



UNDERSTANDING PRICING POLICIES PROHIBITED UNDER THE MALAYSIAN COMPETITION ACT 2010

Lo Ching Wing^{a1}

^a*Labuan Faculty of International Finance, Universiti Malaysia Sabah*

ABSTRACT

Pricing policy is one of the most critical business policies that most enterprises place great emphasis on the day-to-day decisions making. In a perfect competition market, enterprises would formulate their pricing policies freely in line with the firms' bottom line objectives. However, such practice by certain enterprises is hindered ever since the Malaysian government enacted the Competition Law in 2010 as legislation to regulate the competitiveness of the overall business environment with fair trades among enterprises. The competition law applies to all profit-making business organisations in Malaysia. Despite the Malaysian Competition Act 2010 has come into force on 1 January 2012, but to date, the awareness among the business enterprises are still very low. This can be evidenced from the total number of 362 cases being investigated by the Malaysia Competition Commission since 1 January 2012. In order to avoid any breaches of the law, understanding and complying seems the best remedy. The purpose of this paper is to explore the pricing policies prohibited under the Malaysian Competition Act 2010 and to enable the enterprises to grasp it with greater awareness and prevent future chances of infringements when implementing pricing policies. The research methods applied are by content analysis, Acts and case laws studies. It is concluded that the enterprises must comply with the Malaysian Competition Act 2010 stringent pricing policies.

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1. INTRODUCTION

Pricing policy is one of the most critical business policies that most enterprises place great emphasis on the day-to-day decisions making. According to Monroe (2003), price decisions are very important management decisions because it contributes to a company's profitability, return and market competitiveness. This is because pricing is the only marketing mix that can generate revenues (LaPlaca, 1997; Shipley & Jobber, 2001). Pricing policy or often referred to as pricing strategy under the marketing perspective are directly affected by customer perception, cost and competition (Nagle & Holden, 2003). Accordingly, three major pricing methods namely customer value-based pricing method, cost-based pricing method, and competition-based pricing

¹Corresponding author's email: ebryanlo@gmail.com

method have been developed and practised by enterprises in the markets to sustain their revenues (Nagle & Holden, 2003; Kotler & Armstrong, 2016).

In a perfect competition market, enterprises would formulate their pricing policies freely in line with the firms' bottom line objectives. The pricing objectives used by enterprises are often being connected to the public mind with profiteering, high price and monopoly although is it normal from a marketing standpoint (Ezeudu, 2005). All the while, the practice of pricing policies by enterprises always inclined towards the real battlefields kinds of competition. Thus, it is not surprising to see certain pricing policies implemented in the markets seem anti-competitive and abuse of dominant position that were not augured wells for competitors and end consumers. To some enterprises, they might be able to maximise their profitability by driving the competitors out of the markets sometimes at the expense of the end consumers. Such incidents had led to a very unhealthy competitive environment. However, such practice by certain enterprises is hindered ever since the Malaysian government enacted the Competition Law in 2010 as legislation to regulate the competitiveness of the overall business environment with fair trades among enterprises.

The competition law applies to all profit-making business organisations in Malaysia. Despite the Malaysian Competition Act 2010 (CA2010) has come into force on 1 January 2012, but to date, the awareness among the business enterprises are still very low (Lee, 2017). This can be evidenced by the total number of 362 cases being investigated by the Malaysia Competition Commission (MyCC) since 1 January 2012 (MyCC, 2017). Although there are many cases were found with no infringement, but there are some cases held for breaching the pricing policies as prohibited by the CA2010. Whether by intention or ignorance, breaking the law is no excuse except to face legal consequences. However in order to avoid any breaches of the law, understanding and complying seems the best remedy.

The purpose of this paper is to explore the pricing policies prohibited under the CA2010 and to enable the enterprises to grasp it with greater awareness and prevent future chances of infringements when implementing pricing policies. The next section discusses the main provisions of the CA2010. Section 3 covers the definitions of pricing policies. It follows by the clarification of infringements supported by cases. Section 5 discusses the enforcement and compliance of the CA2010. Section 6 concludes.

2. THE MAIN PROVISIONS OF MALAYSIAN COMPETITION ACT 2010

Before enactment of the CA2010, the only legislation that regulates anti-competition practices is the Communications and Multimedia Act 1998 and the Energy Commission Act 2001. However, both Acts only cover the respective sectors in a fairly general perspective (Lee, 2003). Hence, the more detailed competition law was enacted on 10 June 2010 which later implemented on 1 January 2012. The CA2010 has two main provisions: anti-competition and abuse of dominant position with the aim to promote economic development through the effective competitive process as well as protecting the consumer's welfare. The effects of healthy competition will encourage efficiency, innovation and entrepreneurship, which promote competitive prices, improvement in the quality of products and services and wider choices for consumers (CA2010, 2015).

Section 4(1) of the Competition Act 2010 states that any anti-competitive horizontal or vertical agreement that has the object or effect of significantly

preventing, restricting or distorting competition in any market for goods or services are prohibited (CA2010, 2015). According to the MyCC (2015a), horizontal agreements are between enterprises at the same level of production, which normally means competitors in the same market while vertical agreements are between enterprises at different stages of the production and distribution chain. The specific objects being prohibited under a horizontal agreement is price fixing; controlling of market share; limit and controlling of production/distribution/technical or technological development/investment and bid rigging. As for the prohibitions of vertical agreement objects such as resale price maintenance agreements and exclusive agreements, are clarified in the guidelines (MyCC, 2015a) instead of the above Section 4.

With regards to abuse of dominant position, Section 10 of the CA2010 states that no enterprises are permitted to engage, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services (CA2010, 2015). Some of the conducts amongst others that related to this paper are implementing pricing policies by excessive pricing, price discrimination and predatory pricing (CA2010, 2015).

Notwithstanding the above, the CA2010 itself may not be sufficient to refer for pricing policies implementation and decisions making. The CA2010 should be read along with the following additional guidelines provided by the MyCC for further clarification, i.e. Guidelines on Anti-Competitive Agreement, Guidelines on Abuse of Dominant Position, Guidelines on the Market Definition (MyCC, 2015a; MyCC, 2015b; MyCC, 2015c).

3. THE PRICING POLICIES

According to Furse (2008), competition is crucial in today's innovative and globalised economy because it enables enterprises in achieving cost-effectiveness, innovation and production efficiency which ultimately benefit the consumers. A healthy competitive environment can be controlled through competition law especially regulating the pricing policies by discouraging enterprises from engaging anti-competition and abuse of dominant position behaviour (Furse, 2008). In Malaysia, the CA2010 prohibits certain pricing policies from any enterprises aim to create a barrier to entry or drive competitors out of a market. The said pricing policies are discussed as follow.

3.1 Price fixing

Price fixing is a collective group of enterprises act together to fix prices with the aim to distort market competition. The grouping of enterprises could be from the same level or different stages of the production and distribution chain. The price fixing mechanism is to attain a price level or a minimum price by a small group of enterprises to eliminate competition which at the same time maximise profits respectively (Kaserman & Mayo, 1995).

3.2 Price discrimination

Discriminatory pricing is the supply of goods and services of the same specification at different prices, but the discriminated prices come with a different cost (Furse, 2008). Price discrimination often happens in a monopolistic market when there is a transfer of income from consumers to the monopolist. As a result, price discrimination

is considered a form of market power abuse by the monopolists. Price discrimination is also complementing predatory pricing when the monopolists use the profits earned from higher prices to support the lower pricing losses (Furse, 2008).

3.3 Excessive pricing

Excessive pricing occurs when an enterprise setting prices of products or services significantly above the competitive market price. Higher pricing with lower output in the monopoly markets is a standard practice of industrial economics (Colino, 2011). Rodger and MAcCulloch (2009) classified it as an exploitative abuse by charging a monopoly price with minimum competition and maximise profits by reducing output. Excessive pricing normally exists in the medium and long term when there are strong barriers to entry (Furse, 2008). This pricing policy is seen as an act of abuse of a dominant position to exploit the competitive market for one's gain.

3.4 Predatory Pricing

Predatory pricing is the opposite of excessive pricing when the prices are set at a very low level to compete in the market (Furse, 2008). Although low prices or price reductions normally result from competition; the predatory behaviour is considered an act of anti-competitive behaviour whereby underpriced too much from the market level would damage the competitive process (Myers, 1994). Predatory pricing is not a healthy way of competition because it will promote either as a barrier to entry or drive competitors out business (Furse, 2008).

4. INFRINGEMENT OF THE PRICING PROHIBITIONS

Under the CA2010, the two main provisions of anti-competition and abuse of dominant position are quite generally defined in Section 4 and 10. Particularly on the prohibition of pricing policies, the subsections definition required further reference with the guidelines provided by the MyCC (2015a) and MyCC (2015b). What is considered pricing infringements?

According to Section 4(2)(a) of CA2010, "*Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to fix, directly or indirectly, a purchase or selling price or any other trading conditions*" (CA2010, 2015). The MyCC (2015a) states that horizontal cooperation in price fixing on the price itself or fixing any price elements such as fixing a discount, agreeing on a percentage price increase or setting the permitted range of prices between competitors are deemed as infringing the CA2010. The following forms of agreement are also classified as infringements: (i) agreement or arrangement to indirectly restrict price competition in certain way, for example 'recommended pricing' is prohibited; (ii) the sharing of price information before prices are increased either directly or indirectly through an industry or trade association or; (iii) competitors to discuss with each other before determining the agreed price. The MyCC (2015a) elaborated further than any other form of resale price maintenance including maximum pricing or recommended retail pricing that provides a reference point for downstream collusion is an infringement. For example, a manufacturer sets the price for its products to be sold at the retail level either fixed as a minimum resale price or a maximum resale price.

Section 10(2)(a) of the CA2010 provides that, "*Without prejudice to the generality of subsection (1), an abuse of a dominant position may include directly or indirectly*

imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer.” (CA2010, 2015). The MyCC (2015b) guideline clarified no enterprises are allowed to take advantage of market dominance to set high prices when there is a lack of competition for a product as to maximise profit from consumers. This is because the excessive pricing will adversely affect consumer’s welfare and drive the competitors out of the markets. Therefore, this type of exploitative conduct is prohibited.

Price Discrimination is regulated under Section 10(2)(d) of the CA2010 which states that *“applying different conditions to equivalent transactions with other trading parties to an extent that may cause anti-competition and abuse of dominant position”* (CA2010, 2015).

This section prohibits enterprises setting discriminatory prices that adversely affect consumers by offering low prices in very competitive geographic locations and cover the losses by charging higher prices in other locations with lesser competitors. Should any enterprises caught in setting discriminatory prices that affect the competitive environment in the downstream market which also force the competitors out of the markets, it is deemed infringement (MyCC, 2015b).

In Section 10(2)(f) of the CA2010, *“Without prejudice to the generality of subsection (1), an abuse of a dominant position may include any predatory behaviour towards competitors”* (CA2010, 2015).

The above subsection discourages enterprises to set low prices with the aim to drive the competitors out of business. The MyCC will examine whether the low prices offered are genuinely beneficial to consumers, or the low prices will be reverted to original price level once the competitors exited the markets. Unless there is reasonable commercial justification to support the predatory pricing policies, the above scenario is clear evidence of infringement (MyCC, 2015b).

5. THE ENFORCEMENT AND COMPLIANCE OF COMPETITION ACT 2010

Aside from keeping abreast of the pricing policies prohibitions, enterprises must be aware of the competition authorities’ power, the compliance requirements and the penalties imposed.

Firstly, the authorities that deal with the competition law in Malaysia is the MyCC. The MyCC is an independent body established under the Competition Commission Act 2010 (CCA2010) and the purview of the Ministry of Domestic Trade, Co-operatives and Consumerism. Its main aim is to protect the competitive process for the benefit of businesses, consumers and the economy (MyCC, 2015d). As stated in the CCA2010, the MyCC is empowered *“to carry out functions such as implement and enforce the provisions of the Competition Act 2010, issue guidelines in relation to the implementation and enforcement of the competition laws, act as advocate for competition matters; carry out general studies in relation to issues connected with competition in the Malaysian economy or particular sectors of the Malaysian economy; inform and educate the public regarding the ways in which competition may benefit consumers in, and the economy of, Malaysia”* (MyCC, 2015d).

Since the CA2010 implemented in 2012, there were a few cases investigated for price fixing such as the case of Cameron Highland Floriculturist Association (CHFA) whereby a group of the association members had agreed to raise the selling price of flowers by ten per cent. The MyCC found that the said unanimous decision made by

the members had infringed Section 4 (2) (a) of the CA2010 on price fixing. Another similar case related to horizontal agreement on price fixing is the Pan-Malaysia Lorry Owners Association (PMLOA) and lorry enterprises. Upon confirming the association's plan to raise the transportation charges by fifteen per cent on 7 September 2013, the MyCC stopped the association from increasing the price to the consumers as it has infringed the competition Act 2010 (MyCC, 2015e).

The above two cases show not only that the pricing policies discussed earlier is vulnerable to infringement, but it can also be observed that the MyCC is dutifully playing their role effectively according to the power vested as per CCA2010. Although there were leniencies given during the earlier cases such as CHFA was not imposed with penalties, and PMLOA has to stopped pursue the decision. However, gradually the MyCC has to step up efforts to enforce the CA2010 for the benefit of the consumers and attaining a more competitive environment. According to the MyCC report, the total penalties imposed on 50 companies that infringed the CA2010 from 2013 to 2016 amounting to almost RM25 million. The MyCC's enforcement division director Iskandar Ismail stressed that they are beginning to aim to hit harder regarding action towards the bigger companies especially on cases related to the price-fixing cartel. That would enable to create more awareness of the existence of the CA2010 (TheSunDaily, 2016).

Hence, the CA2010 should not be underestimated by the enterprises in carrying out their day-to-day businesses. One of the encouraged measures to avoid infringing on the pricing policies of the CA2010 is to comply with the law. Since the CA2010 came into force on 1 January 2012, the MyCC has advised that all enterprises review their agreements, procedures and practices to ensure compliance towards CA2010. The MyCC recommended enterprises to adopt a compliance programme to minimise the risk of infringements. The detailed compliance guidelines of the CA2010 can be accessed online at <http://www.mycc.gov.my/> (MyCC, 2015f). In fact, the MyCC has repeatedly been educating the enterprises on compliance programme in order for them to avoid infringements that leads to penalties.

Section 40(4) of the CA2010 imposed a financial penalty of up to 10% of the worldwide turnover on any enterprise caught for infringement (CA2010, 2015). However, the risk of enterprises infringing the CA2010 could be greatly reduced if a compliance programme is in place especially employees are educated on the dos and don'ts of the CA2010. Also, the MyCC may also consider reducing penalties on infringers if they can prove that there is an effective compliance programme being implemented (MyCC, 2015f).

6. CONCLUSION

Based on the above review, clearly the CA2010 is a very stringent law in regulating enterprises on four major types of pricing policies namely price fixing, price discrimination, excessive pricing and predatory pricing. Although the CA2010 is relatively new with a history of only five years old, there is no reason for the enterprises to find excuses being ignorance or not ready to adjust their pricing policies towards the requirements. Certainly, to most enterprises, the marketing oriented pricing policies of products and services remain the preferred choice for achieving profitability objective. However with the CA2010 in place and the enforcer is going to step efforts to police around, the enterprises must compromise and comply with the CA2010 with immediate effect. In order to understand better of the overall

competition law development and its impact, enterprises are advised to update from the “*e-Learning System on Competition Compliance for SMEs*” and the CA2010 Compliance Guidelines provided by the MyCC (MyCC, 2015g).

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