

COMPETITION LAW AND EXEMPTION POLICY IN MALAYSIA: WHEN, WHY AND WHY NOT?

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ABSTRACT

The local newspaper "The Star" reported "Exempt and explain, please" as the headline on the (Saturday, 11 January 2014), posed a question among others, "When an industry is excluded from competition law, shouldn't we know why?" The question raised some legitimate legal issues concerning the exercise of the discretionary power to grant exemption or exclusion for anti-competition practices with reference to the open competition policy specifically under the Competition Act 2010(CA 2010) in Malaysia. The report illuminated best practice requires the relevant authority in power when exercising their legal authority to exclude or exempt an industry from liability should properly give some explanation, as to why the exemption was granted in one case and not another case. The CA 2010 have provisions for relief or exclusions of liability, by way of an application to the competition commission for an individual exemption or a block exemption respectively under Section 5, section 6 and Section 8 for specific categories of agreements or conduct subject as stated in the Second Schedule of the CA2010. Alternatively some industry or sectors can also be completely excluded from the competition regulation specifically under the First Schedule of the CA 2010. This exemption or exclusion would relief the parties from infringing the competition law. In this respect the Malaysian Competition Commission (or known as MyCC) decisions for granting of a conditional block exemption order for the liner shipping industry's vessel sharing agreement (VSA) and voluntary discussion agreement (VDA) was challenged by the Malaysian Trade associations and Housing Developers as unconstitutional and failed to satisfy the Competition Act. The parties in this matter challenged the decision making process and not the decision. CA2010.Although driven by various economic reasons and principles but the process of implementation to grant or not grant the relief must be grounded on some accepted legal principles and procedures to be justifiable in the eyes of law. Although, the exemption applications are not automatically granted the public outcry on the media appears to signify there are some serious substantive and procedural fairness issues, which needs to be recognized and addressed in such competition cases. The competition exemption process and the competition commission must be clear of the underlying legal and economic principle for granting or not granting an exemption. This process should as a matter of due process of law include, giving the reason for such action. The basic rights as to transparency in law which includes the right to know the factual and legal basis of enforcement and decisions is important aspects to gain public confidence in the competition agency in nationally and regionally in line with the spirit ASEAN Economic Community (AEC) as a member of ASEAN. The paper explores the rationale, policy and legal instruments being used as key regulatory measures for granting individual and block exemption in Malaysia. The paper critically analyses the exemption regulation as well as the due process in granting exemptions under the Malaysian competition regime. The paper explores critically when, why and why not exemption granted in some cases and not in another to reflect upon the generally applied concept and principles in competition exemption law regimes. An exemption serves as an important element for furthering the objectives of the competition law to meet certain social, economic and political needs in the nation. However it also equally important to have clear guiding legal instruments of reasoning in safeguarding the true interest of the competition policy, agencies as well as the business community. The paper also highlights the shortcomings and proposes relevant recommendations from other competition regimes to improve the due process of law in the context of competition exemption cases. On the road towards the ASEAN Economic Community (AEC) competition laws development at the national level, is important to implicate the trend setting in ASEAN open market business road map.

Key words: open competition, exemption, and exclusion and competition regulation.

Introduction

The Malaysia's Competition Act 2010 (CA 2010) (implemented with effect 1 January 2012) came in pursuance to introducing open market or free trade concept under the ASEAN Economic Community (AEC). An 'open market' policy means an economic system with no barriers to free market activity. An open market aims to provide free-way from tariffs, taxes, licensing requirements, subsidies, unionization and such other regulations or practices that interferes with the natural functioning of the free market. It facilitates the market in which prices are determined by supply and demand, in the absence of barriers to entry and trading without restriction to a specific area.

Generally, there are two generic laws to regulate anti-competition conducts in the Malaysia namely, the CA 2010 and the Competition Commission Act 2010. These enactments envisioned to meet with the ever-increasing demands for competition in the current era of globalization and trade market liberalization in particular to ASEAN Economic Community (AEC) roadmap. The law mainly, framed to ensure enterprises operate in the free market economy without restriction or market distortion to allow the market function optimally for the benefit of the consumer. The competition Act regulates and controls specifically under

Section 4 CA2010, whereby it prohibits enterprises from engaging in anti-competitive agreements, which have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services ("Chapter 1 Prohibition"). Whereas under section 10 of the Act it prohibits any abuse of an enterprise's dominant position in any market ("Chapter 2 Prohibition"). However mergers and acquisition are not regulated yet.

The Competition Commission Act 2010 establishes the Malaysia Competition Commission (also known as MyCC), which is made up of the Chairman and nine other Commissioners. The Competition Commission Act 2010 empowers MyCC to administer all functions in the implementation and enforcement of the CA 2010. The MyCC is under the purview of the Ministry of Domestic Trade, Cooperatives & Consumerism but functions as an independent body in its decision-making process. The MyCC, similar to other competition authority is empowered to carry out various roles that includes: advocacy, investigation and enforcement, market review, exemption & compliance and leniency process. The MyCC is comprised of representatives from both the public and private sectors who have experience in business, law, economics, public administration, and competition law and consumer protection to have a balanced approach in their undertakings.

Open Competition And Concept Of Exemption

According to United Nations Conference on Trade and Development (UNCTAD) the principle of "best practice" recommends that competition (antitrust or antimonopoly) law should be of a general law for general application to all sectors and economic agents in an economy engaged in the commercial production and supply of goods and services irrespective of whether private and public (i.e. State) owned. The fundamental legal and economic reasons theory strongly calls for its application to all sector /enterprise public or private. Whereby, it is believed entities engaged in the same or similar lines of activity with single legal principles and standards legally would ensure fairness, equality and non-discriminatory treatment under the law. This approach fosters "due process" of law, in bringing about greater predictability and consistency in the interpretation and application of the law besides promoting more transparency, accountability and confidence in the legal and other institutions responsible for the implementation of the law (R.Shyam, 2002).

The fundamental economic reason for general application of competition law, relates to the interdependent nature of economic activities conducted in different markets and the promotion of allocative efficiency. The 'economic interdependence' describes a concept based on the characteristic of a society or macroeconomics that in the high degree of division of labour, individuals depend on others to produce all or most of the goods and services required to sustain life and living. An 'allocative efficiency' which also referred as social efficiency means that scarce resources are used in a way that meets the needs of people in a Pareto-optimal way. Whereby, economically suggests conditions prevailing in one market can affect prices and outputs in other markets either because one good or service is an input in the production of other goods and/or services, or because the goods and services are substitutes or complements to each other.

As such concept of providing exemptions in competition law to one sector may perpetuate or induce distortions that can affect the efficiency of economic activity conducted in other sectors. As evidenced, in reality various industries and markets for goods and services today tend to be "seamlessly" interconnected even when the linkages are not directly obvious because of the role that price and profit signals play in the redeployment of resources across different lines of economic activity.

Although "best practice" proposes competition law should apply to all, in practice various exclusions, exemptions and exceptions are granted to cater for various social, economic, and political reasons. The most influential European competition law provides exemptions generally for three categories. The European Union (EU) competition law (Article 101(3)) firstly, creates an exemption for practices beneficial to consumers such as by facilitating technological advances, but without restricting all competition in the area. However, in practice only very few official exemptions have been actually granted to maintain their fair trade policy. Secondly, the Commission agreed to exempt 'Agreements of minor importance' (except those fixing sale prices) from Article 101. This exemption applies to small companies, together holding no more than 10% of the relevant market. In this situation (Article 102 EC), market definition is crucial and highly difficult matter to resolve. Thirdly, the Commission has provision for a collection of block exemptions for different contract types. These include a list of contract permitted terms and a list of banned terms in these exemptions.

Exemptions or exclusions for anti-competition activities usually granted based on either specific sectors, types of economic activity, and/or some situations under some specific/special provisions. However countries with newly enacted competition law, specifically developing and countries with transition market economies such as in Asia which includes Malaysia have been found with much more less exemptions in comparison with more industrialized nations. This could be probably because these less developed countries have yet to fully implement their competition law regime. In fact various businesses, sectors such as Small and Medium Enterprises (SME) and trade associations are still unaware of the potential impact of the competition law on their economic activities and also the potential lobbying for exemption from competition law. Indeed, casual observation suggests that in advanced industrial countries, exemptions granted from competition law have evolved and expanded over time because of specific issues and cases confronted in the application of the law, and the resulting lobbying by business. In addition other reasons, importantly various historical, cultural and political factors have also played some role in their competition regulations evolution to promote certain unique exemptions.

Exemption could be potentially utilized to create a balanced competition regulation localized to the country's economic aspiration. One such interesting and unique exemption, worth noting is in the South African competition regime. The exemption process (Sec. 10) permits consideration under their Competition law for other social or economic policies, notably the promotion of small business competitiveness. An example of such exemption was granted to an association of individually owned

pharmacies, to jointly advertise and market in order to compete with larger chains. Joint marketing supported the group's growth from 10 members to 33, and its success persuaded the Commission to extend the exemptions for another 5 years. Their Competition policy was aimed to incorporate the interests of consumers, workers, emerging entrepreneurs, and other corporate competitors, and on the same note protect the ability of large corporations to penetrate international markets, just as must allow foreign investors to do business in South Africa in the interests of enhancing overall efficiency and growth. Whereby, the exemption policy uniquely provides an equitable opportunity for the local small businesses to participate in the economy and to increase the ownership stakes of historically disadvantaged persons. The competition law reflects the acceptance of free competition in their market and through the exemption policy realized the importance of property rights, the need for greater economic efficiency, the objective of ensuring optimal allocation of resources, the principle of transparency, the need for greater international competitiveness, and the facilitation of entry into markets to all within a developmental context by consciously attempt to correct structural imbalances and past economic injustices.

Rule Of Law For Competition Exemption

The pioneer competition regime, the United States of America's anti-trust (similar to anti-competition law) model, gave initial authority for judges to paint with a broad brush approach their competition law portrait. Competition law was developed on the case by case basis with little need to refer back to the archaically worded statute. Alternatively, the newer models in Australia, New Zealand and Asia the words of the statute have primacy and concepts of reasonableness, efficiency and public benefit into their analysis of deciding an anti-competitive conduct to the extent that the words of the statute permit. So the term of rules in the competition statute determines the rule of law of its application.

The rule of law fundamentally upholds the principle that firstly that the government cannot order one to pay civil damages or criminal punishments except strictly according to some well-established and clearly defines laws and procedures. Secondly, the context of the term rule under law emphasis no branch of the government is above the law and so no public official may act arbitrarily or unilaterally outside the law. And thirdly it also means rule according to higher law whereby means no written law be enforced by the government or its agent unless it conforms to certain unwritten, universal principles of fairness, morality and justice that transcend human legal system.

So legality and equality before the law are the underlying fundamental facets of the rule of law but the principle of law demands something more; otherwise it would be satisfied by giving the government unrestricted discretionary powers. Following that, the courts have developed guidelines aimed at ensuring that statutory powers are not used in ways which the legislature did not intend. These guidelines relate to both the substance and the procedures relating to the exercise of executive power. Thus, it is important in the application of the competition law to exercise the respective authority or powers, in particular the discretionary powers for exemption (on the players in the market) according to the due process of law. Due process of law means the statute referred must be precise and if the government is going to restrict an activity, it must be clear as to what activity is being restricted so to say according to the rule of law which also promotes due process of law in that system of law.

Concept Of Exemption And Due Process In Malaysia

The CA2010 provides space for exemption or relief against anti-competitive agreements mainly through Guidelines on Chapter 1 Prohibition ("Chapter 1 Guidelines") whereby relief can be granted independently through an individual exemption under Section 6 of the Act; or block exemption under Section 8 CA2010. Likewise relief of liability can be invoked through Section 5 CA2010, where parties who are being investigated for breach or in litigation proceedings brought by private parties under for a breach of Section 4 CA2010. MyCC is generally the body empowered to implement and enforce the exemption process and approval. Under CA 2010, any party claiming such relief has to prove that the benefits gained are passed onto consumers. An enterprise, which is a party to an anti-competition agreement may seek relief from liability (Sec 5 CA2010) if can prove all the following four reasons, namely that:

- (a) The are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
- (b) The benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;
- (c) The detrimental effect of the agreement on competition is proportionate to the benefits provided; and
- (d) The agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

In furtherance, the parties applying should conduct a self-assessment to determine its ability to justify its conduct under section 5 CA2010. The individual exemptions are granted to specific applicants and alternatively, block exemptions granted to a class of enterprises. As filing for an exemption is not a pre-condition to raising a section 5 defence, some enterprises may choose not to apply for an exemption but instead raise it as defence arguments when MyCC investigates their conduct or issues a notice of a proposed finding of infringement.

The procedure for application empowers the MyCC to grant individual exemption under Section 6CA2010 an individual agreement and under Section 8 CA2010 to grant a block exemption to a particular category of agreements which, in the opinion of the MyCC, satisfy the criteria set out in Section 5 of the Act. Both exemptions are granted by way of an order published in the *Gazette*. Under Section 6(4) CA2010 the individual exemption granted by the Commission may be— (a) subject to any condition or obligation as the Commission considers it appropriate to impose; and (b) for a limited duration as specified in the order. Section 5(5) provides an individual exemption may provide for it to have effect from a date earlier than that on which the order is made.

The commission may also, by order published in the Gazette, cancel, vary or impose additional condition or obligation on the granted individual exemption where there had been material change of circumstances since it granted the individual exemption or breach of an obligation. Such cancellation, variation or removal or imposition of new conditions or obligations will take effect on the date the order is made and under Sec 7(2), if satisfied that— (1) (a) the information on which the Commission based its decision to grant an individual exemption is false or misleading in a material particular; or (1) (b) breach any condition to the exemption. Where the individual exemption is cancelled by reason of false or misleading information, the individual exemption shall be void *ab initio*. Where it is cancelled because of a breach of condition, the cancellation takes effect from the date on which the condition is breached.

Likewise, in block exemption cases, under Sec 8(5) provides that if an enterprise granted the exemption breaches a condition or fails to comply with an obligation imposed by the block exemption, MyCC may cancel the exemption in respect of the agreement from the date of the breach. In the same manner, MyCC has discretion to cancel the block exemption in respect of a particular agreement where it considers that the criterion set out in Section 5 of the Act no longer fulfilled. The CA2010 states that a cancellation for a breach of condition takes effect from the date of the breach but however silent as to when a cancellation for a breach of obligation will take effect. With regards to the cancellation by reason of notable within the Section 5 criteria, the cancellation will take effect on a date specified by the MyCC.

In addition, an applicant for an individual exemption or a block exemption also required to submit a written application together with a fee of RM50, 000 to the MyCC for each application. The enterprises granted block exemptions must also pay an annual fee of RM20, 000 for every year that the block exemption is in effect while an enterprise granted an individual exemption must pay an annual fee of RM10, 000 for each year that the individual exemption remains in effect. According to MyCC, these fees required to cover manpower costs “to study and review the applications, while also acting as an incentive for companies and industries to conduct their own assessments instead of leaving the task to MyCC (*The Star*, 26 April 2012). As a part of the application process MyCC can request for documents and information that it deems necessary (Sec 9CA2010) and required to publish details of a proposed block exemption. This gives members of the public at least 30 days from the date of publication to make submissions in relation to the proposed exemption. The MyCC is required to give due consideration to any such submission made in deciding whether or not to grant the block exemption.

MyCC could also impose on an applicant any condition or obligation as it deems fit and the exemption are granted subject to a limited period only. Both exemptions may be given retroactively and MyCC also has the inherent power to grant an interim exemption pending its final decision on the application for exemption. The Act does not limit applicants to single enterprises but allows trade bodies or associations representing such enterprises to apply for a block exemption for categories of agreements entered into by the members of the association. MyCC had so far received one application for individual exemption and three applications for block exemptions filed by trade associations on behalf of their members (*The Star*, 26 April 2012).

Scope Of prohibition And Exemption In Malaysia: Critical Evaluation

Under the Chapter 1, Sec 4(1) CA 2010 prohibits horizontal or vertical anti-competition agreement between enterprises in so far as the agreement has the ‘object’ or ‘effect’ of significantly preventing, restricting or distorting competition in any market for goods or services. In addition, Sec 4(2) provides explicitly that without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has 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— (i) production; (ii) market outlets or market access; (iii) technical or technological development; or (iv) investment; or (d) perform an act of bid rigging, deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services. Following that under Sec 4(3) any enterprise, irrespective of their size if had been a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition. It is worth noting, any agreement entered between enterprises, includes agreement entered by or through the related trade associations.

The CA 2010 does not define the term “object” but the guideline to Sec 4 CA2010 reflects the spirit of words in the preamble of the Act “to promote economic development by promoting and protecting the process of competition”. As such the MyCC takes the following approach in examining the certain kinds of agreement for anti-competitive “object.” These are: (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 :- (i) production; (ii) market outlets or market access; (iii) technical or technological development; or (iv) investment; or (d) perform an act of bid rigging. Thus, MyCC will not just examine the actual common intentions of the parties to an agreement but would also assess the aims pursued by the agreement in light of the agreement’s economic context. If the “object” of an agreement is highly likely to have a significant anti-competitive effect, then the MyCC may find the agreement to have an anti-competitive “object.” On the same note, on when once an anti-competitive “object” is shown, the MyCC may not examine the anti-competitive effect of the agreement. If an anti-competitive “object” is not found, the agreement may still breach the Act if there is an anti-competitive effect.

The Act applies to all commercial activities within Malaysia, as well as commercial activities undertaken outside Malaysia to the extent that it effects competition in any local market in the country. Commercial activity refers to any activity of commercial nature but does not include certain categories of activities. The activities excluded, covers: any activity, directly or indirectly carried out in the exercise of governmental authority; such as provision of medical services in hospitals; any activity conducted based on the principle of solidarity, such as EPF and SOCSO; or any purchase of goods or services done not for the purposes of offering goods and services as part of an economic activity such as government procurement activities.

There are also three sectors or industries that were clearly carved out from the scope of the Act. That includes the competition matters relating to communications and energy are enforced by sector regulators, namely the Malaysian Communications and Multimedia Commission in relation to communications and multimedia industries (Communications and Multimedia Act 1998) and the Energy Commission in relation to the energy sector (Energy Commission Act 2001). Commercial activities regulated under the Petroleum Development Act 1974 and the Petroleum Regulations 1974 (directly in connection with upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia) are also excluded from the purview of the CA2010.

In addition, CA2010 also excludes: (1) Agreement or conduct that comply with any legislative requirement; (2) Collective bargaining for employment; and (3) Services of general economic interest or having the character of a revenue-producing monopoly.

These exclusions discussed above, could dilute the range of CA 2010 application. Multiple sector based regulations, creates different requirement for different application test to regulate restrictive business practices applicable in different sector. This scene can also cause some business to be caught by more than one sector competition regime. Whereby, it is exempted in one category but not the other. Such duplicity requirement may cause more confusion and may be stumbling block to effectively establish a standard anti-competition and exemption policy. So the issues related to whether an enterprise should be regulated by a single legislation applying to all sector need to be studied further as we dwell deeper into implementing our competition regime. This may particularly be a serious concern for MyCC too, as an exclusive competition authority to gain public confidence and apply their wings in fully flourishing the rule of law on fair competition sphere in Malaysia.

Individual exemption applied to MyCC and may be granted subject to conditions, obligations and for a limited duration. As such it is left to the parties concerned to demonstrate the claimed benefits according to the criteria set out in Section 5 CA2010. An individual exemption can be cancelled or varied if there is a material change of circumstances or there is a breach or non-compliance of an imposed condition. An individual exemption can be obtained by applying MyCC in the prescribed form and upon payment of the prescribed fee. So far we have only one application for this exemption.

Block Exemption Order (BEO) is granted to a particular category of agreements. For example, this could be a distribution agreement in a particular industry. The advantage of a block exemption is that similar agreements can be examined at the same time to allow MyCC to provide a better overall assessment of the anti-competitive impact and assessment of the claimed benefits. It will also relieve enterprises of having to submit separate applications. Likewise, BEO can be cancelled or varied if there is a material change of circumstances or there is a breach or non-compliance of an imposed condition. For a block exemption, the MyCC will publish details of the application to allow submissions to be made by members of the public. Pursuant to an investigation for breach under Section 4 of the Act, parties being investigated may also rely on relief of liability under Section 5 of the Act. Similarly, these benefits can also be claimed in litigation by private parties for a breach of under Section 4 CA2010. In Malaysia, similar to other competition regimes, relief through individual and block exemptions are provided to cater for the specific requirements and factors of a particular market or industry. Some agreements between parties in the market, either horizontal or vertical, may on the face of it be anti-competitive in order to achieve the necessary social benefits and efficiencies. Such social benefits or efficiencies arising from an agreement or category of agreements, entitles the parties to the agreement for either an individual or block exemption if they can show that the anti-competitive effect of the agreement is proportionate to the benefits provided by the agreement (or agreements) and that competition is not eliminated completely in respect of a substantial part of the goods or services in the relevant market.

In April 2012, Nestlé Products Sdn. Bhd. (“Nestlé”) applied for an individual exemption application to exclude its pricing policy called the “Brand Equity Protection Policy (BEPP)” from complying with the Act. Following which, in May 2012, the Federation of Malaysian Consumers Associations (FOMCA) filed a complaint to the MyCC against the Nestlé for price fixing policy. FOMCA claimed Nestlé had determined retail prices of its products, and thus, eliminating competition. Nestlé was claimed to have dictated the price that retailers must charge for its products like Milo, Nescafe and Maggi products. Retailers therefore, do not have the option to sell these products at lower prices or action can be taken against them. In response to the complaint, Nestlé Malaysia denied charges of price-fixing per se and claimed that its BEPP, have elements of price-fixing relating to the three of its products to prevent loss leader selling activities by retailers. In other words, its BEPP allows only loss leaders to have its price set by the company.

MyCC in Nestlé’s case although acknowledged and recognized its right to promote and enhance its brand equity under the BEPP, but in principle concluded it has elements of Resale Price Maintenance (RPM), which is considered as per se an anti-competitive conduct that prevents resellers from setting their prices independently, potentially leading to increased prices for consumers. So MyCC requested Nestlé to dismantle its pricing policy contained in the BEPP and Nestlé had complied by issuing notices to the trade on the same. However, Nestlé was of the opinion that may be such issues relating to loss leader selling policy should have been addressed to other government organization or more appropriately to the attention of the Ministry of Domestic Trade, Cooperatives and Consumerism. This point of reasoning calls for further analysis on the scope of MyCC to decide on the application of the competition law issues with respect to trade activities or conducts which are legitimately also arises in other areas of commerce which overlaps with CA2010.

With reference to block exemption application, liner industry is the first and thus far only industry to be formally exempted from provisions of CA2010. MyCC granted conditional Block Exemption Order (BOE) on December 2013, which was published in the Gazette on 4 July 2014 to Malaysia Ship owners' Association. Malaysia Ship Owners' Association had applied for the block exemption with respect to their Liner Shipping Agreements on 14 February 2013 to grant a Block Exemption Order (BEO) from

the scope of Section 4(2) and under Section 8 CA 2010. This block exemption was granted to liner shipping agreements in respect of Voluntary Discussion Agreements (VDA) and Vessel Sharing Agreements (VSA) made within Malaysia or which have an effect on the liner shipping services in Malaysia, effectively from 7 July 2014. It broadly exempts liner Vessel Sharing Agreements (VSAs) and (to a more limited extent) Voluntary Discussion Agreements (VDAs) from certain prohibitions set forth in the Malaysia Competition Act of 2010.

It was granted for three years and to be reviewed after two years. While this is positive news for the shipping industry, there is still certain compliance issues associated with the publication of the BEO which requires further attention. The BEO is although valid for three years, it could possibly be cancelled earlier by the MyCC.

Generally, co-operative agreements among liner shipping companies have existed in most trades for more than 100 years and a common practice for competition authorities to grant BEOs to liner shipping agreements. The Competition Commission of Singapore has given similar exemption which they renewed recently. The European Commission although initially withdrew its exemption but also had it renewed later. Most major trading nations in Asia and the Pacific Rim have also recognized the importance of these agreements to shipping industry which ultimately contributes to the national economies.

The introduction of the BEO was subject to a public consultation process, which was held over a 30-day period from 19 February to 18 March 2013. The final BEO was issued in June, after the consultation confirmed that the agreements create "significant identifiable efficiency benefits" and the reduction in competition is "proportionate to the benefits", and there is no opportunity for liner operators to eliminate competition completely in respect of a substantial part of the liner shipping services.

However, despite MyCC following all the procedure and consulting the relevant government agencies which include the Ministry of Finance, Ministry of Transport, as well as the Ministry of International Trade and Industry was still subjected to a judicial review procedure. Judicial Review allows and grants the court's an authority to review the the executive or legislative administrative decision /act and to invalidate them if found to be contrary to Law. The Malaysian Trade Associations and Housing Developers claimed that the BEO given to Malaysian Ship owners' Association was unconstitutional and that not in satisfaction to Section 5 of Malaysia's CA 2010, to grant a relief. It was claimed amongst others that, the CA 2010 was enacted to promote economic development by protecting the process of competition which encourages efficiency, innovation, entrepreneurship, competitive prices, improvement in the quality of products and services, by providing wider choices for consumers and thereby protecting the interests of consumers. So claimed that the Vessel Sharing Agreements (VSA) contradicts the restriction in the BEO 2014 that states that "shall not contain any element of price fixing, price recommendation or tariff imposition by any person". By reason thereof, the conditional BEO to restrict on price fixing of liners shipping services was claimed self-contradictory and impossible to enforce since the pricing information is shared.

Judicial review is the procedure by which a public body's decisions can be challenged in civil courts. The process of judicial review, generally does not contest the decision itself but the process of making the decision. Thus it questions the due process of the decision making process in approving and granting the block exemption. In Malaysia we do have limited exceptions, where judicial review extends to the substance or merits of the decision where there is illegality, irrationality and or proportionality as highlighted in *R. Rama Chandran v The Industrial Court of Malaysia* [1997] 1 CLJ 147 and *Jye Tai Precision Industrial (M) Sdn Bhd v Victoria Arulsamy* [2008] 1 CLJ 760 for further reference as to the scope of the review.

Judicial review, in this sphere was not an appeal on the MyCC's decision but concerns with the decision-making process applied by the MyCC. Therefore BEO decision was not within the jurisdiction of the Competition Appeals Tribunal (CAT) which otherwise has an exclusive jurisdiction to review any findings of infringement or non-infringement made by the MyCC. However the competition authority was very concerned of the civil court stand in Malaysia's in handling the case on the basis that judges are not well verse in competition law principles. The author is of the opinion, that perhaps what may be really lacking here is in reality is a clear guideline as to what measurement, legal and an economic tools applicable to assess the grounds for granting exemption in one case and not in the other which should be provided either by way of a guideline or the legislature itself.

Substantive And Procedural Weaknesses On Competititon Exemption Cases

The CA 2010 was indeed drafted on a "broad-brush" approach broadly based on the European model and does not cater or inculcate the specific nature and requirements of the various local markets o industries that form the Malaysian economy. For example, the economic, social and technical factors relating to the financial services industry are found so different from that of the wholesale flower market or for that matter the criterion in the food market which often overlooked.

Furthermore, the exemption application is subject to substantial amount of application fee and annual fee which is set by MyCC aimed to deter potential applicants. However, how much this fee requirement is going to defeat the true purpose competition exemptions privilege under CA 2010 is yet to be seen. As we have not experienced many application or any challenge on this fee requirement. However it could possibly discourage some deserving local industry who may have a genuine case but too small such as the small and medium enterprises or their related associations who cannot afford to pay.

Justification for exemption as a matter of due process of law also requires as to when certain industry excluded from liability regime, a justifiable reasons for which ground it is excluded must be disclosed. The principle of transparency in law requires reasons as well explanation to be given as to why the exemption was granted in one case and not another case to avoid element of biasness and discrimination in the decision making process. Explanation to justify or defend such decision is a duty of the

controlling authority in line with rules, policy or other principles governing the exercise of discretionary powers under fundamental administrative law principles.

Conclusion

In conclusion, the development of substantive anti-competition law prohibiting practices restricting competition and its context of regulation could be said in Asia as well as other jurisdictions are becoming more universal. However, by contrast there has been significantly less universal legal character in the application of the procedural standards that govern the enforcement of the substantive rules of the competition law. Therefore due process and competition must be seen in the same breadth to bring about procedural fairness in the competition related cases. Due process is generally a marginal subject in procedural rules matters, related to the Competition Commissions access to file, documents and role of the Hearing Officer. Lack of clear procedural rules validly could raise some serious questions for the effective protection of the rights of defence and fair procedure. Within the concept of procedural law, there are also identifiable categories of rights which includes: right to be heard, right to participate, right to defence, right to protect business secrets and other confidential information and as well as the right to judicial review and some other rights such as giving justifiable reasons, publication of reasons and transparency. Competition prohibition and as well as the exemption must observe and respect the due process of law in its exercise of power otherwise it will be a story of the competition between the hare and tortoise which reflects a competition between unequal partners which does not serve the term fair competition in the spirit of the law. However the good news is the Malaysian Competition authority, evidently have far more better development progress record in their advocacy exercise as well as in the implementation related functions compared to other ASEAN nations in line with the ASEAN Economic Community (AEC) road map.

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