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# Centre on Regulation and Competition

## WORKING PAPER SERIES

**Paper No. 45**

### **THE INSTITUTIONAL AND POLICY FRAMEWORK FOR REGULATION AND COMPETITION IN MALAYSIA**

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**December 2002**

**ISBN: 1-904056-44-X**

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Published by: Centre on Regulation and Competition,  
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# **THE INSTITUTIONAL AND POLICY FRAMEWORK FOR REGULATION AND COMPETITION IN MALAYSIA**

## ***Abstract***

Regulatory reforms took place in Malaysia mainly as a consequence of the privatization since the mid-1980s. A sectoral approach to regulation has been adopted in sectors where privatization took place. Competition regulation has only been implemented in one sector, namely the communications and multimedia sector. The government may implement a national competition policy by 2003. Economic regulation, such as control over entry-exit conditions to achieve goals related to poverty eradication and wealth redistribution, continues to be important. Some trade-off between competition and the achievement of these objectives seems imminent and unavoidable. Industrial and trade policies to protect local industries via high import duties also come into conflict with the objectives of competition regulation. Some initiatives to implement good corporate governance have been undertaken.

## **INTRODUCTION**

Regulatory reforms took place in Malaysia when the government embarked on an ambitious privatization program from the mid-1980s. Prior to this, regulation was fairly extensive, particularly since the early 1970s, but these were undertaken chiefly to deal with poverty and wealth distribution issues. Furthermore, sectoral regulation in the pre-privatization period was purely a matter “self-regulation” by the government. With privatization, new regulatory institutions and mechanisms were established to regulate privatized entities. Even though the distributive issue remains an important element in the privatization era, competition became an important regulatory concern. In the absence of a national competition policy or law, a sectoral approach to competition regulation was adopted. In the aftermath of the financial crisis of 1997-98, the process of regulatory reforms has become more challenging due to industry consolidation and, in some cases, re-nationalization. Much work remains to be done, especially since competition regulation is still at a fairly nascent stage Malaysia.

This paper attempts to describe the institutional and policy framework for regulation and competition in Malaysia. Section 2 of this paper begins with a brief historical description of the major changes in the economic policies of the government since 1970. This is followed by a discussion of the institutional as well as the policy framework for competition and

economic regulation in the country in Section 3. We focus on the regulatory structure in the communications and multimedia industry – the only sector which has implemented competition regulation. Under economic regulation, the topics of price, entry-exit, and mergers and acquisition are discussed. Two additional types of economic policies that have impacts on competition are discussed, namely trade and industrial policies and corporate governance. Section 4 concludes.

## **THE HISTORICAL CONTEXT SINCE 1970**

An important event in the post-independence era in Malaysia is the racial riots in May 1969. The government responded to the event with an extensive interventionist development policy called the *New Economic Policy* (NEP). The NEP was implemented to eradicating poverty as well as redressing the economic imbalance between the major races in the country. In the latter case, specific targets were set for ownership in the commercial and industrial sectors. This was achieved through many means from outright purchase of equity by trustee companies (representing the Bumiputra (i.e. indigenous) community's interests) to licensing, quotas and government procurements. An example is the *1975 Industrial Coordination Act* (ICA) which required manufacturing firms exceeding a given size threshold (e.g. 25 or more employees or paid-up capital exceeding RM250,000) to apply for licenses to operate. The use of the ICA to control entry into an industry is to ensure compliance with the NEP (in terms of ownership and employment).

By the early 1980s, the government embarked on another phase of interventionist policies by promotion of heavy industry such as the national car project (Proton) and steel plant (Perwaja). The objective was economic diversification to enhance industrial linkages in the economy. Investments in these projects were accompanied by increases in import duties on both automobiles and steel. Not long after these policies were implemented, the severe recession in the mid-1980s brought about another major shift in government policy, this time in the form of economic liberalization. The ICA was relaxed (and subsequently replaced in 1986). The government's privatization policy, which had already begun by then, gained further momentum after the mid-1980s (see Table 1 for a list of privatized projects). Despite the extensive privatization that has taken place, regulatory reforms have lagged behind. The re-distributive emphasis of the NEP remained an important element in the implementation of privatization. For example, the *Privatization Guidelines* state that at least 30 per cent of equity in privatized projects should be allocated to the Bumiputra community. However,

since the financial crisis of 1997/98, several projects that were privatized in the 1980s (but subsequently experienced substantial losses) have been re-nationalized. These include two LRT systems in Kuala Lumpur (STAR and PUTRA), the national sewage system (IWK) and the national airlines (MAS). Industry consolidation, involving the reduction of operators/firms via mergers etc., has also been an important feature of the economy since 1997/98. This has mostly taken place in the financial sector (commercial banking, finance companies, brokerage houses, insurance companies) and the telecommunications sector.

Over the past thirty years, the most important type of economic regulation were those used to support NEP redistributive objectives. These were mainly in the form of control over entry conditions such as licensing (especially in non-tradable sectors such as infrastructure) and government procurement. In the tradable sectors, equity restrictions have been relaxed, particularly for foreign companies that are export-oriented. In contrast, competition regulation has been virtually non-existent. These issues are discussed in more detail in the following sections.

## **THE INSTITUTIONAL FRAMEWORK OF REGULATION IN MALAYSIA**

Vascusi et al's (2000) makes a distinction between the two types of regulation of relevance to competition, namely<sup>1</sup>:

- Competition regulation that seeks to prevent the development of market concentration that might threaten the competitive functioning of markets; and
- Economic regulation that restricts firm decisions over price, quantity, and entry-exit decisions in cases where the presence of market power is inevitable (i.e. natural monopolies due to scale economies).

**Table 1: Major Privatized Infrastructure Projects in Malaysia**

| <i>Sector and Project</i>                                                                                                                     | <i>Method of Privatisation<br/>(Year)</i>  | <i>Type of Contract</i>             |
|-----------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------|-------------------------------------|
| <b>Roads</b>                                                                                                                                  |                                            |                                     |
| North Klang Straits Bypass                                                                                                                    | BOT (1984)                                 | Concession (25 years)               |
| Jln.Kuching/Kepong Interchange                                                                                                                | BOT (1985)                                 | Concession (16 years)               |
| KL Interchange                                                                                                                                | BOT (1987)                                 | Concession (30 years)               |
| North-South Expressway                                                                                                                        | BOT (1988)                                 | Concession (30 years)               |
| Second Link to Singapore                                                                                                                      | BOT (1993)                                 | Concession (30 years)               |
| Butterworth-Kulim Expressway                                                                                                                  | BOT (1994)                                 | Concession (32 years)               |
| Seremban-Port Dickson Highway                                                                                                                 | BOT (1994)                                 | Concession (30 years)               |
| Shah Alam Expressway                                                                                                                          | BOT (1994)                                 | Concession (29 years)               |
| North-South Expressway Central Link                                                                                                           | BOT (1994)                                 | Concession (25 years)               |
| KL-Karak Highway                                                                                                                              | BOT (1994)                                 | Concession (27 years)               |
| New North Klang Straits Bypass                                                                                                                | BOT (1995)                                 | Concession (25 years)               |
| Cheras-Kajang Highway                                                                                                                         | BOT (1995)                                 | Concession (30 years)               |
| Elevated Highway over Sg. Klang &<br>Sg. Ampang                                                                                               | BOT (1996)                                 | Concession (33 years)               |
| Damansara-Puchong-Putra Jaya Highway                                                                                                          | BOT (1996)                                 | Concession (33 years)               |
| New Pantai Highway                                                                                                                            | BOT (1996)                                 | Concession (30 years)               |
| Sungai Besi Road                                                                                                                              | BOT (1996)                                 | Concession (30 years)               |
| Dedicated Highway from KL to KLIA                                                                                                             | BOT (1997)                                 | Concession (33 years)               |
| Kajang-Seremban Expressway                                                                                                                    | BOT (1997)                                 | Concession (33 years)               |
| Karak-Kuantan-Kuala Trengganu Highway                                                                                                         | BOT (1997)                                 | Concession (33 years)               |
| Butterworth Outer Link Road                                                                                                                   | BOT (1997)                                 | Concession (30 years)               |
| Elevated Interchanges at Putra Jaya, Salak<br>Tinggi, Bandar Baru Nilai and Jalan<br>Sambungan at KLIA (Part of North-<br>South Central Link) | BOT (1997)                                 | Concession (25 years)               |
| <b>Ports</b>                                                                                                                                  |                                            |                                     |
| Klang Container Terminal                                                                                                                      | Lease-Sale (1986)                          |                                     |
| Rest of Port Klang                                                                                                                            | Lease-Sale (1992)                          |                                     |
| Johor Port                                                                                                                                    | Corporatization (1993)                     |                                     |
| Bintulu Port                                                                                                                                  | Corporatization (1993)                     |                                     |
| Lumut Maritime Terminal                                                                                                                       | BOOT (1993)                                | Concession                          |
| Penang Port                                                                                                                                   | Corporatization (1994)                     |                                     |
| West Port                                                                                                                                     | Lease-Sale (1994)                          |                                     |
| Pelabuhan Tanjung Pelepas                                                                                                                     | BOOT (1995)                                | Concession                          |
| <b>Airports</b>                                                                                                                               |                                            |                                     |
| 19 Airports and 12 STOLports                                                                                                                  | Operation and Management<br>License (1992) | Concession (30 years)               |
| KL International Airport                                                                                                                      | Operation and Management<br>License (1998) | Concession (50 years)               |
| <b>Power</b>                                                                                                                                  |                                            |                                     |
| Tenaga Nasional Berhad                                                                                                                        | Sale of Equity (1992)                      |                                     |
| YTL—Paka and Pasir Gudang                                                                                                                     | BOT (1995) <sup>a</sup>                    | Power purchase agreement (21 years) |
| SEV—Lumut                                                                                                                                     | BOT (1996–97) <sup>a</sup>                 | Power purchase agreement (21 years) |
| GSP—Sepang                                                                                                                                    | BOT (1994–96) <sup>a</sup>                 | Power purchase agreement (21 years) |
| PDP—Port Dickson                                                                                                                              | BOT (1995) <sup>a</sup>                    | Power purchase agreement (21 years) |
| PSP—Powertek, Malacca                                                                                                                         | BOT (1995) <sup>a</sup>                    | Power purchase agreement (21 years) |
| <b>Water Supply</b>                                                                                                                           |                                            |                                     |
| Labuan Water Supply                                                                                                                           | BOT (1987)                                 | Concession                          |
| Ipoh Water Supply                                                                                                                             | BOT (1989)                                 | Concession                          |
| Larut Matang Water Supply                                                                                                                     | BOT (1989)                                 | Concession                          |
| Johor Water Authority                                                                                                                         | Corporatization (1994)                     |                                     |
| Pulau Pinang Water Authority                                                                                                                  | Corporatization (1994)                     |                                     |
| <b>Others</b>                                                                                                                                 |                                            |                                     |
| Syarikat Telekom Malaysia Berhad                                                                                                              | Sale of Equity (1990)                      |                                     |
| KTM Berhad                                                                                                                                    | Corporatization (1992)                     |                                     |
| National sewerage system*                                                                                                                     | BOT (1992)                                 | Concession (28 years)               |

|                                       |             |                            |
|---------------------------------------|-------------|----------------------------|
| Light rail transit system I (STAR)*   | BOOT (1993) | Concession (60 + 60 years) |
| Light rail transit system II (PUTRA)* | BOOT (1994) | Concession (60 + 60 years) |
| KL Monorail system                    | BOOT (1994) | Concession (60 + 60 years) |
| Putrajaya Monorail                    | BOOT (2002) |                            |

Notes: BOT is build-operate-transfer; BOOT is build-operate-own-transfer.

<sup>a</sup> Date of commissioning.

\* Subsequently re-nationalized projects.

Source: Naidu and Lee (1994), updated by G.Naidu and Cassey Lee.

This distinction between two types of regulation is not always clear cut<sup>2</sup>. Economic regulation sometimes has impacts on competition, for example, relaxation in entry conditions can reduce concentration in a market. A summary of regulatory institutions in Malaysia is provided in Table 2.

**Table 2: Regulatory Institutions and Mechanisms in Malaysia, 2002**

| Sector                        | Regulatory Agency                                                                                                                                                                                                   | Legislation                                                                                                                            | Type of Economic & Competition Regulation                                                                                                                                     |
|-------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Distributive Trade            | Ministry of Domestic Trade and Consumer Affairs (MDTCA)                                                                                                                                                             | Consumer Protection Act 1999, Price Control Act 1946 and the Supply Control Act 1961                                                   | Prices of essential goods are regulated. No provision for competition regulation.                                                                                             |
| Road                          | Public roads are regulated by the Road Transport Department (Ministry of Transport)<br><br>Privatized roads are regulated by the Malaysian Highway Authority under the Ministry of Works.                           | Road Transport Act, 1987                                                                                                               | Price regulation (toll rates) By Ministry of Works<br><br>Commercial vehicle licensing (entry) by Commercial Vehicle Licensing Board, Ministry of Entrepreneurial Development |
| Railways                      | Railways Department (Ministry of Transport)                                                                                                                                                                         | Railways Act 1991 and Railways (Successor Company) Act 1991                                                                            | Price regulation (fare rates) by Ministry of Transport                                                                                                                        |
| Ports                         | Corporatized ports are regulated by the respective Ports Commission (e.g. Johor Port Authority, Bintulu Port Authority, Klang Port Authority etc.)<br><br>Federal ports are regulated by the Ministry of Transport. | Ports Authorities Act 1963, Ports Act (Privatization), 1990, and the various port commission acts for each port                        | Price regulation by port commission                                                                                                                                           |
| Airports                      | Civil Aviation Department, Ministry of Transport                                                                                                                                                                    | Civil Aviation Act, 1969; Landing, Parking and Housing, Passenger Services and Air Navigation Facility Charges (and) Regulations 1992. | Price regulation by Ministry of Transport                                                                                                                                     |
| Communications and Multimedia | Communications and Multimedia Commission                                                                                                                                                                            | Communications and Multimedia Act 1998                                                                                                 | Price regulation and Competition regulation – CMC advises the Ministry of Energy, Communications and Multimedia.<br><br>Entry is regulated via licensing.                     |
| Electricity Supply            | Energy Commission                                                                                                                                                                                                   | Energy Commission Act 2001, Electricity Supply Act 1990, Electricity                                                                   | Regulation of wholesale prices via agreements between IPPs and Tenaga Nasional (incumbent)                                                                                    |

|              |                                           |                                         |                                                                                                            |
|--------------|-------------------------------------------|-----------------------------------------|------------------------------------------------------------------------------------------------------------|
|              |                                           | Supply (Successor Company) Act 1990     | distributor company)<br><br>Retail tariffs regulated by Ministry of Energy, Communications and Multimedia. |
| Water Supply | Water Supply Department, Water Board, PWD | Water Supply Act, and state legislation | For privatized supplier prices are regulated concession agreements.                                        |

### Competition Regulation

At present, Malaysia does not have a national competition policy. In the past, the protection of consumer interests has generally been approached via the enactment of statutes that regulates commercial and trading activities. These statutes include the Trade Descriptions Act 1972, the Hire-Purchase Act 1967, the Weights and Measures Act 1972, the Direct Sales Act 1993, the Money Lenders Act, 1951, and the Consumer Protection Act 1999. These statutes provide protection to consumers via laws that set out not only the rights of consumers but also the various acts (on the part of the seller) deemed unethical and illegal. Many of these statutes are meant to be applied to specific sectors such as the distributive sector (Trade Descriptions Act, Weights and Measures Act, Direct Sales Act) and financial sector (Hire Purchase Act, Money Lenders Act). These laws do not deal with competition issues such as the impact of market power, collusion etc.

Only in the past five years has the Malaysian government officially expressed some interest in implementing a competition policy. For example, a statement on competition policy was made for the first time in the country's latest five-year plan, the *Eighth Malaysia Plan 2001-2005*:

“During the Plan period (2001-2005), efforts will be made to foster fair trade practices that will contribute towards greater efficiency and competitiveness of the economy. In this context, a fair trade policy and law will be formulated to prevent anti-competitive behaviour such as collusion, cartel price fixing, market allocation and the abuse of market power. The fair trade policy will, among others, prevent firms from protecting or expanding their market shares by means other than greater efficiency in producing what consumers want. In addition, a national policy and master plan on distributive trade will be formulated to facilitate an orderly and healthy development of the sector.”<sup>3</sup>

Even before the publication of the above statement, the Ministry of Domestic Trade and Consumer Affairs (MDTCA) has been drafting a “Fair Trade Practices Bill” (essentially a competition law) since 1993. The document has since gone through several revisions. A



recent speech by the secretary general of the MDTCA indicates that a fair trade law may be enacted before the end of 2003<sup>4</sup>.

Despite this announcement, recent trends suggest that competition is increasingly to be regulated at the sectoral level. This is explicitly acknowledged in the *Eighth Malaysia Plan*. To date, sector-based competition regulation has been established for the communications and multimedia as well as the energy sector. Other sectors such as ports, and transport are at different stages of establishing sector-based competition regulation.

The communications and multimedia sector is the only sector that has legally implemented competition regulation (discussed in detail later). With the passage of the Energy Commission Act 2001 (ECA 2001), the energy sector appears to be following the path taken by the communications and multimedia sector. In the ECA 2001, one of the functions of the Energy Commission is:

“to promote and safeguard competition and fair and efficient market conduct, or in the absence of a competitive market, to prevent the misuse of monopoly power or market power in respect of the generation, production, transmission, distribution and supply of electricity and the supply of gas through pipelines.” (ECA 2001, P.14)

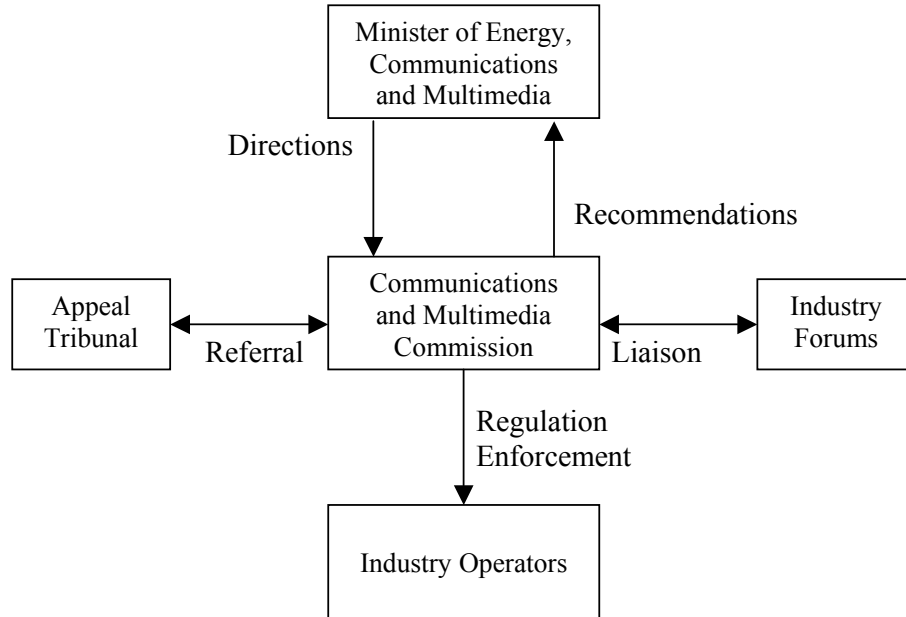
The draft “Fair Trade Practices Bill” mentioned earlier has incorporated some elements pertaining to competition regulation. Thus the regulatory framework established in the communications and multimedia sector is likely to be replicated elsewhere for other sectors (and possibly at the national level at a later stage). It is perhaps worthwhile to examine how competition is regulated in the communications and multimedia sector for these reasons.

### ***Regulation Framework in the Communications and Multimedia Sector***

Figure 1 summarizes the regulatory framework for the communications and multimedia sector. The legislative mandate for regulation of the sector comes from the *Communications and Multimedia Act 1998* (CMA 1998) and the *Malaysian Communications and Multimedia Commission Act 1998* (CMCA 1998). The CMA 1998 spells out the various regulatory institutions involved (minister, commission and tribunal) and their powers, as well as the available regulatory tools and methods (license, determination, inquiry, agreements, standards) and the types of regulation (economic, technical, consumer protection and social).

The CMCA 1998 is a supplementary legislative act that provides for setting up of the regulatory agency and its operational aspects.

**Figure 1: The Regulatory Framework for the Telecommunications Industry in Malaysia, 2000**



Source: Adapted from CMC (2001a) and the CMA 1998

The two key institutions in the regulatory framework are the Communications and Multimedia Commission (CMC) and the Minister of Energy, Communications and Multimedia (hereafter referred to as the Minister). Of the two institutions, the Minister is more influential as all policy decision-making powers are vested (by CMA 1998) in the Minister who also gives policy directions to the Commission. The role of CMC is policy recommendation (to the Minister) and policy implementation. For example, in the case of the issuance of licenses, the Commission administers the application and renewal process, and makes recommendations, but the final decision is up to the Minister. The influence of the Minister over the Commission is also reflected in the fact that the five members of the Commission are appointed by the Minister. The CMA 1998 stipulates that the CMC should comprise of the following<sup>5</sup>:

- A Chairman;
- one member representing the Government;
- and not less than two, but no more than three other members.

The present regulatory framework for the sector allows for inputs from private operators and the public in the sector via the process of public inquiries. The CMC has used this avenue to solicit opinions from operators during the process of drafting regulatory policies (e.g. Access List Determination). Typically, discussion papers are published on CMC's website (<http://www.cmc.gov.my>) and the public is invited to submit their views within a given period (at least 45 days).

Besides this avenue, the CMA 1998 also allows for setting up of an Appeal Tribunal to review CMC decisions and direction when the need to do so arises. Another avenue for public participation is the establishment of industry forums that act as a consultative body to the CMC in important issues such as the access code, consumer code, content code and technical code. Thus far, two industry forums have been established, namely the Consumer Forum and the Content Forum.

The status of the regulatory agency (CMC) is quite unusual. The CMC is financially independent from the government, deriving its revenue mostly from licensing. This has provided the CMC with greater flexibility with regards to staff recruitment. In fact, since its establishment, the regulatory agency has adopted a "greenfield" approach to staff recruitment, i.e. hiring people from the private sector, industry and other regulatory bodies. While leadership of its predecessor organization (the Telecommunications Department) was mostly dominated by engineers, the staff composition of the new set-up is more varied – notably with the hiring of more lawyers and economists.

### ***Competition Regulation in the Communications and Multimedia Sector***

The Communications and Multimedia Sector is the only sector to have implemented competition regulation formally (i.e. via legislation and published guidelines). The legislative mandate for competition regulation comes from the CMA 1998 which states that anti-competitive conduct - such as collusion (rate fixing, market sharing, boycott of competitor) and tying - are prohibited. To implement competition regulation, the CMA 1998 makes provision for the publication of guidelines. To date, CMC has published three documents on competition regulation, namely:

- *Guideline on Substantial Lessening of Competition* (CMC 2000a)

This document clarifies the various notions (e.g. market, potential rivalry), anti-

competitive conducts (e.g. predatory pricing, foreclosure etc.) and conditions (e.g. intentionality) under which such conduct is deemed illegal under the CMA 1998. The document also provides an analytical framework for analyzing cases where substantial reduction in competition is thought to have occurred.

- *Guideline on Dominant Position in a Communications Market* (CMC 2000b)

This document clarifies the concept of dominance and the various structural characteristics (market shares, vertical integration, barriers to entry) and anti-competitive practices (pricing and supply behavior) that might be associated with the presence of a dominant firm. The guideline also makes provision for an analytical framework for determining dominant position in a market.

- *Process for Assessing Allegations of Anti-Competitive Conduct: An Information Paper* (CMC 2000c)

This paper set out in greater detail the sequence of actions to be taken by the CMC when it investigates incidents and firms involving the substantial reduction in competition and presence of dominant market position.

There are several clauses worth highlighting in the guidelines. First, there is a clause that is a specific statement that provides for the protection of smaller operators in the absence of a general competitive policy or trade practices regulatory regime<sup>6</sup>. Second, conduct that might be anti-competitive (i.e. breaching the Act) may be tolerated provided it can be shown that the “national interest” requires it. However, “national interest” is not defined in the Act or in any of the guidelines published thus far<sup>7</sup>. Third, it is also re-emphasized in the guidelines that judgment as to whether conduct is anti-competitive or not is within the jurisdiction of the Minister, and not the CMC. The CMC’s role is confined to enforcement of judgments made by the Minister<sup>8</sup>.

### **Economic Regulation**

Economic regulation is more prevalent compared to competition regulation in Malaysia. The types of regulation include controls on price, entry-exit conditions, and mergers and acquisitions (including limits on foreign equity participation). Most economic regulations involving entry-exit conditions are sectoral whereas M&As and limits on foreign equity participation are regulated nationally. Prices are regulated both sectorally and nationally. Many government and quasi-government institutions are involved in these regulatory activities. Finally, trade and industrial policies, even though not traditionally associated with

economic regulation, have significant impacts on prices and entry-exit conditions in an open economy such as Malaysia's.

### ***Price Regulation***

Various types of price regulations exist in the country. The Price Control Act 1946, Supply Control Act 1961 and their subsidiary legislations empower the Ministry of Domestic Trade and Consumer Affairs (MDTCA) to ration the supply of selected goods as well as to control and stabilize prices in the country<sup>9</sup>. To date, these Acts have been mainly used to stabilize the prices of essential food items such as food items (poultry and vegetables). Retail utility prices are also regulated by their respective ministries. All changes in power as well as telecommunications tariffs require the approval of the Minister of Energy, Communications and Multimedia. Often, such decisions are referred to the Cabinet for approval. The tariff rates for tolled roads are similarly regulated (applications to the Ministry of Transport, with the high likelihood of referral to the Cabinet for final decision). Prices in the services sector (with the exception of financial services) are mostly not regulated by the government. Various industry associations (legal, medical, etc.) set price standards in their respective industries.

### ***Entry-Exit Condition***

Entry into a few major sectors is regulated via licensing. These sectors include the financial sector, the communications and multimedia sector and the transport sector. The approving agency in most cases is the ministry / minister overseeing the sector. In the banking and finance sector, licenses are approved by the Minister of Finance and issued by the central bank (Bank Negara). In the communications and multimedia sector, the Communications and Multimedia Commission (CMC) issues licenses approved by the Minister of Energy, Communications and Multimedia. The licensing setup in the transport sector is more complicated. The Commercial Vehicle Licensing Board (CVLB) is responsible for licensing private commercial vehicles (bus, trucks, taxis) in the country<sup>10</sup>. Entry conditions in these sectors have been regulated to meet several objectives. One objective is to increase the presence of the participation of Bumiputra entrepreneurs in these sectors. On a few occasions, entry conditions have also been relaxed to encourage competition in these sectors, e.g. in the telecommunications sector in the mid-1980s, and the road haulage sector since the 1990s.

While exit conditions are generally not regulated, the government has occasionally consolidated industries via various measures. In the banking sector, the Ministry of Finance used moral suasion (and tax incentives) to get commercial banks to merge in 2000-2001. In the communications and multimedia sector, the allocation of the 3G spectrum to three firms in a market with five mobile service operators will have the impact of consolidating the mobile services market.

### ***Mergers & Acquisition***

The legal framework for regulation of mergers and acquisition is provided by two statutes, namely, the *Securities Commission Act 1993* (Part IV Division 2) and the *Malaysian Code on Take-Overs and Mergers 1998*. The regulatory agency is the Securities Commission. These statutes were primarily enacted to protect investors' interest. There are no provisions in these statutes for the impact of M&As on competition. An important regulatory agency in the area of M&As is the Foreign Investment Committee (FIC) under the Economic Planning Unit in the Prime Minister's Department. Any M&A transaction involving foreign interests also needs to get FIC approval. The FIC has guidelines limiting foreign equity participation in companies registered in Malaysia. The purpose of the FIC guidelines is to ensure that the pattern of ownership and control of private enterprises in the country is consistent with government policies such as the New Economic Policy / National Development Policy. In the past, exemptions have been allowed for foreign direct investments that are export-oriented. In the wake of the financial crisis in 1997/98, the government also relaxed limits on foreign equity participation in Malaysian private enterprises. Even though the FIC guidelines focus on distributive issues, its implementation has effects on competition. Limits on foreign equity participation constrain the amount of resources that domestic firms can enlist from foreign investors to compete in the market.

### ***Trade and Industrial Policies***

Trade and industrial policies have direct impact on competition in Malaysia. Even though Malaysia has adopted a fairly liberal trade policy since it embarked on export-oriented industrialization since the late 1960s, it has also selectively imposed high import duties on selected industries for the purpose of protecting and nurturing these industries (i.e. the "infant industry" argument). This has taken place mainly in heavy industries such as the automotive, steel and cement industries. The two local automotive companies - Perusahaan Otomobil Nasional Bhd. (Proton) and Perusahaan Otomobil Kedua Sdn. Bhd. (Perodua) - have a total

market share of around 75%. The dominance of the two companies in the automotive sector is partly due to the high import duties (between 42% - 300%) levied on cars<sup>11</sup>. In another area, hefty import duties were imposed on a wide range of steel products in March 2002 to improve the competitiveness of the country's largest steel maker, Megasteel Sdn. Bhd<sup>12</sup>.

### **Corporate Governance**

An area of regulation that does not fall neatly into either competition regulation or economic regulation is corporate governance. Corporate governance only became an important issue in Malaysia after the financial crisis of 1997/98. The Finance Committee on Corporate Governance was set up to study the issue. The committee subsequently came up with the *Report of the Finance Committee on Corporate Governance* in February 1999. The report emphasized the importance of independent directors and subsequent changes in listing requirements on the KL Stock Exchange took this concern into account. The report also made recommendations on the monitoring functions of a company's board of directors. These recommendations found their way into the *Malaysian Code on Corporate Governance* (MCCG) – a document published in March 2000. To ensure important matters are deliberated at the board, the Code specifies the types of issues and transactions that ought to be tabled at a board for scrutiny. These include asset acquisitions and investments in capital projects, amongst others. In terms of enforcement of the MCCG, a mixture of self-regulation and official sanctions was adopted. The latter took the form of sanctions by the Securities Commission based on listing requirements and Section 11 of the Securities Industry Act 1983<sup>13</sup>. The efficacy of these sanctions is not known.

### **CONCLUSION**

The regulation and competition framework in Malaysia is fragmented. Competition regulation is at a very nascent stage – it exists only in one sector, namely the communications and multimedia sector. There is some indication that a competition policy may be implemented at a later stage. Urgency to implement a competition policy may materialize if this issue is proposed for multilateral negotiations at the WTO. Such a policy, if implemented, may reflect trade-offs between competition and other social objectives such as equity. Most economic regulations in Malaysia have, in the past, been aimed at achieving social-economic objectives such as poverty eradication and wealth redistribution. Hence, some trade-offs between competition and the achievement of these objectives seem imminent and unavoidable. Industrial and trade policies to protect local industries via high import

duties also come into conflict with the objectives of competition regulation. In the area of corporate governance, it is still too early to tell if the industry-initiated codes of conduct will be effective, given the largely self-regulatory nature of these codes of conduct.



## *Notes*

<sup>1</sup> Other types of regulation include technical regulation (standards), health, safety and environmental regulation.

<sup>2</sup> OECD (1997) adopts a broader definition on economic regulation that includes competition regulation.

<sup>3</sup> Government of Malaysia (2000), Section 16.32, page 467.

<sup>4</sup> STAR, August 2, 2002.

<sup>5</sup> In the present set-up, the Chairman was a former Secretary General of the Energy, Communications and Multimedia Ministry. The official government representative is the present Secretary General of the Ministry of Domestic Trade and Consumer Affairs. The other three members are individuals from the private sector (senior partners from major accounting and legal firms and one from an association representing the manufacturing sector).

<sup>6</sup> CMC (2000a), Section 4.3.

<sup>7</sup> CMC (2000a), Section 5.4.

<sup>8</sup> CMC (2000a), Section 5.7.

<sup>9</sup> The subsidiary legislations include the Price Control Order 1980, 1993, 2000 and the Price Control Regulations 1984 and 2000.

<sup>10</sup> The licensing of commercial vehicles was originally the responsibility of the Transport Ministry. This function was transferred to the Ministry of Entrepreneurial Development (then, the Ministry of Public Enterprises) in the early 1970s to support the NEP policies.

<sup>11</sup> For a detailed study see Tham (2001).

<sup>12</sup> Steelnews.net (2002), 'Malaysia Adds Steel Tariff, Levy Helps Lion Group', <http://steelnews.net>.

<sup>13</sup> Malaysian Institute of Corporate Governance (2001), p.8.

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