THE DOMINANCE AND MONOPOLIES REVIEW

Seventh Edition

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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SEVENTH EDITION

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CONTENTS

PREFACE

Each of the past few years' editions of *The Dominance and Monopolies Review* has observed rapid development in abuse of dominance rules. If anything, the past year has seen more developments than ever before, including loud calls for an overhaul of antitrust rules to address perceived challenges raised by the digital economy.

Professor Carl Shapiro argues 'we need to reinvigorate antitrust enforcement in the United States'. US presidential hopeful Elizabeth Warren claims that 'competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere'. Nobel Prize economist Joseph Stiglitz contends that 'current antitrust laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace'.

Against this background, governments have commissioned several thoughtful reports on whether competition law should be reformed. These include, in the UK, a report entitled Competition in Digital Markets, by a committee chaired by Professor Jason Furman; in the EU, a report entitled Competition Policy in the Era of Digitisation, written by Professors Heike Schweitzer, Jacques Crémer and Yves-Alexandre de Montjoye; and in Germany, a report entitled Modernising the Law on Abuse of Market Power, by Schweitzer and others. In parallel, greater regulation of the digital sector is already underway through, for example, the General Data Protection Regulation in Europe (which has triggered calls in the US to adopt a comparable framework); an EU platform-to-business regulation; and digital services taxes in France and the UK.

But even as these reports and regulations discuss and formulate new rules, the case law and decisional practice on abuse of dominance has continued to evolve as well. For example, in the EU, the courts reached notable decisions in *MEO*, *Servier* and *Slovak Telekom*, while the Commission continued its active enforcement in cases such as *Google Android*, *Qualcomm* and *Google AdSense for Search*. In the US, the Supreme Court reached its long-awaited decision in *American Express*, while the Californian District Court found that Qualcomm had violated antitrust laws in the landmark judgment of *FTC v. Qualcomm*. In Germany, the Federal Cartel Office identified a novel abuse concerning Facebook's terms and conditions relating to its use of user data. And in China, Brazil, Japan, the UK and other countries, authorities and courts reached several notable decisions – and continue to pursue investigations – in the pharmaceutical sector.

The seventh edition of *The Dominance and Monopolies Review* provides a welcome overview for busy practitioners and businesses who need an accessible and easily understandable summary of global abuse of dominance rules. As with previous years, each chapter – authored by a specialist local expert – summarises the abuse of dominance rules in a jurisdiction; provides a review of the regime's enforcement activity in the past year; and sets

out a prediction for future developments. From those thoughtful contributions, we identify three themes in 2018 enforcement.

Scrutiny of digital platforms

Digital platforms continue to come under intense antitrust scrutiny. As discussed in the EU chapter, in the *Android* case, the Commission fined Google a record-breaking €4.34 billion for imposing allegedly illegal restrictions on Android device manufacturers. Finding Android dominant in a market that excludes Apple, the Commission claims that Google's pre-installation of its search and browser apps prevents users accessing rival services and forecloses competition. The Commission kept up its focus on Google by also fining it €1.49 billion in a separate case relating to alleged exclusivity clauses in contracts with third-party websites (*AdSense for Search*).

Perhaps even more strikingly, in Germany, the Federal Cartel Office found that Facebook's terms and conditions relating to its collection of user data constitute an exploitative abuse of dominance. Specifically, the Federal Cartel Office – relying on German law principles that a breach of fundamental rights can constitute an abuse of dominance – held that Facebook committed an abuse by combining data from different sources (such as WhatsApp, Instagram and Facebook) without satisfactory user consent. Contrary to some reports, the case was therefore not about the amount of data Facebook collected. Rather, it concerned whether it was lawful for Facebook to combine users' Facebook profiles with data from, for example, WhatsApp without effective user consent.

Interestingly, Commissioner Margrethe Vestager has stated that the *Facebook* decision could not 'serve as a template' for EU action because the case 'sits in the zone between competition law and privacy'. That reflects case law from the European Court of Justice in *Asnef* that 'issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection'. Likewise, in its *Facebook/WhatsApp* decision, the Commission stated that 'privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules'.

Several of the Policy Reports mentioned above recommend stricter regulation of online platforms, and establishing a set of 'pro-competition' *ex ante* rules (in line with calls made by economics professor Jean Tirole for 'participative antitrust'). This may have some benefits over a reliance only on *ex post* enforcement. If designed in cooperation with stakeholders, such *ex ante* rules may enhance consumer welfare better than enforcement in individual cases. But there is a concern about proliferation of unharmonised initiatives in various jurisdictions: online platforms are typically active internationally. They must comply with rules in all countries where they are active, and have to take into account the combined effect of practice codes, platform regulation and reinforced competition enforcement. If they face a combination of policies to make it easier to find intra-platform dominance, impose stricter rules for unilateral conduct, reintroduce form-based abuse principles (or reverse the burden of proof, requiring defendants to prove absence of anticompetitive effects), eliminate a requirement to show consumer harm, show greater tolerance of over-enforcement and 'false positives' – all examples of policy recommendations – the cumulative effect may be stifling.

This concern is even more pressing when combined with procedural proposals to speed up proceedings and make appeals more difficult. While it makes sense to accelerate proceedings and – where appropriate – use interim measures more widely and wisely, this should not be at the expense of due process and the rule of law.

On the other side of the Atlantic, in terms of digital platforms, the past year was notable for the US Supreme Court's decision in *Ohio v. American Express*. As discussed in the US chapter, that case will have significant implications for future monopolisation cases in multi-sided markets. The Supreme Court held that 'anti-steering provisions' in American Express's contracts – which prohibit merchants from encouraging customers to use credit cards other than American Express by, for example, stating that the merchant prefers Visa or Mastercard – do not violate antitrust laws. Importantly, the Court held that competitive effects on both sides of the market need to be considered (merchants and cardholders) when assessing overall effects on competition: identifying a price rise on one side of the market is insufficient to prove anticompetitive effects – one needs to consider the overall effect on the platform as a whole. In this respect, the decision is consistent with the European Court of Justice's *Cartes Bancaires* decision, which finds that it is always necessary to take into consideration interactions between 'the two facets of a two-sided system'.

Focus on pharmaceutical sector

There is a continued focus on the pharmaceutical sector, through a variety of different cases covering both exploitative and exclusionary abuses. In the UK, for example, the Competition Appeal Tribunal (CAT) quashed the Competition and Market Authority's (CMA) landmark 2016 decision to fine Pfizer and Flynn £90 million for charging excessive prices for phenytoin sodium tablets (an anti-epileptic drug), discussed in the UK chapter. The CMA had considered that overnight price increases of 2,600 per cent after the drug was de-branded were excessive and broke competition rules. The CAT found that the CMA applied the wrong legal test for identifying excessive prices. It failed to identify the appropriate economic value of the drug. It also wrongly ignored the price of comparable products, such as the price for phenytoin sodium capsules. Unsurprisingly, the CMA has expressed disappointment with the judgment and is appealing it before the Court of Appeal. The CMA has other excessive pricing cases in the pharmaceutical industry in the pipeline and the direction of those cases may turn on the outcome of the appeal proceedings. Given the increase in exploitative abuses in Europe – with cases at the EU Commission, Germany, France and Italy – there is keen interest in the appeal, and the EU Commission has applied to intervene.

There is enforcement activity in pharmaceuticals outside the sphere of excessive pricing. In its *Remicade* case, the CMA issued a notable no grounds for action decision after issuing a statement of objections, finding that Merck's volume-based discount scheme was not likely to limit competition from biosimilar products. In *Servier*, by contrast, the EU General Court upheld much of the Commission's findings that pay-for-delay agreements between Servier and generic manufacturers relating to its blockbuster drug perindopril constituted restrictions by object contrary to Article 101 of the Treaty on the Functioning of the European Union (TFEU). The judgment is noteworthy for abuse of dominance, however, for three main reasons:

a The judgment – coming in at 1,968 detailed paragraphs – illustrates how the General Court is increasingly subjecting Commission decisions to extremely detailed and thorough judicial review.

b The Court annulled the Article 102 of the TFEU part of the Commission's decision due to errors in the market definition – one of the very few cases where the Commission has not prevailed on market definition at the court level.

c When assessing the anticompetitive effects of the conduct, the Court held it would be 'paradoxical' to permit the Commission to limit its assessment to likely future effects in a situation where the alleged abusive conduct has been implemented and its actual effects can be observed. In this respect, the judgment is consistent with Mr Justice Roth's observation in *Streetmap* that he would 'find it difficult in practical terms to

reconcile a finding that conduct had no anticompetitive effect at all with a conclusion that it was nonetheless reasonably likely to have such an effect'.

Standard-essential patents

The third theme of 2018's enforcement is the continued global focus on the licensing of standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms, especially around Qualcomm's licensing practices. In 2015, China's National Development and Reform Commission fined Qualcomm US$975 million for failing to license its SEPs according to its FRAND promise. In December 2016, the Korean Fair Trade Commission followed suit, fining Qualcomm US$854 million. In January 2018, the EU Commission fined Qualcomm €997 million for making significant payments to Apple on the condition that Apple would not buy baseband chipsets from rivals. And most recently, Judge Koh issued her decision in the *FTC v. Qualcomm* (discussed in the US chapter) finding that Qualcomm violated antitrust laws.

In the US case, the FTC alleged that Qualcomm would only supply its modem chips to mobile phone manufacturers that agreed to a Qualcomm patent licence requiring the customer to pay royalties to Qualcomm even when using modem chips bought from Qualcomm's rivals. The FTC claimed this 'no licence, no chips' policy imposed an anticompetitive tax on competing chips. In her opinion, Judge Koh reached several notable findings:

a The 'no licence, no chips' policy is anticompetitive.

b Qualcomm's provision of incentive funds to manufacturers such as Apple constituted *de facto* exclusive deals that were also anticompetitive.

c Qualcomm's refusal to license its SEPs to other chip suppliers violates its FRAND commitments and is anticompetitive, too. The Court also found that Qualcomm's refusal to license is tantamount to an anticompetitive refusal to deal because it was the termination of a prior, voluntary and profitable course of dealing.

d Qualcomm's royalties for its SEPs are unreasonably high. In particular, Qualcomm's contributions to the standards do not justify its high rates and its SEPs do not drive handset value (and so taking a percentage of handset value is inappropriate).

Overall, the combined effect of these practices was to cause the exit of, or to foreclose, rival chip manufacturers, raise prices for chips, and to slow innovation. The judgment was scant comfort for the many competitors that have, in the meantime, left the modem market, but is important as a benchmark for licensing of SEPs for 5G and the internet of things. The proceedings were remarkable in that they led to an unusual juxtaposition between the US Department of Justice Antitrust Division (led by Makan Delrahim, a former lobbyist for Qualcomm who is recused from any case involving Qualcomm but who has clocked up a high number of speeches in favour of the SEP owners' position) and the US Federal Trade Commission, which was deadlocked and thus allowed the legal proceedings to continue to judgment.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this seventh edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

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London
June 2019

Chapter 18

MALAYSIA

Shanthi Kandiah[1]

I INTRODUCTION

The Competition Act 2010 (the CA 2010), which came into force on 1 January 2012, is a cross-sectoral legislation (subject to certain exceptions)[2] that aims to promote and protect the process of competition in the interests of consumers. The CA 2010 applies to any commercial activity both within and outside Malaysia (if the commercial activity has an effect on competition in any market in Malaysia). The CA 2010 presently sets out prohibitions on anticompetitive agreements (horizontal and vertical agreements) and abuse of dominant position. Section 10 of the CA 2010 prohibits enterprises from engaging, independently or collectively, in conduct that amounts to an abuse of dominance in a relevant market.

The CA 2010 does not provide for merger control powers. The absence of merger control powers deprives the enforcement agency and the government of a more direct influence over changes in market structures that may be adverse to competition.

The Malaysian Competition Commission (MyCC) is the enforcer of the CA 2010. To date, the MyCC has issued seven guidelines to act as reference to the public on how the MyCC interprets the CA 2010:

a Guidelines on Complaints Procedures;
b Guidelines on Market Definition;
c Guidelines on Anti-competitive Agreements;
d Guidelines on Abuse of Dominant Position (Guidelines on Abuse of Dominance);
e Guidelines on Financial Penalties;
f Guidelines on Leniency Regime; and
g Guidelines on Intellectual Property Rights and Competition Law.

Several sectors have been given carve-outs from the CA 2010 (set out in the First Schedule therein) as sector laws provide for competition rules.

1 Shanthi Kandiah is a partner at SK Chambers. She was assisted in writing this chapter by Denishia Rajendran, Nimraat Kaur and Henin Tong.

2 Section 3(3) read together with the First Schedule, and Section 13(1) read together with the Second Schedule, of the CA 2010.

Sector	Enforcement authority	Legislation
Communications and multimedia	Malaysian Communications and Multimedia Commission	Communications and Multimedia Act 1998
Aviation services	Malaysian Aviation Commission	Malaysian Aviation Commission Act 2015
Energy sector	Energy Commission (EC)	Energy Commission Act 2001 (ECA 2001) (Section 14(d) of the ECA 2001 empowers the EC to implement and enforce energy supply laws, such as the Gas Supply Act 1993 (GSA 1993). In 2016, the GSA 1993 was significantly amended by the Gas Supply (Amendment) Act 2016 to include extensive competition law provisions)

Similar guidelines on market definition and abuse of dominance were issued by the Malaysian Communications and Multimedia Commission (MCMC), the Malaysian Aviation Commission (MAVCOM) and the Energy Commission (EC).

The Gas Supply Act 1993 (GSA 1993) was amended to facilitate the third-party access network, which aims to provide easy access to new players into the gas market by substantially changing the licensing requirements of the gas supply chain.

In 2013, an amendment was made to exclude commercial activities undertaken under the Petroleum Development Act 1974 (PDA 1974) and Petroleum Development Regulations 1974 insofar as the activities are directly in connection with the activities of exploring, exploiting, winning and obtaining petroleum, whether onshore or offshore of Malaysia. The PDA 1974 grants exclusive rights to the national petroleum corporation, PETRONAS, which is, in effect, a statutory monopoly. All of PETRONAS' downstream activities or concessions granted by PETRONAS to third parties remain liable to be sanctioned under the CA 2010 or the Energy Commission Act 2001 (ECA 2001) (for matters falling within the scope of the ECA 2001) where it is found to be anticompetitive.

II YEAR IN REVIEW

Perhaps the most significant impediment to a robust anti-monopoly policy is the absence of merger control provisions in the CA 2010. Based on news reports, it is understood that the MyCC has begun the process of seeking legislative amendments to include new provisions on mergers and acquisitions into law. There are some positive signs that anti-monopoly competition policy will gain traction in years to come:

On 20 June 2018, the Communications and Multimedia Minister announced that fixed broadband prices were expected to drop by at least 25 per cent by year-end, following the implementation of the Mandatory Standard on Access Pricing, which requires that infrastructure providers give access to their networks at regulated prices. It is reported that government intervention has resulted in a reduction of more than 30 per cent in broadband prices for entry-level packages.

In August 2018, Parliament considered breaking the monopoly on sugar imports to reduce the price of this commodity.

In April 2019, a joint committee, chaired by the Economic Affairs Minister, was reported to be investigating companies holding a possible monopolistic position in their respective markets (Padiberas Nasional Berhad, Puspakom Sdn Berhad, Pharmaniaga Berhad and My EG Services Bhd (MyEG)) as part of the government's initiative to liberalise the relevant industries and promote competition in business.

Based on news reports dated 3 April 2019, the Minister of Domestic Trade and Consumer Affairs (MDTCA) cited three factors in assessing monopolies: whether policies allowing these monopolies are still relevant; their investment size; and the economic impact of possibly dismantling them.

In terms of enforcement action by the MyCC, there has only been one abuse of dominance infringement finding to date and one proposed decision (set out in the table below). The cases are nevertheless noteworthy in that they demonstrate the MyCC's committed enforcement efforts against government-installed monopoly concessionaires.

Sector	Investigating authority	Conduct	Fines levied or proposed
Insurance (My EG)[3]	MyCC	Section 10(2)(d)(iii) of the CA 2010: imposing different conditions in equivalent transactions in the purchase of mandatory insurances for the renewal of temporary work permits for foreign workers	Financial penalty of 2,272,200 ringgit and a directive to cease and desist its infringing conduct
Trade facilitation (Dagang Net Technologies Sdn Bhd (Dagang Net))	MyCC	Section 10(2)(c) of the CA 2010: monopoly provider of trade facilitation services under the national single window by refusing to supply electronic mailboxes to end users of the customs operating system	Proposed financial penalty of 17,397,695.30 ringgit and a directive to cease and desist its infringing conduct

III MARKET DEFINITION AND MARKET POWER

Section 2 of the CA 2010 defines 'market' as a market in or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services. Defining a 'relevant market' means identifying all the close substitutes for the product under investigation.

Section 10 of the CA 2010 does not prohibit an enterprise from being dominant in a relevant market so long as the enterprise does not abuse its dominant position.

The MyCC adopts a two-stage test in determining if an enterprise has infringed Section 10 of the CA 2010:

a whether the enterprise being complained about is dominant in a relevant market in Malaysia; and

b if the enterprise is dominant, whether the enterprise is abusing that dominant position.

A 'dominant position' is defined as a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms without effective constraint from competitors or potential competitors.[4]

In general, the MyCC will consider a market share of above 60 per cent to be indicative of dominance. However, the fact that the market share of any enterprise is above or below any particular level shall not in itself be conclusive of dominance.

The Guidelines on Abuse of Dominance clearly point out that dominance is not simply a conduct by a single enterprise, but can also include conduct of enterprises exercising significant market power together (i.e., 'collective dominance').[5] The MyCC will look at

3 Case No. MyCC (ED) 700-1/1/2/2015, 24 June 2016.

4 Section 2 of the CA 2010.

5 Guidelines on Abuse of Dominance, Paragraph 2.23.

each case on its merits but, in general, an infringement finding may be made if two or more separate enterprises, which have significant market power, act similarly in a market and that conduct excludes equally efficient competitors.[6]

In assessing whether an enterprise is dominant, first the relevant market must be defined in accordance with the MyCC's Guidelines on Market Definition. This involves determining both:

a the relevant product market; and

b the relevant geographic market.

In identifying the relevant market, the MyCC has said that it will employ the hypothetical monopolist test (HMT), and will rely on economic evidence in defining the relevant market, such as:

a market research surveys; and

b interviews with:

- industry associations;
- the initial complainant;
- competitors; and
- customers.

In practice, we have not seen significant evidence of an economic approach as the only infringement finding for abuse of dominance made by the MyCC involved a monopoly concessionaire.

Aviation service sector

Apart from issuing the Guidelines on Abuse of Dominant Position, the MAVCOM has also issued the Aviation Service Market Definition, which adopts the same principles applied by the MyCC in defining a market.

Communications and multimedia sector

In its Guideline on Dominant Position in a Communications Market, the MCMC outlines the general approach in identifying whether a licensee is dominant. This includes defining the boundaries of the relevant communications market and determining whether the licensee is in a dominant position in the relevant market.

The MCMC's approach to market definition is similar to the MyCC's in that it applies the HMT in identifying the relevant market. The Communications and Multimedia Act 1998 (CMA 1998) empowers the MCMC to pre-define markets for purposes of making a determination of dominance under Section 137 of the CMA 1998. There are currently 26 pre-determined markets, according to the 'Market Definition Analysis – Definition of Communications Market in Malaysia' dated 24 September 2014. The finding of a market does not pre-empt a finding of dominance, and instead, it identifies the boundaries of the field of rivalry that exists in the communications sector. In some markets, effective competitive

6 Guidelines on Abuse of Dominance, Paragraph 2.24.

constraints may exist and no dominance finding will need to be made. In other markets, effective competitive constraints may be dormant or inhibited and a finding of dominance may be made.[7]

When analysing market share data, the MCMC will consider the current market share of the licensee against market shares of its competitors and the changes in the licensees' market shares over time. A market share of more than 40 per cent will be considered a high market share. However, this does not preclude a licensee with a market share of less than 40 per cent from being found to be dominant if it is not subject to effective competitive constraints.[8]

The MCMC will consider certain key factors in determining whether a licensee is in a dominant position in the market. The non-exhaustive list is as follows:[9]

a the structure of the market and the nature of competition in that market, including market shares;
b barriers to entry and expansion;
c the countervailing power of buyers; and
d the nature and effectiveness of economic regulation (if any).

Gas supply sector

The Guidelines on Competition for the Malaysian Gas Market in relation to Market Definition, Anti-Competitive Agreements and Abuse of Dominant Position (the Gas Market Guidelines) issued pursuant to Section 37C of the GSA 1993 employs the MyCC's approach of applying the HMT in identifying the relevant market. The EC considers a market share of above 60 per cent as a strong indication of a dominant position in the relevant market and it is unlikely that an entity will be individually dominant if its market share is below 40 per cent.[10] However, market share is said to not be the sole indicator of dominance.

IV ABUSE

i Overview

Malaysian law recognises the same categories of abuse (i.e., exclusionary and exploitative abuses) as the European Union. Section 10(2) of the CA 2010 provides a non-exhaustive list of what an abuse of a dominant position may include:

a directly or indirectly imposing an unfair purchase or selling price or other unfair trading condition on any supplier or customer;
b limiting or controlling production, market outlets or market access, technical or technological development or investment, to the prejudice of consumers;
c refusing to supply to a particular enterprise or group or category of enterprises;
d applying different conditions to equivalent transactions with other trading parties;
e making the conclusion of contract subject to acceptance by other parties of supplementary conditions that have no connection with the subject matter of the contract;
f predatory behaviour towards competitors; and

7 Market Definition Analysis – Definition of Communications Market in Malaysia, Paragraph 6.2.
8 MCMC Guideline on Dominant Position, Paragraph 4.17(a).
9 MCMC Guideline on Dominant Position, Paragraph 4.6.
10 The Gas Market Guidelines, Paragraph 5.3(c)(i).

g buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification.

The CA 2010 does not prohibit an enterprise in a dominant position from taking any step that has a reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor.[11] The MyCC adopts an 'effects-based' approach when assessing a potential abuse of dominance.

ii Exclusionary abuses

The MyCC assesses exclusionary conduct in terms of its impact on the competitive process and not its effects on competitors. Exclusionary conduct includes predatory pricing, price discrimination, exclusive dealings, loyalty rebates and discounts, refusal to supply and share essential facilities, buying up scarce intermediate goods or resources and bundling and tying.

By adopting an effects-based approach, the MyCC ensures that conduct that benefits consumers will not be prohibited and therefore ensuring that enterprises have the incentives to compete on merits. In assessing whether the effect of an exclusionary conduct is an abuse, the MyCC will use two tests for assessing anticompetitive effects:

a whether the conduct adversely affects consumers; and

b whether the conduct excludes a competitor that is just as efficient as the dominant enterprise.[12]

In July 2018, Dagang Net was provisionally found to have infringed Section 10(2)(c) of the CA 2010 for allegedly abusing its position as a monopoly provider of trade facilitation services under the national single window by refusing to supply electronic mailboxes to end users of the customs operating system. Dagang Net was also provisionally found to have imposed an exclusivity clause on its business partners that would have had the effect of distorting competition in the provision of trade facilitation services under the national single window, thereby creating a barrier to entry. The MyCC imposed a proposed financial penalty of 17,397,695.30 ringgit, as well as a directive on Dagang Net to cease and desist its infringing conduct and any future conduct that may disrupt competition. The directors and senior management of Dagang Net and its related companies were required to undergo a competition law compliance programme within three months of the issuance of the proposed decision.

The MyCC, in its non-infringement finding against Megasteel Sdn Bhd,[13] initially provisionally found that Megasteel had abused its dominant position in the hot rolled coil (HRC) market by charging or imposing a price for its HRC that amounts to a margin squeeze that has an actual or potential effect of constraining the ability of reasonable efficient competitors in the downstream cold rolled coil market. Upon the submission of Megasteel's oral and written representations, the MyCC found that, while Megasteel was a dominant in the upstream market for HRC, it had not abused its dominance.

The MyCC made a non-infringement finding in the *Pangsapuri Perdana* case,[14] where a complaint was made to the MyCC alleging that there was a monopoly of renovation contracts

11 Section 10(3) of the CA 2010.

12 Guidelines on Abuse of Dominance, Paragraph 3.9.

13 Case No. MyCC/002/2012, 15 April 2016.

14 Case No. MyCC.700.2.008.2014, 12 February 2015.

by a single contractor at the Pangsapuri Perdana apartment building. The alleged abuse was in relation to an exclusivity given to the contractor. The investigations revealed that this was not the case and the owners of Pangsapuri Perdana were free to appoint any contractor to carry out renovation works.

iii Discrimination

An abuse of dominant position includes applying different conditions to equivalent transactions with other trading parties to an extent that may:

a discourage new market entry or expansion or investment by an existing competitor;

b force from the market or seriously damage an existing competitor that is as efficient as the dominant enterprise; or

c harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market.[15]

An example of MyCC investigating a dominant player that has engaged in discriminatory conduct is the *MyEG* case. MyEG is an electronic government (e-government) service that enables employers to renew insurances for foreign and domestic workers. MyEG, via its subsidiary, is also engaged in the sale and purchase of insurance as an insurance agent. For renewals to be approved, employees must upload mandatory insurance policies through MyEG's e-government service. However, renewals of insurance policies purchased from other insurers were not approved as fast as renewal policies purchased from MyEG. The MyCC found that, as a dominant concessionaire, MyEG is obliged to grant equal access of its facilities and promote competition in the downstream market. MyEG's conduct of imposing different conditions on equivalent transactions in the purchase of mandatory insurances for the renewal of insurance policies for foreign workers constituted an abuse of dominance as per Section 10(2)(d) of the CA 2010.

MyEG appealed against the MyCC's decision. However, the Competition Appeal Tribunal (CAT) upheld the MyCC's decision and, on 22 January 2019, the High Court dismissed MyEG's judicial review application upholding both the MyCC and the CAT's findings of infringement. At the time of writing, MyEG had also filed for an appeal to the Court of Appeal against the MyCC and CAT's findings and against the penalty imposed by the MyCC.

iv Exploitative abuses

Exploitative conduct, such as excessive pricing, may result from structural conditions in the market. For example, where there are high barriers of market entry, a dominant enterprise may set high prices to exploit customers. This type of conduct typically occurs where the enterprise is a sole concessionaire and would be able to abuse its dominance by imposing an unfair purchase or selling price to exploit suppliers or customers. The MyCC is only concerned with excessive pricing where there is no likelihood that market forces will reduce dominance in a market.

15 Section 10(2)(d) of the CA 2010.

V REMEDIES AND SANCTIONS

Section 40 of the CA 2010 empowers the MyCC to impose a number of remedial actions against an enterprise that has infringed Section 10 of the CA 2010 by:

a requiring that the infringement be ceased immediately;
b specifying steps to be taken by the infringing enterprise to bring the infringement to an end;
c imposing a financial penalty; or
d giving any other direction that the MyCC deems appropriate.

These remedies are also available under the GSA 1993 and the Malaysian Aviation Commission Act 2015 (MACA 2015).

i Sanctions

The MyCC may impose a financial penalty of up to 10 per cent of the infringing enterprise's worldwide turnover for the duration of the infringement period.[16] In MyEG's case, the total financial penalty imposed by the MyCC was 2,272,200 ringgit. The financial penalty was inclusive of the penalty imposed during the infringement period and a daily penalty for MyEG's ongoing infringement for failure to adhere to the directions imposed in the MyCC's proposed decision to provide an efficient gateway for all its competitors at the downstream market.

In relation to the *Dagang Net* case, the MyCC proposed to impose a financial penalty of 17,397,695.30 ringgit. The provisional financial penalty is, however, subject to the final decision by the MyCC. If an infringement finding is made against Dagang Net, the MyCC would be imposing the highest financial penalty for an abuse of dominance case in Malaysia.

In determining the total financial penalty imposed against an infringing enterprise, the MyCC may have regard to the following factors:[17]

a seriousness (gravity) or impact of the infringement;
b duration of the infringement;
c turnover of the market involved;
d degree of fault (negligence or intention);
e recidivism;
f the role of the enterprise in the infringement;
g aggravating and mitigating factors;
h existence of a compliance programme; and
i level of financial penalties imposed in similar cases.

ii Behavioural remedies

Where an investigation has been initiated but not completed, the MyCC may impose interim measures if it has reasonable grounds to believe the infringement occurred, and considers the interim measures necessary as a matter of urgency to prevent serious damage or protect the public interest.[18] Interim measures are only available for *ex officio* investigations and not where an investigation is initiated pursuant to a complaint made to the MyCC. Such measures

16 Section 40(4) of the CA 2010.
17 Guidelines on Financial Penalties, Paragraph 3.2.
18 Section 35(1) and (2) of the CA 2010.

include directing an infringing enterprise to desist from any suspected infringement. While the MyCC has imposed interim measures in cartel cases, it has yet to issue any interim measures in cases of abuse of dominance.

Communications and multimedia sector

The MCMC may direct a licensee in a dominant position to cease conduct that has or may have the effect of substantially lessening competition, or to implement appropriate remedies.[19] Licensees or any person who contravenes the competition provisions under the CMA 1998 may be subject to criminal penalties of up to 500,000 ringgit or a term of imprisonment of up to five years, or both.

Aviation service sector

In addition to imposing financial penalties against enterprises for anticompetitive practices under the MACA 2015, the MAVCOM can impose financial penalties of up to 1 million ringgit against an individual and up to 5 per cent of an enterprise's annual turnover for the preceding financial year for non-compliance of guidelines issued under the MACA 2015.[20]

iii Structural remedies

Structural remedies are not available for infringements under the CA 2010.

VI PROCEDURE

The MyCC may initiate investigations:

a through an *ex officio* investigation;[21]

b under the direction of the MDTCA to investigate any suspected infringement under the CA 2010;[22] or

c upon receipt of a complaint.[23]

These procedures are also available under the GSA 1993.

The procedural stages of an investigation once initiated are as follows:

a An *ex officio* investigation may only be launched if the MyCC has 'reason to suspect' that an enterprise has infringed or is infringing Section 10 of the CA 2010.

b If an investigation is initiated pursuant to a complaint, the MyCC may first make inquiries on the complainant to decide whether the matter should be investigated. If a complaint comes from an anonymous source, the MyCC may open an *ex officio* investigation instead.

c The MyCC will then proceed with an information-gathering process, which enables the MyCC to request the production of information or a statement of parties in relation to the requested information.[24] The MyCC also has the power to conduct a raid with or

19 Section 139 of the CMA 1998.

20 Section 65(4) of the MACA 2015.

21 Section 14(1) of the CA 2010.

22 Section 14(2) of the CA 2010.

23 Section 15 of the CA 2010.

24 Section 18(1) and (2) of the CA 2010.

without a warrant on any premises (i.e., dawn raids).[25] A raid can only be conducted without a warrant if the MyCC has 'reasonable cause to believe' that the investigation would be adversely affected owing to the delay in obtaining a search warrant.[26]

d An enterprise can make a legally binding undertaking to the MyCC.[27] If the MyCC accepts an undertaking, the MyCC shall close the investigation without making any finding of infringement and shall not impose a penalty on the enterprise.

e If the MyCC decides to make an infringement finding, it will first issue a proposed decision against the enterprise, which is essentially a written notice detailing the reasons for the proposed decision and any provisional penalties or remedial actions.[28] It will also inform the enterprise concerned of the period in which the enterprise may submit a written representation and for the enterprise to indicate whether it wishes to make oral representations before the panel of members of the MyCC.

f The MyCC will then proceed to decide whether to make an infringement or non-infringement finding. Final decisions are usually published on the MyCC official website.

g An aggrieved party may appeal against an infringement finding to the CAT. Parties aggrieved by the CAT's findings may make a judicial review application to the High Court. The *MyEG* case was the first abuse of dominance case to have been judicially reviewed by the High Court, which upheld the decisions of both the CAT and the MyCC in making an infringement finding.

In relation to interim measures, the MyCC will first issue a written notice to the relevant enterprise and permit the enterprise to make written representations within seven days of the date of the written notice. The notice should indicate the nature and reasons for the direction that the MyCC proposes to give.[29]

The MyCC does not offer guidance or a review process to enterprises in regards to the interpretation and application of competition laws. Enterprises that require such guidance would have to seek independent legal advice. In the Competition Act 2010 – Compliance Guidelines, the MyCC recommends Malaysian businesses to review all existing arrangements and practices to ensure compliance with the CA 2010 and to implement a competition law compliance programme.

Aviation service sector

When MAVCOM's investigation powers have been invoked, an authorised officer can issue a compliance order if satisfied of an infringement or likely infringement.[30] The compliance order can require a person to refrain from conduct in contravention of MACA 2015 or to

25 Sections 25 and 26 of the CA 2010.

26 Section 26 of the CA 2010.

27 Section 43 of the CA 2010.

28 Section 36 of the CA 2010.

29 Section 35(4) of the CA 2010.

30 Section 85(1) of the MACA 2015.

take actions required in order to comply with MACA 2015.[31] The MAVCOM may make a finding of infringement notifying the infringing enterprise of the same within 14 days of making an infringement finding.[32]

Communications and multimedia sector

The MCMC can conduct an investigation on any matter under the CMA 1998, either upon the direction of the Minister for the MCMC or if the MCMC has grounds to believe that a civil or criminal offence will be committed.[33] The MCMC may also conduct an investigation pursuant to a complaint received.[34]

Appeals

Parties aggrieved by decisions of the MCMC or the EC may appeal to the respective appeal tribunal. The CMA 1998 also provides for an aggrieved party to further apply for judicial review if the party is dissatisfied with the decision of the appeal tribunal. The MACA 2015 only enables an aggrieved party to bring an appeal directly to the High Court.

VII PRIVATE ENFORCEMENT

Any person who suffers loss or damage directly as a result of an infringement of any prohibition under the CA 2010 can initiate an action for relief in civil proceedings against any infringing enterprise.[35] There is no requirement for the MyCC to make an infringement finding before a civil action may be initiated. The MACA 2015 and the GSA 1993 also provide for the right of private action.

While the CA 2010 does not specify whether collective actions are available in civil proceedings, such actions, commonly known as representative actions, are available.[36] The civil courts have the jurisdiction to award damages and equitable remedies, including injunctive relief, specific performance and declarations of illegality. In assessing the amount of damages to be awarded, a party claiming for special damages (where the amount of damages is quantifiable) would have to prove that the sum being claimed was reasonably incurred. If the party is claiming for general damages (where the amount may not be quantifiable), the court will assess the amount to be awarded.

While there does not appear to be a large number of cases actioned through the courts, there are cases where the civil courts were open to making declaratory orders if an enterprise infringed the CA 2010. In *Fantasy Ruby Sdn Bhd v. Padiberas Nasional Bhd*,[37] the defendant sought a declaration of illegality from the court on the basis that an agreement was null, void and unenforceable owing to a breach of the CA 2010. However, owing to the lack of evidence in proving that the plaintiff had abused its dominance, the court did not make a declaration of illegality.

31 Section 85(3) of the MACA 2015.
32 Section 59(2) of the MACA 2015.
33 Section 68 of the CMA 1998.
34 Section 69 of the CMA 1998.
35 Section 64(1) of the CA 2010.
36 Order 15, Rule 12 of the Rules of Court.
37 [2018] 11 MLJ 618.

In *Honda Giken Kogyo Kabushiki Kaisha v. Dnc Asiatic Holdings Sdn Bhd & Ors and another suit*,[38] a counterclaim was filed by the defendant for a declaratory order under the CA 2010 for unlawful interference with trade. The plaintiff initiated an action for copyright infringement as the defendant distributed motorcycles that were based on the model created by the plaintiff's employee. In its counterclaim, the defendant claimed that the plaintiff's action in enforcing its copyright prevented 'legitimate competition'. However, the court dismissed the defendant's counterclaim on the basis that the plaintiff would suffer unjust and unfair competition if its competitors were free to copy its copyright-protected works under the guise of the CA 2010.

Contingency fee or conditional fee arrangements are prohibited;[39] however, advocates and solicitors can enter into an agreement on the amount of legal costs in respect of contentious business pursuant to Section 116 of the Legal Profession Act 1976.

VIII FUTURE DEVELOPMENTS

The actions taken by the government so far are in line with its election agenda, which is to re-examine monopolies to make sure goods and services are fairly priced, ensure that competition policy framework is robust and ensure that government-linked corporations operate in sectors that suffer from market failure instead of competing against private companies. In light of the agenda to curb monopolistic activity, the MyCC may place emphasis on preventing large conglomerates' abuse of economic power and guaranteeing fair competition opportunities for small to medium-sized enterprises. The MyCC's enforcement of abuse of dominance cases will continue to be bolstered by important wins for the MyCC, such as the *MyEG* case.

38 [2017] MLJU 1575.

39 Section 112 of the Legal Profession Act 1976.

Appendix 1

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Shanthi Kandiah is the head of SK Chambers' legal and regulatory advisers, specialising in competition law, telecommunications regulation, data protection and cybersecurity. Her competition law practice covers antitrust litigation, cartels and sectoral competition regimes, including merger control. She regularly advises many corporations in sectors such as media and telecommunications, aviation, fast-moving consumer goods, construction, pharmaceuticals and other service industries covering issues ranging from competitor collaborations, cartels, pricing and rebate policies, and compliance. Recently, she acted as coordinating counsel in the largest enforcement action to date by the Malaysian Competition Commission involving fines exceeding 200 million ringgit. On mergers, her recent assignments include serving as local counsel on a multi-jurisdiction merger transaction led by a magic circle firm. She has also successfully advised on antitrust approval for acquisitions in the communications and multimedia sector. Shanthi has a master's degree in law and a postgraduate diploma in competition economics, both from King's College London.

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