RECENT DEVELOPMENTS OF COMPETITION LAW IN MALAYSIA: LEGAL CHALLENGES AND ANALYSIS OF DECISIONS

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ABSTRACT

Competition law is implemented in Malaysia through the Competition Act 2010 (CA 2010) and Competition Commission Act 2010 (CCA 2010). The CA 2010 came into force in 2012, and in 2011, a dedicated commission known as the Malaysian Competition Commission (MyCC) was established under the CCA 2010 to enforce competition provisions. The CA 2010 was largely modelled after the Treaty on the Functioning of the European Union (TFEU). Throughout the 13 years of enforcement, the Commission issued 14 final infringement decisions against enterprises involved in hardcore cartels, particularly price-fixing agreements, while only 2 final infringement decisions were issued against abuse of dominant position. Recently, the Court of Appeal (confirmed by the Federal Court of Malaysia) quashed the Commission's decision against Malaysia Airlines and AirAsia (the MAS/AirAsia case) for a market-sharing agreement after nearly a decade of legal battle. The Commission has also lost two important cases, namely the General Insurance Association of Malaysia (PIAM) and its 22 members (at the appeal level, Competition Appeal Tribunal (CAT)), as well as a judicial review application to review the Commission's proposed decision against MyTeksi/Grab. This article highlights the latest developments in Malaysian competition law and explores the legal and institutional

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challenges in its enforcement. Adopting a doctrinal legal research approach, the paper relies on both primary and secondary sources, particularly recent decisions issued by Malaysian competition authorities. Findings indicate that the influence of foreign competition rules, particularly those from the EU treaty, presents numerous challenges amidst judicial testing of local competition law enforcement. It suggests that the Malaysian competition authority needs to strengthen its internal guidelines and enforcement procedures, as well as increase capacity building efforts to address these legal and institutional challenges effectively. This study is expected to contribute to the existing body of knowledge on competition law.

Keywords: competition law, Competition Commission, developments, legal and institutional challenges, Malaysia

INTRODUCTION

The primary aim of competition law is to safeguard the competitive process among firms in the market by prohibiting anti-competitive agreements and the abuse of dominant or monopoly positions. Despite the existence of the law since 2010, the implementation of competition rules across economic sectors in Malaysia is still developing. Section 4 of the Competition Act (CA 2010), addressing anti-competitive agreements, mirrors Article 101 of the Treaty on the Functioning of the European Union (TFEU), while section 10, covering the abuse of dominant positions, mirrors Article 102. However, it is important to note that the two provisions were not copied verbatim from the TFEU provisions. Unlike the European Union (EU) competition provisions, which are treaty-based and have evolved over many years through case law and decisions of competition authorities, the Malaysian competition law regime is an act of Parliament. Both Sections 4 and 10 of the CA 2010 incorporate numerous competition law concepts and principles from the EU, many of which have developed from decisions of EU competition authorities.

The adoption of EU competition concepts and principles assists the Competition Commission to align the interpretation of competition law provisions with EU practices, given the wealth of authorities and precedents in the EU competition law regime. However, a significant question arises regarding the extent to which Malaysian authorities can rely on EU legal principles and standards, particularly in tribunal or court cases. The Malaysian civil courts lack specialisation in competition law, which can result in differing legal interpretations of competition law provisions or reliance on different legal standards to establish infringements. This disparity may lead to varying legal outcomes or conflicts between the competition authority and the courts.

The Malaysia Competition Commission (MyCC), a specialised agency established in 2011 under the Competition Commission Act 2010 (CCA 2010), primarily enforces the competition provisions of the CA 2010. Under the CA 2010 and CCA 2010, MyCC carries out investigations, adjudicates competition law cases, and exercises administrative functions including imposing financial penalties. This legal framework mirrors the institutional design of competition authorities in the EU.

With all these functions consolidated under a specialised agency, such as MyCC, the commission can focus on familiarising itself with market-economic principles and devising strategies to prevent anti-competitive behaviour. Given the costly and lengthy nature of litigation, placing the responsibility for deciding competition law cases in courts may result in delays in the adjudication process. Additionally, judges may lack the necessary skills and experience to effectively handle cases involving a blend of legal and economic principles and theories. However, centralising all functions, including investigative and adjudicative powers, within a single agency exposes the commission to various legal disputes, particularly concerning enforcement procedures and due process.

LEGAL FRAMEWORK OF THE MALAYSIAN AND EU COMPETITON LAW

Anti-Competitive Agreement

(a) Object Restriction Vs Effect Restriction

Section 4 (1) of the CA 2010 prohibits both, horizontal and vertical agreements, between enterprises that have the object or effect of significantly preventing, restricting, or distorting competition in any market for goods or services. Additionally, certain types of horizontal agreements, the objects of which fall under subsection (2), are specifically identified as hardcore cartel activities. These include agreement to fix price, to divide market, to limit output and to perform bid rigging (collusion in tender). These activities require a lesser standard of proof to establish an infringement of the CA 2010.

Section 4 of the CA 2010 largely borrows the provision of Article 101 of the TFEU which distinguishes between 'object' and 'effect' restrictions for establishing infringement. If an agreement falls within the 'object' category, it is presumed illegal irrespective of its actual effect on competition and the consumer or the market power of the parties involved.[1] MyCC is not obligated to precisely define the relevant market or assess whether the agreement meets the de minimis

[1] Dato' Seri Mohd Hishamudin Yunus, "Competition Law in Malaysia: A Digest of Recent Developments," *Singapore Academy of Law Journal* 32 (2020): 349–72.

threshold (appreciable effect).[2] Conversely, if an agreement falls within the 'effect-based' category, MyCC must conduct a detailed economic analysis, including defining the relevant market and assessing market power, competition effects, and any pro-competitive benefits.

The boundaries between object and effect sometimes blur. Object restriction applies to conducts that by their inherent nature are harmful to proper functioning of competition.[3] The presumption of illegality is based on "the serious nature of the conduct and on experience showing that restrictions of competition by object are likely to produce negative effects on the market."[4] Object restriction normally applies to naked cartels particularly those that are listed under Article 101 (1) i.e. agreement between competitors to fix prices, limit output and allocate market.[5] The fact that the parties to an agreement acted without any subjective intention of restricting competition[6] or an agreement does not have the restriction of competition as its sole aim

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2 See European Commission, "Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (2014/C 291/01)," *Official Journal of the European Union* C 291, no. 1 (2014). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)

3 Christian Bergqvist, "What to Consider Restrictive by Object?," Kluwer Competition Law Blog, accessed September 30, 2025, https://legalblogs.wolterskluwer.com/competition-blog/what-to-consider-restrictive-by-object/.

4 European Union, "Guidelines on the Application of Article 81(3) of the Treaty (2004/C 101/08)," Official Journal of the European Union, accessed September 30, 2025, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(07); Mehmet Vedat Ervan, "Mehmet Vedat Ervan, Restriction of Competition by Object and Effect Under Art.101 TFEU," Ersan Şen | Her Hakkı Saklıdır, accessed September 26, 2025, https://sen.av.tr/tr/makale/restriction-of-competition-by-object-and-effect-under-art-101-tfeu.

5 See for example the opinion of Advocate General in the case of *Toshiba Corporation v European Commission* Case C-373/14 P, if an agreement falls under the list of category referred to in Art 101, the analysis of legal and economic context may be a secondary consideration, para 89 <https://curia.europa.eu/juris/document/document.jsf;jsessionid=65DBE410DEF3DCDD79C474E953C65EF4?text=&docid=165230&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13003016>

6 Case C-209/07 Beef Industry Development Society Ltd, para 21.

but also pursues other legitimate objectives[7] is irrelevant. Effect restriction on the other hand applies to an agreement when restriction on competition is not obvious such as vertical agreements entered between non-competitors.

The difference between object restriction under section 4 (2) of the CA 2010 and object restriction under Article 101 of the TFEU (presumed illegal) is that the list of agreements falling under section 4 (2) is exhaustive and limited to horizontal agreements such as price fixing, market sharing and output limitation, while the list of agreements falling under object restriction in Article 101 is non exhaustive and can be expanded to cover both horizontal and vertical agreements.[8] For example, in the EU, price-related vertical restraints such as RPM may fall under object (presumed illegal) or effect restriction, while under the CA 2010 vertical restraints will normally be treated under the effect analysis. Another difference lies in the legal standards applied under EU competition law in relation to anti-competitive agreements, which recognise only two legal standards: (1) anti-competitive by object (presumed illegality), and (2) anti-competitive by effect. In contrast, Malaysia applies three legal standards: (1) anti-competitive by object, which is presumed illegal (a deeming provision under section 4 (2)); (2) anti-competitive by object, which requires some market analysis (a non-deeming or non-presumption approach); and (3) anti-competitive by effect. Due to space constraints, this article focuses on the first legal standard.

(b) Enterprises vs Undertaking

Competition law governs the conduct of specific economic actors within the market. While the CA 2010 uses the term 'enterprises,' the EU employs the concept of 'undertakings.' According to the CA 2010, an enterprise is defined as "any entity carrying on commercial activities relating to goods or services". This definition encompasses a broad spectrum of commercial entities, including sole proprietorships, partnerships, companies, government-linked companies (GLCs), cooperatives, collecting societies, and even government agencies or public bodies engaged in commercial activities. In contrast, the term

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7 Case C-551/03 P General Motors BV, para 64.

8 See also the Singapore competition law; Benjamin YongQuan Wong, "Object Restrictions in Singapore Competition Law," *Singapore Journal of Legal Practice* 2017, no. 1 (2017): 169–71.

'undertaking' is not explicitly defined in the TFEU. Based on case law it "encompasses every entity engaged in an economic entity, regardless of the legal status of the entity and the way it is financed".[9]

In general, the concept of 'enterprise' under the CA 2010 shares similarities with the notion of 'undertaking' in the TFEU, as both emphasise functionality or activity rather than the form or nature of the entity. However, it remains unclear whether economic and commercial activities exhibit identical characteristics.[10] Based on case law in the EU, an activity is considered as economic in nature if (a) it involves the offering of goods and services on the market (b) the activity could, at least in principle, be performed by a private entity to make profit. Notably, an entity need not be profit-oriented to qualify as an undertaking; rather, it suffices that the activity could be carried out by a private entity or is offered in competition with profit-seeking market players. It is essential to differentiate between economic activities and those involving the exercise of official authority or public powers.[11]

The CA 2010 does not explicitly define the characteristics of 'commercial activity.' However, section 3 (4) of the CA 2010 identifies certain activities as non-commercial, including (1) activities carried out directly or indirectly in the exercise of governmental authority i.e. any activities related to governmental functions or state sovereignty, such as tax collection, granting subsidies, or awarding tenders, which are typically reserved for the government or its agencies (2) activities conducted based on the principle of solidarity- activities exclusively serving social

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9 See for example, Case C-41/90 Klaus Höfner and *Fritz Elser v Macrotron GmbH.*

10 Section 2(1) of the Singapore Competition Act 2004; The Competition Law Implementation Program (CLIP) team, "Case Study Manual for ASEAN Competition Agencies," the Competition Law Implementation Program (CLIP) team with assistance from competition agencies in the member states of the Association of Southeast Asian Nations (ASEAN), accessed November 17, 2025, https://asean-competition.org/file/post_image/Case Study Manual for ASEAN Competition Agencies.pdf.

11 Alison Jones, Brenda Elizabeth Sufrin, and Niamh Dunne, *EU Competition Law: Text, Cases, and Materials* (Oxford University Press, USA, 2019).

functions, such as pension schemes, social security, and national health programs and (3) purchases of goods or services not intended for offering them as part of an economic activity -such as the activity of purchasing drugs for supply to government hospitals for public use free.

The proviso leads to the conclusion that activities can only be considered commercial if they could at least be performed by private entities seeking for profit. This understanding aligns commercial activity with economic activity, leading to the conclusion that 'enterprise' under the CA 2010 corresponds to the concept of 'undertaking' under the TFEU. Notably, there is no requirement under section 3 of the CA 2010 that the entity under investigation must seek profits to be treated as an enterprise, as long as those activities can be carried out by or in competition with other private entities seeking for a profit.

One of the key issues at hand is whether associations of undertakings or enterprises, such as trade associations, fall under the purview of competition rules. While trade associations serve to promote the interests of their members, they can also become platforms for anti-competitive behaviour, which contravenes the CA 2010. Some associations engage in economic or commercial activities themselves, unequivocally subjecting them to the CA 2010. However, if an association does not engage in economic or commercial activities, the question arises as to whether it qualifies as an undertaking or enterprise under competition law. In the EU, the 'functional' approach, which applies to the concept of undertaking, also extends to associations of undertakings.[12] Under this approach, if an association carries out non-economic activities, the association itself is not considered as an undertaking and thus will not be subject to competition law. However, even though the association is not considered an undertaking, if its members are undertakings, the association will be treated as an association of undertakings,[13] and its decisions are regarded as joint actions with its members. Therefore, the competition authority may hold the

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12 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*, Case C-309/99, EU: C:2002:98.

13 *FNCBV v Commission* Cases T-217/03 and T-245/03 (2006) ECR II-4987.

association liable for coordinating and facilitating anti-competitive agreements.[14]

(c) *Agreement*

The most challenging aspect for competition authorities in enforcing section 4 of the CA 2010 is establishing the existence of agreements between enterprises aimed at restricting or distorting competition in any market for goods or services. Agreement is defined as "any form of contract, arrangement or understanding, whether or not legally enforceable…and includes a decision by an association and concerted practices". The concept of agreement under the CA 2010 differs from that under other legislations such as the Contracts Act. It aims to capture various forms of collusion or coordination among enterprises, even those that fall short of meeting the criteria for a formal agreement. In fact, the definition of agreement under the CA 2010 mirrors that of the Treaty on the Functioning of the TFEU, which requires proof of a concurrence of wills or meeting of the minds. In *Bayer v Commission*, the Court of First Instance held that the concept of an agreement "centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.[15]

Based on section 2 of the CA 2010 and established EU principles, the concept of agreement encompasses binding or non-binding agreements, whether oral or written, with or without sanctions for breach. This broad definition includes formal contracts, gentlemen's agreements,[16] simple understanding,[17] guidelines, partial or conditional

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14 In determining the financial penalty, the EU Commission may take into account members' turnover, see *Coop de France bétail et viande (C-101/07 P) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others (C-110/07 P) v Commission of the European Communities*.

15 Case T-41/96 (2000) ECR-II-3383, para 69.

16 See for example, Case 41/69 *ACF Chemiefarma NV v Commission* (1970) ECR 661 (Quinine), and Case T- 53/03 *BPB plc v Commission* (2008) ECR II- 1333, para 72 (*Plasterboard).*

17 See Case Re Stitching Sigarettenindustrie Agreement OJ L (1982) L 232/1; National Panasonic OJ (1982) L 354/28.

agreements,[18] agreements on good neighbour rules and best practices,[19] among others. As long as there is a joint intention to conduct a common plan in the market, an agreement can be established within the purview of competition law. Mere participation in a meeting to discuss anti-competitive plans is sufficient to establish liability, regardless of whether the enterprises actively participated, were compelled to attend, or did not implement the meeting's outcomes. Furthermore, as established in EU case law, mere exchange of correspondence can amount to an agreement[20] and even formally terminated agreements can still fall under competition law if their effects continue to be felt.[21]

The definition of agreement under the CA 2010, for example, intends to encompass decisions made by trade associations representing the interests of their members. Such decisions are typically reached through collective agreement among association members. The CA 2010 also acknowledges the potential for trade associations to serve as vehicles for collusion, coordinating the behaviour of their members. Such decisions include a recommendation by an association where the fact that the recommendation is not binding or not all members comply with the recommendation, is irrelevant.[22]

INSTITUTIONAL DESIGN

MyCC was established pursuant to the CCA 2010 as a quasi-judicial authority vested with the powers to conduct investigations, adjudicate competition law cases, and impose remedial measures, including financial penalties. This institutional framework closely resembles the enforcement structure adopted by the EU. MyCC may initiate

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18 See for example, Case Pre Insulated Pipe Cartel OJ (1999) L 24/1, para 133 – conditional agreement; Anheuser-Busch Incorporated — Scottish & Newcastle OJ (2000) L 49/37, para 26.

19 *Heintz van Landewyck SARL and others v Commission of the European Communities*, Joined cases 209/78 R to 215/78 R and 218/78 R: ECLI:EU:C:1980:248, para 85-86.

20 See for example, Case Nitendo OJ (2003) L 255/33, para 196.

21 See for example, Case T-7/89, *SA Hercules Chemicals NV v Commission EU*:T:1991:75.

22 See for example, *IAZ International Belgium NV v Commission* cases 96/82 etc (1983) ECR 3369; see also the case of FENEX (1996) OJ L 181/28 (96/438/EC).

investigations based on complaints, *ex officio* (on its own initiative), or upon the direction of the Ministry responsible for domestic trade and consumer affairs. During the course of an investigation, MyCC is empowered by law to request information, conduct searches of premises with or without a warrant, and seize relevant records and documents.

Following the conclusion of an investigation, MyCC may issue a proposed decision outlining the rationale behind its decision and any proposed penalties or remedial actions. This proposed decision does not constitute a final decision, affording the target enterprises the opportunity to present written representations in defence against the Commission's proposed decision and penalties. Following the consideration of the arguments presented by the target enterprises, MyCC issues a final decision regarding infringement or non-infringement.

To uphold checks and balances on the Commission's authority, the Competition Appeal Tribunal (CAT) was established under the same Ministry pursuant to the CA 2010. The decisions made by MyCC can be appealed to the CAT, and the CAT's decisions are considered final and binding.[23] However, the CAT's decisions remain subject to judicial review by higher courts, particularly concerning the legality of the decision-making process rather than the merit of the decision itself. Judicial review may be sought on three grounds: illegality, unreasonableness or irrationality, and procedural impropriety.[24]

Under the EU competition law institutional framework, the EU Commission is the main enforcer of the EU competition rules. Similar to MyCC, the EU Commission has investigative, prosecutorial and adjudicative functions.[25] The EU Commission can commence investigation on the alleged infringement based on its own initiatives or complaints. In the investigation process, the Commission also has

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[23] See section 58(3), CA 2010.

[24] Ern Nian Yaw, "Legal Nutshell- Judicial Review," LoyarBurok, accessed October 15, 2025, https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/legal-nutshell-judicial-review.

[25] Cristina Teleki, *Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights* (Brill, 2021).

the power to request for information, take statement, carry out inspection on undertakings and private premises etc.

At the conclusion of the investigation, if the Commission determines that there is sufficient evidence to establish an infringement, it may issue a statement of objections (SO) detailing the facts and providing a legal assessment explaining why it believes the competition rules have been violated, along with any proposed remedies. The parties are given the opportunity to comment and reply to the objection within a set time limit. The SO is only a preparatory act and is not subject to a review or annulment. The parties are also entitled to an oral hearing, if so requested, in their written submissions. The oral hearing is not a formal trial and shall be conducted by hearing officers (HO) who are attached to the competition Commissioner. The HO is not a judge and only responsible for organizing the oral hearing, ensuring the effective exercise of procedural rights and dealing with issues raised during the investigative phase.[26] The HO will submit a report on the outcome of the hearing and matters relating to the effective exercise of procedural rights to the Competition Commissioner. The final report will be attached to the draft decision to be submitted to the College of the Commissioners for consideration.[27] The final decision shall be made by the College of Commissioners who must take into consideration all the relevant facts.

The decision of the EU Commission can be appealed to the EU Courts, namely, General Court (GC) and Court of Justice (ECJ). Since the GC is the court of first instance, the GC has extensive power to review the Commission's decision, both on questions of facts and question laws. The GC has the power to determine not only the accuracy of the facts but also to verify whether the substantive elements to establish an infringement have been proven and the essential

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[26] European Commission, "Hearing Officers' Mission - Main Tasks," European Commission, accessed October 15, 2025, https://competition-policy.ec.europa.eu/hearing-officers/mission_en.

[27] Clara Beatrice Calini, "Hearing Officer," Competition Dictionary, accessed October 15, 2025, https://www.concurrences.com/en/dictionary/Hearing-officer; Alexander Italianer, "The European Commission's New Procedural Package: Increasing Interaction with Parties and Enhancing the Role of the Hearing Officer 7-8 (2012):," *Revista de Concorrência e Regulação* 7–8 (2012): 23–34.

procedural rights have been observed.[28] The GC can assess the evidence, annul decision and alter the amount of financial penalty.[29] The decision of the GC can be further reviewed by the ECJ whose jurisdiction is limited to review the question of law, and shall not get drawn into factual dispute.[30] The national competition authorities in member states may also directly apply to the ECJ for preliminary ruling on question on the interpretation and validity of EU law where the decision on the question is important for the national courts or tribunal to give judgement.[31]

RECENT DEVELOPMENTS OF THE MALAYSIAN COMPETITION LAW

MAS/AirAsia case

In this case, MyCC took action against Malaysia Airlines (MAS) and AirAsia for an anti-competitive market sharing agreement. After issuing a final infringement decision to both parties, MAS and AirAsia appealed the Commission's decision to the CAT, which ruled in favour of the parties. MyCC then sought judicial review of CAT's decision in the High Court, resulting in the High Court overturning CAT's decision. The parties further contested the High Court's decision by appealing to the Court of Appeal (COA), where the COA upheld CAT's decision and quashed MyCC's decision. The Federal Court also affirmed the COA decision.

The focal point of contention in this case revolves around a Collaborative Agreement between MAS and AirAsia, which MyCC alleged contained a market-sharing clause. However, a key complicating factor is that the Collaborative Agreement was entered into in 2011, predating the enforcement of the CA 2010. Notably, the agreement was conditional upon antitrust clearance by MyCC, and the

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28 John Ratliff, "Judicial Review in EC Competition Cases before the European Courts–Avoiding Double Renvoi," in *European Competition Law Annual 2009: The Evaluation of Evidence and Its Judicial Review in Competition Cases*, 2011, 453–473.

29 Richard Whish and David Bailey, *Competition Law. Oxford University Press, 2021* (Oxford University Press, 2015).

30 Ibid, 24.

31 Ibid, 7, p 82.

parties indicated their intention to seek an individual exemption under the CA 2010. Furthermore, it is worth noting that the market-sharing clause was only terminated on 2nd May 2021, five months after the enforcement of the CA 2010 when the parties entered into a Supplemental Agreement. This timeline underscores the complexities involved in assessing agreements under the CA 2010.

According to the COA, an agreement made before the enforcement of the Act and conditional upon obtaining approval from the competition authority does not violate the CA 2010. Although the CA remains in effect for five months after the Act's enforcement (status quo), there is no violation unless there is evidence demonstrating that the parties took affirmative action pursuant to a previous agreement or entered into a new agreement.[32] The CA 2010 does not require parties to terminate the agreement immediately upon the Act coming into force while awaiting prior approval from MyCC. If MyCC rejects an application for exemption, the conditional agreement should not incur antitrust liability since it has not been implemented.

The main clause subject to contention is clause 5 of the Collaborative Agreement, which, according to MyCC, has the effect of facilitating market sharing (market-sharing agreement). Based on Clause 5, each party intends to focus on its own market segment, whereby MAS will concentrate on being a full-service premium carrier ('FSC'), while AirAsia intends to focus on being a regional low-cost carrier, and AirAsia X on a medium-to-long haul low-cost carrier. MyCC believes that as a result of this agreement, Firefly (a wholly owned subsidiary of MAS) withdrew from the Kuala Lumpur-Kuching, Kuala Lumpur-Kota Kinabalu, Kuala Lumpur-Sandakan and Kuala Lumpur-Sibu routes (Sabah and Sarawak routes) leaving AirAsia to be the sole low-cost carrier.[33] This, according to MyCC, amounts to a market sharing agreement, i.e. sharing business model or sharing customers. Even though MAS was still competing with AirAsia after the withdrawal of FireFly from the market, MAS and AirAsia are targeting different consumers. As a result of the Collaborative Agreement, consumers preferring low-cost airlines will

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32 Court Of Appeal, Civil Appeal No.: W-01(A)-31-01/2019, para 68.

33 MyCC Decision, 31 March 2014 (No. MyCC.0001.2012) para 9.

have no choice but to fly with AirAsia (instead of having the option of 2 low-cost airlines).

However, the COA, in affirming the CAT's decision, was of the view that the agreement has no object to share market. First, in determining whether the Collaborative Agreement has the object of distorting competition, the COA considered all terms and conditions of the Collaborative Agreement and concluded that the main objectives of the Collaborative Agreement was to explore the possibilities of collaboration in order to be able to utilise each other's respective core competencies, optimise efficiency and increase all parties' competitiveness to the benefit of consumers.[34] This is in stark contrast with MyCC's approach where it found that the Collaborative Agreement was beyond an alliance arrangement as it contained a clause on market sharing.[35] Secondly, the COA found no evidence that the parties were sharing the market by carving out routes or overlapping routes. The COA also agreed with the CAT that the withdrawal of Firefly is purely a business decision due to losses and this happened prior to the Act coming into force.[36] In fact, the four withdrawn routes were taken over by MAS, the parent company of Firefly, and MAS continues to compete head-on with AirAsia after the withdrawal.[37] Therefore, given that MyCC failed to prove that the Collaborative Agreement had the object to share the market, the deeming provision under section 4 (2) cannot be invoked.

Another important principle elucidated in this appeal case was that even in an object restriction case (deeming) the requirement to demonstrate the significant effect of the agreement on competition remains essential. The de minimis rules must be applied to assess the market power of the parties,[38] which consequently obligates MyCC to

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34 COA's decision, para 129, 141.

35 MyCC's decision, para 67.

36 COA's decision, para 72, Competition Appeal Tribunal's decision, TRP 1 – 2012 & TRP 2 – 2014, 18 February 2016 – page 123.

37 COA's decision, para 72.

38 Malaysia Competition Commission, "Guidelines on Chapter 1 Prohibition: Anti-Competitive Agreements," Malaysia Competition Commission, accessed November 20, 2025, https://www.mycc.gov.my/sites/default/files/pdf/newsroom/MYCC-4-Guidelines-Booklet-BOOK1-10-FA-copy_chapter-1-prohibition001_1.pdf.

precisely define the relevant market in greater detail. According to the COA, market definition requirement is pertinent in both abuse of dominant position and anti-competitive agreement "as the general principle of market definition should cut right across any consideration involving the market."[39] However, the COA found that MyCC had failed to conduct the proper relevant market assessment to establish infringement in the case of market sharing.[40] Assuming the Collaborative Agreement infringes the Act, the COA holds that the burden is on MyCC to prove that the Collaborative Agreement meets the requirement of section 5 of the CA 2010 for relief of liability.

Under section 58 (3) of the CA 2010, the decision of the CAT is considered final and binding. One of the important grounds in quashing the MyCC's decision relates to the issue of local standi to apply for judicial review. MyCC is a quasi-judicial body having the power to investigate and decide. In order to ensure impartiality, neutrality, and fair adjudication, the COA concluded that MyCC cannot review or challenge the decision of its own appellate body, the CAT which in effect would tantamount to administrative insubordination.[41] Once MyCC issues its final decision under section 39 (non-infringement decision) and section 40 (infringement decision), its role becomes *functus officio*.[42] The duty of MyCC is to assist the CAT to arrive at a fair and just decision on the appeal before it by an aggrieved party.[43] The Commission should not have personal or official interest in the confirmation or reversal of its own decision at the CAT level. For this reason, MyCC cannot be "a person who is adversely affected by the decision" within the meaning of Order 53 rule 2(4) of Rules of Court 2012 ("ROC").[44] Following the decision of the COA, MyCC filed an application for leave to appeal against the COA's decision, but the leave application was rejected by the Federal Court stating that MyCC's application did not meet the threshold for leave to appeal further.

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39 COA's decision, para 163.

40 By considering for example, airport substitutability (175), direct and indirect routes substitutability (179) and differentiation in services between LCC and FSC (178) (COA's decision, para 175, 179, 178).

41 COA's decision, para, 44.

42 COA's decision, para, 44.

43 COA's decision, para 45.

44 COA's decision, para 46.

PIAM and its 22 Members

In this case, MyCC commenced an investigation upon receiving a complaint from the Federation Automobile Workshops Owners' Association of Malaysia (FAWOAM) alleging that PIAM and its members had fixed the parts trade discounts and labour rates for PARS workshops. The agreement between PIAM and its members was a result of serious negotiations between PIAM and FAWOAM. The latter was dissatisfied with unreasonable parts trade discounts and lower labour rate imposed by the insurers. Along the way, the Central Bank (Bank Negara Malaysia) played a facilitative role to ensure that the parties resolve this issue amicably in no time to avoid delay in approving insurance claims to the detriment of consumers. Based on a meeting which took place between PIAM and FAWOAM in July 2011, PIAM had communicated to its members the outcome of discussions between PIAM and FAWOAM in the 10th PIAM Claim Management Sub-Committee Meeting. Subsequently Members' Circular No. 132 of 2011 was issued showing members' consensus and agreement on the trade parts discount and labour rates. The story did not end here. Both PIAM and FAWOAM agreed to dismantle the standard rates in tandem with the coming into force of the CA 2010. FAWOAM proceeded to inform its members that all trade discounts and hourly rates should no longer be applicable in complying with the new CA 2010. However, according to FAWOAM and supported with evidence, when submitting claims, PIAM Members' Circular No 132 of 2011 dated 28 July 2011 was still applicable to PIAM approved repairers (PARS). On this basis, MyCC took action against PIAM and its members and treated FAWOAM as a complainant in this case.

PIAM and its 22 members appealed to the CAT against the decision of MyCC and in September 2022, the CAT quashed MyCC's decision, based on several grounds. One of the key questions raised at the CAT level was whether PIAM, functioning as a trade association representing general insurers, qualifies as an enterprise under the definition provided in section 2 of the CA 2010. The CAT reached a conclusion that PIAM does not fit within the scope of 'enterprise' as defined under the CA 2010. This definition, in the context of the CA, pertains to any entity engaged in commercial activities. Conversely, European Union (EU) law employs the term 'undertaking,' which encompasses entities involved in 'economic activity.' According to the CAT, a trade association's decisions in the EU are subject to scrutiny

under EU competition law due to the broader interpretation of 'economic activity,' which extends beyond mere commercial endeavours outlined in the CA 2010. While the latter focuses on activities involving the exchange of goods and services for profit, the former encompasses a broader range of economic activities.[45] This broader interpretation of 'economic activity' by the EU allows for the inclusion of various activities undertaken by a trade association, even those not primarily aimed at generating profits. In light of the restrictive nature of the CA 2010, the CAT concluded that while PIAM's activities 'could be considered part of economic activities,' they do not involve engaging in commercial activities for financial gain.[46] However, there was no decision by the CAT whether members are enterprises under the CA 2010 and the CAT did not take into account that PIAM is an association of enterprises.

Another issue raised in proceedings before the CAT is whether the agreement between PIAM and its members has the object of restricting, preventing or distorting competition in the market. The CAT reiterated the COA decision of the MAS/AirAsia case that even under the object restricting (deeming) MyCC is bound to define the precise market definition failure of which lead to rejection of the case. The CAT disagreed with the MyCC's determination of the relevant market, namely, market for part trade discount and labour rate and market as fixing a minimum labour rate for car repair services.[47] The CAT further concluded the contested agreement is not a horizontal agreement but rather a series of vertical agreements between PIAM and FAWOAM to resolve long pending issues supervised by the BNM. In addition, the CAT took the view that the PIAM Members' circular 123 falls short of an agreement and was merely a record of feedback on the outcome agreed between PIAM and FAWOAM. The Circular is no more than an announcement of survey results conducted by PIAM with its members.[48] Even if an agreement existed between PIAM and its members, the object is not an agreement to fix price as argued by

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45 Economic activity would encompass, but are not limited to, the input of capital resources, labour resources, manufacturing and production resources, which combine to produce specific goods or services, CAT's decision date 2 September 2022, para 128.

46 CAT's decision, para 130.

47 CAT's decision, para 150.

48 CAT's decision, para 136-137.

MyCC, thus the deeming provision under section 4 (2) cannot be invoked. The agreement to fix a maximum discount rate of 25% for car parts is not price fixing because the repairers can still have the freedom to give or not to give discounts or to give a discount ranging from zero to 25%.[49] Similarly, the agreement to fix minimum labour hours of RM30 is not a price fixing agreement since the repairers can charge more than RM30. The minimum rate for labour hours works to the advantage of repairs since that is the minimum the insurers agreed to pay.[50]

Myteksi/Grab – Judicial Review against the MyCC's Proposed Decision

MyCC started a formal investigation in October 2018 and later found that 'Grab had abused its dominant position by imposing a restrictive clause on its drivers which effectively prevented the drivers from promoting Grab's current and potential competitors in the e-hailing platforms and transit media advertising'.[51] MyCC then issued a proposed decision containing a financial penalty of RM86,772,943.76 on the applicants together with remedial directions that Grab was to permanently remove the restrictive clause from its terms and conditions, supplement terms of use and code of conduct and issue notifications to all drivers of the removal of the restrictive clause. Failing to comply with the remedial directions, the applicant would be subjected to a daily penalty of RM15,000.00 from the date of service of the Proposed Decision (PD). On 30 December 2019, Grab submitted a written application from the parties but at the same time, the parties applied for an application for leave to file a judicial review to the High Court before MyCC issued a final decision. Grab sought, among others, an order for Certiorari to quash the MyCC's proposed decision and a declaration that the MyCC's decision to impose a penalty retroactively prior to the determination of an infringement under section 40 (1), was ultra vires the CA 2010 and the CCA 2010.

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49 CAT's decision, para 144.

50 CAT's decision, para 145-146.

51 *Myteksi Sdn Bhd & Ors v Suruhanjaya Persaingan*, Judicial Review Application No: WA-25-594-12/2019 [2020] MLJU 750 para 4 <https://advance.lexis.com/api/document?collection=cases-my&id=urn:contentItem:609B-72G1-JT42-S21V-00000-00&context=>

The High Court rejected the application on the basis that the PD was not final and subject to further process before the final decision of finding of non- infringement or infringement.[52] The PD does not dispose of the right of the parties or alter such rights. Since the decision was not final, the appellant, according to the High Court, should exhaust the internal remedy of an appeal to the CAT.[53] The High Court considered the judicial review application as pre-mature and as such frivolous and vexatious,[54] thus refused the leave.

The Appellants appealed to the COA where the COA allowed the leave application. The COA considered the extent to which the PD affected the legal rights of the parties.[55] Even though the PD was not final there is no automatic bar for the parties to challenge the decision[56] especially when the decision affects rights or where through a preliminary step it is sufficiently connected with a decision that does so.[57] The COA was of the view that the PD is a step in a process of affecting rights, interest or liabilities of the appellants.[58] Having scrutinised the PD, the COA found that the nature of the PD was indeed a decision in principle, particularly with regard to the imposition of a daily financial penalty of RM15,000 running from the date of service of the PD, in the event the appellants failed to comply with the respondent's directions. The COA reached a conclusion that "the nature of the respondent's determination under section 36 of the Act demonstrates that it was an important step on the path to a decision-making under section 40 of the Act."[59] The Appellants in this case have no alternative remedies since the CAT does not have jurisdiction to deal with complaints concerning the issuance of PD under section 36 (1).[60] MyCC applied for a leave application against the COA's decision to the Federal Court but the application was dismissed on 5 December 2022.

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52 Ibid at 46, para 42.
53 Ibid at 46, para 31.
54 Ibid at 46, para 30.
55 Court of Appeal, Civil Appeal No: W-01(A)-162-03/2020 para 34.
56 COA's decision, para 42.
57 COA's decision, para 43.
58 COA's decision, para 46.
59 COA's decision, para 39.
60 COA's decision, para 55.

During the judicial review hearing at the High Court, Grab raised the issue of procedural impropriety and breach of natural justice. According to Grab, MyCC had received numerous complaints from drivers against Grab concerning various issues, including unfair pricing practices, discriminatory conduct, and restrictive clauses imposed on drivers. The majority of these complaints were lodged in 2018, and MyCC issued several section 18 notices to Grab and the complainants, requesting information. However, the Proposed Decision issued by the Commission specifically referred to a complaint lodged in 2019. The High Court found no evidence indicating that MyCC had investigated the 2019 complaint in the same manner as the 2018 complaints. Due to this failure to properly investigate the 2019 complaint, the appellants were only able to respond to the 2018 complaints. This procedural impropriety deprived the appellants of their right to adequately defend themselves, thereby constituting a breach of natural justice. In October 2023, the High Court quashed the Proposed Decision issued by MyCC against Grab. The High Court's decision was subsequently upheld by the Court of Appeal in 2025.

ANALYSIS OF THE DECISIONS AND ITS IMPLICATION ON THE DEVELOPMENT OF COMPETITION LAW IN MALAYSIA

The decisions made by the appellate body, CAT and the courts have shaped the development of competition law in Malaysia, particularly on how certain competition rules or legal standard should be interpreted and applied in competition cases and how the Competition Commission should exercise its power in future. Most of the competition law enforcement focus on anti-competitive agreement particularly those that are categorised as hardcore cartel under section 4 (2) of the CA 2010. From the competition authority's perspective, relying on deeming provision makes it a lot easier to prove anti-competitive agreement since the agreement falling under section 4 (2) is presumed illegal without the need to prove the actual effect of the agreement on competition and consumers. Nevertheless, some competition concepts under section 4 such as "agreement", "enterprises" and "object" are still alien to the court of law and are open to differing views and interpretation to suit with facts of particular cases.

In light of recent decisions, the court/tribunal interpretation on the concept of agreement differs from the EU and established practices in the field of competition law, which focuses on a joint intention of the parties to behave in a specific way. Non-binding, conditional agreements, agreements not implemented or a mere meeting of enterprises to gather views on certain pricing policy, may no longer as agreements under the CA 2010. Whilst the Court or the CAT base their judgments on specific facts of a case,[61] these decisions would undeniably set a precedent for future competition law enforcement and can be relied upon by enterprises to avoid liability under the CA 2010 in the event there is no formal binding contract formed by competitors. To determine whether an agreement has an anti-competitive object, MyCC is now required to assess the entire agreement in question rather than focusing solely on specific anti-competitive clauses within a general framework agreement. This implies that the primary objective of the agreement must be the pursuit of an anti-competitive agenda to fall under the purview of the CA 2010. An agreement that pursues other legitimate objectives while containing only minor anti-competitive elements is permissible and does not contravene competition law.

The CA 2010 and the EU competition law recognise the important role of a trade association in coordinating the conduct of its members. However, the decision of the CAT in the PIAM case has rendered it challenging to hold an association of enterprises jointly liable for the conduct of its members simply because the association does not engage in commercial activity for profit. The unintended consequences of this decision are that enterprises may evade accountability for their anti-competitive conduct by using their association as a shield, avoiding liability under the CA 2010. From an enforcement perspective, MyCC has the option to take action against a trade association representing its members, or against members or both. Taking action against a trade association may save the MyCC's time and resources. With this new legal development, MyCC now has only one choice: to focus its investigation and adjudication against each and every enterprise involved in the suspected anti-competitive behaviour, even if it involves hundreds of enterprises in the agreement.

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[61] For example, the COA in the case of MAS/AirAsia considered the fact that the collaborative agreement was entered before the coming into force of the CA 2010.

Another challenge in establishing infringement under section 4 of the CA 2010 is the ambiguity surrounding the definition of anti-competitive agreements such as price fixing and market sharing, as the Act or guidelines do not offer clear definitions. MyCC interprets these concepts broadly, aligning with established best practices. However, the Court and CAT adopt a different approach, offering narrower interpretations of price fixing and market sharing. For instance, the CAT interprets price fixing literally, requiring the prices to be fixed. Setting maximum or minimum prices for products and services falls outside the definition of price fixing, as competitors still retain discretion over the prices they charge. In the MAS/ AirAsia case, the COA rejected the notion that dividing market segments or business models constitutes market sharing under section 4(2)(b), despite the fact that sharing market segments also entails sharing customers. Instead, the Court concluded that no market sharing occurred, as there was no carving out or sharing of overlapping routes.

Section 4 of the CA 2010 generally categorises anti-competitive agreements into two types: anti-competitive by object (object restriction) and anti-competitive by effect (effect restriction). Parliament's intention is to designate certain anti-competitive agreements as hardcore restrictions due to their inherent detrimental impact on competition, without any countervailing benefits. These behaviours are presumed illegal without MyCC needing to conduct detailed market analysis, including defining the relevant market precisely and assessing the market power of the parties. Consequently, the *de minimis* or safe harbor threshold stipulated in MyCC guidelines would not apply to these behaviours. From an enforcement perspective, this reduces the burden on competition authorities to prove certain types of conduct that are inherently anti-competitive. Since under the object restriction, the anti-competitive agreement is presumed illegal, the burden is shifted to the parties to the agreement to prove that the agreement meets section 5 criteria for relief of liability.

The legal position has shifted following the COA decision in the MAS/AirAsia case. Even in object restriction (deeming), MyCC is obligated to conduct thorough market analysis, including the precise definition of the relevant market and the assessment of market power held by the parties involved in the agreement, to determine whether the agreement falls below the *de minimis* threshold. Failure to establish the correct market definition proves detrimental to the Commission's case.

In addition, the COA also puts the burden to prove that the agreement fulfils section 5 of the CA on MyCC. The COA decision in the case of MAS/AirAsia further blurs the distinction between anti-competitive by object and anti-competitive by effect, undermining the purpose of having different categories of anti-competitive agreements under section 4 of CA 2010. This complication increases regulatory costs and undermines the effectiveness of the Commission's enforcement capabilities.

Although the proposed decision (PD) of MyCC is not final, it remains susceptible to annulment or amenable to judicial review in a higher court, depending how MyCC drafts its decision and whether the PD affects the rights of the parties involved. This means that the decision of the COA that the PD is amenable to judicial review should not be applied to all cases. The damaging part of the PD rests on the daily financial penalty imposed from the date of the service of the PD in the event of non-compliance with the proposed remedial directions has the effect of final decision. This according to the COA affects Grab's interest. However, from the enforcement perspective, the daily financial penalty is necessary to ensure that Grab immediately ceases the anti-competitive practices (exclusivity clauses) to protect the interest of consumers (drivers) and other e-hailing operators. Furthermore, the daily penalty is still subject to the final decision. Furthermore, even though the imposition of the daily financial penalty makes the PD to have a final effect, this can still be challenged at the CAT level. This new development may set a precedent for target enterprises to prematurely challenge the Commission's PD. It also allows the target enterprises to have two bites of the cherry by simultaneously challenging the PD at the Commission's level and at the judicial review proceeding. If the judicial review is granted, the PD effectively loses its validity, despite potentially extensive periods of investigation. MyCC might choose to appeal or initiate a fresh investigation into the complaint, but both scenarios pose a risk of inefficient utilization of MyCC resources, which could impact its other enforcement activities. Additionally, even if the judicial review application to quash MyCC's decision is refused, applying judicial review at the PD stage can still cause delays in issuing the final decision.

While the infringing enterprise can appeal against the decision of MyCC in civil courts, the Commission, as the quasi-judicial body,

is not considered an aggrieved party and is thereby constrained from challenging its own appellate body's decision. The ruling in the MAS/AirAsia case affords infringing enterprises the opportunity to challenge MyCC's decision. However, simultaneously, it limits MyCC's ability to challenge the CAT's decision and deprives it of the opportunity to seek further clarification on certain legal interpretations and principles of competition law established by the CAT from higher courts. This stands in stark contrast to the EU competition law regime, where competition law principles undergo further refinement and development through court decisions via judicial review.

Lastly, procedural issues and natural justice were raised by the learned counsel during the judicial review proceedings in the Grab case. In carrying out an investigation, MyCC relies on the totality of evidence to establish conduct that leads to market distortion. The conduct may be continuing for several years. In light of the High Court and COA's judgment in that case, MyCC is now required to open a separate investigation paper for each complaint received even when the investigation is part of a continuous process and concerns the same subject matter. This requirement applies even where the scope of investigation, as outlined in the Section 18 notice, remains the same from the beginning to the end of the inquiry. Such an approach places a significant administrative burden on MyCC, as it is time-consuming and leads to unnecessary duplication of effort and wastage of resources.

CONCLUSION AND RECOMMENDATIONS

The decision of the CAT and the courts appear to diverge from established competition law principles and practices. This approach may stem from the relatively nascent development of competition law jurisprudence in Malaysia, where courts often draw upon principles from other areas of law, such as contract law, and focus on the specific facts of each case to ensure fairness and justice for the enterprises involved. Some of the issues highlighted may be addressed through proposed amendments to the CA 2010, which are currently awaiting parliamentary approval. For example, MyCC is in the process of amending the definition of 'enterprise' to include entities engaged in economic and commercial activities, in line with other jurisdictions such as the EU and Singapore. The term 'economic activity' is broader than 'commercial activity' and may capture the economic conduct of

trade associations. Nevertheless, certain concepts, such as 'object restriction,' remain open to interpretation and debate, requiring more detailed guidelines, discussion, and training—particularly among members of the judiciary. Additionally, it is timely for MyCC to revisit and enhance its existing guidelines and internal procedures relating to investigations, both to prevent procedural issues and to assist judicial officers in understanding how law enforcement is carried out by the Commission. For instance, MyCC may consider initiating investigations *ex officio* under Section 14, rather than relying solely on Section 18 investigations based on individual complaints, particularly where a series of complaints pertains to the same conduct. This approach would allow MyCC to address recurring or continuous anti-competitive behaviour more efficiently, without the need to open separate investigation papers for each complaint relating to the same issue.

ACKNOWLEDGEMENT

This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.