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PP 19339/05/2018 (034908)  
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Peninsular Malaysia RM3.50 | OCT 19-25, 2019 | WEEKLY ISSUE 356

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## "We are a different animal"

The Malaysia Competition Commission has been given the mandate to play a stronger role to investigate anti-trust deals. But is this good for business?

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# Making MyCC a potent regulator

- **Malaysia** does not have merger control provisions but if all goes well, a bill will be tabled soon
- **An empowered role** would see better scrutiny of possible anti-trust deals



by  
**Emmanuel Samarathisa**

Playing the role of an anti-trust authority is no easy feat. Just ask Malaysia Competition Commission (MyCC) CEO Iskandar Ismail. “We are an enforcement body yet at the same time a quasi-judicial body. We are a different animal. Different from the rest. It’s a tough job,” he tells *FocusM*.

Born out of the Competition Act 2010, MyCC’s main objective is to “protect the process of competition” which, in Iskandar’s own words, means facilitating a healthy level of competition among enterprises.

But his ability as chief and that of his teammates will certainly come under the spotlight in the near term as MyCC craves greater power.

Iskandar says it is working to amend the Competition Act 2010 to include, among others, the power to play an active role in mergers and acquisitions (M&As) as well as takeovers.

This brings MyCC closer to its peers the Competition and Consumer Commission of Singapore (CCCS) and the European Commission for Competition (ECC).

“Other countries have it. And what this means is when you want to merge, you have to get permission from the competition agency. But not in MyCC yet. Why I say ‘yet’ is because we are in the process of amending the law to include that power. The process has started this year,” he says.

## Merger control

While details are still being hammered out, Iskandar notes that such an empowered role would see better scrutiny of possible anti-trust deals.

Malaysia does not have merger control provisions and, if all goes well, a bill is slated for tabling soon, he adds.

“That is one of our short-term goals. This will give us the power to act in cases like what happened between CCCS, and Grab and Uber.”

In a rare move, CCCS fined both ride-hailing giants on Sept 24, 2018, a combined US\$9.5 mil (RM39.8 mil) over their merger deal and ordered Uber to sell vehicles from its local leasing business to any rival that made a reasonable offer.

US-based Uber Technologies sold its Southeast Asian business to its much larger regional rival Grab Holdings Inc in March last year in exchange for a 27.5% stake in the Singapore-based firm.

CCCS said it found the merger substantially reduced competition in the market and fined Uber and Grab to stanch future completed, irreversible mergers that impede competition.

Grab’s fortunes across the causeway have not been pretty either. On Oct 3, MyCC slapped a proposed fine of RM86.77 mil on Grab for abusing its dominant position by placing restrictive clauses on its drivers.

The decision includes a penalty of RM15,000 per day on Grab starting that day. It is believed this is the largest fine issued by MyCC to date. Grab is contesting the fine.



Grab is contesting a proposed fine of RM86.77 mil imposed by MyCC on Oct 3 for abusing its dominant position by placing restrictive clauses on its drivers

## Breaking cartels and monopolies

“Basically, what you have is once a merger is announced, a typical competition commission will look at the aspects of the merger and ask whether this will, as what we call it, substantially lessen competition (SLC).

“So if, after scrutinising the deal, we note that the merger will distort the market, we will either stop it or ask both parties to review the deal,” says Iskandar.

MyCC’s more muscular stance comes in the wake of policy priorities of the Pakatan Harapan (PH) government.

In the run-up to the general election last year, PH promised in its election manifesto to reduce the cost of living which included, among others, a review of cartels and monopolies believed to have abused their positions in providing unfair services to consumers.

In April this year, Domestic Trade and Consumer Affairs Minister Datuk Seri Saifuddin Nasution Ismail said the government had identified certain entities and sectors and is seeking to liberalise these areas to spur competition.

“This is part of the government’s initiative to liberalise the industry and promote competition and technological innovation in business and services,” he told reporters on April 4.

But the ministry sent a strong message when it liberalised the sugar sector in June. Saifuddin’s ministry approved eight permits for Sarawak food and beverage

(F&B) manufacturers to import up to 60% of their sugar requirements earlier this month.

Despite appeals from local refiners, the ministry affirmed its stand that more sugar import permits would be given to other F&B players nationwide in the future.

Naturally, this reduced the margins of two dominant players: MSM Malaysia Holdings Bhd, a listed entity, and Central Sugars Refinery Sdn Bhd, a unit controlled by tycoon Tan Sri Syed Mokhtar Albukhary.

Finance Minister Lim Guan Eng repeated this tone at a recent post-Budget 2020 forum, highlighting that this government under Prime Minister Tun Dr Mahathir Mohamad preferred a “free” yet “fair” market.

“Selective state intervention is required to improve competitiveness, prioritise investment in

strategic areas, and structure incentives around industrial policy goals,” he told participants at an Oct 14 forum.

## An independent institution?

MyCC reports to Saifuddin and, as mentioned earlier, is a unique body that investigates, decides and enforces its down decision.

On his part, Saifuddin has mandated the agency to act more independently. Sectors not under MyCC’s purview are communications and media, energy and upstream oil and gas.

In a normal scenario, an enforcement body carries out the investigation. The Attorney-General’s Chambers would then pursue the case in court and it’s for the judge to decide the case.

“But for us everything is under one roof,” says Iskandar.

MyCC typically zeroes in on



MyEG was one of the companies fined by MyCC for contravening the Competition Act

Iskandar says large entities must not bully the new kid on the block or stop it from growing in the market





Malaysia Airlines and AirAsia were taken to task by MyCC in 2012



Evanson says regulators like MyCC are a 'necessary bane' to shareholders and a boon to public interest

cartels and abusive monopolies. The former deals with anti-competitive agreements between enterprises. The latter revolves around dominant players abusing their position in the market.

There are four ways MyCC moves in to investigate: complaints, ministerial direction, self-initiative or through leniency regime.

"This is another area we want to focus on. Leniency regime means if you come to us, confess and help in investigations, we can waive your fine up to 100%. But this only applies to cartels; not abusive monopolies," says Iskandar.

He also clarifies that being a monopoly is not a problem per se.

"In Malaysia, the notion is that a monopoly is wrong. But in our own laws (competition act), it is not. Any monopoly or dominant player can set up shop in Malaysia or even any local player can be as big as it wants and carry out its own business here. But this comes with conditions.

"For starters, large entities are not allowed to abuse their position by creating barriers of entry for newer and smaller players.

"They cannot bully the new kid on the block or do something that stops the new competitor from

growing in the market," says Iskandar.

He cites predatory pricing and a refusal to supply goods as real-world examples.

"For predatory pricing, let's say a monopoly is offering a 10-litre bottle of cooking oil for RM50. The new player comes in and, of course, when it enters the market, it'll offer promotional prices to introduce itself and stamp its mark in the industry.

"So it offers its cooking oil at RM40 per bottle. But the dominant player feels disturbed by this so in a bid to keep 90% of the market and kill off competition, the company drops the price to under RM25. Obviously the new player is not going to be able to fight that price and will eventually exit the market.

"As for a refusal to supply, let's say I am the only one supplying cement in Malaysia. A monopoly. So I've been dealing with everyone on the supply chain and have been supplying them under agreed terms and conditions. Everyone is happy.

"Suddenly I stop supplying cement to a few of these players without commercial justification. We can't allow that to happen. So it's in these scenarios that MyCC steps in," says Iskandar.

## Public interest

But will a stronger MyCC bode well for business in general? To be fair, aside from Grab, the agency has taken to task some of the industry's heavy hitters such as MyEG Services Bhd (2015), Megasteel Sdn Bhd (2012, but cleared in 2016), Malaysia Airlines Bhd and AirAsia Bhd (2012).

Still, market observers are divided over a more potent competition agent.

Kenanga Investors Bhd CEO Ismitz Matthew De Alwis believes a supercharged regulator could "spook innovation as the agency can come off as being overzealous."

His ideal version of a regulator is akin to a watchdog with minimal interference in the market.

"Because you need to ensure there is space for certain industries to come together to determine floor and ceiling prices for products and services. The commission should act as a facilitator here but it should not dictate the flow of things."

Minority Shareholders Watch Group CEO Devanesan Evanson, however, observes that entities such as MyCC are a "necessary bane" to shareholders while being a boon to public interest.

"There is always this potential for conflict when we compare shareholders' interest to public ones. That is why we have regulators like MyCC to step in and provide some sense of balance."

Abuse of a dominant position by charging high rates is technically good for shareholders as the profits of said dominant corporation will go up. But it is not good for the public who end up paying exorbitant rates," he tells *FocusM*.

According to Evanson, corporations tempted to abuse their dominant position by increasing rates have to be reminded that their corporate governance is to both shareholders and stakeholders; the latter includes the public.

"MyCC provides this balance between blatant abuse of a dominant position and public interest. Minority shareholders will not

be grudge the existence of the agency as it plays an important role in striking a balance between unconscionable profits accruing to shareholders and the public interest."

## Protecting the process

Iskandar, too, allays fears that the agency will impede growth. It's about "protecting the process," he insists.

"Just to put things in context, some companies overcome cartel restrictions by merging. Because when they merge, they are one company.

"There are no 'cartel agreements' with other enterprises. This is now just one entity. That is why these things need supervision. Because once a merger is done, it is near impossible to split them apart.

"Also when a merger happens, some companies will become too large for the market. Also the acquirer will want to recoup money used in the merger, so this giant will naturally raise prices," says Iskandar.

In the case of Grab, Iskandar notes that the decision to impose a proposed fine was not done overnight either. "Most of our cases start with consumer complaints. These can be from the public or from enterprises," he says, adding that the entire investigation cycle is a "long process".

After MyCC decides to investigate, it goes on a fact-finding mission. It then prepares an investigative report and tables it at a commission meeting where the commissioners, consisting of leading men and women from the private and public sectors, will either greenlight or shoot down the report.

If the commissioners approve, then MyCC prepares a proposed decision which spells out the fine, among others.

"This is where Grab is at. We call this proposed decision because our actions are based on administrative law. You have to give the right to natural justice," says Iskandar.

When a proposed decision is issued, with evidence, the defendant has 30 working days to prepare its defence.

"Working days, not normal 30 days. It's like a show-cause letter," stresses Iskandar. Grab is expected to meet the commission circa end-November.

"It's not a simple case. There are a lot of documents. A lot of statements. So they have to prepare their defence," he adds.

If MyCC does find that Grab had infringed the Competition Act, it will issue a decision under Section 40. If not, it will issue a non-infringement decision based on Section 39. Those charged under Section 40 can seek remedial action at the Competition Appeal Tribunal, another lengthy process.

Indeed, all eyes are on this case as it will be a barometer to gauge the kind of "animal" MyCC will become.

"But rest assured, we will perform our duties without fear or favour and all evidence presented against a company is based on strong and compelling evidence," says Iskandar. *FocusM*

## Keeping watch over bid rigging

**ONE** of the niche areas the Malaysia Competition Commission (MyCC) seems to be an expert in is bid rigging. This was seen in March when the agency issued a combined penalty of RM1.94 mil against eight companies for their involvement in a bid-rigging offence related to an information technology (IT) procurement by a public higher learning institution.

The case involved Akademi Seni Budaya dan Warisan Kebangsaan (Aswara), which is Malaysia's first bid-rigging case in public procurement. Aswara is a statutory body under the Tourism, Arts and Culture Ministry.

MyCC found that eight companies colluded with each other by sharing their request for quotations (RFQs) and tender proposal information, manipulating prices and preparing documents for one another. The winner of the RFQs and tender also shared its profits with the losing bidders.

According to Iskandar, the current govern-

ment's thrust for open tenders is a step in the right direction. "We support this because when you have an open tender, it will facilitate competition."

But he notes that the system is not immune to cartels, which could manipulate prices. Some of the bid-rigging methods include bid suppression and bid rotation. The former happens when a bidder tells others to not compete for the project while the latter, as its name suggests, implies each bidder takes turns to win projects.

Iskandar also notes that bid rigging is in a segment of its own. "When the government looks at procurement, it will check for fraud or corruption. But there is this one segment which is on bid rigging and sometimes it can be tricky because there can be no element of fraud or corruption but there is bid rigging," he says, adding that there have also been cases where all three were present in a procurement project.

The good news is, according to Iskandar, government bodies are now actively seeking MyCC's help. "They are coming to us. But not just that, they are inviting us to give talks on bid rigging, how to detect it and how to file a proper complaint to us." The landscape has changed, he notes, because "the government has realised it is losing a lot of money."

Some of these problems have been well-documented in the annual Auditor-General's Report.

But MyCC is also hoping that more business owners will opt for leniency regime. "This is because we have already proved a bid-rigging case. So we are hoping that more people will use that option because you can get a waiver of up to 100%. But somehow people still do not want to use that option. It's still one of our short-term targets," Iskandar says.

Now all he and the agency need are adequate resources to ensure MyCC remains effective.