

The Coadjuvancy of the Malaysian Regulatory Policies in Addressing the Cartel Activities in Malaysian Corporations

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ABSTRACT

Cartels pose significant turbulence in many aspects, ranging from the increase in prices of goods and services to affect long-run economic growth and productivity. In 2010, the Competition Act was formulated to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith. However, in terms of the enforcement of the Act, Malaysia is still at the infancy stage. Hence, this paper attempts to examine the effectiveness of the Act in mitigating the cartel activities in Malaysia. Besides that, this paper also attempts to examine the collaborative feasibility between the Competition Act 2010 and Whistleblower Protection Act 2010 (Regulatory Policies) in addressing the cartel activities in Malaysian firms. This paper also offers suggestions to the policy makers to strengthen the feasibility of the Competition Act. Methodologically, an extensive literature review was carried out by the researchers based on the policies formulated in Malaysia and developed countries. A content analysis was also performed to identify major themes and delineate a crucial means to address cartel activities in Malaysia. The finding of the study revealed that there is a room for improvement in the Malaysian Competition Act 2010. Besides, the collaborative action between two regulatory policies are significant and it would be able to curb the cartel activities in Malaysia.

Keywords: Cartel, Competition Act 2010, Regulatory Policy, Whistleblowing, Whistleblower Protection Act 2010

INTRODUCTION

A cartel is an agreement among firms to get rid of competition among them and at the same time increase both prices and profits of those participating firms (Klimašauskienė and Giedraitis, 2011). Connor (2008) defined a cartel as “an association of two or more legally independent firms that explicitly agree to coordinate their prices or outputs to increase their collective profits.” Section 4 of the Competition Act 2010 (Act 712) refers cartel as a situation where the companies come into consensus and agreed to eliminate the competition and disrupt the market forces (the Competition Commission of Malaysia (MyCC) Annual Report, 2017). Fear (2006) defined cartel as a voluntary practice committed by several firms to control the market. Based on the above definitions, it is believed that a cartel is a conspiracy activity involving several firms

which obstructs the competition to increase the price of goods and services as well as their profits. Jasper (2017) highlighted that the firms limit the competition with a hope that they can maximize their profits.

The damage derived by cartels and its impact on the economy and consumer welfare is substantial. The most significant damage resulted from the cartel activity is its effect on the prices of the goods and services (Klimašauskienė and Giedraitis, 2011). In Malaysia, Chief Executive Officer of Malaysia Competition Commission (MyCC), Iskandar Ismail contends that there were some firms agreed to share tender information, manipulate tender prices and provide documents to each other. The situation may bring an adverse effect as it will result in higher contract prices. Besides that, the firms no longer have to compete with each other, the industry becomes inefficient, product quality is not in line with its cost and inefficient use of tax collection (Alzahrin, 2019). Other businesses that are not in favor of anti-competitive agreements have to cease operations because they cannot compete on prices (Mohd Safri, et al., 2019). Therefore, consumers will suffer damages as they have fewer choices, face higher prices, and get products or services of lower quality. Besides, the economy will not grow as new businesses are unable to penetrate the market and existing businesses have no incentive to become more innovative and efficient (MyCC, 2012). Hence, cartel detection and deterrence are among the highest priorities of competition authorities (Chen & Rey, 2013). In 2010, the Malaysian government introduced The Competition Act (Act 172) to address cartel activities in Malaysia. Since this act is relatively new in Malaysia, the effectiveness of the legislation is yet to be proven (Mohd Safri et al., 2019). Therefore, this paper attempts to examine the effectiveness of the Act in mitigating the cartel activities in Malaysia. Besides that, this paper also offers suggestions to the policy makers to strengthen the feasibility of the Competition Act.

LITERATURE REVIEWS

Cartel Activities in Malaysia

Among the examples of cartel agreements are price fixing, market sharing and bid rigging (Klimašauskienė and Giedraitis, 2011). Price fixing means an agreement among competitors to increase, fix, or maintain the price at which they sell their goods or services. Meanwhile, market sharing refers to an agreement between competitors to split the market by location and allocating each area to a specific participant, effectively creating a monopoly in each area. This practice has the effect of limiting the options available to consumers, resulting in increased prices or lower outputs (Dabbah, 2004). An agreement is made between two bidders in a tender exercise, effectively distorting the normal conditions of competition. The agreement includes who should win the tender at the agreed price.

According to the Deputy President of the Malaysian Malay Contractor Association, Datuk Mohd. Rosdi Ab. Aziz, a group of high profile contractor cartels are working together to set prices that

will benefit them after understanding the pricing methods of a government tender and thus, limiting the opportunity for small contractors to compete (Izzat, 2019). According to Salleh Buang (2019), in May 2015, the MyCC investigated 51 cases of violations of the Act since its enactment in January 2012. Among the most notable cases are confidential pricing cases by companies and associations in the services, food, shipping and pharmaceutical sectors.

The first cartel charged by MyCC under this Act was the Cameron Highlands Floriculturist Association (CHFA) (Shila & Burgess, 2016). In 2012, the cartel was found to be in the process of pricing flowers sold to wholesalers and distributors in the country. It was initially fined RM 20,000 but was later dropped after the group complied with all MyCC directives and promised all its members not to engage in anti-competitive practices. Meanwhile, at the end of October 2018, MyCC imposed a fine of RM33,068.85 on seven tuition centers and day care centers in the SS19 area of Subang Jaya for engaging in pricing activities. The operators agreed in May 2017 to set and standardize their tuition and day care service fees. All of them are required to stop pricing activities immediately.

The Malaysian Regulatory Policies

2.2.1 Competition Act 2010 (Act 712)

The Competition Act was gazetted on 10 June 2010 to encourage the competition culture among the firms and protecting the rights of the consumers (MyCC Annual Report, 2011). The competition also encourages firms to take initiatives to improve efficiency and innovation to produce a wide range of products and services at low cost and high quality in certain markets. The Competition Act confers powers to the MyCC to investigate and take action against any company involved in anti-competition practices including the cartel. The MyCC is armed with wide investigative powers, namely the power to obtain information (Section 18 of the CA 2010), the power to retain documents (Section 19 of the CA 2010), the power to access records (Section 20 of the CA 2010), as well as the power to search and seize with or without a warrant (Sections 25 and 26 of the CA 2010) (Mohd Safri et al., 2019). Generally, the MyCC may conduct the investigation when it is suspected that there is an infringement by any enterprise or arising from complaints made by the public (Section 14 of the CA 2010).

Section 4 (1) states that a horizontal or vertical agreement between enterprises is prohibited if it "has the intent or effect of obstructing, restricting or disrupting the competition significantly in any market for goods or services". Although the term 'cartel' is not specifically defined in the Act, its existence is indirectly stated in Section 4 (1). A horizontal agreement refers to an agreement between enterprises operating at the same level (business competitors) in the production or distribution chain (Section 2 of the CA 2010).

The collaboration agreement aimed at market sharing between MAS, AirAsia & AirAsia X is a Horizontal Agreement under Section 4 (2) (b) in which the two large organizations are subjected to a maximum penalty of RM 20 million. Besides, the Cameron Highlands Floriculturist Association (CHFA) is the first offender charged with setting wholesale prices among its members. In the context of the Competition Act, the agreement is not restricted to a written agreement only, but also includes oral agreements, whether through telephone or in meetings either in private or in social settings.

Meanwhile, a vertical agreement refers to the agreement between enterprises operating at different levels in the production or distribution chain Section 2 of the CA 2010 . Pavlova and Shastitko (2016) found that many countries introduced leniency programmes in order to detect cartels more easily . The programme is designed to encourage cartel participants to come forward not only to confess their involvement in cartel activities, but also to collaborate with the competition authorities in leading for discovery of the cartel. In return, the participants of the cartel will be immunized or offered reduced penalties (Middleton, Rodger & MacCulloch, 2009).

In Malaysia, Section 41 of the Competition Act 2010 provides for a relaxation regime if a company recognizes its involvement in anti-competitive activities provided for under section 4 (2) of the Competition Act 2010. In return, the company may receive a maximum reduction of 100 percent penalty if applicable to them. Previously, most of the companies arrested under this Act for cartel activity setting prices on the market were the result of public complaints while the rest was the result of MyCC's observation of pricing of goods. If the Commission determines that there has been an infringement of Act 712 by an enterprise, the latter can incur a financial penalty of up to a maximum of 10% of its worldwide turnover and to comply with any other directions as the Commission deems appropriate for to bring the infringement to an end (MyCC Annual Report 2017).

2.2.2 Whistleblower Protection Act 2010

The Whistleblower Protection Act 2010 was formulated by the government as a part of its effort in fulfilling the obligations under the United Nation Convention against Corruption (Meng and Fook, 2011). The Act offers civil and criminal immunity to the whistleblowers if they disclose the wrongdoings committed by other people in both the private and public sectors. Section 6 (1) WPA 2010 states that the Act only provides the immunity to the whistleblower if they furnish the information on the occurrence of wrongdoings to the enforcement agencies. Among the agencies categories as the enforcement agencies include the Police, Customs, Road Transport Department, Malaysian Anti-Corruption Commission and the Immigration Department. The Act will not give protection to whistleblowers if they channel to other parties such as media, friends and family members. A whistleblower may complain to any enforcement agency if he or any person related to or associated with him suffers from any detrimental action in breach of s.10(1).

Since the Act took effect on 15 December 2010, about 100 people had disclosed wrongdoings to the authorities and 95% exposed the wrongdoings committed by their friends, colleagues, and whom the whistleblowers knew since the whistleblowers trusted that the Act would protect them sufficiently. 95 percent of cases were reported to the MACC, and the remaining 5% were reported to the Road Transport and the Immigration Departments (Lai, 2011). Section 7 of this Act confers protections for whistleblowers in the forms of protection of confidential information; immunity from civil and criminal action; and (c) protection against detrimental action. Section 9 of this Act provides the civil and criminal protection to the informant of any wrongdoing committed by anyone in the organization. Section 26 also states that the reward will be given to the informant for the person's efforts in providing the correct information. Sometimes, a whistleblower may receive compensation for their act to blow the whistle externally (Singer, 1992). Unfortunately, there are still many who do not understand the provisions. If more people knew and understood this Act, there might be more cartel activities to be ceased (Mohd Rozaimy et al., 2017).

ANALYSIS AND DISCUSSION

The Effectiveness Of Competition Act 2010 In Addressing Cartel Activities

Lee (2014) urged that Malaysia is still in the infant stage of competition law enforcement. This is because Malaysia is currently using the soft approach in addressing the problem of cartel rather than using punitive action to combat cartel. Section 41 of the Competition Act 2010 mentioned that a firm may be granted 100 percent deduction of penalty if the participants come forward and declare their involvement in cartel activities. Besides that, unlike the US Anti-Trust, the Competition Act does not provide for any jail term for cartel practices. In Malaysia, the Competition Act only prescribes penalties whereby large corporations easily pay all penalties imposed on them. Strict measures to criminalize the cartel should be considered as adopted by the Australian government in 2009. Under the new law, the Australian Trade Practices Act 1974 is amended to provide a maximum jail term of 10 years and a fine of up to AU \$ 220,000. Companies participating in the cartel practices are subject to a higher maximum fine of AU \$ 10 million or three times the benefits derived from cartel participation or, in some cases, 10 percent of the company's annual sales.

As discussed previously, the leniency program supposedly acts to encourage people, including the cartel participants to channel their report to MyCC about the occurrence of a cartel. However, the MyCC's decisions published on its website revealed that of six cartels that were found to have infringed, none had been first detected through the leniency programme. Through section 41 of the Competition Act 2010, there was one cartel participant who intended to use leniency program and disclose the occurrence of cartel activity to MyCC. However, the effort had been rejected by the MyCC because the participant was an instigator of the activity and the MyCC had

already obtained the evidence on the cartel activity before the participant report it. Since there is no cases reported under the leniency program, therefore, the effectiveness of the programme has yet to be proven (Mohd Safri et al., 2019).

Government-Linked Companies (GLCs), agencies and ministries are advised to report to the Competition Commission of Malaysia (MyCC) on cartel activities (Alzahrin, 2019). If the government encourages employees in the company to report the cartel activity, this cartel activity will inevitably be curtailed and, eventually, consumers continue to benefit with the lower price of goods and services. Employees either at the management or non-management level may prefer to remain silent, although they knew the occurrence of cartel exists in their company. The fear of being told about this wrongdoing (fear of being dismissed, demoted for disclosing on Cartel's activities) caused them to be silent and keep on blaming the government for failing to control the prices of goods and services in the market.

Likewise, the government needs to utilize the Whistleblower Protection Act 2010 to encourage citizens to lodge a report on cartel activities to the enforcement agencies. Both Competition Act 2010 and Whistleblower Protection Act 2010 are significant measures to combat the cartel activities in Malaysia. According to Mohd Rozaimy et al. (2017), an employee is more likely to blow the whistle externally as they believe that their organization supports the act of wrongdoings, as long as such action can increase the company profit. Besides that, they prefer to blow the whistle externally because they perceive that the organization is ineffective to solve the problem. Moreover, they will not blow the whistle internally if they believe that they would be retaliated by the wrongdoer if the confidential information is disclosed to the wrongdoer. Moreover, they choose to blow the whistle externally as they are unaware of the procedures to blow the whistle internally. Hence, in order to encourage workers to lodge a wrongful act (cartel), the government needs to also utilize the Whistleblower Protection Act 2010. As mentioned previously, the Act will protect the whistleblower from having detrimental actions and the same time those who lodge a report to enforcement agencies will be granted a reward. In comparison to the leniency program under the Competition Act, the Whistleblower protection is deemed more practical since the Act can attract more than 100 informants to disclose the wrongful act committed by other people. If the government promotes the use of two regulatory policies (Competition Act 2010 and Whistleblower Protection Act 2010), the cartel activities can be curtailed effectively since both policies can encourage people to disclose the wrongful act.

4.0 Conclusion

Fighting the cartel is not an easy task (Monti, 2000) because the cartel exists in secrecy (Chen & Harrington, 2007). Some guidelines need to be developed to explain the interpretation of a provision. For example, the word "social benefits" under Section 5 of the Competition Act has not been clearly defined. In that section, if a party (enterprise) successfully proves that the social

benefits will be passed on to the customer, the authority will consider giving away the liability. However, it is not easy to determine whether an enterprise has provided social benefits to its customers. This may make it difficult for authorities to determine whether an agreement should be released from liability under the Competition Act. Besides that, the punishment in the Competition Act 2010 needs to be severe to curb the cartel activity. Strict measures to criminalize the cartel should be considered as adopted by the Australian and the United States government as per discussed previously.

The government also needs to utilize both Competition Act 2010 and the Whistleblower Protection Act 2010 in addressing the cartel activities. Both Acts offer rewards for those who disclose the wrongful acts to the authorities. In fact, the Whistleblower Protection Act provides civil and criminal immunity to those who willing to furnish the wrongful acts information to the enforcement agencies. However, it is argued that the Whistleblower Protection Act does not give protection to the informant if it is found that he or she also involved in the wrongful acts. It is suggested that the government needs to re-examine the provision because it can prevent the people to report the wrongful acts to the authorities. According to Mohd Rozaimy et al. (2017), there is a probability that the wrongdoer (who involved in the wrongful acts) regrets over his or her own action and willing to co-operate with the enforcement agency to expose the wrongdoings.

The government will continuously establish any Act. However, if people do not understand the provisions of the Act, the desired change will fail to be achieved. In the end, the Act will only be discussed by academics and researchers. Governments, including ministers, civil servants, District Officers, and the Civil Society need to make the people aware of these two Acts (the Competition Act 2010 and the Whistleblower Protection Act 2010). Therefore, the MyCC needs to play its role in spreading information about the leniency programme, the conditions that must be complied with, and the benefits that will be gained upon successful application to the enterprises that are running their business in Malaysia.

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