ASEAN COMPETITION LAW PROJECT (DRAFT)
MALAYSIA COUNTRY REPORT

Paper Written By Associate Professor Dr. Cheong May Fong, Faculty of Law, University of Malaya, Kuala Lumpur, Malaysia, 20 March 2001.

(A paper submitted to Professor Dr. Yasuda Nobuyuki, Graduate School of International Development, Nagoya University, Japan.
Project funded by the Japan Fair Trade Commission)

A. INTRODUCTION

For the purposes of this paper, the term "competition" and "competition policy" defined by the United Nations Conference on Trade and Development (UNCTAD) will be adopted. The term "competition" refers to the process of rivalry among firms and to market structures conducive to such rivalry (or potential rivalry).[1] A similar definition was given by Professor Clark in his paper on "Workable Competition" in 1940. In his paper, he argued that the stimulation of economic rivalry by way of market pressure (which is exerted to penalize laggards and to reward the enterprising) will promote economic progress.[2] "Competition policy" refers to policy aimed at preserving and promoting competition, both by enforcing competition law against restrictive business practices by firms and by influencing the design and implementation of other governmental policies or measures affecting competition.[3] Thus, competition policy encompasses all government policies that affect competition in the markets and as such, competition law is a subset of competition policy.[4]

Malaysia does not have a comprehensive competition policy or competition law. While there is no comprehensive competition legislation in Malaysia, there is an array of statute which regulate trading and business activities as well as protecting the consumer interests. This includes the *Trade Descriptions Act 1972*,[5] the *Hire-Purchase Act 1967*,[6] the *Weights and Measures Act 1972*,[7] the *Direct Sales Act 1993,*[8] the *Moneylenders Act 1951*[9] and more recently the *Consumer Protection Act 1999*.[10] It may be said that the aim

[1] See "Empirical Evidence of the Benefits from Applying Competition Law and Policy Principles to Economic Development in order to Attain Greater Efficiency in International Trade and Development", UNCTAD (TD/B/COM.2/EM/10) 18 September 1997, p 4.
[2] Clark, J M "Towards a Concept of Workable Competition" (1940) *American Economic Review*.
[3] See Note 1.
[4] Stewart, Taimoon, *Globalisation, Competition Policy and International Trade Negotiations: Considerations for Developing Countries*, Monographs on Investment and Competition Policy, #4 (Jaipur, India: CUTS Centre for International Trade, Economics & Environment, 2000), p 4.
[5] Act 87. This Act came into effect on 3.11.1972.
[6] (Revised 1978). Act 212. This Act came into effect on 11.4.1968.
[7] Act 71. This Act came into effect on 1.1.1981.
[8] Act 500. This Act came into effect on 1.6.1993.
[9] (Revised 1989). Act 400. This Act came into effect in West Malaysia on 31.3.1952. In Sabah, the *Moneylenders Ordinance* (Cap. 81) came into effect on 8.11.1901 and in Sarawak, the *Moneylenders Ordinance* (Cap. 114) came into effect on 17.2.1912.

of preventing anti-competitive elements is ingrained in statutes such as the *Control of Supplies Act 1961*[11] and the *Price Control Act 1946*.[12] The control of basic and essential commodities is also seen in the *Control of Padi and Rice Act 1994*[13] and the *Gas Supply Act) 1993*.[14] These consumer protection statutes related to competition law will be considered at Part B below.

Besides existing legislation, two instruments in relation to the acquisition of assets, take-overs and mergers in Malaysia which have an impact on competition are the Guidelines for Regulation of Acquisition of Assets, Mergers and Take-overs and the Malaysian Code on Take-Overs and Mergers 1998. They will be considered at Part C below.

The Government's awareness of the need for a competition law is particularly seen in some provisions of the *Communications and Multimedia Act 1998*.[15] Thus, although there is no comprehensive competition law regulating trade and business in Malaysia generally, sections 133-144 of this Act provides for general competition practices applicable to the communications and multimedia industries. These provisions will be considered at Part D below.

The need for a competition law has been recognized by the Government as indicated by the efforts of the Ministry of Domestic Trade and Consumer Affairs (hereafter referred to as "the Ministry") to draft this law. In 1992, the Government received a report on competition policy,[16] in response to which a draft of the Trade Practices Bill was made in 1993.[17] However, the efforts taken were slowed down due to apprehension as to the need for introducing such a law. Thus, while recognizing the advantages of having its own competition law, a cautious approach has been adopted.[18] The Ministry has received feedback on the draft Bill and is conducting a continuous study for a comprehensive competition policy and a competition law. The proposed draft of this Bill will be considered at Part E below.

B. RELATED CONSUMER PROTECTION LAWS

---

[10] Act 599. This Act came into effect on 15.11.1999.
[11] (Revised 1973). Act 122. This Act came into effect in West Malaysia on 1.7.1963 and in East Malaysia on 5.3.1964.
[12] (Revised 1973). Act 121. This Act came into effect in West Malaysia on 31.12.1949 and in East Malaysia on 16.9.1963
[13] Act 522. This Act came into effect on 7.7.1994.
[14] Act 501. This Act came into effect on 17.7.1997.
[15] Act 588. This Act came into effect on 1.4. 1999. This Act repealed the *Telecommunications Act 1950* (Act 20) and the *Broadcasting Act 1988* (Act 338).
[16] Hazaldine, Tim, "A Competition Policy for Malaysia?", Malaysian Institute of Economic Research, 1992.
[17] Yasuda Nobuyuki, "Indonesian Competition Law in ASEAN Perspectives", paper presented at Competition Law Conference, Jakarta, 10 November 2000.
[18] Planning and Development Division, Ministry of Domestic Trade and Consumer Affairs, "Competition Law and Policy in Malaysia", paper presented at Competition Seminar, Bangkok, 13-14 December 1999.

There are a number of statutes which have been enacted to control trading activities in Malaysia and which protect the consumer interests. Chief among them is the *Consumer Protection Act 1999* which was finally put into force on 15 November 1999, after many years since it was first announced.[19] The major portion of the Act deals with guarantees in respect of supply of goods and services with some provisions on safety of goods and services and product liability. There are some provisions which regulate the conduct of traders. Part II of the Act (sections 8-18) provide for misleading and deceptive conduct, false representation and unfair practice. Section 9 provides that a person shall not engage in conduct that is misleading or deceptive, as to the nature, manufacturing process, characteristics, suitability for purpose or quantity, both in relation to goods and services. Section 10 prohibits false and misleading representation of various aspects in relation to goods and services while section 11 relates to land. Section 12 provides for situations when a person is said to have committed an offence of misleading indication as to price. The other remaining provisions deal with conduct relating to advertising, the offering of gifts and prizes, claims of limited goods, intention to supply and future services contract. In terms of remedies, consumers now have access to the Tribunal for Consumer Claim which is established under the Act. This paves the way for a cheaper, faster and easier access to justice for consumers as an alternative to the court system which is heavily congested with other civil claims. This Act also established the National Consumer Advisory Council to advise the Minister of Domestic Trade and Consumer Affairs in relation to consumer issues.

Other than the above Act, there are statutes which seek to control the supply and the price of commodities. The *Price Control Act 1946* was enacted to control prices and the Price Controller is empowered to fix the prices and charges of goods. Through the *Control of Supplies Act 1961*, the Minister has the power to declare any article or food as a "controlled" or a "rationed" article or both. Traders must obtain licenses to sell these items failing which they are liable to pay a fine. The Controller is given wide powers to enter the trading premises, to arrest, seize, investigate and prosecute for offences under the Act. Similar legislation has been enacted to control essential commodities. For example, the Director General appointed under the *Control of Padi and Rice Act 1994* has the duty to ensure fair and stable prices of rice for the consumers and for the farmers and to make recommendations to the Government to promote the development of this industry. Similarly, the Director General appointed under the *Gas Supply Act 1993* has the function to protect the consumers interest for gas supplied to consumer in respect of, *inter alia*, the quality of the gas supplied, the price charged, other terms of supply as well as to promote efficiency and economy of the licensee to supply gas. Besides controlling supply and price, other consumer legislation such as the *Trade Description Act 1972* and the *Weights and Measures Act 1972* regulate the conduct of the traders in relation to description, weighing and measurement of products.

Other consumer related statutes seek to regulate trading activities in specific sectors. Thus, the *Hire-Purchase Act 1967* provides for the form and content of hire-

[19] This Act was first proposed in August 1993 and was originally expected to be tabled in Parliament in July 1994. See *Business Times*, 22 February 1996.

purchase agreements and the duties of parties to such agreements. The *Direct Sales Act 1993* regulates direct selling while the *Moneylenders Act 1951* regulates money-lending activities.

C. ACQUISITIONS OF ASSETS, TAKE-OVERS AND MERGERS

Two legal instruments which are vital in relation to the acquisition of assets, take-overs and mergers in Malaysia are the Guidelines for Regulation of Acquisition of Assets, Mergers and Take-overs (hereafter referred to as "the Guidelines of the Foreign Investment Committee" or the "FIC Guidelines") and the Malaysian Code on Take-overs and Mergers 1998 (hereafter referred to as "the Code"). The FIC Guidelines are issued by the Economic Planning Unit of the Prime Minister's Department.[20] The Code is prescribed by the Minister of Finance on the recommendation of the Securities Commission by virtue of the powers conferred under section 33(A)(1) of the *Securities Commission Act 1993*.[21]

The FIC Guidelines[22] have to be seen in the light of the New Economic Policy/National Development Policy of Malaysia. The New Economic Policy was introduced in the Second Malaysia Plan 1971-1975 to accelerate the process of restructuring Malaysian society to correct economic imbalance. The carrying out of the objectives for the New Economic Policy is now continued under the National Development Policy. The Government's decision to set out the FIC Guidelines is based on the national interest, that is, the concern that the acquisition of assets or any interests, mergers and take-overs of companies and businesses incorporated or registered in Malaysia may result in greater concentration of wealth in the hands of a minority and in increasing imbalance in ownership and control. The FIC Guidelines apply to the following:

- Any proposed acquisition by foreign interests of any substantial fixed assets in Malaysia;
- Any proposed acquisition of assets or any interests, merger and take-over of companies and businesses in Malaysia, which result in ownership or control passing to foreign interests;
- Any proposed acquisition of 15% or more of the voting power of any one foreign interests or associated group, or by foreign interests in the aggregate of 30% or more of the voting power of a Malaysian company and business;

---

[20] While the legal status of the FIC Guidelines is arguable, it will be wise not to fall short of it. For cases on the position of the Guidelines, see for eg, *Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Ting & Ors* [1979] 2 MLJ 224; *David Hey v New Kok Ann Realty Sdn Bhd* [1985] 1 MLJ 167; *MAA Holdings Sdn Bhd & Anor v Ng Siew Wah & Ors* [1986] 1 MLJ 170; *Cheah Theam Swee & Anor v Overseas Union Bank Ltd & Ors* [1989] 1 MLJ 426.

[21] Act 498. This Act came into effect on 1.3.1993. This Act establishes the Securities Commission and to provide for matters connected therewith.

[22] The Guidelines can be assessed at the website of the Economic Planning Unit of the Prime Minister's Department at http://www.epu.jpm.my.

- Control of Malaysian companies and businesses in Malaysia through any form of joint venture agreement, management agreement, and technical assistance agreement or other arrangements;
- Any merger or take-over of any company or business in Malaysia whether by Malaysian or foreign interests;
- Any proposed acquisition of assets or interests exceeding in value RM5 million whether by Malaysian or foreign interests;

The Code came into operation on 1 January 1999 and is administered by the Securities Commission.[23] In administering the Code, the Commission shall take into account the desirability of ensuring that the acquisition of voting shares or control of companies takes place in an efficient, competitive and informed market.[24] In particular, the Commission have to ensure that the interests of minority shareholders are protected.[25] The Code contains principles and rules governing the conduct of all persons or parties involved in a take-over offer, merger or compulsory acquisition. Failure to comply with the Code will subject the persons to the powers given to the Commission which includes the imposition of penalties, direction and reprimand and directing the stock exchange to deprive access to the stock exchange's facilities, suspension of trading and listing of the corporation.

D. THE COMMUNICATIONS AND MULTIMEDIA ACT 1998

The *Communications and Multimedia Act 1998* (hereafter referred to as "the *CMA*")[26] came into effect on 1 April 1999. This Act repealed the *Telecommunications Act 1950* [27] and the *Broadcasting Act 1988* [28] which formerly controlled telecommunications and broadcasting services in Malaysia. The CMA was enacted in response to technological developments which have brought major changes in communications, trade and industry, entertainment and recreation, giving rise to the convergence of telecommunications, broadcasting and information technology industries. These industries are now regulated by the Malaysian Communications and Multimedia Commission which was established by the *Malaysian Communications and Multimedia Commission Act 1998.*[29] The Commission consists of five members appointed by the Minister of Energy, Communications and Multimedia. Its functions are set out in section 16(1) and include, *inter alia*, two major areas, that is, economic regulation and consumer protection. In relation to economic regulation, besides the role of licensing, its function includes the promotion of competition and the prohibition of anti-competitive conduct.[30]

---

[23] Information relating to the Securities Commission and the Code can be accessed at the Securities Commission's website at http://www.sc.com.my.
[24] Section 33A(5) of the *Securities Commission Act.*
[25] See sections 33A(5) (c) and (d) *Securities Commission Act*.
[26] Act 588.
[27] (Revised 1970). Act 20.
[28] Act 338. This Act provides for the control of broadcasting services.
[29] Act 589. This Act came into effect on 1.11.1998. However, the Commission only assumed responsibility on 1.4.1999 when the *CMA* came into effect.
[30] See the Communications and Multimedia Commission's website at http://www.cmc.gov.

The *CMA* is based among, *inter alia,* the principles of more competition and less regulation. Section 3(2) declares the Government's 10 national objectives for the communications and multimedia sector, *inter alia*, (a) to establish Malaysia as a global centre and hub for communications and multimedia information and content services, (d) to regulate the long-term benefit of the end user, (e) to promote a high level of consumer confidence in service delivery from the industry and (h) to facilitate allocation of resources such as skilled labour, capital knowledge and national assets.[31] To achieve these stated objectives, Part VI provides the framework for economic regulation encompassing Chapter 2 on general competition practices while Part VIII addresses the protection and promotion of consumer interests. As these provisions are the first "specific-type" competition law provisions in Malaysia, they will be considered in detail below.

Two major concepts utilized in Chapter 2 are the concept of "substantial lessening of competition" and "dominant position". The relevant provisions are as follows:

> S 133: A licensee shall not engage in any *conduct* which has the *purpose* of *substantially lessening competition* in a communications market.
> S 139(1): The Commission may direct a licensee in a *dominant position* in a communications market to cease a *conduct* in that communications market which has, or may have the *effect* of *substantially lessening competition* in any communications market, and to implement appropriate remedies.
> S139(2): The Commission will only issue a direction under subsection (1) if the Commission is satisfied that the direction is consistent with (a) the objects of this Act; and (b) any relevant instrument under this Act.
> S 140(1): A licensee may apply to the Commission, prior to engaging into any *conduct* which may be construed to have the *purpose or effect* of *substantially lessening competition* in a communications market, for authorization of the *conduct*.
> S 140(2): Notwithstanding the provisions of this Chapter, the Commission shall authorize the conduct if the Commission is satisfied that the authorization is in the national interest.

Three situations arise from these provisions. Section 133 prohibits anti-competitive conduct, that which has the purpose of substantially lessening competition in a communications market. Section 139 allows the Commission to direct a licensee who is in a dominant position to cease such conduct which have the effect of substantially lessening competition in a communications market. Section 140 allows a licensee to apply to the Commission for authorization to engage in a conduct which may be construed to have the purpose or effect of substantially lessening competition in a

[31] The other objectives are: (b) to promote a civil society where information-based services will provide the basis of continuing enhancements to quality of work and life; (c) to grow and nurture local information resources and cultural representation that facilitate the national identity and global diversity; (f) to ensure an equitable provision of affordable services over ubiquitous national infrastructure; (g) to create a robust applications environment for end users; (i) to promote the development of capabilities and skills within Malaysia's convergence industries; and (j) to ensure information security and network reliability and integrity.

communications market. Sections 134(1) and 138(1) provide that the Commission may publish guidelines which clarify the meaning of "substantial lessening of competition" and "dominant position" respectively. Both Guidelines have been published which took effect from 1 February 2000.[32]

1. The Guideline on Substantial Lessening of Competition

Section 134(2) provides that the Guideline may include reference to (a) the relevant economic market; (b) global trends in the relevant market; (c) the impact of the conduct on the number of competitors in the market and their market share; (d) the impact of the conduct on barriers to entry into the market; (e) the impact of the conduct on the range of services in the market; (f) the impact of the conduct on the cost and profit structure in the market and (g) any other matters which the Commission is satisfied are relevant. The above considerations are not exhaustive and the Commission will not be limited by it.

The Guideline has proposed a three-step approach in determining matters concerning "substantial lessening of competition". First, the Commission will make an initial assessment of the impact of the conduct on the level of competition. Second, the communications market must be defined. Third, once the market has been defined, the Commission will determine whether the situation justifies action under the *CMA*. "Competition" is the process of the actual or potential rivalry between firms in a market. The level of competition in a market is simply the level of this rivalry. "Lessening competition" therefore means a reduction in the level of actual or potential rivalry between firms in a market. The term "substantially" has been adopted from the Australian *Trade Practices Act 1974*. The Guideline refers to two Australian cases and to the Explanatory Memorandum to the Australian *Trade Practices Revision Bill 1986* which states that 'substantial' is intended to signify 'large or weighty', or 'considerable, solid or big'. In the Malaysian context, the significance of any reduction in the level of competition will be determined in the context of the objects and the national policy objectives of the *CMA* set out in section 3(2).[33]

Thus, in considering decisions under section 139, the impact of licensee conduct on the achievement of the national policy objectives will be considered. In other words, the Commission will make an assessment of the likely outcome of the conduct, make an assessment of the likely outcome in the absence of the conduct, and make a judgement of whether the difference is substantial. The national policy objectives are also used to consider decisions under section 139 as to whether a conduct should be subject to a direction and under section 140, whether to authorize any conduct on the ground of national interest.

However, the difference in approach to section 133 and the approach to sections 139 and 140 is that sections 139 and 140 contemplate that the objective of promoting

[32] Both Guidelines can be obtained from the Commission's website stated at Note 30 above.
[33] See Note 31 above.

competition may be traded off against other objectives (see sections 139(2) and 140(2)). However, the Commission's view is that this would only be justified when the benefits of such a course clearly outweigh the direct and attendant benefits of competition which would otherwise ensue.

The Guideline also clarifies the scope and meaning of "conduct", "purpose" and "effect" as used in sections 133, 139 and 140. It is important to note that "conduct" means any action, or a lack of action, which can either actually or potentially affect the level of competition in a market. Examples of certain conduct include predatory pricing, foreclosure, refusal to supply, bundling and parallel pricing. The Guideline also sets out the broader principles in which the Commission will infer "purpose" which includes the nature, circumstances and the likely effect of the conduct. As for "effect" of conduct, this is a matter of fact which can be determined by an examination of the results.

2. The Guideline on "Dominant Position"

Section 138(2) provides that the Guideline may include the following matters: (a) the relevant economic market; (b) global technology and commercial trends affecting market power; (c) the market share of the licensee; (d) the licensee's power to make independent rate setting decisions; (e) the degree of product or market differentiation and sales promotion in the market; (f) any other matters which the Commission is satisfied are relevant. The above considerations are not exhaustive and the Commission will not be limited by it. Like the Guideline on Substantial Lessening of Competition, this Guideline also contain a similar three–step approach in determining whether a firm is in a dominant position in a communications market. After an initial assessment of the relevance of the dominant position criteria to the issue at hand and after defining the communications market, the Commission will determine whether a particular licensee is in a dominant position in that market.

The characteristics of market behavior which have been associated with dominant position include the ability to act independently of rivals and customers, the ability to prevent effective competition and the ability to force rivals to act in ways they would not have independently chosen. Further, a dominant position is not primarily a matter of the formal structure of the market, but of the conduct of actual or potential competitive rivals within it. The Guideline also sets out two types of behavior of licensee which are indicative of a position of dominance, that is, pricing behavior and supply behavior. In relation to the structural criteria, the following matters are relevant, that is, the distribution of market share and the level of market concentration, the level of vertical integration in the market, the extent of barriers to entry, global technology and commercial trends and the degree of product or service differentiation and sales promotion.

3. Other Provisions on Competition Practices

One other form of anti-competitive action prohibited by the *CMA* is the prohibition on entering into collusive agreements in relation to rate fixing, market sharing, boycott of a supplier of apparatus or boycott of another competitor.[34] There is also a prohibition on tying or linking arrangements.[35] Any person who contravenes any prohibition under this Act shall on conviction, be liable to a fine not exceeding RM500,000 or to imprisonment for a term not exceeding 5 years or both as well as a fine of RM1000 for every day or part of the day during which the offence is continued after conviction.[36] The Commission or a person may also seek an interim or interlocutory injunction against any conduct prohibited in Chapter 2 of the *CMA*.[37] Finally, the Commission may make rules in respect of agreements between licensees and foreign network facilities providers and/or network service providers. The rules can only be made if it was intended to prevent or mitigate (a) any conduct of the providers which will or is likely to lead to, a substantial lessening of competition in a communications market or (b) the misuse of market power in a communications market. However, the scope of "misuse of market power" is unclear.

E. DRAFT TRADE PRACTICES BILL 1996

In 1993, the Ministry began drafting a competition legislation which is now in its sixth draft. The provisions of the Trade Practices Bill (hereafter referred to as "the Bill") were adopted from the Australian *Trade Practices Act 1974* and the New Zealand *Commerce Act 1986*. The provisions to establish the Trade Practices Commission was however adopted from the Malaysian *Securities Commission Act 1993*.[38] As this intended legislation is still a draft, its provisions will only be briefly considered in this paper.

This Bill comprises 69 sections contained in seven parts as follows; Part I on Preliminary; Part II on the Trade Practices Commission; Part III on Acts which Substantially Lessen Competition; Part IV on Mergers and other Acquisitions; Part V on Authorization, Part VI on Enforcement, Remedies and Appeals and Part VII on General Provision.

Part I sets out important preliminary matters on the application and scope of the Bill. The Bill applies throughout Malaysia as well as outside Malaysia to the extent that such conduct affects a market in Malaysia. The Bill also applies to the Government engaging in trade including a body corporate that is an instrument of the Government. There are however certain activities that are exempted from the Bill, for example, activities of employees for their own reasonable protection, arrangements for collective

[34] Section 135.
[35] Section 136.
[36] Section 143.
[37] Section 142(1).
[38] See Note 21 above.

bargaining or of trade unions for purpose of fixing terms and conditions of employment and matters relating to the use, license or assignment of rights under laws relating to intellectual property. The definition section in this Part is also important, particularly for key definitions such as "consumer", "competition", "market" and "substantial lessening of competition".

Part II provides for the establishment of the Trade Practices Commission, its membership and matters relating to tenure, resignation and remuneration. The procedure for meetings, powers and functions of the Commission and the financial matters are also set forth.

Part III, IV and V are the crux of the competition provisions. Part III deals with acts which substantially lessen competitions. Section 32 states that no person shall enter into a contract, agreement, arrangement or understanding containing a provision that has the purpose or is likely to have the effect of substantially lessening competition in a market. Section 33 provides a list of such contracts or agreements between competitors which are deemed to substantially lessen competition, such as contracts or agreements which has the purpose or effect of fixing, controlling or maintaining the price of goods or services. Other sections in this Part provide for resale price maintenance, recommended price and abuse of market power. Part IV provides for merger and other acquisition, contrived acquisition outside Malaysia and pre-merger notification. Part V provides for the concept of authorizations whereby any persons who proposes to enter into contracts, agreements, arrangements or understanding which may contravene Parts III and IV may apply for authorization from the Commission to do so. The procedure, effect and revocation of authorization are also provided.

Part VI deals with enforcement, remedies and appeals. Section 49 allows the Commission to apply to court for various orders, that is, for temporary or permanent injunction, for imposition of pecuniary penalties, for damages, for divestiture in relation to mergers and for other redressal. The Bill also provides enforcement against persons who aid, abet, induce, conspire or who has been in any way, directly or indirectly, knowingly concerned in or was a party to the contravention. This Part also provides for the investigating officers and their powers including forcible entry and forfeiture of goods. Part VII on General Provision provides for the concept of unconscionable conduct and prohibits such conduct. Other general provisions relate to the conduct of prosecution, obligation of secrecy, supply and disclosure of information, documents and evidence and the power of the Ministry to make regulations.

F. CONCLUSION

Although the Bill has yet to be enacted as law, the Ministry is continuing in its efforts towards this process. A Working Committee on Competition Policy and Law was set up in 1999 to explore the elements of competition which are best suited for

Malaysia.[39] The aim towards a competition policy and competition law in Malaysia should be supported. It is not within the scope of this paper to deal with the theoretical and economic benefits of having a competition policy and a competition law.[40] This paper however seeks to show that besides the specific provisions in the *CMA* dealing with general competition practices in the communications and multimedia industries, the current existing legislation in Malaysia were not intended and are inadequate to control anti-competitive behavior. The statutes that were discussed at Part B above are primarily aimed at protecting the consumer interests but does not address the wider issue of market structure and competition. Similarly, the main concern of the FIC Guidelines which was discussed at Part C above is the preservation of a balanced pattern of ownership and control between Malaysian and foreign interests and the equitable distribution of wealth. In other words, while the existing instruments discussed in this paper (except for the *CMA* in relation to the communications and multimedia industries) do have an impact on competition, their role in encouraging competition or restraining anti-competitive behavior is only indirect and incidental. Thus, there is inadequate general regulation of anti-competitive behavior in Malaysia. While there is sectoral regulation of competition in the communications and multimedia industries, the enforcement of the competition practices provisions in the *CMA* is only one of the many functions that the Communications and Multimedia Commission is expected to discharge. Thus, there is a possibility that the Commission may not be able to devote the necessary time and resources to carry out this function.

The need for a comprehensive competition policy and competition law in Malaysia may also be indicated by some anti-competitive phenomena and practices which have surfaced. The phenomenon of interlocking directorates where directors of a company are also directors of other companies and the increase in firms in the form of holding companies may provide opportunities for collusion among the companies concerned. Some anti-competitive practices such as resale price maintenance, price collusion, tied selling and cartel agreements have been detected. There is also evidence that the market structure in certain sectors of the economy in Malaysia is increasingly oligopolistic in nature.[41] Finally, competition law will be necessary as Malaysia faces the realistic challenges that will result from the increasing trends of liberalization policies and the globalization of economic activities. This challenge has been identified under the Seventh Malaysia Plan 1996-2000 as a major future challenge, that is, "augmenting competitiveness in the face of greater globalization, advances in technology as well as changing market preferences which call for reinforcing the nation's competitive foundation, strengthening infrastructure, widening global networks as well as maintaining a conducive environment for private initiatives".[42]

---

[39] See Ministry of Domestic Trade and Consumer Affairs, "Malaysia Country Paper", paper presented at Course on Competition Law and Policy: Cross-Country Approaches and Experiences, Singapore, 14-20 May 2000.

[40] See for eg, Korah, Valentine, *Competition Law of Britain and the Common Market* (London: Blek Books Limited, 1975) pp 2-9; Merkin, Robert & Williams, Karen, *Competition Law: Antitrust Policy in the U.K. and the EEC* (London: Sweet & Maxwell, 1984) pp1-4.

[41] See "Competition Policy and Law in Malaysia", Note 18 at pp 6-8.

[42] Economic Planning Unit, Prime Minister's Department, Kuala Lumpur, *Seventh Malaysia Plan 1996-2000*, p 9.

In drawing out a competition policy, the elements below will have to be considered:

1) The need to curb, if not, to eliminate anti-competitive practices;
2) Application of competition policy to governmental policies and in particular, to trade policies;
3) The need for creating an appropriate institution for enforcement of competition law and for the adjudication of competition disputes;
4) The need to subserve consumer welfare and public interest;
5) The need for competition advocacy and competition culture.[43]

The above elements will be considered in the light of the existing position in Malaysia set out in the various parts of this paper above. An objective of a competition policy is to foster economic efficiency, economic growth and international competitiveness. At the same time, the welfare of the consumer and the public interest must be attended to (this refers to element number 5). The consumer interest and the public interest must be distinguished. The consumer interest is narrowed to the class of persons who purchase and use products and services and who are affected by pricing policies, quality of goods and services and various trade practices. Public interest is broader, in which the public or community at large have some pecuniary interest or some interest by which their legal rights and liabilities are affected.[44] Both are broad aims and may be competing at some point or another. The key to addressing a competition policy in relation to these broad aims is the combination of competitiveness and development.[45] In Malaysia, this has to be seen in the light of the need for a competitive business environment in achieving the objectives set out in the National Development Policy as well as in the longer term aims set out in Vision 2020.[46] Vision 2020 aims to make Malaysia into a fully developed and industrialized nation by the year 2020 in all aspects. From the nine strategic challenges outlined for Malaysia, three are economic in nature; first, establishing a scientific and progressive society; second, ensuring an economically just society in which there is a fair and equitable distribution of the nation's wealth and third, establishing a prosperous economy that is fully competitive, dynamic, robust and resilient. Towards realizing this Vision, industrialization is expected to be accelerated at an immense pace providing immense investment opportunities for the domestic and foreign investor. Competition policy will thus have to be linked to industrial and trade policies (this refers to element number 2).

---

[43] S. Chakravarthy, *Role of Competition Policy in Economic Development and the Indian Experience*, Monographs on Investment and Competition Policy, #1 (Jaipur, India: CUTS Centre for International Trade, Economics & Environment, 1999) p 2.

[44] Ibid, pp 4-5.

[45] See Department of Trade and Industry Pretoria, "Proposed Guidelines for Competition Policy, A Framework for Competition, Competitiveness and Development", 27 November 1997 obtainable at http://www.polity.org.za which discusses the public interest policy and the competition policy of South Africa.

[46] Vision 2020 was first put forward by the Prime Minister, Dato' Seri Dr. Mahathir Bin Mohammed at the inaugural meeting of the Malaysian Business Council at the end of February 1991. The blueprint was delivered by the Prime Minister to the Dewan Rakyat (Lower House) on 17 June 1991.

On the first element on curbing anti-competitive practices, the content of the competition policy has to be identified. Bearing in mind some of the phenomena of anti-competitive practices and the market structure which have surfaced in Malaysia, areas such as restrictive agreements or cartel regulation, monopoly or abuse of dominant position, resale price maintenance will have to regulated. Most of these concerns have been provided for in the Bill although some of its provisions may need reconsideration and redrafting. In relation to the concept for control, the Bill uses the concept of "substantial lessening of competition". This concept is also used in the *CMA* and while it is too early to assess the practical utility of the provisions in the *CMA* and the Guideline on Substantial Lessening of Competition, they provide a good start to the application of this form of control. The concept of "dominant position" used in the *CMA* and clarified in the Guideline on Dominant Position can be further explored in future competition legislation. However, the concept of "market abuse of power" provided in the *CMA* needs further clarification. It is also interesting that the Bill also provided the concept of "unconscionable conduct". This concept is used in the Australian *Trade Practices Act 1974* in various situations, including to small businesses and is the subject of active litigation. However, this concept as is provided in the Bill needs further clarification and should be placed in the main parts of the Bill and not in Part VII on General Provision.

As to mergers and other acquisition which are also provided in the Bill, this will have to be considered together with existing instruments, that is, the FIC Guidelines and in particular, the Code of Mergers and Take-overs 1998. Both of these instruments are enforced by different bodies and thus, the issue of an appropriate institution arises (this refers to element number 3). Related to this is the issue of general or sectoral regulation, the latter of which already exists in the communications and multimedia industries. What should the considerations be and what needs to be satisfied before any particular sector should be separately regulated in terms of its competitive component? When is the administration and mechanics of a sector considered so specialized that the advantages of sectoral regulation overrides the advantages of general regulation by one institution set up for this purpose? However, this also presupposes that the one institution has the resources to regulate competition issues of various different sectors. At the same time, the observation above in relation to the communications and multimedia industries that enforcement of competition policies is only one of the functions of the Communications and Multimedia Commission should be noted. Above all, any institution set up to regulate competition policies must be fully independent in order to properly discharge its functions and to gain the confidence of both consumers and the business community. A competition law must clearly set out the powers and functions of such an institution, a system of check and balance by ensuring due process of law and clear procedures for the enforcement of competition provisions which should be transparent, non-discriminatory and rule-bound. Finally, as in the introduction and implementation of any new concept, all persons involved in the economic process, producers, manufacturers, distributors, suppliers and others will have to be educated and exposed to the competition culture towards enhanced efficiency and economic development (this refers to element number 5).