

Boon or curse?

With the passing of the Competition Act 2010 and the soon-to-be established Competition Commission, the question now arises as to whether a fair and healthy business landscape will see SMEs growing stronger or lagging behind.

By Vickneswari Gannason

With the private sector having been handed the baton to lead the economy, a conducive and healthy business environment is crucial for Malaysia to achieve high-income status.

"Healthy competition is needed to make the economy more efficient and dynamic," said Prime Minister Datuk Seri Mohd Najib Razak when announcing the Tenth Malaysia Plan on June 10.

"The competition law is being introduced to provide a regulatory framework against market manipulation and cartel prices that may affect market efficiency. The Competition Commission and Appeals Tribunal will be established to ensure a more orderly and effective implementation of the law."

It was therefore, clearly the right move forward to pass the Competition Act 2010 (Act), after almost 15 years of discussion. There was an initial reluctance on the part of government-linked companies (GLCs) to be bound by the same laws as other businesses.

Domestic Trade, Cooperative and Consumerism Minister Datuk Seri Ismail Sabri on July 6 at a media briefing at the Dewan Rakyat said: "With this Act, the perception that GLCs have always been protected by the government will be erased. This will ensure fair competition and all will be protected, including the SMEs."

“SMEs are encouraged to go to the Competition Commission that will be set up on Jan 1, 2011, should they need to seek advice on the competition law.”



"It is always good to have a healthier playing field regardless of any laws passed. Having a written law in place does not mean anything if the execution is not done right," said ATCEN Sdn Bhd founder and group chief executive officer Ernie Chen.

A level playing field with exemptions

The Act, which was passed by Parliament in May 2010 will come into force on Jan 1, 2012 seeks to bolster economic development by promoting and protecting the process of competition in the Malaysian market in order to maximise consumer welfare.

It applies to all commercial activities undertaken within Malaysia and also those outside Malaysia should they have an effect on competition in the Malaysian market. However the Act exempts anti-competitive practices which are already regulated by the Communications and Multimedia Commission Act 1998 and Energy Commission Act 2001.

Furthermore, any activity, directly or indirectly in the exercise of governmental authority is exempted for the purposes of the Act.

MALAYSIA SME™ sat down with the Domestic Trade, Cooperative and Consumerism secretary-general Datuk Zain Mohd Dom to discuss the workings of the Act, the establishment of the Competition Commission and how SMEs are responding.

"An anti-competition law is not a new phenomenon in the world. At least 110 countries have some sort of competition policy. Despite having various laws that protect the consumers, we have never had a governing law on how businesses should behave in the marketplace," said Zain.

Supporting the NEM

"Anti-competitive behaviour has happened and is happening. But for the new economic model (NEM) to succeed, it is important to have a healthier business landscape. Therefore, the Act helps to regulate the business environment," said Zain.

"Healthy competition brings out the best in business. The best is seen when businesses compete to bring or create better products and services, coupled with higher quality and prices that give better value for money. Thus, in the



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long run, our business landscape will be highly innovative and productive.

"Furthermore, with the Act we can attract foreign direct investment more easily as they look at markets where the rule of law applies and best business ethics and laws are practised," Zain remarked.

Educating SMEs

"We rolled out advocacy programmes to the business community recently, to educate and create awareness on the implications of the Act to the way their business is conducted.

"During the first three months of the advocacy programme, we had talks with SMEs which revealed a mixed response to the Act.

"Some were worried about the impact of the Act on the kind of activities they partake in while another group of SMEs were not sure whether what they were currently doing falls under the anti competition scope. Interestingly, some of them felt that they have been practising such behaviours for a long time and do not see why they should change now.

"The SMEs are encouraged to go to the Competition Commission that will be set up on Jan 1 2011, should they need to seek advice on the competition law. Prior to the set up, queries can be directed to the Domestic Trade, Cooperatives and Consumerism Ministry. It is also important for SMEs to know that regardless of the size of your business, you are bound by the law, so it is vital to abide by the law," Zain stated. He further commented that healthy competition will allow SMEs to achieve high standards.

Advocacy programmes specially targeted for SMEs will be formulated in the near future and for this purposes, a working arrangement will be made with SME Corporation.

What are anti-competitive practices?

The Act divides anti-competitive practices into two main categories. One is

the anti-competitive agreement. These are any kind of agreements between businesses be it formal, verbal, written or unwritten and mainly covers four instances which is price fixing, market allocation, bid rigging and limiting production.

The offence of price fixing occurs when competitors control or maintain the price of goods and services. "For example, a new competitor comes into the market and offers a lower price for a particular product or service. The other players in the same market collectively set a very much lower price compared to the newcomer for the same product or service and continue to do it until the newcomer loses his business. This is clear cut anti-competitive behavior," explains Zain.

Market allocation is where competitors divide customers either by geographical area or customer type and agree to sell only to their allotted customers.

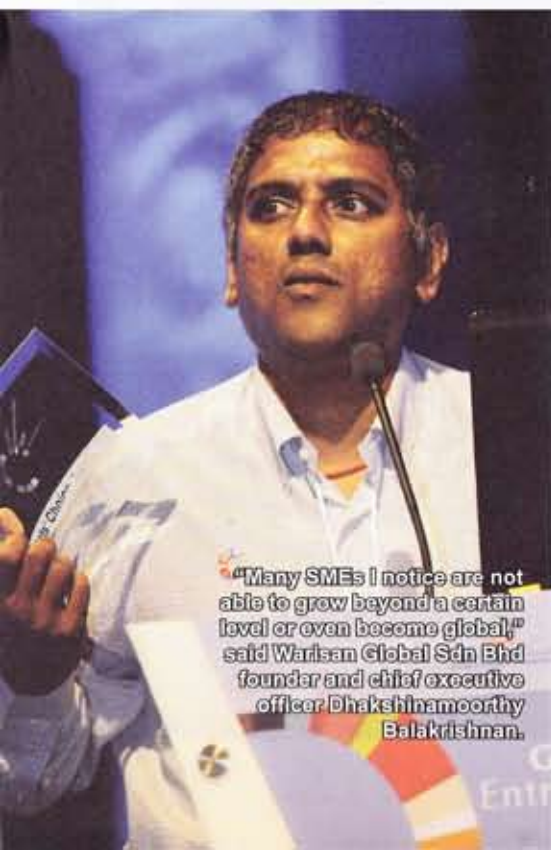
"For example, one player handles Kerinchi's demand, another covers Bangsar's demand and so forth. This mode of controlling the marketplace coupled with price fixing actions makes it difficult for emerging companies to penetrate the market," explains Zain.

Quoting another example Zain said, "A big supplier usually sells to hypermarkets because hypermarkets can afford to buy in bulk and therefore, it is more attractive for the big suppliers to do business with hypermarkets. In such an event, should a big supplier not wish to supply mom and pop shops and smaller mini markets, this could amount to unfair competition."

Where a dominant business maximises profits by limiting or controlling the supply of goods and services, it is called limiting production and is a form of anti-competitive behaviour.

"When supply meets demand, the price remains stable. But producers may feel that the price is not good enough for them and in order increase the price, the

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"Many SMEs I notice are not able to grow beyond a certain level or even become global," said Warisan Global Sdn Bhd founder and chief executive officer Dhakehinamoorthy Balakrishnan.

Execution important once Competition Act is enforced

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producers group together and collectively cut supplies to create an artificial shortage. Increasing the price in such a fashion is definitely deemed as anti-competitive behaviour," said Zain.

A bid-rigging agreement is another anti-competitive practice where competitors agree on who should win a tender. "Let's assume ten companies know that the government will be offering ten tenders this year. The companies then agree between themselves that each will take a turn to bid at the lowest price. With this sort of uncompetitive agreements, all ten companies will be able to win a tender unfairly," explained Zain.

"This type of agreement can take place if the ten companies are separate entities or even when they are smaller companies belonging to the same parent."

Abusing dominant powers

Another main prohibition in a competitive market is the abuse of a dominant position. The definition of dominant has not been interpreted by law. However, the Competition Commission will set guidelines and detail this aspect.

Being a dominant player confers great power. "A dominant player, having control over prices and supply, can dictate various conditions to customers. For instance, a multinational corporation (MNC) knows that it profits from doing business in an urban city and so, small towns may not be of interest to them. But should the small town need the supply of a product from the MNC, the MNC cannot refuse the small town. As a good businessmen, you must want to do business with everybody," Zain explained.

"So under these conditions, SMEs shop owners can file a complaint to the Commission should a big supplier refuse to supply them."

Another situation of an abuse of a dominant position can take place when a player tries to curtail competitors from coming in. "Let's assume that the supply of a certain product is limited and the dominant player knows that their competitors need it. Should the dominant player buy all the limited supply despite not needing it, it infers that the dominant player has the intention of denying their competitor the limited supply. If the dominant player cannot justify their action, then it amounts to uncompetitive behaviour."

Lodging complaints post-2012

The Competition Commission will be set up on Jan 1, 2011 and the Act will come into force on Jan 1, 2012. "We need time after setting up the Commission to come out with guidelines which are crucial as they lay down important details. For example, the guidelines will establish whether decisions made by the Commission will be by a simple majority, full consensus or other variations," said Zain.

"It gives us exactly one year for everything to be completed. Once the Act comes into force, businesses will have to abide by it," he said.

Complaints can be made to the Com-



The Federation of Malaysian Manufacturers president Tan Sri Mustapa Mansur shared his views on the implications of the Competition Act 2010 with MALAYSIA SME™, and stressed that SMEs must be familiar with the law.

Q: Do you feel that there are anti-competitive practices among our SMEs, particularly the manufacturers?

A: It would be unlikely for individual SMEs, being small players, to be accused of anti-competitive behavior. A possible scenario would be if an SME is part of an industry group colluding to fix prices. On the other hand, SMEs face anti-competitive practices such as unfair competition in the



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petition Commission by consumers, businesses affected by uncompetitive behaviour and non-governmental organisations. The Commission will also look into investigative reporting that highlights anti-competitive business behaviour.

Zain said that: "Upon a complaint being made and a job file opened, the aggrieved party is called in to explain the cause of their claims. The company, at which the complaint is directed, will also be called to offer their side of the story."

Stiff penalties

"By law, the Commission will have full investigative power which is close to a police investigative officer's authority. Thus, the Commission's investigative officers are allowed to get warrants from the Magistrate to enter private premises and seize evidence. In exceptional circumstances should there be a delay to get a warrant and if the delay raises fears that evidence will be removed, the investigative officer can still proceed and enter the premise concerned without a warrant," explained Zain.

course of doing business because SMEs lack resources, market intelligence, negotiating clout and have limited distribution capacity. Therefore, SMEs generally are unlikely to distort competition in the market.

Q: How is the competition law going to affect SMEs from the manufacturing sector?

A: The competition law would help to remove artificial and anti-competitive market barriers that are imposed by big companies. This would allow SMEs to enjoy lower costs of inputs that might occur in a more competitive environment. On the sales side, it would also ensure a more level playing field for SMEs in access to markets or being suppliers of goods and services to the bigger entities including the government linked companies (GLCs).

The competition law could protect SMEs by deterring bigger companies from adopting abusive or other anti-competitive practices. With the coming establishment of the Competition Commission and Appeal Tribunal, SMEs aggrieved by anti-competitive business practices would now have an authority which they could submit their complaints. Prior to the law, there was no clear authority in-charge.

Q: Looking forward, do you have any advice for SMEs?

A: SMEs need to understand and be familiar with the competition law in particular business practices that are deemed as anti-competitive and prohibited. This is so that they can recognise what is illegal anti-competitive behavior and fight it by bringing it up to the Commission, and at the same time avoid committing any anti-competitive acts themselves. Being ignorant of the law is not an excuse.

For companies or employees of companies who do not cooperate during the course of an investigation, a hefty penalty will be imposed. A corporate body including SMEs can be liable for not more than RM5 million in fines for the first offence while an employee of the company who obstructs justice, can be liable to not more than a RM1 million fine or five years imprisonment for the first offence.

10% of worldwide turnover

At the conclusion of the investigation, a report with recommendations will be presented to the commissioners who will then make the decision on whether to accept the recommendations. Should the decision be that there has been an infringement of the Act, the company in question can be liable to a financial penalty of 10% of its worldwide turnover over the period during which the infringement occurred. This is aside from requiring the company to stop all infringing conduct immediately.

"However, the company found to have infringed the Act has a right to appeal against the decision of the Commission to the Appeals Tribunal of the Commission. The next recourse will be the High Court of Malaysia," summed Zain.

SMEs say...

They say that the proof of the pudding is in the eating. Likewise, although the Act looks great on paper and seems to greatly benefit SMEs, the strength of the Act will come from how fairly and independently it is interpreted and enforced by the Competition Commission and the Appeals Tribunal.

ATCEN Sdn Bhd founder and group chief executive officer Ernie Chen said: "It is always good to have a healthier playing field regardless of any laws passed. Having a written law in place does not mean anything if the execution is not done right."

"It has never been our practice to rely on any 'beneficial' business law. That would be too risky as the law may just change tomorrow."

Genaxis Technology Sdn Bhd managing director Nuraslina Zainal Abidin, who is also a Six Sigma/Process Improvement consultant feels that the passing of the Act is a positive sign as it shows that the government is starting to embrace economic globalisation issues in a mature way.

"I believe the presence of the Act and the Competition Commission will actually help open up more business opportunities for competitive SMEs. There are SMEs who provide excellence in the quality of their product or service, fair prices and on time delivery. For those SMEs who are not, it is time to embrace technology and innovation as part of your work culture, in order to respond to the stiffer competition that can cut quickly into your market share."

Warisan Global Sdn Bhd founder and chief executive officer Dhakshinamoorthy Balakrishnan, sees that with such an overarching regulatory environment, "the local SMEs will be viewed as serious players in the market who are not using their special relationship with certain quarters to gain opportunities and this will bring new partnerships and help SMEs grow both locally and internationally".

In terms of the existence of anti competitive behaviour in the marketplace, he said: "There must be such behaviour now given the present business landscape. Many SMEs I have noticed are not able to grow beyond a certain level or even become global. This could be due to some regulatory voids in the market-place where anti-competitive behaviour and certain abuses of dominant positions have gone unchecked."

"With the Act and the Competition Commission, SMEs may become fearless and will be able to compete more openly in the market. However, at the same time, some SMEs may go out of business, people may lose jobs and there could be a temporary backlash. But, some blood on the table is important for the long-term growth of the country."

Form needs substance

Malaysia has a history of coming up with best policies and regulations, which is a good trait indeed. However, in many instances we have witnessed a failure to follow through on the fine intentions of the policies and regulations.

It is time everyone, including SMEs realized that in order to achieve high-income status we must also be highly productive and able to play on level playing fields anywhere in the world. If the private sector is expected to drive economic growth, then this Act should be fairly enforced through the Competition Commission and the courts for the benefit of all with no fear or favour.