

UNIVERSITI TEKNOLOGI MARA

**A DECADE OF COMPETITION
LAW: A STUDY ON THE
TRANSPLANTATION OF
EUROPEAN UNION COMPETITION
LAW PRINCIPLES IN MALAYSIA IN
RELATION TO THE APPLICATION
OF THE COMPETITION ACT 2010**

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ABSTRACT

It has been a decade since the introduction of the Competition Act 2010 in Malaysia. Cases were decided by the Malaysian Competition Commission (MyCC) and some of those companies found liable for infringement of the Act were large and listed companies. Hefty fines were imposed. This sent a shockwave to the business community on the seriousness of the Malaysian government in enforcing competition law in this country. It also put a spotlight on the MyCC to ensure the decisions that it made were correct and consistent with competition law principles and practices from the jurisdiction that it transplanted its law. Decisions that were not based on sound principles of competition laws will distort the market and erode the confidence of the business community and the competitiveness of the Malaysian economy. Thus, it is the purpose of this research to study the application of the law in Malaysia to ensure the degree of consistency with competition law principles from the European Union (EU), which the Malaysian Competition Act 2010 is modelled after. This is important to ensure certainties in the market that the competition law in Malaysia will have the same principles as the one found in the EU. Singapore which also follows the European Union's competition law model is also used as a comparison. The research uses transplantation theory to look at how the Competition Act 2010 is implemented in Malaysia to ensure certainty and uniformity with the implementation of competition law principles in the European Union. The certainty and uniformity of the implementation are very important as Malaysia is a major trading nation and an important destination for foreign investments. The research finds that in the early days of its decision-making, no reference was made to any decisions from any jurisdictions, not even from the EU, which could lead to mistakes being made in its decision. The research also found evidence that in one instance, the Competition Appeal Tribunal (CAT) based its decision in the *MAS and AirAsia* case on contract law and not competition law principles. This resulted in huge losses to the parties involved. Without proper directions, businesses maybe at a blind on the approaches competition law enforcement was going to be in Malaysia. They may have to readdress their legal risks assessment to accommodate law enforcement in Malaysia and thus, incur more cost of doing business in Malaysia. The research proposes that the final decisions made by the MyCC should include references to cases from other jurisdictions, especially from the EU, to expand the wealth of knowledge and understanding in the area to ensure the successful transplantation of competition law in Malaysia. Guidelines on the general application of the law and some of the definitions proscribe by the Act should also be made clearer to reflect and capture the true intention of competition law. Legal trainings and more advocacy programmes on this area of the law should be held especially for those who are directly involved in the enforcement of the law. It is hoped that the study will add to a greater understanding of the law and expand on the literature on the Malaysian Competition Act 2010.

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CHAPTER ONE

INTRODUCTION

1.1 Research Background

It has been 10 years since Malaysia introduced its comprehensive competition law to regulate businesses in Malaysia. Section 3 of the Competition Act 2010 clearly states that the Act applies to any commercial activity both within and outside Malaysia. Previous regulations on anti-competitive behaviours are only applicable to specific sectors.¹ A lot has happened since then. The MyCC has received a total of 547 complaints from the public, 14 cases were referred to it by the Minister of Domestic Trade and Consumer Affairs, and it initiated 74 investigations into alleged anti-competitive practices since the Act has come into force.² According to the Malaysian Competition Commission (MyCC) website, a total of 29 cases were decided by the MyCC at the time of writing. A further four proposed decisions were issued against four entities.³ On the same MyCC website, it can be noted that three cases were heard by the Competition Appeal Tribunal where decisions have been issued and four cases reached the judicial review stage.⁴ One case went to the Court of Appeal concerning an appeal against the decision of the judicial review at the High Court.⁵

Among the most notable case pursued by the MyCC is the *Malaysian Airline System Berhad, AirAsia Berhad and AirAsia X Sdn.Bhd (MAS-AA)* case for infringement under section 4(2) of the Competition Act 2010 (the Act). It is also among

¹ The other Acts that regulate competition within their specific sectors are
i. Communication and Multimedia Act 1998 (section 133 – the Act is only applicable to licensee under the Act).
ii. Energy Commission Act 2001 (section 14(h) only in relation to electricity and gas supplied through pipelines).
iii. Malaysian Aviation Commission Act 2015 (section 48, only in relation to aviation services).

² Hishamudin Yunus, “*Competition Law in Malaysia : A Digest of Recent Developments*” (2020) 32 SAcLJ 349, available at <<https://journalonline.academyPublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/1522/Citation/JournalsOnlinePDF>> accessed on 30 Decemeber 2020.

³ Malaysian Competition Commission website <<https://www.mycc.gov.my/case>> accessed on 30th. January 2021.

⁴ Ibid, under Judicial Review section.

⁵ Malaysian Airline System Berhad, AirAsia Berhad and AirAsia X Sdn. Bhd. (the MAS-AA’s case.)