



The Interaction between IP and Competition Law in Malaysia

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Government policy in innovation

- 10th Malaysia Plan
- “innovation is a vital ingredient to increasing productivity and ultimately raising the competitiveness of the economy”
- The predominant concept is that IP and Competition laws are complementary where they both aim at promoting innovation and competition
- Competition Law 2010 acknowledges that innovation is one key factors required to promote competitive pricing, improve quality in products and services and results in wider choices for Malaysian consumers.

Introduction to Competition Law in Malaysia

- The Malaysian Competition Act ("the Act") and the Competition Commission Act were passed by the Parliament on 21 April 2010
- Royal assent was given on 6 June 2010
- Gazetted on 10 June 2010
- The Act took effect on 1 January 2012

Introduction to Competition Law in Malaysia (cont.)

- The Act also applies to any commercial activities outside Malaysia which has an effect on competition in Malaysia (*extra territorial effect*)
- Commercial activities regulated by the Communications and Multimedia Act 1998 and the Energy Commission Act 2001 are exempted under the Act

Introduction to Competition Law in Malaysia (cont.)

- There are two main practices that the Act is centered around with:

(1) Anti-Competitive agreements

(2) Abuse of dominant position

*Mergers and acquisitions are not governed under the Act

Introduction to Competition Law in Malaysia (cont.)

Anti-competitive agreements

Section 4(1) of the Act - *Prohibited horizontal and vertical agreement*

“A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.”

Introduction to Competition Law in Malaysia (cont.)

Abuse of dominant position

Section 10(1) of the Act - *Abuse of dominant position is prohibited*

“dominant position” means a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors;

The Interaction between IP and Competition Law : the current position in Malaysia

- Any matters in relation to IP is governed under the purview of the Intellectual Property Corporation of Malaysia (MyIPO)
- The Competition Act does not stipulate explicitly any provision which relates to IP

The Interaction between IP and Competition Law : the current position in Malaysia (cont.)

- However, section 4 of the Act prohibits agreements which has the **object** or **effect** of significantly distorting competition in the market (Anti competitive agreements)
- Section 10 of the Act prohibits **abuse of dominant position** which may also cover practices concerning IP

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- As such, where there is possible issues of anti-competitive practices concerning IP, it is still subject to the Competition Act
- To illustrate:-
 - (i) Designs- possible dominant position for the spare parts industry
 - (ii) Patents-refusal to licence

(i) Potential anti- competitive effects of protection: Designs Law

- Malaysia has recently amended its Industrial Design Law to be more in line with the international trend. (yet to undergo for First reading in Parliament)
- Amongst the significant changes made is with regards to the 'spare parts provision'.
- Effect: giving the spare parts owner the exclusivity to exclude other players from producing a similar product.

Potential anti- competitive effects of protection (continue)

- In the Malaysian context, Will the spare parts owner have the power to dominate the market for a particular spare part?
- Will it be a misuse of market power?
- As spare parts designs said to give market power, it would lead to higher prices and reduced availability.
- Although the cost of genuine parts was relatively high even without protection, the cost would be much higher if competition from alternative manufactures was not possible.

Potential anti- competitive effects of protection (continue)

- Competition Law is timely to accommodate this loopholes.
- Since the proposed new Design Law is silent on the any provision to allow repairs, it is concerned that it would not prevent persons having exclusive rights in a spare parts design from charging monopoly process for the relevant spare parts. Hence, allowing a monopoly on secondary market.

(ii) Potential anti- competitive effects of protection: Patents Law

- Patents Law caters for anti-competitive effect by way of a compulsory Licence
- Compulsory Licence- a procedure for authorities to licence companies or individuals other than the patent owner to use the right of the patent : to make, use, sell or import a product under patent, without the permission of the patent owner.

Potential anti- competitive effects of protection (continue)

- Reason for imposing compulsory licence:
 - Refusal to deal
 - Non working or inadequate supply of the market
 - Public interest
 - Abusive and/or anti competitive practices
 - Government use
 - Dependent or 'blocking' patents
 - Licenses of right

Potential anti- competitive effects of protection (continue)

- Section 84 of the Patents Act 1983

Allows for compulsory licensing to be undertaken in certain situations such as national emergency, public interest or where a judicial or relevant authority has determined that the manner of exploitation by the owner of the patent or his licensee is anti-competitive...

The Interaction between IP and Competition Law : the current position in Malaysia (cont.)

Possible exemptions are available in the Competition Act where the following grounds are proven:

- significant technological, efficiency or social benefits arise from the agreements
- benefits could not reasonably be obtained without the anti-competitive clauses
- the detrimental effect of the agreement on competition is proportionate to the benefits provided
- the agreement does not allow the enterprise to eliminate competition completely

The Interaction between IP and Competition Law : the current position in Malaysia (cont.)

- The Malaysia Competition Commission ("MyCC") notes the inherent tension between IP and Competition Law
- There is a need to strike a balance between IP and Competition Law by allowing the protection of the IPR holder's interest legitimately while equally protecting against abuses that may unjustifiably distort competition

The Interaction between IP and Competition Law : the current position in Malaysia (cont.)

IPR holder is therefore not entitled to:

- exclude competitors from his rights when a license is essential for competition
- prevent the introduction of a new product
- monopolise a secondary market

The way Malaysia is looking forward

- MyCC may adopt concepts which are common to most competition laws as different positions taken by outside jurisdictions will provide a certain level of guidance to MyCC
- At present, focal point will be on the main prohibitions under the Act



Thank You

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