potential offsetting effects can be minimised. (Note: Detailed analysis for this argument will be left for as a separate discussion and not within the focus of this introductory paper).

There may be certain **exemptions** that may be considered within the proposal Malaysian competition policy due to potential conflict with development goals, for example, franchising whose primary objective is to increase the knowledge transfer between the franchisors to the franchisees so that the number of entrepreneurs in the country would increase. Despite it proposed exemption, it is firmly recommended that this industry be regulated by an independent agency like the proposed Competition Commission or the Malaysian Franchise Association to ensure the franchisees are not subject to anticompetitive conduct and abuse by the franchisors. Other areas of exemptions that are currently being debated by the ministry are export cartels whose objectives are to increase national exports and export competitiveness (although these cartels may be required to notify the Competition Commission), crisis or recession type joint ventures/activities whose objectives are to stimulate economic activity for the period of depression. The ministry is also discussing if small and medium enterprises (SMEs) should be allowed to collude horizontally or vertically in view that they might achieve economies of scale against the larger producers. We do not believe this should be an exception because under general competitive dynamics, if the firms are small – merger activities amongst themselves will not increase market concentration

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80 Christopher Maule, Ibid, page 14

sufficiently that it may require an antitrust investigation. Likewise, collusions are ineffective in the presence of a large number of alternatives.

## **6.2 Proposed Enforcement Authority**

The enforcement of the competition law and policy should be handled by a quasi-autonomous body of the government similar to that of CMC. The Ministry of Domestic Trade and Consumer Affairs will be advocating that the Competition Commission be set-up formally under the ministry with powers to make inquiries, investigate infringements and complaints, apply sanctions and recommend penalties to the judicial courts. The Ministry may recommend that banking, communications and multimedia and corporate law pertaining to listed companies be exempted from the jurisdiction of the Commission's as presently the areas fall under BNM, CMC and SEC respectively. There are benefits and disadvantages to this model:

- The benefits are that BNM, CMC and SEC all hold specific areas of responsibility and would therefore be more capable of handling detailed analysis of infringements particularly those that apply under the rule of reason law.
- The disadvantages is that there may not be a cohesive authority to make a decision on an infringement and possible conflict in competition law and industry policies may arise based on point-of-views and opinions from different agencies. There may also be 'grey' areas such as trade related infringements, which may arguably be under the Commission or MITI.

We believe an alternative model is to establish the Competition Commission under the Ministry of Domestic Trade and Consumer Affairs but have a composition of members from the SEC, CMC, BNM, MITI. Ideally, any violations to the competition law will require an area expert from these agencies to assist in the full investigations and

imposition of sanction or penalties. The overall decision or outcome will be issued via the Commission on behalf of all agencies.

Some of the roles and responsibility of this commission includes:

- Making inquiries and investigations based on initiative or as part of a follow-up of a complaint submitted to the Commission
- Issuing industry concentration indices to monitor the market concentration such as the HHI index. This includes performing any research studies or publishing information for the public.
- Maintaining a facility that receives pre-merger notification and performs the corresponding investigation that either recommends for or against the merger.
- Recommending new laws, regulation, policies to the judicial body and the ministries.

It is important that the commission maintain confidentiality in all its undertaking.

The ministry also will be recommending that appeals be allowed only for the following reasons:

- 'Request for review by the commission of its decision in light of *changed circumstances*
- Affording the possibility for an enterprise or individual to appeal to the appropriate judicial authority against the whole and any part of the decision of the commission on any *substantive point of law*<sup>81</sup>,

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<sup>81</sup> Ministry of Domestic Trade and Consumer Affairs

### **6.3 Conclusion**

As a free enterprise economy, Malaysia encourages healthy competition and a fair play of the market forces of supply and demand. The Government has, since the 1980s, embarked on policies of deregulation and liberalisation of the economy. The continuous efforts towards deregulation of trade and investment, together with accelerated privatisation of trade-owned enterprises in traditionally monopolistic sectors such as power generation, the distribution sector, telecommunications, transport and the postal services has boosted overall market competitiveness.

To complement these activities, this paper aimed to describe the importance of formulating and implementing a competition policy framework for Malaysia. It outlined the role that a competition policy should play in the following areas:

- Increasing consumer welfare through the assurance of low prices and high quality of goods
- Ensuring a level playing field for entrepreneurs; i.e. free entry conditions with minimal barriers to entry
- Providing a developing country with a control framework in carrying out reforms in the areas of privatisation and regulation; i.e. supporting the principles of competitive neutrality.

The paper then discussed the scope of a good competition framework, namely by describing the need to have conduct policies, structural policies and performance policies to regulate the dynamics of competition. Conduct policies includes regulating illegal business practices like price fixing, structural policies include control of merger and acquisition activities that may increase the level of concentration in a market, while performance policies typically focussed on monitoring price levels; e.g. administrative



pricing. In the area of international trade policies, the paper also concludes that international trade policies should not be seen as an alternative but a complement to any competition policies within a country.

The paper supports the notion that a competition policy framework should be adopted in Malaysia. It does so on the following grounds:

- Market distortion argument – Competition policies may help to correct misallocation of resources and distorted market prices that are caused by scarcity of information and lack of effective competition - especially evident in developing countries like Malaysia.
- Natural monopolistic industries – Competition policies may help to prevent the creation of natural monopolies caused by privatisation and deregulation activities.
- Globalisation argument – Malaysia is already subject to global trade and competition agreements through its membership to the WTO, APEC and AFTA. The introduction of domestic competition framework will help Malaysia customise its policies to counter some of the effects of these agreements especially those areas that support development and social objectives.
- Anecdotal evidence of restrictive business practices – Competition policies may also help reduce the anti-competitive activities that are already occurring in Malaysia; e.g. resale price maintenance.

It is the opinion of the Ministry of Domestic Trade and Consumer Affairs that the Malaysian government should strive to achieve what it deems as **workable competition**, rather than maximum competition. They believe that a competition framework should include development goals so that the international competitiveness

and capacity of the local enterprises can be built up prior to allowing unfettered forces of competition into the local markets. It is hoped that together with these development objectives, the Malaysian Competition Law and Policy will draw assurances for a level playing field for entrepreneurs and assure consumers of greater choice, low prices and high quality of products and services.